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Italian Competition Law Newsletter

Highlights

- The Council of State annuls the TAR Lazio judgment concerning the amount of the fine for participation in a cartel in the road safety barriers sector and provides clarifications on the turnover to be taken into account for the purposes of setting antitrust fines and the scope of the principle of proportionality when assessing inability to pay
- The TAR Lazio upholds the interim measures adopted by the ICA in the context of an investigation for a possible abuse of dominant position in the market for taxi demand management services in Turin

The Council of State annuls a judgment of the TAR Lazio concerning the amount of the fine for participation in a cartel in the road safety barriers sector in light of the applicant's reduced ability to pay

On June 25, 2019, the Italian Council of State (“Council of State”) partially upheld the appeal lodged by Società Metalmeccanica Fracasso in Liquidazione S.p.A. (“Metalmeccanica Fracasso”) against the judgment issued by the Regional Administrative Tribunal of Latium (“TAR Lazio”) on February 1, 2017 (“Judgment”),¹ which had confirmed the decision of the Italian Competition Authority (“ICA”) to re-determine the fine imposed on Metalmeccanica Fracasso for an alleged restrictive agreement.²

Factual Background

On September 28, 2012, the ICA found that some companies active in the market for road safety barriers had violated Article 101 TFEU (“Infringement Decision”). In particular, the ICA imposed a fine of €11,013,165.40 on Metalmeccanica Fracasso, for having entered into an anticompetitive agreement consisting of a single, complex and continuous concerted practice affecting competition in the national market for safety barriers between January 2003 and May 2007.³

¹ Council of State, judgment No. 4335/2019; TAR Lazio, judgment No. 1618/2017.

² ICA decision of December 22, 2015, No. 25796, Case I723B, *Intesa nel mercato delle barriere stradali-rideterminazione della sanzione Metalmeccanica Fracasso*.

³ ICA decision of September 28, 2012, No. 23931, Case I723, *Intesa nel mercato delle barriere stradali*.

Metalmeccanica Fracasso challenged the Infringement Decision before the TAR Lazio, which partially upheld the appeal and re-determined the fine accordingly.⁴ The ICA challenged the TAR Lazio's ruling before the Council of State, which partially annulled the judgment and required the ICA to re-determine the fine taking into account the revenues achieved by Metalmeccanica Fracasso through the anticompetitive conduct and its contribution to the agreement.⁵

On December 22, 2015, the ICA set a new amount of the fine to be imposed on Metalmeccanica Fracasso, equal to €7,714,083.04. Against this decision, Metalmeccanica Fracasso filed a motion for compliance with the Council of State, arguing that the ICA had not complied with the criteria set forth in the decision of the Council of State. The Council of State, however, rejected Metalmeccanica Fracasso's motion.⁶

Metalmeccanica Fracasso also filed an appeal against the decision re-determining the fine before the TAR Lazio. However, in the Judgment, the TAR Lazio rejected the appeal in its entirety. Metalmeccanica Fracasso challenged the Judgment before the Council of State.

The judgment of the Council of State

(i) The relevant turnover

In the first three grounds of appeal, Metalmeccanica Fracasso argued that: (i) the TAR Lazio had erroneously considered that, to determine the basic amount of the fine, it was necessary to take into account the 2011 turnover, used in the Infringement Decision, as this issue was already covered by a final judgment (*i.e.*, the 2015 judgment of the Council of State); (ii) the TAR Lazio had failed to acknowledge that the fine was disproportionately high, as it did not take into account the turnover realized by Metalmeccanica Fracasso when the decision re-determining the fine was adopted; (iii) the Judgment violated Article 15 of Law 287/1990 or, in any event, EU law, given that the ICA should have taken into account

the turnover realized during the year before the adoption of the decision re-determining the fine and not during the year before the adoption of the Infringement Decision.

