

December 2019

Italian Competition Law Newsletter

Highlights

- The Court of Milan dismisses a follow-on action for damages brought against the incumbent in the Italian electronic communications sector
- The ICA fines bid-rigging practices in the private security services sector in Italy
- The Council of State annuls the judgments of the TAR Lazio that quashed an ICA decision fining bid-rigging practices in the home oxygen therapy and home mechanical ventilation sectors

The Court of Milan dismisses a follow-on action for damages brought against the incumbent in the Italian electronic communications sector

On December 18, 2019, the Court of Milan rejected an action for damages brought by Enter S.r.l. (“**Enter**”) against Telecom Italia S.p.A. (“**TIM**”) in follow-on litigation for an alleged abuse of dominance in the provision of wholesale access services, which had been established and fined by the Italian Competition Authority (the “**ICA**”) in 2013.¹

Background

In order to provide electronic communications services to final customers, the other authorized operators (“**OAOs**”) normally need access to TIM’s fixed network. When the OAOs acquire new

customers, they send TIM a request to activate the wholesale access services needed to provide users with retail electronic communications services. This process can either have a positive outcome, leading to the provision of the retail service to final customers, or a negative outcome, when TIM communicates the presence of one of the circumstances provided for by sector-specific regulation, which prevent the activation of wholesale access services.

In a decision delivered on May 9, 2013, in the A428 case (the “**A428 Decision**”), the ICA stated that, in the period 2009-2011, TIM had abused its dominant position by communicating an

¹ Court of Milan, Judgment No. 11772 of December 18, 2019.

unjustifiably high number of refusals to activate wholesale access services (KOs), in order to hinder the expansion of competitors in the markets for voice telephony services and broadband internet access.² In particular, the ICA found that the procedures for the provision of wholesale access services to competitors and to TIM's commercial divisions did not coincide. In the ICA's view, the differences between external and internal procedures were not as such unlawful, but they had resulted, *de facto*, in higher percentages of KOs for competitors compared to TIM's commercial divisions.

In the civil proceedings, Enter claimed that it had been harmed by the above-mentioned conduct. The claimant argued that, in the period 2009-2011, it had received percentages of refusals to activate higher than those received by TIM's retail divisions. Enter also claimed that there was a causal link between the contested conduct and the damage allegedly suffered, taking into account the competitive relationship between TIM and Enter, the alleged exclusionary effects of the contested conduct and the high number of refusals to activate allegedly received by the plaintiff. Enter therefore asked the Court of Milan to award damages amounting to around €1.9 million. TIM asserted that the statistical analysis demonstrated the absence of discriminatory treatment, as Enter had actually gained, in percentage terms, a number of customers higher than the clients gained by TIM's internal commercial divisions. TIM also contested that Enter had not alleged and proved any unjustified refusals to activate. In addition, there was no evidence of the damage allegedly suffered and a causal link between such damage and the contested conduct.

The Judgment

In its Judgment No. 11772 of December 18, 2019, the Court of Milan rejected Enter's request and ordered it to reimburse the costs of the proceedings.

The Court of Milan first considered the evidentiary value of the ICA's decision. The Court noted that Article 7 of Legislative Decree No. 3 of 2017, according to which final decisions by a competition authority have full evidentiary value against the infringer in relation to the nature and scope of the infringement, could not be applied retroactively to this case. The claimant could rely on settled case law according to which the decisions of the ICA constitute "privileged evidence" of the nature and scope of the infringement. However, the claimant bears the burden of proving, *inter alia*, that: (i) it was actually affected by the contested conduct; (ii) it suffered damages; and (iii) there was a causal link between the conduct and the alleged damage, on the basis of ordinary rules on burden of proof, with some adjustments to take into account the particular nature of private antitrust enforcement.

