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# Italian Competition Law Newsletter

## Highlights

— Council of State annuls ICA decision on alleged bid-rigging in open tender procedures for the provision of private security services in certain Italian regions.

— ICA accepts commitments by Consorzio Polieco in abuse of dominance proceedings.

## Council of State annuls ICA decision on alleged bid-rigging in open tender procedures for the provision of private security services in certain Italian regions.

On September 30, 2022, the Council of State upheld the appeals submitted by Sicuritalia S.p.A., Lomafin Sicuritalia Group Holding S.p.A., Italpol Vigilanza S.r.l. and Mc Holding S.r.l. (the "**Appellants**"),[1] and annulled a decision of the Italian Competition Authority ("**ICA**") on alleged bid-rigging in open tender procedures for the provision of private security services in certain Italian regions.[2]

### The Decision

On November 12, 2019, the ICA issued a decision finding that the Appellants, Coopservice S.Coop.p.A., Allsystem S.p.A., Istituti di Vigilanza Riuniti S.p.A. and its parent companies Skibs S.r.l. and Gruppo Biks S.p.A. (collectively, the "**Parties**") participated in a cartel affecting the outcome of several open tender procedures for the provision of private security services, launched by contracting authorities located in the regions of Lombardia, Emilia Romagna and Lazio between 2013 and 2017. The ICA ordered the Parties not to engage in similar conduct in the future and fined them more than €30 million overall.

The ICA initiated the proceedings in February 2018, following the receipt of several complaints of alleged bid-rigging. The scope of the investigation was subsequently extended to include alleged coordination in additional tenders for the award of security services to

[1] Council of State, Judgments No. 8399/2022 and No. 8400/2022.

[2] See ICA Decision No. 27993 of November 12, 2019, Case I821, *Affidamenti vari di servizi di vigilanza privata* the ("**Decision**"). On this decision, see Cleary Gottlieb, Italian Competition Law Newsletter, December 2019.

public and private entities, and a "*compensation scheme*" whereby the Parties allegedly put in place a system of regular mutual assignments of services to regulate their relationships.

The ICA held that the practices constituted a restriction by object under Article 101 TFEU, consisting of a single, complex and continuous collusive scheme aimed at sharing the lots among the participants and allowing them to retain their historical market shares.

In this context, the parties allegedly entered into a series of anticompetitive agreements aimed at coordinating their participation in some tenders in the areas where the parties were historically active, by using legitimate tools, such as temporary groupings ("**RTIs**") and subcontracting schemes, in an anticompetitive manner. According to the ICA, in some cases the parties participated in the tenders with fictitious RTIs, which concealed a geographical sharing of the lots. In other cases, before the tender, the parties entered into opt-out agreements, according to which some firms committed not to compete in exchange for the assignment of subcontracting quotas. In addition, the parties bilaterally regulated their relationships through the mutual assignment of security services, both in private and public tenders. Finally, in some cases, the agreements resulted in all the parties refraining from participating in the tenders, in pursuit of the same common purpose of eliminating competition between them.

## The judgment of the TAR Lazio

On July 22, 2021, the Administrative Regional Tribunal of Lazio ("**TAR Lazio**") dismissed in full the applications filed by the Parties for the annulment of the Decision.[3]

The TAR Lazio confirmed the ICA's finding that the Parties had entered into a series of anticompetitive agreements aimed at coordinating their participation in some tenders, which were particularly important in terms of value and geographical scope, in areas where the Parties were historically active.

The TAR Lazio referred to the case law under which anticompetitive conduct repeated by different undertakings over a certain period of time, comprising in part agreements and in part concerted practices, can amount to a single collusive scheme. Consequently, a participant can be held liable for all actions of a cartel, even if it does not personally take part in all of them, once it has consented to the objective of the anticompetitive conduct itself.

In the TAR Lazio's view, even cartel members whose participation is limited (because they do not take part in all aspects of the anticompetitive conduct or play a minor role in it) ultimately contribute to the overall infringement. In such cases, in order to establish the liability of a company that claims not to have participated in a cartel or to have played only a limited role, it is necessary to demonstrate both that it intended to contribute to the common objectives pursued by all participants and that it was aware of the planned conduct or was at least able to foresee it.

According to the TAR Lazio, the Decision fully addressed these issues, taking into account the network of interwoven and bilateral relationships in place between the Parties, showing that they were aware of the objective of preserving their market positions and thus restricting competition.

The TAR Lazio also found that there was no reasonable explanation, economic or otherwise, for the Parties' coordination, and that the ICA had correctly calculated the fines imposed on them.

[3] See TAR Lazio, judgments Nos. 8810, 8815, 8816, 8817 and 8825 of July 22, 2021. On these judgments, see Cleary Gottlieb, Italian Competition Law Newsletter, July 2021.

