Maritime Transport in the Gulfs of Naples & Salerno. A Leading Case for Infringement of Commitment Decision and Reassessment of Facts

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Keywords: Italian competition Authority, maritime transport, art. 101 TFEU, commitment decision, infringement

1. INTRODUCTION


Among routes affected: the connections between Naples and Pozzuoli for Capri and Ischia, those between Naples and Amalfi and Sorrento coast, as well as the links along the same coast and finally those to and from Aeolian and Pontine Islands.


At the end of its investigations ICA fined the companies involved, together with their common entities, over 14 million euro in total.

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1 Italian Competition Authority.
2 Case no I689, Decision n. 20378 of 2009 October, 15.
The proceedings and its outcome are important insofar as for the first time the ICA deals with the legal consequences of infringing a commitment decision and re-evaluates the facts underlying both former and new proceedings.

2. CONDUCTS AND LEGAL ASSESSMENT

The case started on the basis of numerous complaints filed by individuals and consumer associations. It was opened pursuant to art. 14-ter (3) of the Italian competition law providing that the ICA may reopen proceedings when, inter alia, the undertakings concerned act contrary to commitments offered in a previous case.

2.1 The infringement of commitments under Art. 14-ter antitrust law no 287/90


As to the first commitment: i) they continued to cooperate through an anticompetitive agreement, instead of limiting the common initiatives to the coordination aimed at improving the quality of the service; ii) exactly in the same temporal frame in which they closed CLMP they created Gescab, which replicates the setting and the activities of CLMP, whilst this latter should have been dissolved as the main instrument for the collusive agreement; iii) they continued to use the so-called “Biglietto Unico” (single ticket – same price for the same connection regardless of the service provider) beyond the limits allowed by the commitment decision, in particular for all connections operated different from those to/from Capri.

As regards to the second commitment, the parties have issued a regulation for the use of “Biglietto Unico” which in fact cannot support its intended use, inasmuch as clients were not allowed to change the issued ticket and to convert it, for a different hour on the same connection, in contrast with the ratio of the authorised use of “Biglietto Unico”.

2.2 The infringement of Art. 101 TFEU


In the context of dawn raids, the case team found copies of an agreement signed by NLG and Lauro in 1998 which: i) requires the parties to share costs and revenues generated each year on the basis of
those realised in 1996, also implying the maintenance over time of the respective services offered in that year; ii) contains a non-competitive clause whereby each of them undertakes not to provide services on a series of routes served by the other party, such as Napoli-Capri and Napoli-Ischia.

In order to implement the agreement, the parties founded a consortium named CLMP: CLMP sold tickets on behalf of the parties from 1998 to 2009 when it was dissolved in compliance with commitments presented in the context of case 1689. During the entire period, CLMP coordinated the implementation of the 1998 agreement and was active in the coordination of commercial policies and the parties’ pricing policies.

In February 2007, the cartel widened its scope: the parties to the 1998 agreement, together with Medmar Navi and SNAV, founded an association called ACAP which turned out to be involved in the implementation of the cartel. In addition to a series of legitimate initiatives to promote the interests of its members before public authorities, ACAP supported the implementation of the agreement entered upon the parties in 1998 and was also active in the coordination of the parties’ pricing policies (e.g., releasing announcements of price increases on behalf of its members).

In parallel to the dissolution of CLMP in 2009, following the commitment decision, NLG and Lauro together with SNAV founded Gescab in order to continue the activities conducted by CLMP and implement a second collusive agreement entered into in 2008.

This second collusive agreement of 2008 was entered into by NLG and Lauro with SNAV and Medmar Navi, which were not parties to the previous agreement signed in 1998. Similarly to the previous one, the new agreement aimed at sharing the revenues and costs incurred on a series of routes within and outside Campania region (most notably from Naples to Aeolian islands in Sicily and Pontine Islands in Latium).

The 2008 agreement had a much wider scope than the one signed in 1998 because it included parties that did not adhere to the previous one (i.e., SNAV and Medmar Navi) and encompassed new routes outside the gulfs of Napoli and Salerno.

The cartel aimed at maintaining over time the margins held in 2007 through the following conducts: i) each party agreed to continue serving the routes on which it had traditionally operated; ii) the revenues and costs generated by each party were pulled together and then distributed between the various cartelists on the basis of the market shares held by each player in 2007.

Throughout the entire period covered by the proceedings, the parties exchanged sensitive information, inasmuch as it was functional to the cartel.
3. CONCLUSIONS

At the end of the proceedings, ICA ascertained an infringement against a previous commitment decision and an anticompetitive cooperation illicit in its object, started at least since 1998 and still ongoing. As to the fines, ICA considered the undertakings' conducts as very serious infringements of competition law and fined the parties involved for 14 million euro.

Notably, taking into account the duration and all aggravating and mitigating circumstances, according to general Italian law on fines, ICA sanctioned the companies for the legal maximum allowed by national antitrust laws, i.e. 10% of the total turnover of each party.

In this respect, the principle provided for by Art. 8 of law no 689/81 establishes that in case of same conducts violating at a time different provisions which could result in fines, the single fine for the most serious infringement applies, increased until three times. In the case at stake, the ICA considered the amount of the fine for the cartel as to be the basic amount and, in the light of the duration (almost 17 years) and all other elements, applied the cap of 10%, although the final amount for each of the party involved would have been much higher. Conclusively, it is noteworthy to consider that the case represents a leading precedent because it is the first case where ICA fined undertakings for infringement of commitment decision, and in parallel re-opened proceedings re-assessing the conducts already dealt with in the previous procedure closed with commitments.

In other cases, ICA assessed the lack of evidence for finding an infringement: see decisions A357C – Tele2/Tim-Vodafone-Wind, of 29 September 2009, A396C – Gargano Corse/ACI of 8 February 2012 and A359C - AQP – Opere di allacciamento alla rete idrica of 27 March 2014.