The Court of Milan then assessed whether the facts alleged and the evidence submitted by Enter satisfied the legal standard. In the Court's view, the claimant had not adequately established that it was actually harmed by the conduct fined by the A428 Decision and there was a causal link between such conduct and the alleged harm. In particular, the Court found that, in civil proceedings, the statistical analysis of the percentage incidence of the refusals to activate communicated to Enter – which in any case did not provide clear indications of discriminatory treatment – was not sufficient to demonstrate the alleged wrongdoing, as it could only constitute circumstantial evidence or reinforce and confirm further evidence. The available evidence showed that Enter regularly checked whether the refusals to activate communicated by TIM were actually justified by the circumstances provided for by sector-specific regulation. As the claimant had not specified which refusals to activate were in its view unlawful or unjustified, the Court held that it was not necessary to appoint an expert (CTU) to carry out further investigations in that regard.

² ICA Decision of May 9, 2013, No. 24339, Case A428, *Wind-Fastweb/Condotte Telecom Italia*. The decision was subsequently upheld by the TAR Lazio (Judgment No. 4801/2014) and the Council of State (Judgment No. 2479/2015).

The proceedings before the Court of Milan are part of a series of follow-on actions based on the A428 Decision. The findings of the Court in this case could have important implications for the

other ongoing cases based on the A428 Decision as well as, more generally, for the assessment of antitrust damages claims in follow-on actions.

The ICA fines bid-rigging practices in the private security services sector in Italy

On November 12, 2019, the ICA issued a decision finding that Coopservice S.Coop.p.A. (“**Coopservice**”), Allsystem S.p.A. (“**Allsystem**”), Istituti di Vigilanza Riuniti S.p.A. (“**IVRI**”) and its parent companies Skibs S.r.l. (“**Skibs**”) and Gruppo Biks S.p.A. (“**Biks**”), Italpol Vigilanza S.r.l. (“**Italpol**”) and its parent company MC Holding S.r.l. (“**MC Holding**”), Sicuritalia S.p.A. (“**Sicuritalia**”) and its parent company Lomafin SGH S.p.A. (“**Lomafin**”) 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 2017.³

The ICA fined the parties over €30 million overall for the alleged infringement of Article 101 TFEU.

The tenders and the opening of the investigation

The alleged cartel affected tenders representing (in terms of basic amount) around 23% of the main tenders in which the parties participated between 2013 and 2017 in Lombardia, Emilia Romagna and Lazio, where their activities tended to overlap. In particular, the alleged cartel concerned the tenders launched by: (i) Azienda Regionale Centrale Acquisti S.p.A. (“**ARCA**”); (ii) Trenord S.r.l. (“**Trenord**”); (iii) Expo 2015 S.p.A. (“**Expo**”); (iv) Intercent-ER; and (v) ATAC S.p.A. (“**ATAC**”). These tenders were among the most important ones in the regions concerned. Their value, compared to the total value of the tenders launched at the regional level, was

particularly high in Lombardia and in Emilia Romagna.

On February 21, 2018, the ICA started its investigation into alleged bid-rigging, following several complaints. Among others:

- Associazione Nazionale Istituti di Vigilanza Privata e Servizi Fiduciari di Sicurezza (ANIVP) and Associazione Italiana Vigilanza e Servizi Fiduciari (ASSIV) reported to the ICA their suspicions about possible collusive conduct concerning the ARCA tender. This tender, divided into 12 lots and having a total value of approximately €47 million, was almost entirely awarded (11 lots out of 12) to a temporary consortium of undertakings (an “**RTI**”) involving the main firms active in the market (Sicuritalia, Allsystem, Italpol, and IVRI);
- Trenord and the Autorità Nazionale Anticorruzione (ANAC) reported to the ICA possible collusive practices implemented by the same firms and another important player (Coopservice) in connection with the Trenord and Expo tenders.

On May 29, 2018, the ICA extended its investigation to the alleged coordination in additional tenders for the award of security services to public and private entities, and to the “compensation scheme” whereby the parties allegedly put in place systematic reciprocal assignments of security services to regulate their relationships.