The Council of State agreed with the TAR Lazio that the issue of the turnover to be taken into account for the purposes of setting the fine was already covered by a final judgment, *i.e.* the 2015 judgment of the Council of State, according to which the ICA had correctly taken into account the turnover realized by Metalmeccanica Fracasso in 2011. The Council of State made reference to the binding value of a final judgment, and added that, apart from limited exceptions (which, in any event, should be provided for by national law), the fact that a judgment violates EU law is not enough to set aside national procedural rules on the binding value of a final judgment.

In any case, the Council of State stated that the ICA had complied with the relevant provisions of national and EU law on the relevant criteria for calculating antitrust fines. Indeed, in line with these provisions, the ICA had rightly taken into account the turnover realized by Metalmeccanica Fracasso in the year before the Infringement Decision (*i.e.*, 2011) and not in the year before the decision re-determining the fine (*i.e.*, 2014).

(ii) The principle of proportionality in the assessment of inability to pay

Metalmeccanica Fracasso also argued that the TAR Lazio had erroneously upheld the ICA's evaluation of Metalmeccanica Fracasso's ability to pay, which was not compatible with the principle of proportionality.

The Council of State first recalled the principles established by both national and European case law, according to which (i) a reduction of the fine for inability to pay is possible only in exceptional circumstances, and (ii) the parties seeking the reduction should provide adequate evidence of the inability to pay and of the link between the inability to pay and the payment of the fine. In the case at hand, the Council of State held that, in

⁴ TAR Lazio, judgment No. 8674/2013.

⁵ Council of State, judgment No. 3291/2015.

⁶ Council of State, judgment No. 4563/2016.

light of the evidence provided by Metalmeccanica Fracasso, the Judgment had to be annulled, because the TAR Lazio had not adequately taken into account the company's inability to pay, thus violating the principle of proportionality.

In particular, the Council of State stated that the fine should be proportionate not only to the gravity of the infringement, but also to the infringer's economic and financial situation and, more generally, to the objectives pursued through the imposition of antitrust fines.

After having underlined that the ICA had correctly taken into consideration the turnover realized by the company in 2011, the Council of State added that, in light of the circumstances of the case and

the considerable amount of time that had passed since the Infringement Decision, the ICA should have also taken into account the decrease in the turnover realized by the company, which fell from more than €110 million in 2011 to €2.6 million in 2014.

Therefore, the Council of State ruled that the imposition, in 2014, of a fine of more than €7 million on Metalmeccanica Fracasso exceeded the company's ability to pay and was not proportionate, as the turnover realized by the company in 2014 amounted to only €2.6 million. As a result, the Council of State ordered the ICA to re-determine the fine, taking into account Metalmeccanica Fracasso's reduced ability to pay.

The TAR Lazio upholds the interim measures adopted by the ICA in an investigation concerning an alleged abuse in the market for taxi demand management services in Turin

On June 7, 2019, the TAR Lazio rejected the appeal filed by Società Cooperativa Taxi Torino ("Taxi Torino") against the interim measures adopted by the ICA on November 29, 2018, in an investigation concerning an alleged abuse in the market for taxi demand management services in Turin.⁷

Factual Background

On November 29, 2018, the ICA imposed interim measures on Taxi Torino, the firm managing radio taxi services in Turin, in the context of an investigation for a possible abuse of dominant position in the market for taxi demand management services in Turin. The ICA opened the investigation following a complaint by MyTaxi, a company that manages a mobile app connecting taxi drivers and consumers. MyTaxi's complaint concerned a clause of Taxi Torino's by-laws, which imposed a non-compete obligation on taxi drivers participating in Taxi Torino's network.

The ICA found that the clause (i) had been introduced in Taxi Torino's by-laws right before

the launch of MyTaxi's app in Turin, and (ii) had led to the exclusion of several taxi drivers from Taxi Torino's network. According to the ICA, the clause hindered entry by open platforms (such as the MyTaxi app) on the relevant market, and was neither indispensable for the functioning of Taxi Torino's network nor proportionate.

