April 2019

Italian Competition Law Newsletter

Highlights

— The ICA imposes a fine of € 1.1 million on the company holding a legal monopoly in the provision of suburban public passenger land transport services in the Alto Adige region, for an alleged refusal to provide essential information in the context of a public tender procedure.

— The TAR Lazio quashes two infringement decisions by the ICA regarding an alleged parallel network of anticompetitive vertical agreements between radio taxi companies and drivers active in Rome and Milan.

Refusal to supply essential information: the ICA fines legal monopolist in the local public transport sector

On April 10, 2019, the Italian Competition Authority ("ICA") levied a fine of € 1.1 million on SAD – Trasporto Locale S.p.A. ("SAD"), a company entrusted by the Autonomous Province of Bolzano ("APB") with the provision of suburban public passenger land transport services in the Bolzano area, for an alleged infringement of Article 102 TFEU.[1]
According to the ICA, SAD abused its dominant position on the local market for suburban public passenger land transport services, by refusing to provide the APB with information necessary to carry out a public tender procedure for the assignment of transport services in the Alto Adige region.

Case Summary

In the Bolzano area, local public passenger transport services are carried out by several companies, including SAD, on the basis of concessions granted by the APB. In the Sixties, SAD was entrusted by the APB with the provision of public passenger land transport services with respect to certain suburban lines, where it enjoyed a legal monopoly.

In view of the forthcoming expiration of the concessions in 2018, the APB decided to implement a new territorial organization of local public transport services, by splitting the Alto Adige region into four geographic areas and issuing a public tender procedure for the assignment of the right to provide local public transport services in each of these geographic areas.

[1] ICA decision of April 10, 2019, No. 27635, Case A516, *Gara affidamento servizi TPL Bolzano*.

In January 2018, following a complaint submitted by the APB, the ICA opened an investigation against SAD for alleged abuse of dominant position. According to the complainant, SAD had unlawfully refused to provide information that was essential to prepare the supporting documentation required to carry out a public tender procedure for the assignment of the suburban public passenger land transport services in the Bolzano area. The APB argued that, as a consequence of the alleged refusal, SAD's potential competitors were placed in a disadvantageous position compared to the incumbent, due to an information asymmetry with respect to data indispensable to participate in the public tender procedure.

After having rejected the commitments submitted by SAD, at the end of its investigation, the ICA concluded that SAD had abused its dominant position. According to the ICA, SAD had engaged in an obstructive conduct *vis-à-vis* APB, by delaying and ultimately refusing to provide updated information regarding certain production factors used for the provision of the transport services (*e.g.*, the list of vehicles used and logistics, such as storage and parking spaces) as well as the personnel employed. As a consequence, the ICA imposed on SAD a € 1.1 million fine.

SAD's dominant position

The ICA defined the relevant product market as the market for the provision of suburban public passenger land transport services. The geographic dimension of the relevant market corresponded to the areas of the Alto Adige region that included the lines for which SAD, on the basis of a concession granted by the APB, provided on an exclusive basis the suburban public passenger land transport services.

The ICA rejected SAD's claim that the relevant market corresponded to the public tender procedure issued by the APB, on the ground that the market should be defined on the basis of factual elements existing at the time of the alleged anticompetitive conduct. As a consequence, in the ICA's view, the relevant market should be defined by taking into account the service organization in the period under investigation (i.e., SAD's position of legal monopoly) and not the public tender procedure, which took place after SAD's refusal to provide the information requested by the APB.

The refusal to provide the essential information

The ICA found that SAD failed to provide the APB with the information requested for a particularly long period of time. While initially SAD used delaying tactics (such as claims that the information was not indispensable for the purposes of organizing the public tender procedure), it later explicitly refused to comply with the APB's request, sticking to its position even after the opening of the ICA's investigation. Over time (but many months after the expiry of the deadline set by APB's first request for information), SAD provided some of the information requested, but the complete set of data was provided only one year after the first request.

During the ICA's investigation, SAD argued that its refusal was justified for two reasons. First, it claimed that the APB already had all the information requested, given that such information was the basis for the calculation of the standard annual cost of local public transport services (which was periodically carried out by the APB with a view to compensating the public service obligations imposed by the concessions). Second, it claimed that the requested data contained strategic and sensitive information on SAD's commercial organization which, if disclosed to third parties, could negatively impact its business.