³ ICA Decision of November 12, 2019 (published on December 16, 2019), No. 27993, Case I821, *Affidamenti vari di servizi di vigilanza privata*.

The ICA's findings

The ICA held that the contested 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—particularly important in terms of value and geographical scope—in the areas where the parties were historically active, by using legitimate tools, such as RTIs and subcontracting, in an anticompetitive manner. According to the ICA, in some cases the parties participated in the tender with fictitious RTIs, which concealed a geographical sharing of the lots; in other cases, before the tender, the parties entered into opt-out agreements in 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 agreement resulted in all the parties refraining from participating in the tenders, pursuing the same common purpose of eliminating competition between them.

The amount of the fines

In calculating the amount of the fines, the ICA considered the value of sales to be: (i) the amount awarded, where the undertaking won the bid; and (ii) the amount of the offer, for the second ARCA tender (that was not awarded) and for Lot No. 3 of the Expo2015 “Evento” tender, which was subsequently ruled out. The ICA also took into account the actual share of the awarded amount allocated to each firm within the RTI, which mirrored the revenues the parties expected to realize as a result of the cartel.

After having determined the basic amount of the fine, the ICA applied a 15% increase taking into account the gravity of the infringement, which constituted a hardcore restriction. However, the ICA reduced by 5% the fines imposed on Coopservice, Italpol, IVRI and Sicuritalia, in view of the fact that they had adopted an antitrust compliance program. The ICA did not reduce the fine imposed on Allsystem, as it had adopted a compliance program only after the statement of objections was sent by the ICA to the parties.

As a result, the ICA imposed fines of €3,514,730 on Coopservice, €5,443,923 on Allsystem, €5,488,998 on IVRI and its parent companies Skibs and Biks, €7,264,520 on Italpol and its parent company MC Holding, and €8,328,592 on Sicuritalia and its parent company Lomafin.

The Council of State annuls the judgments of the TAR Lazio that quashed an ICA decision fining bid-rigging practices in the home oxygen therapy and home mechanical ventilation sectors

Background

The decision of the ICA

On December 21, 2016, the ICA concluded its investigation into certain anticompetitive practices allegedly implemented by major firms active in the provision of home oxygen therapy (“**HO**”) and home mechanical ventilation (“**HMV**”) services. According to the ICA, Linde Medicale S.r.l. (“**Linde**”), Medicaire Italia S.r.l. (“**Medicaire**”), Medigas Italia S.r.l. (“**Medigas**”), Sapio Life S.r.l. (“**Sapio**”), Vitalaire Italia S.p.A. (“**Vitalaire**”), Vivisol S.r.l. (“**Vivisol**”), Eubios S.r.l. (“**Eubios**”), Oxy Live S.r.l. (“**Oxy**”), Ossigas S.r.l. (“**Ossigas**”), Magaldi Life S.r.l. (“**Magaldi**”) and Ter.gas. S.r.l. (“**Ter.gas.**”) participated in three separate agreements affecting the outcome of open tender procedures for the provision of HMV in part of the Milan province, HMV and HO in the Marche region and HO in the Campania region, launched by ASL Milano 1, ASUR Marche and SORESA between 2012 and 2014.⁴

In particular, the ICA found that:

- Linde, Medicaire, Medigas, Sapio, Vitalaire and Vivisol entered into an agreement affecting the outcome of four calls for tender issued between 2012 and 2014 by (or on behalf of) ASL Milano 1 for the provision of HMV services. The agreement aimed at maintaining the HMV service prices artificially high and at sharing the market;

- Linde, Medicaire, Sapio, Vitalaire and Vivisol coordinated their strategies so as to affect the outcome of the call for tender launched in 2010 by ASUR Marche for the provision of HMV and HO services to patients resident in the region;
- Linde, Medicaire, Eubios, Oxy, Ossigas, Magaldi, Ter.gas., Vitalaire and Vivisol put in place a coordination strategy aimed at: (i) keeping the price of HO services in Campania artificially high; (ii) hindering the launch of a public tender for the award of the service; and (iii) affecting the outcome of the tender launched by SORESA in 2014.