In the ICA's view, the conditions for the adoption of interim measures were met, given that: (i) there was *prima facie* evidence of an infringement and its effect on competition; and (ii) the practice gave rise to a risk of serious and irreparable damage to competition, as the non-compete clause applied to around 90 per cent of taxi drivers active in Turin, and an increasing number of drivers had already discontinued the use of the MyTaxi app.

In light of these circumstances, the ICA ordered Taxi Torino to cease the application of the non-compete clause pending a final decision on the alleged abuse.

⁷ TAR Lazio, judgment No. 7463/2019; ICA decision of November 29, 2018, No. 27434, A521, *Attività di intermediazione della domanda di servizi taxi nel comune di Torino*.

The judgment of the TAR Lazio

The TAR Lazio first set out the legal standard applicable to the judicial review of interim measures. When reviewing these measures, a court is not under an obligation to verify whether the ICA gathered conclusive evidence on the violation of competition law, but must rather limit its assessment to verifying whether there are elements from which it can be inferred, with a sufficient degree of reliability, that an anticompetitive behavior is taking place.

On the merits of the case, the TAR Lazio held that: (i) taxi demand management services offered through apps, phone or radio constitute a single relevant market from an antitrust perspective; (ii) the amendment to Taxi Torino's by-laws, which imposed the non-compete obligation on taxi drivers participating in Taxi Torino's network, was aimed at limiting competition; (iii) the interim measures issued by the ICA were reasonable and well grounded. These issues are discussed below.

(i) Taxi demand management services offered through apps, phone or radio constitute a single (local) market

According to Taxi Torino, the ICA had mistakenly held that taxi demand management services offered through apps, phone or radio constitute a single relevant market. Indeed, the apps that allow users to book taxis have features (such as geo-localization and the possibility to pay through the app) that make them irreplaceable by the more traditional means of booking taxis, such as phone and radio.

Moreover, Taxi Torino argued that the ICA was also wrong in considering that the market for taxi demand management services offered through apps is a purely local market (comprising only the municipality of Turin). Instead, this market should be considered at least national (if not European).

The TAR Lazio took the view that the ICA was right in defining a single product market for taxi demand management services offered through apps, phone or radio. The TAR Lazio agreed with Taxi Torino that some features of apps could actually be relevant in the user's experience, and held that these aspects should be further

explored by the ICA in the pending investigation. However, the TAR Lazio concluded that users still consider taxi demand management services offered through apps and those offered through phone or radio as substitutes, and may well switch from one to the other in case one of the two is not available or difficult to use. The TAR Lazio also noted that, at the same time, the means used to book taxi services has no relevance for taxi drivers, given that the only relevant aspect from their perspective is the provision of the service to the end user, regardless of how the taxi is booked and paid.

As to the relevant geographic market, the TAR Lazio upheld the ICA's view that the market was limited to the municipality of Turin. Indeed, even though MyTaxi operates at a national level and the service it provides is homogeneous in the whole of Italy, the TAR Lazio agreed that the relevant geographic area to be considered for the purposes of the proceedings is the municipality of Turin, where MyTaxi and Taxi Torino compete.

(ii) The non-compete obligation in Taxi Torino's by-laws

Taxi Torino argued that the non-compete obligation in its by-laws did not prevent other players from entering the market. According to Taxi Torino, this obligation was introduced in the context of a broader review of the by-laws, which was necessary after Taxi Torino entered into an exclusive dealing agreement with the platform Move Plus. According to the applicant, the amendment to the by-laws was justified by the need to protect Taxi Torino from the risk of free-riding on the investments carried out by Taxi Torino's members.

The TAR Lazio held that the amendment to Taxi Torino's by-laws did not take place in the context of a broader review of the by-laws made necessary by the exclusive dealing agreement with the platform Move Plus. Documentary evidence showed Taxi Torino's intent to react to the behavior of certain taxi drivers, who had joined the MyTaxi app. As a consequence, the TAR Lazio agreed with the ICA's view that the contested clause was introduced in the by-laws precisely to eliminate or reduce competition.

