October 2019

Italian Competition Law Newsletter

Highlights

— The TAR Lazio rules on Enel's and Acea's appeals against ICA decisions that the incumbents abused their dominant position in local markets for retail electricity supply.

— The Court of Salerno rules on the invalidity of a guarantee agreement containing clauses from an anticompetitive form.

The TAR Lazio reviews ICA decisions on alleged abuses of dominant position in the retail supply of electricity

On October 17, 2019, the Regional Administrative Tribunal for Latium (the "TAR Lazio") ruled on appeals by companies belonging to the Enel and Acea groups, two major energy firms active, among others, in the distribution and sale of electricity in Italy, against Italian Competition Authority ("ICA")'s decisions finding that the two incumbents had abused their dominant position in local markets for retail electricity supply.[1]

The TAR Lazio upheld Acea's appeals and annulled the Acea Decision.[2] Conversely, Enel's appeals against the Enel Decision were upheld only with respect to the fine calculation.[3] As a consequence, the TAR Lazio ordered the ICA to recalculate the fine imposed on Enel on the basis of the parameters indicated in the TAR Lazio's Enel Judgment. In both judgments, the TAR Lazio rejected the grounds of appeal that were based on procedural reasons, such as the fact that both decisions were adopted by a board composed of only two members (which did not include the President of the ICA).

Background

On December 20, 2018, in parallel proceedings against Enel and Acea, the ICA found that the two incumbents had infringed Article 102 TFEU by carrying out an abusive strategy based on their position as companies active in both the enhanced protection service ("EPS") and the retail supply of electricity at market prices.

The EPS is a regulated regime, reserved to domestic clients and small businesses that do not opt for offers at market prices. Under the EPS regime, electricity is supplied at a tariff set by the sector regulator. In Italy, the EPS was initially scheduled

[1] ICA decisions of December 20, 2018, No. 27494, Case A511, *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*, and No. 27496, Case A513, *Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica* (respectively, the "Enel Decision" and the "Acea Decision").

[2] TAR Lazio, Judgment Nos. 11960 and 11976/2019 (the "Acea Judgment").

[3] TAR Lazio, Judgment Nos. 11954, 11957 and 11958/2019 (the "Enel Judgment").

to end in July 2019, following full liberalization of the electricity market, but the deadline was recently postponed to 2020.

Enel and Acea are entrusted with providing the EPS in the local markets where they respectively manage the distribution of electricity. In addition, they are active in the retail supply of electricity at market prices. Enel provides the EPS through its subsidiary Servizio Elettrico Nazionale ("SEN"), and carries out the retail supply of electricity at market prices through its subsidiary Enel Energia ("EE"). In contrast, Acea entrusted its subsidiary Acea Energia S.p.A. ("AE") with the provision of both services.

In the ICA's view, Enel and Acea leveraged their position as vertically integrated operator, active in both the distribution and the retail supply of electricity in the respective local markets, to exclude competitors active in the provision of deregulated services at market prices. In particular, according to the ICA, Enel and Acea collected from their EPS customers, in a discriminatory manner, the privacy consent to be contacted for commercial purposes, and used these lists of customers to formulate targeted offers in the deregulated segment of the market. In addition, in its commercial strategies, AE made use of a series of privileged and detailed information on the evolution of market shares and the positioning of competitors in the areas in which the Acea group provides the distribution service, through its subsidiary Areti. According to the ICA, these practices aimed at inducing Enel and Acea's respective EPS customers to switch to the incumbents' offers in the deregulated segment of the market, so as to avoid losing those customers to competitors following the full liberalization of the market.

In the Enel Decision, the ICA held that the alleged abusive conduct had taken place between January 2012 and May 2017, and fined Enel over €93 million. In the Acea Decision, the ICA found that Acea's alleged infringement had been carried out between March 2014 and 2017, and fined Acea approximately €16 million.[4]

The Acea Judgment

In the Acea Judgment, the TAR Lazio upheld the appeals lodged by Acea S.p.A., AE and Areti (i.e., the company belonging to the Acea group that is entrusted with the distribution of electricity in certain areas of Italy) against the Acea Decision.