The ICA fined the parties approximately €47 million overall for infringing Article 101 TFEU.

The parties challenged the ICA decision before the TAR Lazio, which upheld the appeals.⁵ Following appeals by the ICA, the Council of State quashed the TAR Lazio’s judgments.

The Judgments

The Council of State upheld the appeals filed by the ICA against the TAR Lazio’s judgments in a number of decisions issued on December 19, 2019 and January 3, 2020.⁶

(i) The tenders launched by ASL Milano 1

The Council of State quashed the judgments of the TAR Lazio that had upheld the appeals

⁴ ICA Decision of December 21, 2016, No. 26316, Case I792, *Gare ossigenoterapia e ventiloterapia*.

⁵ TAR Lazio, Judgments Nos. 4467, 4468, 4471, 4473, 4476, 4481, 4482, 4483, 4484, 4485, 4486, 4487, 4489/2018.

⁶ Council of State, Judgments Nos. 8583, 8584, 8585, 8586, 8587, 8588, 8589, 8590, 8591/2019 and Nos. 50, 51, 52, 53/2020.

lodged by Linde, Medicaire, Medigas and Vivisol in connection with the tenders launched by ASL Milano 1. According to the Council of State, the parties coordinated their strategy in order to boycott the first 3 tenders launched by ASL Milano 1 and to get the lots involved in the fourth tender at a much higher price than the one originally intended by the contracting authority. In fact, while the first three tenders' award conditions would have not allowed for the price increases pursued by the firms concerned, as the calls for tenders provided for an auction base in line with the prices in force, as a result of the boycott of these tenders the fourth tender provided for significant increases in the auction base.

The Council of State held that, contrary to the TAR Lazio's finding, the parties did not act in a "spontaneous and autonomous" way. In the court's view, the presence of an alternative explanation for the parallel behaviour must be examined in the relevant factual context, in light of the available evidence. The analysis must focus on plausible reasons that may justify the parties' decision not to participate in a tender. The appellants claimed that their decision was based on the non-profitability of the tenders. According to the Council of State, the tenders had to be considered profitable, regardless of any comparison between them, and the economic studies put forward by the parties to justify their behavior on the basis of the non-profitability of the tenders did not rule out the existence of a boycott strategy, as they were based on discretionary assumptions that could not be taken for granted. The ICA's view was considered more credible, as the alleged coordination was reasonable and consistent with the available evidence, whereas the alternative explanations put forward by the parties were not supported by the file of the proceedings. The Council of State also pointed out that possible discrepancies in the circumstantial evidence did not affect the ICA's findings. This may happen only in case of serious inconsistencies that threaten the overall reliability of the evidentiary framework.

(ii) The tender launched by ASUR Marche

The Council of State also quashed the judgments of the TAR Lazio that had upheld the appeals lodged by Linde, Medicaire and Vivisol in connection with the tender launched by ASUR Marche. According to the Council of State, even though the parties had pre-qualified for the tender—having expressed their interest in taking part in it within the deadline set in the call for tender—and actively contributed to the definition of the tender documents, they agreed not to participate in the tender launched by ASUR Marche, in order to ensure the extension of previously signed supply contracts, which were more favorable from an economic standpoint. In the Council of State's view, the TAR Lazio erred in holding that the parties had not entered into an anticompetitive agreement because, among other things, it did not take into account the provision contained in the call for tender according to which even one single offer could lead to the award of the service. According to the Council of State, the presence of such a clause in the call for tender bore extremely high risks for the participants, as it could lead to a five-years exclusivity even in case one single offer was presented. In such a scenario, the behaviour of the parties could only be explained by the fact that they anticompetitively coordinated their strategies to boycott the tender and make sure that the above-mentioned provision would remain unused.