In light of the above, the TAR Lazio concluded that (i) the evidence gathered by the ICA was sufficient to adopt interim measures, and (ii) the interim suspension of the non-compete obligation in Taxi Torino's by-laws was required to prevent an irreparable harm to competition in the market concerned.

(iii) The interim measures adopted by the ICA were reasonable and well grounded

In its last ground of appeal, Taxi Torino argued that the interim measures adopted by the ICA were unjustified and disproportionate. In particular, as to the condition of a prima facie case (*fumus boni iuris*), Taxi Torino argued that the evidence gathered by the ICA was insufficient even to prove the "mere probability" of an alleged violation of competition law. As to the urgency (*periculum in mora*), Taxi Torino argued that there was no actual risk of exclusionary effects. According to the applicant, this was proved by the fact that new operators had recently entered the market and there was no serious risk of economic losses for MyTaxi.

The TAR Lazio took the view that the interim measures adopted by the ICA were reasonable and well grounded. According to the TAR Lazio, the conditions to issue interim measures were met, since the ICA demonstrated the probability of an exclusionary strategy through documentary evidence showing the applicant's intent to react to the behavior of certain taxi drivers, who had joined the MyTaxi platform. Moreover, Taxi Torino had not proved to the requisite legal standard that, due to the interim measures, it could suffer greater harm than the competitive harm the ICA wanted to prevent. Finally, in the TAR Lazio's view, the interim measures were proportionate, as they did not jeopardize the efficient operation of Taxi Torino.

Other developments

The TAR Lazio upholds the ICA's decision to fine the Italian Football Federation for an alleged anticompetitive agreement in the market for professional services in the sports sector

On June 4, 2019, the TAR Lazio upheld a decision issued by the ICA in 2018, which had fined the Italian Football Federation ("FIGC") for an anticompetitive agreement, consisting of the FIGC's decision to limit access to the market for professional services provided by sports directors, sport management assistants, talent scouts and match analysts.⁸ The TAR Lazio agreed with the ICA that the FIGC's decision, setting certain limitations on access to the above-mentioned professions (quantitative limitations for the attendance of courses to qualify for these professions, Italian citizenship and residence requirements, and need to be included in certain "lists"), constituted an anticompetitive agreement, as it was capable of limiting the freedom of access to those professions with no legitimate justification. The TAR Lazio also held that there was no clear link between the limitations introduced by the FIGC and the objective of ensuring the quality of the services provided. Therefore, the TAR Lazio fully upheld the ICA's decision and the fine imposed on the FIGC.

The Council of State annuls the TAR Lazio's decision to reduce the fine imposed on San Marco for a cartel in the road safety barriers sector

On June 20, 2019, the Council of State partially annulled a ruling delivered by the TAR Lazio in 2013,⁹ which had reduced the fine imposed by the ICA on San Marco S.p.A. – Industria Costruzioni Meccaniche in liquidazione ("San Marco") for an alleged cartel in the road safety barriers sector.¹⁰ The Council of State held that the TAR Lazio, on the basis of equitable principles and by taking into account the fact that the company was bankrupt,

⁸ TAR Lazio, judgment No. 7177/2019; ICA decision of June 27, 2018, No. 27249, Case I812, *F.I.G.C. Regolamentazione dell'attività di direttore sportivo, collaboratore della gestione sportiva, osservatore calcistico e match analyst*.

⁹ Council of State, judgment No. 4203/2019; TAR Lazio, judgment No. 8677/2013.

¹⁰ ICA decision of September 28, 2012, No. 23931, Case I723, *Intesa nel mercato delle barriere stradali*.

had unlawfully reduced the fine imposed on San Marco. According to the Council of State, the TAR Lazio had *de facto* set aside Article 15 of Law 287/90, according to which, in the event of a serious infringement of competition law, the fine should be calculated on the basis of the gravity and the duration of the infringement, taking into account the turnover achieved in the market affected by the agreement in the year before the infringement decision.

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