THE ITALIAN COUNCIL OF STATE PROVIDES WELCOME CLARIFICATIONS REGARDING THE STANDARD OF PROOF THAT THE ITALIAN COMPETITION AUTHORITY MUST DISCHARGE

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INTRODUCTION

The Italian Council of State ("**CdS**") has recently annulled a EUR 29 million fine imposed by the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato,* "**AGCM**") in 2015 on two insurance companies for alleged bid-rigging. With this decision, the CdS upheld the ruling of the lower court, the T.A.R. Lazio, which had already concluded that the AGCM failed to provide sufficient evidence to sustain its findings concerning alleged coordination.

In particular, the CdS found that there were alternative explanations to the parallel behavior of the companies in connection with the tender process. This is consistent with EU settled case-law pursuant to which competitors must remain free to determine their own future conduct independently. In other words, such independence does not deprive the companies of the right to adapt their commercial practices intelligently to existing or anticipated conduct of competitors.

BACKGROUND AND RULING OF THE COUNCIL OF STATE

In March 2015, the AGCM found anticompetitive behavior between two insurance providers for the participation in tenders concerning third party liability insurance for 15 local public transport companies. The conduct consisted in not participating in a number of tender procedures. Of a total of 58 tenders, the companies did not participate in 39 and 19 were assigned to the company which had been historically providing the service, as the only bidder.

The AGCM also found that the conduct was carried out, in particular, through agreements within the *Associazione Nazionale fra le Imprese Assicuratrici*, the insurance companies' trade association. The infringement occurred between 2010 and 2014.

Both the T.A.R. Lazio and the CdS found that the AGCM conclusions were not supported by sufficient evidence. In particular, the CdS established that the AGCM did not provide sufficient proof of the conduct which allegedly consisted of illegal contacts between the two companies within the trade association. Under Italian and EU competition law, antitrust infringements may take the form of formal agreements between their members to adopt a given anti-competitive conduct in the market (e.g. cartel) but may also consist of looser forms of coordination

regarding the parties' commercial behaviour. Typically, the AGCM will rely on the notion of "concerted practice" to scrutinize conduct on the part of two or more companies which falls short of an agreement or decision but which consists of some form of direct or indirect, and often informal, contact or co-operation between competitors. However, for there to be a concerted practice, uncertainty as to the future conduct of the competitors must be eliminated or lessened. The AGCM failed to prove that this had happened when the insurance companies decided to participate in the tenders.

The CdS also stated that it was for the AGCM to prove that the parallel behavior of the companies was due to collusion, and could not be justified rationally in any other way; for example, by a reference to the market characteristics. The AGCM failed to discharge its burden of proof in this case.

In particular, according to the AGCM, the two insurers knew that other companies would not interfere with their conduct. However, the authority did not provide a plausible explanation for how the anticompetitive conduct could have been put in practice without the participation of other insurance companies, representing between 60% and 70% of the market. Although other insurance providers did not participate in the tenders, the AGCM did not involve such companies in its investigation. For the CdS, this demonstrated that there were alternative explanations for the contested conduct, in particular the low profitability of the sector.

RELEVANCE FOR COMPANIES

This judgment of the CdS is a helpful reminder that, in the absence of conclusive proof, competition authorities cannot so easily ascertain the existence of anticompetitive conduct simply on the basis of parallel behavior. This is in line with the Court of Justice of the EU's case law, according to which, companies can adapt intelligently to their competitors' conduct without breaching competition rules. The authority has to assess whether parallel conduct cannot, "*taking into account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concertation*". In the absence of such findings, there cannot be liability imposed on companies.

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