However, the ICA found that SAD's conduct had no legitimate justification, especially in light of the legislative framework in force, which imposes on companies entrusted with the provision of local public services (and, in particular, local transport public services) to provide, upon request by a local public authority that has decided to issue public tender procedures for the assignment of such services, all information concerning technical characteristics of plants and infrastructures, their book value at the beginning of the financial year as

well as any other information necessary to launch the tender.[2]

The effects of SAD's conduct

In light of the above, the ICA found that SAD's dilatory tactics (and, ultimately, its refusal to provide the information requested) had significantly delayed the launch by the APB of a public tender procedure for the assignment of the rights to provide suburban public passenger land transport services in the Bolzano area and, thus, the opening of the relevant market to competition. According to the ICA, this delay had the effect of foreclosing the entry on the relevant market by SAD's potential competitors and, ultimately, of harming consumers. Accordingly, the ICA found that SAD's conduct amounted to a serious infringement of Article 102 TFEU.

The TAR Lazio quashes two infringement decisions by the ICA regarding an alleged parallel network of anticompetitive vertical agreements between radio taxi companies and drivers active in Rome and Milan

On April 29, 2019, the Regional Administrative Tribunal of Latium ("TAR Lazio") upheld[3] the appeals submitted by five radio taxi companies against infringement decisions issued by the ICA in the context of two parallel proceedings for alleged vertical restraints ("Decisions").[4]

The judgments are remarkable not only because they deal with a topic (*i.e.*, vertical anticompetitive agreements) that has been relatively neglected in the last years (even though the wind is changing, at both the EU and national level),[5] but also because they include some interesting (albeit not always entirely convincing) lines of reasoning.

Factual background

On June 27, 2018, the ICA found that six major companies managing radio taxi services in, respectively, Rome and Milan had infringed Article 101 TFEU by imposing on the taxi drivers affiliated to their networks certain exclusivity and non-compete obligations, provided for by the companies' by-laws or in the contracts entered into with the drivers.

Both investigations were opened following a complaint submitted by a competitor, Mytaxi, which operated a mobile app aimed at connecting taxi drivers and consumers. Mytaxi claimed that the exclusivity and non-compete clauses (which governed the contractual relationship between the radio taxi companies and the affiliated taxi drivers) hindered the development of new innovative tools for the management of taxi demand (such as the Mytaxi app), thus preventing new competitors from entering the market for taxi demand management services.

The ICA found that the clauses at issue, forcing each taxi driver affiliated to the radio taxi companies to allocate all his/her capacity solely to one radio taxi company, resulted in a parallel network of anticompetitive vertical agreements between each radio taxi company and the affiliated drivers, which created a cumulative foreclosure

[2] Decree-Law No. 1/2012, Article 25, paragraph 4.

[3] TAR Lazio, judgments Nos. 5358, 5359, 5417, 5418 and 5419/2019.

[4] ICA decisions of June 27, 2018, No. 27244, Case I801A, Servizio di prenotazione del trasporto mediante taxi – Roma; June 27, 2018, No. 27245, Case I801B, Servizio di prenotazione del trasporto mediante taxi – Milano.

[5] Commission decisions of March 25, 2019, Case AT.40436, *Ancillary Sports Merchandise*; December 17, 2018, Case AT.40428, *Guess*; July 24, 2018, Case AT.40182, *Pioneer*; July 24, 2018, Case AT.40181, *Philips*; July 24, 2018, Case AT.40469, *Denon & Marantz*; July 24, 2018, Case AT.40465, *Asus*; ICA decisions of April 18, 2014, No. 27142, Case I813, *Restrizioni alle vendite on line di stufe*; March 23, 2016, No. 25940, and April 21, 2015, No. 25422, Case I779, *Mercato dei servizi turistici-Prenotazioni alberghiere on line*; December 11, 2014, No. 25229, Case I757, *Ostacoli all'accesso al mercato di un nuovo operatore di telefonia mobile*; July 9, 2014, No. 25021, Case I718, *Enervit-Contratti di distribuzione*; July 2, 2014, No. 25013, Case I766, *Inverter solari ed eolici*; May 20, 2014, No. 24935, Case I702, *Agenti monomandatari*.

effect vis-à-vis open platforms (such as the MyTaxi app), thereby hindering entry by actual and potential competitors on the local markets for taxi demand management services. This harmed both taxi drivers and consumers. However, the ICA found that the anticompetitive conduct did not amount to a "serious" violation of competition law, and therefore did not impose any fine on the radio taxi companies.