## The findings of the Council of State

In its judgment, the Council of State held that the ICA had not gathered sufficient evidence to prove the existence of an anticompetitive agreement between the Parties, and that the elements relied upon by the ICA also had a plausible alternative explanation.

According to the Court, the use of RTIs was not anomalous, as it could be objectively explained by the particular structure and subject matter of the tenders analyzed by the ICA, which made it difficult for the companies to participate individually. The participation in such tenders in bigger groupings constituted an almost physiological if not necessary behavior, because in this way the bidders could rely on the already tried-and-tested organizational structure of the co-participants, and could share the risks of insolvency of the contracting entities. Consequently, according to the Council of State, the participation in RTIs could not be considered, *per se*, indicative of an infringement.

The Court also noted that the ICA had not adequately analyzed and demonstrated the anticompetitive effects stemming from the alleged restrictive agreement.

According to the Court, such effects could not be considered *in re ipsa*, as the alleged cartel did not have as its object the sharing of the lots of the tenders under investigation and the determination of prices. Therefore, the ICA should not have taken for granted that the absence of competitive confrontation resulted in economic injury for the contracting entities.

Moreover, the Council of State held that the agreement could not be qualified as a restriction by object, taking into account that the turnover generated by the tenders under investigation was minimal vis-à-vis the total turnover generated by Italian companies in this sector. This circumstance made it possible to exclude a presumption of harm.

Lastly, the Court noted that the Decision had defined the relevant market as coinciding with the services under the tenders investigated by the ICA. According to the Court, the reasoning of the ICA in this respect was not correct. While the definition of the relevant market should take into account the scope of an anticompetitive agreement, this does not mean that the relevant market should be tailor-made on it, without including all other transactions of the same type.

Since the alleged anticompetitive cartel concerned only tenders having as their object the provision of security services in Lombardia, Emilia Romagna, and Lazio, the relevant market should have been identified with reference to all tenders in the three-year reference period and in the three regions indicated. The relevant market should have included all public tenders involving similar, or identical, services. Furthermore, three separate relevant geographic markets could be identified, for each of the three regional territories.

Finally, the Council of State concluded that the ICA also mischaracterized the alleged cartel as an infringement by object.

In light of the above, the Council of State upheld the appeals brought by the Appellants and annulled the Decision.

# Other developments

## ICA accepts commitments by Consorzio Polieco in relation to abuse of dominance proceedings

On September 13, 2022, the ICA accepted the commitments offered by Consorzio Polieco ("**Polieco**"), the consortium for the recycling of polyethylene waste goods.[4]

On August 31, 2021 the ICA opened proceedings against Polieco for allegedly abusing its dominant position on the national market for the management of the recycling of polyethylene waste goods, instrumental to meeting the Extended Producer Responsibility (EPR) obligations.

EPR obligations are based on the polluter pays principle and require producers, importers, distributors, users, recyclers and recoverees of polyethylene goods to establish a system for managing such waste goods, and to finance the related activities.

Polieco has operated since 1997 as a monopoly for the recycling of polyethylene waste. Producers, importers, distributors, users, recyclers and recoverees of polyethylene goods can join the consortium, which carries out the collection and recycling of goods at the end of their life cycle. All such operators are required by law to pay contributions to Polieco, in the absence of autonomous management systems effectively operating.

The ICA considered that Polieco had abused its dominant position by preventing the only competitor, Consorzio Ecopolietilene ("**Ecopolietilene**"), from entering the market. The allegedly abusive strategy of Polieco consisted in obstructing the establishment of Ecopolietilene, and in discouraging in various ways undertakings from withdrawing from the Polieco and joining Ecopolietilene. In particular, Polieco sought to fully recover past contributions due from undertakings that were not members of any consortia, or that had already joined Ecopolietilene, while it granted the possibility to pay only a part of such past contributions to the undertakings that accepted to become (or that were already) its members.

On January 20, 2022, Polieco offered commitments to the ICA. Among the remedies, Polieco offered to scrap discriminatory conditions, including more favorable conditions that had been on offer to producers of polyethylene goods that were registered or intended to register with Polieco. Most interestingly, Polieco committed to establish a fund that would collect all the past contributions due from the undertakings active in the chain of polyethylene-based goods and of the waste generated by them, irrespective of whether they were payable to Polieco or Ecopolietilene. Such fund, established as a trust, is intended for the management of environmental emergencies.

The ICA found that Polieco's commitments were suitable to overcome its competitive concerns. Moreover, the ICA stated that the establishment of a fund intended for the management of environmental emergencies demonstrates a positive complementarity between competition rules and sustainability goals. The commitments offered by Polieco were considered capable of protecting the environment and enhancing more efficient waste collection and recycling activity. Hence, the ICA stated that, in the case concerned, the application of antitrust rules also contributed to achieving environmental and sustainability goals.

The ICA therefore closed the proceedings.

[4] ICA, decision of September 13, 2022, No. 30300, case A545, *Consorzio Polieco/Condotte anticoncorrenziali*.

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