(iii) The tender launched by SORESA

Finally, the Council of State quashed the judgments of the TAR Lazio that had upheld the appeals lodged by Linde, Medicaire, Oxy, Ter. Gas, Eubios and Vivisol in connection with the tender launched by SORESA. According to the Council of State, the companies implemented a coordinated strategy aimed at: (i) keeping the price of HO services in Campania artificially high; (ii) hindering the launch of a public tender for the award of the service (by boycotting the proposal for a framework agreement put forward by SORESA); (iii) and preventing effective competition in the tender launched by SORESA.

In particular, according to the Council of State, the TAR Lazio erroneously held that the agreement entered into by the parties to refuse the price proposed by the contracting authority did not constitute anticompetitive conduct and could not alter price dynamics in the market, in light of the alleged crucial role of Federfarma in setting the prices. In the Council of State's view, under competition law, the firms concerned were forbidden from coordinating their commercial strategies, regardless of the role played by Federfarma.

Regarding the second conduct, the Council of State disagreed with the TAR's finding that the ICA had not produced sufficient documentary

evidence. In the court's view, even though there was no smoking gun, the evidence collected by the ICA satisfied the legal standard required to demonstrate a coordination of the parties' commercial policies.

Finally, regarding the third conduct, the Council of State ordered the ICA to adjust the fine imposed on Linde and Vivisol, taking into account: (i) as value of sales, the actual shares of the awarded amount allocated to each firm within the RTI; and (ii) the original 20% increase on account of gravity of the infringement (that the TAR Lazio had reduced to 15% because it had annulled the parts of the ICA's decision concerning the other two conducts).

Other developments

The Council of State orders the ICA to refund the fine imposed on a non-appellant firm following the annulment of the decision finding an infringement

The Council of State ordered the ICA to refund a cartel fine imposed on Hapag Lloyd Italy S.r.l. ("**Hapag Lloyd**"), after the underlying infringement decision was overturned based on appeals brought by other cartelists.⁷

In February 2012, the ICA fined 15 shipping agencies and two industry associations €4 million overall for infringing Article 101 TFEU.⁸ Hapag Lloyd, which benefited from a 50% reduction of the fine on the basis of the leniency programme, did not challenge the decision. Following the appeals filed by the other alleged cartelists, in January 2013 the TAR Lazio quashed the ICA's decision.⁹ The judgment was confirmed by the Council of State in July 2014.¹⁰

In an effort to benefit from the outcome of the fellow cartelists' appeals, Hapag Lloyd asked the TAR Lazio (i) to extend the effects of the judgment to those that did not challenge the ICA's decision and, therefore, (ii) to find that the payment of its fine was undue, and (iii) to order the ICA to repay the fine. The TAR Lazio dismissed Hapag Lloyd's request to extend the effects of the judgment on the ground that Hapag Lloyd did not challenge the ICA's decision, despite having had the opportunity to do so, and reopened the proceedings for the analysis of Hapag Lloyd's further requests.¹¹ The decision of the TAR Lazio was subsequently confirmed by the Council of State.¹²

Hapag Lloyd then asked the TAR Lazio to adjudicate on its remaining requests by (i) finding that the payment of its fine was undue, and (ii) ordering the ICA to repay it. The TAR Lazio rejected the request, on the ground that the payment was made on the basis of a decision in force and, thus, could not be deemed undue.¹³

⁷ Council of State, Judgment No. 8568/2019.

⁸ ICA Decision of February 22, 2012, No. 23338, Case I733, *Servizi di agenzia marittima*.

⁹ TAR Lazio, Judgment No. 362/2013.

¹⁰ Council of State, Judgment No. 3406/2014.

¹¹ TAR Lazio, Judgment No. 6241/2015.

¹² Council of State, Judgment No. 362/2016.

¹³ TAR Lazio, Judgment No. 4010/2017.

