BID RIGGING PRACTICES AIMED AT MANIPULATING CONSIP’S TENDER IN THE MARKET OF CLEANING SERVICES FOR PUBLIC INSTITUTIONS (I785)

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1. INTRODUCTION

On 22nd December 2015, the Italian Competition Authority (ICA) closed its proceeding I/785 finding that CNS (Consorzio Nazionale Servizi società cooperative: CNS or Consortium), Manutencoop Facility Management S.p.A. (Manutencoop), Roma Multiservizi S.p.A. (Roma Multiservizi) and Kuadra S.p.A. (Kuadra) infringed article 101 of the Treaty on the Functioning of the European Union (TFEU) with an illicit cartel aimed at rigging a tender competition procedure issued by Consip (Italian central purchasing body) in the market of cleaning services for public educational institutions.

The proceeding was launched in October 2014 on the basis of ex officio investigations upon Consip’s acquisition of data concerning the tender results, from which an alleged antitrust infringement was inferred.

The proceeding was initially addressed to four companies - CNS, Manutencoop, Kuadra and Exitone - which participated in the tender. In particular, CNS, Kuadra and Exitone took part in the tender through a temporary association led by the Consortium, which participated on behalf of several associated companies.

On the basis of evidence collected during the dawn raids, in April 2015 the proceedings was extended to another Party, namely Roma Multiservizi (a company under Manutencoop’s industrial influence through corporate governance rules and shareholding relationship). In fact, owing to the winning temporary association headed by CNS, Roma Multiservizi obtained a subcontract on a relevant lot of the tender in return for its commitment not to compete on that lot.

After concluding investigations, the ICA held CNS, MFM, Roma Multiservizi and Kuadra liable for the mentioned infringement; as for Exitone, the ICA ascertained no liability pursuant to the EU competition law.

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2. THE ICA’s LEGAL ASSESSMENT AND THE CONDUCT ASCERTAINED

2.1 The relevant market

The relevant market of the alleged infringement was defined taking into account the boundaries of the tender procedure issued by Consip in July 2012, according to the usual approach followed by the ICA. In particular, the public tender under investigation concerned the supply of cleaning, maintenance and other services in public schools throughout the Italian territory.

The public procurement tender was organized in 13 lots, each one roughly corresponding to Italian regions. The value of the tender – almost 1.63 billion Euros - exceeded the EU threshold, and it was awarded by Consip as a central purchasing body. The agreement entered into between Consip and the winners of the tender was open to the adhesions (obligatory or facultative, depending on the relevant legislation) of central and local administrations.

2.2 The bid-rigging scheme

According to the ICA, the Parties carried out a secret cartel in the form of a concerted practice with the aim to allocate ex-ante the lots of the tender procedure influencing the relevant awarding dynamics in an anti-competitive way.

In detail, findings demonstrated that, despite the decision to participate separately in the selective procedure and although they should have acted as competitors in the tender procedure, CNS and Manutencoop - a company associated to the Consortium - entered into a temporary association preventing real competition for awarding the contracts.

The Parties chose a mutual coordination of their tender strategies in order to safeguard their respective market shares in terms of portfolio managed value. At the same time, the aim was to obtain the maximum amount of desirable lots allowed according to tender rules (according to which, while each competitor was allowed to bid on more lots, a single tenderer could be awarded a maximum of three lots).

In such anti-competitive scenario, the collusive purpose was pursued also by a distorted use of subcontracts as means of compensation.

More precisely, CNS and Roma Multiservizi (as mentioned, a company linked to Manutencoop) signed a written compensation agreement by which the latter company committed not to take part in the public procurement in exchange of subcontracts with the aim to maintain its market share.

Likewise, the investigation showed further evidence of subcontracts used by the Parties to balance their respective competitive positions.
2.3 The supporting evidence

The existence of the described anticompetitive cartel is inferred from both endogenous and exogenous elements.

The endogenous evidence consists in parallelism and coincidences of conducts in tender strategies, which lack of plausibility.

More in detail, the apparently irrational choices made by the Parties can find a sound explanation only if read in a collusive framework:

i) the absence of overlaps in lots potentially desirable for both CNS and Manutencoop;

ii) the lack of compliance with the consortium regulations by CNS in selecting the associates entitled to execute the contracts awarded. These rules were breached by CNS for Consip’s tender;

iii) the irrational transfer of the relevant companies associated to CNS, from tender lots where they were well-established (in order to grant these lots to Manutencoop) to other lots where they were less settled (in which Manutencoop was not interested).

The irrationality of CNS’ choices culminated in its decision not to compete for the lot regarding the Region of Emilia Romagna. Indeed, Emilia Romagna is a historical and strategic area for CNS’s business and main associates. CNS’s decision not to bid for that lot can find a plausible ground only in the collusive purpose to eliminate competition between the Consortium and Manutencoop and facilitate the awarding to the latter.

The exogenous evidence is based on the exchange of information among Parties and on the written compensation agreements. The exchange of information was facilitated on the one hand by the structural link between CNS and Manutencoop in the consortium context and, on the other hand by the fact that Manutencoop and Roma Multiservizi belonged to the same group.

In such a collusive system, Roma Multiservizi played a double role: as active party of the cartel and, at the same time, as a transmission belt of the relevant information between its industrial partner Manutencoop and the temporary association composed by CNS and Kuadra. Several pieces of written evidence show the anticompetitive aim of the compensation agreement signed between Roma Multiservizi and CNS with the supervision of Manutencoop.

According to the case-law, the mentioned evidence, considered in its whole, was deemed sufficient to prove the infringement of the competition rules and the collusive conduct. Under this perspective, the Parties’ alternative explanation of the facts at stake - focused on the unnatural parceling of each single proof collected and inconsistent with the evidence gathered - was reckoned unable to satisfy the plausibility test.
3. CONCLUSION

At the end of its assessment, the ICA ascertained a very serious antitrust infringement, considered a restriction by object, which manipulated the national tender procedure issued by Consip. Consequently, a fine amounting to more than 100 million Euros was imposed on CNS, Manutencoop, Roma Multiservizi and Kuadra.

In its final decision, the ICA also imposed on the Parties remedies aimed at preventing similar collusive conducts, with particular regard to the need to refrain from a distorted use of the consortium.

Conclusively, it is noteworthy to consider that the ICA, for the first time in a bid rigging investigation, reckoned the negotiation of subcontracts and additional elements related to the execution of the services awarded as a collusive means of the overall infringement carried out by the Parties.