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 18th October 2017, the Italian Competition Authority (ICA) closed its proceeding 1/796 finding that firms members of the “big four networks” KPMG, KPMG Advisory, Ernst&Young, Ernst&Young Financial Business Advisory, PWC, PWC Advisory, Deloitte & Touche and Deloitte Consulting 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 the technical assistance services.

The proceeding was launched on March 15 2016 on the basis of a Consip compliant concerning the tender results, from which an alleged antitrust infringement was inferred. The ICA, in a first time, opened a proceeding against five undertakings, active in the technical assistance services – in particular certification and audit - of funds cofinanced by EU, that participated to the tender: KPMG, PWC, PWC Advisory, Deloitte & Touche and Meridiana.

On the basis of evidence collected during the dawn raids, in July 2016 the proceeding have been later extended to other three undertakings, members of network KPMG (KPMG Advisory), Ernst&Young (Ernst&Young Financial Business Advisory) and Deloitte (Deloitte Consulting), active in the field of advisory.

The Parties took part in a single infringement concerning the allocation of the share of the tender launched by Consip for technical assistance to the public authorities in the field of audit.

After concluding investigations, the ICA held KPMG, KPMG Advisory, Ernst&Young, Ernst&Young Financial Business Advisory, PWC, PWC Advisory, Deloitte & Touche and Deloitte Consulting liable

1 Italian Competition Authority.
for the mentioned infringement; as for Meridiana, the ICA ascertained no liability pursuant to the EU competition law.

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 March 2015, according to the usual approach followed by the ICA.

In particular, the public tender under investigation concerned the supply of technical assistance to the public authorities in the field of audit, throughout the Italian territory.

The public procurement tender was organized in 9 lots, 7 of them corresponding to Italian regions. Lots 8 and 9 corresponded, instead, to central administrations. The value of the tender – almost 66 million Euros - exceeded the EU threshold, and it was awarded by Consip as a central purchasing body. In fact, from 2014, according to the provisions of Article 9, paragraph 8 bis of Law Decree no. 66 of 24 April 2014, converted with amendments into Law 66 of 23 June 2014, no. 89, the Ministry of Economy and Finance must use Consip to carry out centralized tender procedures for the acquisition - by the Audit, Management and Certification Authorities, set up in the individual administrations holding development projects co-financed with European Union funds - of goods and services instrumental to the exercise of their functions. The agreement entered into between Consip and the winners of the tender was open to central and local administrations.

2.2 The big four network: qualification as single economic entity

Firstly, it should be pointed out that the Ernst&Young, KPMG, Deloitte and PWC networks, commonly known in the industry as "big four networks", occupy a very important position in the market. These are the four main entities active worldwide in auditing and advisory service. In Italy a consulting firm and an audit firm co-exist in every "big four" network: this division is for regulatory reasons. Despite this formal subdivision, all the companies involved in the proceedings belonging to the same networks were moving on the market in a coordinated manner as a single economic entity and the ICA has demonstrated that they have actively participated in the selection of the strategies of the specific tender under examination. With particular reference to the configuration of the companies that are parties to the agreement, the elements examined by the ICA showed that each network is made up of companies identified by the same brand, which share professional and structural resources (such as offices and information resources), adopt unitary communication strategies and present themselves to the market as the sole entity (for example, they use the same website as a tool to promote the entire range of services offered by the network and provide data on the structure of the
network and the results achieved for all the services offered). In addition, companies belonging to the network are integrated through the sharing of offices and personnel, as well as through the action of shareholders who operate for both entities and/or through legal structures that ensure their coordination.

The ICA underlined several documents that clearly show strong links of economic integration and cooperation, as well as the identity of the intentions pursued by the companies that are part of the same network. These elements lead to the exclusion of the possibility that several entities parties of the network, which are only formally distinct, may develop competitive relations.

The classification, for antitrust purposes, of the above mentioned networks as single economic entities, operating at an Italian level with shared methods, is based on precise and detailed elements assessed from a purely competitive perspective.

The ICA demonstrated how both big four network companies shared the competition strategy to be adopted both within the network and horizontally with the main competitors.

2.3 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, the above mentioned “big four” firms choose a mutual coordination of their tender strategies in order to safeguard their respective market shares and to obtain the best lot for their network.

More precisely, the parties have put in place a complex mechanism by which each network presents the best offer only in the lots assigned in the cartel contest and, at the same time, shadow bids in others lots. This behavior determined a perfect “checkerboard schema” in which best offers have never overlapped.

These complementary bids were intended to allow the hypothetical assignee to obtain a high economic score even if other third parties had submitted better bids with higher rebates than the one agreed between them.

2.4 The supporting exogenous elements

The endogenous elements mentioned above are supported by strong exogenous elements, consisting on the exchange of information among parties, qualified meetings in the closeness of the tender and simulations which, even before the submission of bids, described participation mechanisms very similar to those which then occurred.

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. CONCLUSIONS

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 20 million Euros was imposed on KPMG, Deloitte, Ernst&Young and PWC. The fine must be paid jointly by undertakings belonging to the same network in consequence of their qualify as a single economic unit.