Judgments

On appeal, the TAR Lazio held that the Decisions were vitiated on a number of grounds, including: (i) failure by the ICA to meet the standard of proof required to find an infringement of Article 101 TFEU; (ii) errors in the definition of the relevant product market; (iii) failure to establish the anticompetitive effects of the alleged vertical restraints; and, overall, (iv) internal logical inconsistencies, lack of proper investigation and failure to state reasons. As a consequence, the TAR Lazio upheld the appeals lodged by the radio taxi companies and annulled the Decisions.

The alleged parallel network of anticompetitive vertical agreements

First, the TAR Lazio upheld the radio taxi companies' argument that the ICA failed to meet the required standard of proof for establishing the existence of a parallel network of anticompetitive vertical agreements. According to the TAR Lazio, the ICA inferred the existence of such parallel agreements on the mere basis of the presence of non-compete obligations in the radio taxi companies' by-laws and the contracts entered into with the affiliated drivers. However, the ICA did not carry out any analysis regarding the actual existence of a parallel network of agreements, limiting itself to "*describing it rather than investigating it*". Moreover, it did not prove that the radio taxi companies and the taxi drivers shared a "*common interest*", which – in the TAR Lazio's view – would represent a key element in the context of any findings of anticompetitive agreements between companies operating at different levels of the production or supply chain.

An interesting (albeit controversial) point of the TAR Lazio's reasoning concerns the role of the taxi drivers in the alleged anticompetitive agreements. The TAR Lazio held that the decisions were vitiated by patent internal inconsistencies, in that the ICA on the one hand found that the taxi drivers were *part* of the anticompetitive agreements, while on the other hand it found that the latter (along with open radio taxi platforms and consumers) were also *harmed* by those agreements (given that the non-compete clauses prevented them from using their entire capacity). According to the TAR Lazio, such finding could have been warranted in the context of an abuse of dominance case, but is "*radically antithetic to the concept of anticompetitive agreement*". From this perspective, the judgments seem difficult to reconcile with a well-established principle of the EU case-law, according to which a company that is party to an anticompetitive agreement may in principle also be harmed by that same agreement (and, accordingly, may claim the damages suffered in this capacity).[6]

The definition of the relevant product market

The TAR Lazio also upheld the companies' argument that the ICA had erred in defining the relevant product market. More specifically, according to the TAR Lazio, the ICA alleged that there was substitutability between the services provided by radio taxi companies and those offered by mobile apps without engaging in any empirical analysis, in particular with respect to the nature (cumulative or alternative) of the demand for taxis. Moreover, the TAR Lazio held that, in defining the relevant product market, the ICA had not adequately taken into account the fact that the market for taxi management services is characterized by a double source of demand (*i.e.*, passengers and taxi drivers), and that the demand coming from passengers has an impact on the demand coming from taxi drivers.

[6] Courage v. Crehan, Case C-453/99, EU:C:2001:465, § 36

The anticompetitive effects of the agreements

Finally, the TAR Lazio upheld the companies' claims that the ICA had failed to state reasons as to the anticompetitive impact of the alleged vertical restraints. While recognizing that the agreements did not amount to "by object" restrictions of competition law, the ICA had not analyzed the actual anticompetitive effects of the relevant clauses. Moreover, according to the TAR Lazio, the ICA based its findings almost exclusively on data put forward by the parties (and, particularly, on the complainant's allegations), especially regarding the possible anticompetitive harm allegedly caused by the functioning of the "closed" platforms (as opposed to open platforms, such as Mytaxi) and the causal link between the companies' behavior and the foreclosure of the relevant market.

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