First, the TAR Lazio recalled the principles established by the recent EU judgment in the Intel case, according to which – even when the incumbent's conduct may fall, in principle, within the scope of Article 102 TFEU – antitrust authorities are required to carry out "*an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.*"[5] As a consequence, the sole fact that a company holds a monopolistic position on a relevant market, and carries out initiatives aimed at retaining clients (even during the liberalization of a given market), does not per se amount to an abuse. On the contrary, antitrust authorities must prove the existence of a "*discriminatory strategy, which may determine the foreclosure of competitors.*"[6]

According to the TAR Lazio, the ICA's reasoning in the Acea Decision did not meet the abovementioned standards.

On the one hand, the ICA did not take into account the arguments submitted by Acea in relation to the first alleged abusive conduct, i.e. the collection by AE of the contact details of EPS

[4] On the same day, the ICA closed proceedings against A2A, opened to investigate a similar infringement of Article 102 TFEU, without finding any infringement (ICA decision of December 20, 2018, Case A512, *A2A/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*).

[5] Case C-413/14 P, Intel II, EU:C:2017:632, § 140.

[6] See Acea Judgment.

customers, allegedly carried out in a discriminatory manner, and the use of such contact details in AE's commercial activities on the deregulated segment of the market. In the TAR Lazio's view, such arguments proved the absence of any discriminatory practice. The TAR Lazio noted, *inter alia*, that EPS customers had been contacted with "standardized" offers, designed by AE for its whole customer base, instead of offers specifically targeted to EPS clients. Accordingly, in the TAR Lazio's view, AE's alleged infringement could not be considered capable of foreclosing competitors' access to the "free" market.

The TAR Lazio also annulled the decision in the part concerning the alleged use by AE of sensitive information on the market positioning and performance of its main competitors - which was exclusively available to Areti in its capacity as electricity distributor in certain areas - with a view to better targeting its marketing strategy and monitoring its effectiveness. In this respect, the TAR Lazio held that the ICA had failed to clarify how aggregated data on competitors' market positioning could be used by AE to guide (or monitor the effectiveness of) its business strategy of "retention" of EPS customers. The ICA's reasoning was based on mere presumptions and did not adequately demonstrate the existence of anticompetitive conduct.

The Enel Judgment

In the Enel Judgment, the TAR Lazio upheld some of the grounds of appeal, while rejecting the others.

First, the TAR Lazio partially annulled the Enel Decision with regard to the duration of the alleged abuse. In this respect, on the one hand, the TAR Lazio noted that, in the ICA's view, the "*actual use*" of customers' contact details to "*submit targeted offers dedicated to EPS customers*" was an essential element of the alleged abuse. On the other hand, it found that the only offer specifically targeted to EPS customers was launched by EE in March 2017 and lasted only two months before being discontinued. Accordingly, the TAR Lazio held that the ICA had wrongly calculated the fine, by including in the duration of the infringement also years in which EE did not engage in targeted offers.

Interestingly, the TAR Lazio stated that, in the calculation of the new fine, the ICA should take into account a duration of 1 year and 9 months, i.e., since September 2015 (almost two years before the launch of the first and only targeted offer), when the first legislative proposals concerning the liberalization of the Italian electricity market were put forward. This is because, according to the TAR Lazio, these legislative proposals provided Enel with an incentive to try to retain its EPS customers by "transferring" them to EE, in order to avoid losing them following the liberalization. This point is difficult to reconcile with the overall reasoning of the TAR Lazio (as also laid down in the Acea Judgment), which seemed to attribute decisive relevance to the *actual* use of customers' contact details to submit targeted offers.

In addition, the TAR Lazio upheld Enel's claim that the ICA erred in calculating the fine by taking into account the turnover generated by Enel in 2017, notwithstanding that the last full year of the alleged infringement was 2016. In the TAR Lazio's view, this amounted to a violation of the ICA's Guidelines on the method of setting fines (§ 8).[7]

On the other hand, the TAR Lazio rejected the grounds of appeal concerning the alleged abuse.