Hapag Lloyd challenged the TAR Lazio's judgment before the Council of State, which upheld its appeal. According to the Council of State, under EU Regulation No. 1/2003 a fine can only be imposed if there is an infringement of competition rules. In the case at issue, the ICA decision found an anticompetitive agreement involving several parties, but the administrative courts held that the alleged cartel did not exist. The courts quashed the ICA decision because there was no infringement of competition rules, and not because some of the parties did not participate in the cartel or because of other issues linked to the parties' individual positions. Therefore, it was not possible to find that the anticompetitive agreement existed in respect of some participants but not others.

As a result, even if the effects of the judgment could not be extended to Hapag Lloyd because it did not challenge the ICA decision, the Council of State held that the payment of the fine can still be considered undue under EU law, and must therefore be returned, in the absence of anticompetitive conduct. In addition, the Council of State considered that the payment of a fine in the absence of an infringement would be incompatible with the proportionality principle. Finally, the Court noted that, pursuant to Article 2033 of the Italian Civil Code, undue payments must be returned. Accordingly, the Council of State ordered the ICA to return the fine.

The Council of State orders the ICA to re-assess alleged anticompetitive conduct in the market for maintenance services for TIM's electronic communications networks

On December 23, 2019, the Council of State upheld the appeals brought by TIM and a number of firms active in the provision of corrective maintenance services for its electronic communications networks (the "**Maintenance Firms**") against the judgments

of the TAR Lazio that had confirmed the ICA's decision finding an anticompetitive agreement in the market for the above-mentioned services.¹⁴

Pursuant to Article 47(2-*quater*) of Law Decree No. 5 of February 9, 2012, alternative telecommunications operators can acquire maintenance services directly from the firms active on this market, without TIM's intermediation. After the entry into force of the above-mentioned provision, Wind S.p.A. reported to the ICA and the Italian Communications Authority certain anomalies in the offerings presented by the Maintenance Firms, which were allegedly due to an anticompetitive agreement.

The ICA held that the Maintenance Firms had put in place, thanks to TIM's coordination efforts, a 'by object' anticompetitive agreement aimed at hindering competition in the relevant market.¹⁵ In particular, the alleged anticompetitive agreement took place through: (i) the exchange of information concerning corrective maintenance services aimed at coordinating prices and other aspects of the offerings (such as quality levels and possibility of subcontracting); and (ii) the coordination of the parties' conduct in the hearings before the Italian Communications Authority, which were held to oversee the market. On appeal, the TAR Lazio fully upheld the ICA's decision.¹⁶

On subsequent appeals filed by the Maintenance Firms and TIM, the Council of State overturned the TAR Lazio's judgments. First, according to the Council of State, the ICA erred in considering that, at the time of the ICA's decision, there was a liberalized market for maintenance services for TIM's electronic communications network. Indeed, Article 47(2-*quater*) of Law Decree No. 5 of February 9, 2012, which aimed at making the relevant market competitive, still needed to be implemented by a regulation of the Italian Communications Authority and, until that time,

¹⁴ Council of State, Judgment No. 8695/2019.

¹⁵ ICA Decision of December 16, 2015, No. 25784, Case I761, *Mercato dei servizi tecnici accessori*.

¹⁶ TAR Lazio, Judgments Nos. 9553, 9554, 9555, 9556, 9559, 9560, 9561/2016.

alternative telecommunications operators had to rely on TIM's intermediation for the provision of maintenance services. Therefore, the Council of State concluded that the very assumption on which the ICA initiated the proceedings was incorrect. Second, in line with European case law (namely, the *Groupement des Cartes Bancaires* judgment),¹⁷ the Council of State held that the notion of 'by object' anticompetitive agreement had to be construed restrictively. In this case, also in the light of the particular features of the market concerned, the ICA should have proven the existence and magnitude of the anticompetitive effects of the contested conduct.

As a result, the Council of State stated that the ICA must re-assess the contested conduct in light of the principles established by its judgment. Following the re-assessment of the conduct, the ICA could close the proceedings without finding any infringement, or confirm its finding of infringement and, possibly, reduce the amount of the fines.

¹⁷ *Groupement des Cartes Bancaires*, C-67/13 P, ECLI:EU:C:2014:2204.

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

