MIXED BODIES AND COMPETITION: BALANCING PUBLIC MEASURES AND PRIVATE INTERESTS. 
A_snapshot_of_the_API’s_judgment

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Keywords: Competition law, advisory body, regulatory measures, minimum costs, public interest, proportionality test

1. THE BACKGROUND TO THE API CASE AND THE ICA OPINION IN ACCORDANCE WITH ARTICLE 21- BIS OF LAW NO. 287/1990

The judgment of the European Union Court of Justice (EUCJ) of 4 September 2014 in Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 (API – Anonima Petroli Italiana s.p.a. v. Ministero delle Infrastrutture e dei Trasporti, Ministero dello Sviluppo Economico), the so-called API case, is a preliminary ruling, concerning Italian measures to fix minimum operating costs in the sector of carriage of goods by road for hire and reward.

In 2005, despite the introduction under Italian law of liberalisation with a system based on free bargaining for setting prices for road transport services (Law no. 32/2005), the national government passed Legislative Decree no. 284/2005 which entrusted a number of activities relating to the road transport sector to a mixed advisory body (“Consulta generale per l’autotrasporto e la logistica”). This Consulta was composed of representatives of State authorities (36), associations of road transport operators and consumer associations (60), and undertakings and bodies in which the State holds a majority stake (6). The decree also established the “Osservatorio sulle attività di autotrasporto”, a body of the Consulta, consisting of ten members chosen among the members of the Consulta. At the time, the Osservatorio had ten members, eight of them representing associations of road transport operators and consumers, and two of them representing State authorities.

Subsequently, Decree Law no. 112/2008 determined that the charges payable by customers could not be lower than the minimum operating costs fixed by the Osservatorio, in order to ensure road safety. Consequently, the Osservatorio adopted a series of tables which set minimum operating costs for road transport undertakings for hire and reward, then included in an administrative decree.

1 Italian Competition Authority.
The picture outlined above highlights a number of critical concerns relating to competition, as the Italian Competition Authority (ICA) has pointed out several times\(^2\).

Indeed, one of the requests for the abovementioned preliminary ruling (C-208/13) arises from a case brought before the Italian administrative judge of first instance at the regional court of Lazio (“TAR Lazio”), in which the ICA sued the Italian Ministries of Transportation and of Economic Development, under the framework of the new power vested in 2012 in the ICA in accordance with Article 21-bis of law no. 287/1990 (AS913 – Disposizioni in materia di autotrasporto, 5 March 2012, Boll. 8/2012). In that opinion, the ICA highlighted some of the competition-related concerns subsequently identified by the EUCJ in the API case judgment.

The ICA opinion underlined that the procedure established by the Osservatorio was at odds with European and national competition law, as it required minimum costs for road haulage activities to be set artificially, with no meaningful correlation with road safety issues. According to the ICA, the decisions of the Osservatorio introduced compulsory charges in Italy with the potential to harm trade between EU countries.

The ICA also stressed that the instruments adopted by the Osservatorio and by the Ministero did not guarantee quality and safety standards for the supply of road haulage services. In addition, the Authority pointed out that the broad presence of delegates of the association could bring about coordination in the sector.

Following the ICA opinion, the Italian Ministry of Economic Development reiterated the legitimacy of the measures, stating that they were related to costs and not minimum prices. Consequently, in consideration of the fact that the Ministry failed to comply with the ICA’s opinion, the Authority determined to take legal action against the contested measures before the administrative judge of first instance, who subsequently decided to refer a preliminary ruling to the EUCJ.

For the referring administrative court, the legislation introduced a regulated system by setting minimum operating costs, which constrains free bargaining with regard to one of the essential elements of a contract, albeit for the purpose of ensuring compliance with safety standards.

Although the need to maintain road safety is contemplated by the EU law, the Italian administrative judge doubted that the enforcement of minimum costs set by a body mainly consisting of representatives of the economic operators was consistent with EU law and, in particular, with the protection of competition, freedom of movement of undertakings, of establishment and of providing services.

2. THE EUCJ DECISION: BALANCING PUBLIC MEASURES AND PRIVATE INTERESTS

According to the EUCJ, the role and the composition of the Osservatorio do not pass the “proportionality test” modelled on established European case-law concerning mixed private/public bodies adopting binding decisions which directly affect the public interest.