In particular, the TAR Lazio upheld the ICA's finding that the contact details collected by SEN, compared to other lists available on the market, provided additional (and strategic) information, i.e., that the customers included therein belonged to SEN's EPS. In the TAR Lazio's view, this made it impossible for EE's competitors to duplicate SEN's lists. The TAR Lazio acknowledged that

[7] Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1, of Law No. 287/90, ICA decision of October 22, 2014.

the fact that, while collecting their contact details for commercial purposes, SEN allowed its customers to choose whether to grant consent to being contacted exclusively by the Enel group or also by third parties, did not amount in itself to a discriminatory practice. However, in the TAR Lazio's view, the collection of contact details was characterized by an additional factor, namely SEN's alleged plan to provide the lists to EE to enable it to launch targeted offers. Finally, with respect to the analysis of the effects of the alleged abuse, the reasoning of the Enel Judgment seems to depart from the position taken in the Acea Judgment. In the Enel Judgment, the TAR Lazio limited itself to reiterating the traditional view that, once it is established that a given practice is, in theory, capable of excluding competitors, it is not necessary for an antitrust authority to assess the actual effects of such conduct. It did not make reference to the Intel judgment, which requires antitrust authorities to carry out an analysis of the intrinsic capacity of a practice to foreclose competitors, when an investigated company "*submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects*."[8]

[8] *Intel II* (Case C-413/14 P), EU:C:2017:632, §§ 138 and 140.

The Court of Salerno declares null and void in its entirety a guarantee agreement containing clauses from an anticompetitive form

On October 2, 2019, the Court of Salerno declared null and void in its entirety a guarantee agreement containing standard clauses based on a form by the Italian Banking Association (the "ABI"), which had been held anticompetitive by a decision of the Bank of Italy.[9]

Background

On May 2, 2005, the Bank of Italy established that some of the clauses in a form circulated by the ABI were anticompetitive, because they would lead to a standardization of the clauses imposed by the banks, to the detriment of guarantors.[10] In particular, the Bank of Italy contested the clauses according to which: (i) the guarantor must reimburse the bank the amounts it received as payment for covered bonds, in case they have to be returned following the annulment, ineffectiveness or revocation of the payments, or for any other reason; (ii) if the covered bonds are declared null and void, the guarantor must guarantee in any event the debtor's obligation to return the amounts received; (iii) the rights of the bank deriving from the guarantee are effective until all its credits towards the debtor have been paid, and the bank is not under an obligation to request the payment from the debtor or the guarantor within the time limits provided for by Article 1957 of the Italian Civil Code.

The claimant asked the Court of Salerno to declare that a guarantee agreement entered into with Banca della Campania S.p.A. was null and void in its entirety because it violated Article 2 of Law No. 287/1990. In particular, the claimant argued that, based on the case-law of the Italian Supreme Court, a guarantee agreement must be considered null and void if it contains the clauses from the ABI form, which was declared anticompetitive by the Bank of Italy.[11] Indeed, the violation of Article 2 of Law No. 287/1990 through the form circulated by the ABI would automatically render null and void the downstream contracts that reproduce its clauses, as these contracts constitute the way the unlawful form circulated by the ABI produces a concrete effect on the market. Moreover, the claimant argued that, according to the Italian Supreme Court, Article 2 of Law No. 287/1990 would apply not only to the first anticompetitive act or agreement, but also to the whole sequence of subsequent acts that restrict competition.[12]

The judgment of the Court of Salerno

The Court of Salerno stated that, for the downstream guarantee agreement to be declared null and void, it is sufficient that its clauses reproduce those envisaged in the ABI's form, considered anticompetitive by the Bank of Italy. Indeed, the invalidity of the upstream form would extend to the downstream guarantee agreement, as the only purpose of the form was to standardize the clauses applied by banks in their downstream contracts.[13] Accordingly, the downstream contracts must be considered incompatible with competition rules, regardless of whether the parties to these contracts were involved in the proceedings initiated by the Bank of Italy.[14] In the court's view, the downstream contract between the undertaking and the consumer implements the anticompetitive upstream agreement between firms. Considering the upstream and downstream contracts as separated would be contrary to the goals of competition law, which is aimed at

[9] Court of Salerno, Judgment No. 3097 of October 2, 2019.

[10] Bank of Italy, decision of May 2, 2005, No. 55, Case I584, *ABI: Condizioni generali di contratto per la fideiussione a garanzia delle operazioni bancarie*.

[11] Italian Supreme Court, Order No. 29810 of December 12, 2017.

[12] Supreme Court (Grand Chamber) Judgment No. 2207 of February 4, 2005.

[13] See Supreme Court Judgment No. 21878 of June 15, 2019; Order No. 29810 of December 12, 2017.

[14] Supreme Court Judgment No. 17475 of December 9. 2002.

protecting not only the firms concerned, but also other market players.[15]

After having established that the clauses contained in the guarantee agreement between the claimant and Banca della Campania, which reproduced the anticompetitive clauses of the ABI form, were unlawful, the Court assessed whether the nullity was limited to those clauses or extended to the entire contract. The Court concluded that the guarantee agreement in its entirety had to be declared null and void, taking into account different elements.

First, even though the Italian Supreme Court has never taken a stance on this specific point, the gravity of the violations at stake led to consider that the entire agreement was null and void, also in light of the principle of solidarity, which should also apply in contractual relationships.

Second, a declaration of nullity of the entire guarantee agreement was consistent with the need to enhance the protection of competition through an effective private enforcement system.

Third, according to the Court of Salerno, the wording of the Italian Supreme Court's case-law, which refers to the invalidity of the guarantee agreement and not of its individual clauses, suggests that the whole contract, and not only individual clauses, should be considered invalid.[16]

Based on the foregoing, the Court stated that the guarantee agreement entered into by the claimant and Banca della Campania was null and void in its entirety.

The judgment of the Court of Salerno concerns a controversial topic. While Italian courts have repeatedly considered that the clauses of downstream guarantee agreements reproducing the anticompetitive provisions of the ABI's form are null and void, it is still disputed whether the invalidity of these clauses should extend to the agreement in its entirety. This issue has already been assessed in other cases, with different outcomes. Some courts agreed with the Court of Salerno,[17] while others held that only the clauses reproducing the anticompetitive provisions of the ABI's form should be declared null and void.[18]

[15] Supreme Court Judgment No. 2305 of February 2, 2007.

[16] Supreme Court Order No. 29810 of December 12, 2017.

[17] See, for instance, Court of Appeal of Bari Judgment No. 526 of March 21, 2018; and Court of Salerno Judgment No. 3016 of August 23, 2018.

[18] See, for instance, Court of Appeal of Brescia Judgment No. 161 of January 29, 2019; and Court of Mantova Judgment of January 16, 2019.

Other developments

The ICA fines the Italian Federation of Equestrian Sports for non-compliance with commitments and alleged abuse of dominance

On October 8, 2019, the ICA found that the Italian Federation of Equestrian Sports ("FISE") had (i) breached the commitments it offered in 2011, and (ii) abused its dominant position in the market for the organization of events and horse races having a professional, amateur or recreational nature, with a view to restricting the activities of amateur operators (or sports promotion bodies).[19]

The commitments accepted by the ICA in 2011, in the context of a previous investigation, were aimed at preventing FISE from limiting the performance of equestrian activities and events by abusing its regulatory powers.[20] According to the ICA, FISE breached the commitments by unlawfully using its regulatory powers to restrict the activities of amateur operators, *inter alia* by introducing restrictive regulations and sending letters of formal notice to operators active in the relevant market that did not comply with them. In addition, the ICA found that the contested conduct also amounted to an exclusionary abuse, in that it prevented third parties from having access to the market for the organization of equestrian events.

In light of the foregoing, the ICA fined FISE €451,090.82 overall for the two violations. The amount of the fine was determined on the basis of the criteria provided for by Article 8 of Law No. 689 of November 24, 1981, concerning the violation of different provisions through the same conduct.

[19] ICA decision of October 8, 2019 No. 27947, Case A378E *Federitalia/Federazione Italiana Sport Equestri (FISE)*.

[20] ICA decision of June 8, 2011, No. 22503, Case A378C, *Federitalia/Federazione Italiana Sport Equestri (FISE)*.

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

191209.02_120919