In fact, as established by previous EUCJ judgments (C-96/94, Centro Servizi Spediporto, 5 October 1995; C-35/99, Manuele Arduino, 19 February 2002; C-94/04 and C-202/04, Cipolla, 5 December 2006), Article 101 TFEU, in conjunction with Article 4(3) TEU, is infringed every time a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or strengthens their effects, or also when it delegates to private economic operators responsibility for taking decisions affecting the economic sphere. Thus, the Member State cannot introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.

In the Spediporto case, the EUCJ foresaw the conditions excluding when the decision of a mixed body is against competition, i.e. the committee must be composed of a majority of representatives of the public authorities and a minority of representatives of the economic operators concerned; and, the committee proposals must observe certain public interest criteria. Furthermore, in the Librandi judgment (C-38/97, 1st October 1998), the EUCJ added that there is no infringement of competition law even if the representatives of the economic operators no longer constitute a minority on the committee, if the tariffs are fixed according to public interest criteria and the public authorities do not delegate their powers to private economic operators.

In the context of the Spediporto and Librandi cases, the API decision attaches further criteria to the formation of a hybrid body involved in the adoption of mandatory prescriptions.

In fact, the EUCJ observes not only that the Osservatorio is mainly composed of representatives of private operators and its decisions are approved by a majority of its members, but also that there is no mechanism to offset this difference in the composition of the body, such as a veto power or a casting vote for the representatives of public authorities (paragraphs nos. 32-33). In the Arduino case, the EUCJ declared that EU law does not preclude a regulation from approving a tariff, on the basis of a draft produced by a professional body, as long as the State does not waive its powers of review and decision. Indeed, in that circumstance, the State did not delegate responsibility for taking binding decisions to private economic operators (paragraphs nos. 40-43).

Moreover, the EUCJ states that the Osservatorio does not act as an arm of the State pursuing the public interest (paragraph no. 38), because national legislation does not make provision for any guiding directive that can prevent it from acting in the exclusive interest of the economic operator (paragraph no. 35).
Another principle established in the *API* decision is the urgent need for a clear definition of the public interest pursued, failing which the representatives of the private operators would have a large degree of discretion and independence (paragraph no. 37).

Additionally, the independence of the decision is the result of the absence of any control by the public authorities over the assessments of the committee and of any consultation of other public bodies (paragraphs nos. 39-40).

With regard to the implementation of legitimate objectives that could avoid the prohibition laid down in Articles 101 TFEU and 4(3) TEU, the EUCJ stresses the importance of a linkage between the measure adopted and the public objective. In the *API* case, the EUCJ excludes any connection between the establishment of minimum costs and the improvement of road safety (paragraphs nos. 51-52). Thus, the fixing of minimum costs cannot be justified by a legitimate objective.

According to the EUCJ, the effect of the Italian provisions relating to the fixing of minimum costs is to establish mandatory minimum tariffs for road transport undertakings for hire and reward. Consequently, the system outlined hitherto may restrict competition in the internal market (paragraphs nos. 43-45).

### 3. Restraining Competition and Safeguarding the Public Interest

Indeed, following the statements of the *Arduino, Cipolla, Spediporto* and *Librandi* decisions, the *API* judgment establishes and applies a “proportionality test” to the activity of a mixed body participating in a procedure for the adoption of mandatory measures.

In point of fact, on the one hand, the proportionality test concerns the relevance of private elements in binding public decisions while on the other hand it regards the effectiveness of the legitimate objective that can justify the adopted measure.

In applying this test, the EUCJ stresses that the abovementioned measures go beyond what is necessary (paragraph no. 55). Likewise, the European judge places value on the existence of different measures that can protect said public interest, acting “as more effective and less restrictive” measures (paragraph no. 56).

Thus, the EUCJ decision raises the issue of the balance between competition and (other) public interests: to what extent can the public interest justify restraint of competition?

The EUCJ refers to measures that cannot go beyond what is necessary and gives a hint as regards a future perspective, identifying alternative, “more effective and less restrictive” measures that can be adopted in order to safeguard the public interest.
Hence, the EUCJ acknowledges the existence of a trade-off between the public interests concerned, \textit{viz.} competition and road safety, going further from the allowable restriction of competition in favour of the public interest as it relates to safety.

In order to demonstrate that establishment of a minimum cost is a “disproportionate” measure, the Court implements a number of symptomatic indicators of the effective safeguarding of the public interest in terms of road safety through any public measure that constitutes a “more effective and less restrictive” provision (e.g. maximum weekly working hours, breaks, rest, night work and vehicle roadworthiness tests).

In conclusion, the path paved by the EUCJ is a factual and effective analysis of the pursuit of the public interest which goes far beyond a mere declaration of principles affirmed by the legislator or by the State administration.