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Italian Competition Law Newsletter

Highlights

— The Court of Naples awards first ever antitrust damages in a follow-on claim stemming from the EU "*Trucks*" case, quantifying the damages on equitable principles

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On July 6, 2021, the Court of Naples upheld a claim for damages filed by a logistics company (the "**Applicant**") against one truck manufacturing company (the "**Defendant**") in connection with the purchase of a truck falling within the scope of a European Commission decision of July 2016 (the "**2016 Decision**").[1] The 2016 Decision established that the Defendant and four other truck manufacturers colluded for 14 years on truck pricing and on passing on the costs of compliance with emission rules.[2] While several similar claims are currently pending in Italy, this is the first known case in which a court awarded damages. Interestingly, notwithstanding that the Court of Naples had ordered an expert opinion to quantify the alleged damages, it eventually decided to quantify the damages solely on equitable principles.

Background

The European Commission decision

Following an immunity application submitted by German truck manufacturer MAN, in January 2011 the European Commission (the "**EC**") initiated investigations and carried out unannounced inspections at the premises of six truck manufacturers.

On July 19, 2016, the EC adopted a settlement decision,[3] in which it concluded that the truck manufacturing groups Volvo/Renault, Daimler, Iveco, MAN and DAF had colluded for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules.

[1] Court of Naples, Judgment of July 6, 2021, No. 6319.

[2] European Commission, Decision of July 19, 2016, Case AT.39824 – *Trucks*.

[3] In a settlement, companies acknowledge their participation in a cartel and their liability for it. Settlements are based on EC Regulation No. 1/2003 and allow the Commission to apply a simplified and shortened procedure. The parties benefit from the settlement procedure in terms of faster decisions and a 10% reduction in fines.

In particular, the EC's investigation revealed that, between 1997 and 2011, the truck manufacturers had engaged in a collusive agreement aimed at coordinating: (i) the prices at "*gross list*" level for medium and heavy trucks in the European Economic Area; (ii) the timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards (from Euro III through Euro VI); and (iii) the passing on to customers of the costs incurred in order to comply with the abovementioned emissions standards.

The EC granted MAN full immunity from fines and imposed fines of a record amount of €2.9 billion overall on Volvo/Renault, Daimler, Iveco and DAF. Another truck manufacturer (Scania) decided not to settle and was fined €880 million by the EC on September 27, 2017.[4]

The judgment of the Court of Naples

Based on the 2016 Decision, the Applicant brought a claim for damages against the Defendant before the Court of Naples in connection with the purchase of one Iveco Magirus truck in 2007. The Applicant quantified the damage it claimed to have suffered as 20% of the truck's purchase price.

The Court of Naples rejected the statute of limitations defense and the arguments concerningthe limited evidentiary value of settlement decisions raised by the Defendant. Inparticular, the Court ruled that: (i) the claim wasnot time-barred, because the Applicant couldnot have known that it had suffered harm before the publication of the 2016 Decision; (ii)although adopted in the context of a settlementprocedure, the 2016 Decision has the same evidentiary valueas an ordinary infringement decision.

In addition, the Court of Naples held that the Applicant could seek damages from the Defendant, even though the Applicant had purchased the truck at stake not directly from the Defendant, but from a third-party dealer. According to the Court of Naples, the fact that the overcharge was ultimately borne by the Applicant could be presumed in this case, as the Applicant proved that: (i) the Defendant had infringed competition rules; (ii) the infringement had altered the pricing of trucks; and (iii) the Applicant had purchased, even though only indirectly, one of the goods falling within the scope of the infringement. Against this background, the Court of Naples concluded that the overcharge had been passed on to the Applicant, while the Defendant had failed to prove that the Applicant had, in turn, passed on any overcharge to its own customers.

In light of the above, the Court of Naples considered it necessary to appoint an independent expert to quantify the actual damage suffered by the Applicant. The expert made reference to the EC's Practical Guide,[5] but was not able to reach a conclusion supported by economic or econometric evidence. Accordingly, the expert referred the case back to the Court of Naples, and suggested quantifying the damage on an equitable basis. The Court of Naples agreed that it was not possible to objectively quantify the damage in the case at hand, also because the Applicant was an indirect purchaser of the goods covered by the infringement found by the 2016 Decision.

The Court of Naples thus ordered the Defendant to pay the Applicant 15% of the truck's net purchase price, *i.e.* € 11,550.

The judgment is the first known decision in Italy awarding antitrust damages based on the 2016 Decision. It suggests that, faced with relatively small claims, courts may prefer to follow equitable solutions, instead of engaging in complex and time-consuming estimates of the damage. While this approach may seem practical from a procedural efficiency standpoint, it might raise some due process issues. It remains to be seen whether the judgment will be upheld on appeal and, possibly, followed by other courts.

[4] European Commission, Decision of September 27, 2017, Case AT.39824 – *Trucks*.

[5] European Commission, SWD(2013) 205, Strasbourg 6 November, 2013 ("*Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the Functioning of the European Union*").

Other developments

The Council of State reaffirms its position concerning the assessment of the "*value of sales*" and the "*entry fee*" in calculating the fines for a bid rigging case

On August 31, 2021,[6] the Council of State reaffirmed the position it recently took in two previous judgments regarding the calculation of fines for bid rigging cases.[7]

In particular, in line with its recent decision-making practice, the Council of State reaffirmed that the Italian Competition Authority (the "**ICA**"): (i) had correctly considered as "*value of sales*" the value of the contract awarded including its one-year extension, since it was expressly mentioned in the tender documents and reasonably foreseeable by the tenderers; and (ii) had correctly applied the so-called "*entry fee*", since it had found that the infringement was "*very serious*", took place in the context of a public tender procedure between leading national players in the market, and effectively resulted in higher economic offers submitted by the parties. Therefore, the Council ofState agreed with the ICA about the need to include the entry fee in the fine applied, in order toensure a sufficient deterrent effect.

The Council of State further upholds an ICA decision concerning a cartel in helicopter transport services

Between August 18 and August 23, the Council of State rejected the separate appeals filed by Babcock Mission Critical Services International S.A. ("**Babcock International**"), Heliwest S.r.l. ("**Heliwest**"), Elitellina S.r.l. ("**Elitellina**"), Eliossola S.r.l. ("**Eliossola**") and Associazione Elicotteristica Italiana ("**AEI**" and, jointly with Babcock International, Heliwest, Elitellina and Eliossola, the "**Parties**") against judgments issued by the Regional Administrative Tribunal of Lazio ("**TAR Lazio**"), which had confirmed a 2019 ICA decision.[8] In particular, the ICA had fined eight providers of helicopter services and their trade association for two separate cartels, comprising: (i) an agreement not to offer significant rebates in the context of tenders for helicopter forest fire-fighting services; and (ii) agreeing on a price list for aerial work services and passenger transport.

The judgments follow two other recent decisions of the Council of State on the same matter, in which the court reached the same conclusions.[9]

In particular, the Council of State confirmed that: (i) the ICA decision complied with the principle of collegiality and the rules governing the functioning of the ICA, even though the decision had been adopted by only two members of the Board and without the participation of the President; (ii) the ICA correctly categorized the parties' conduct as two separate, single and complex infringements; and (iii) the recommendations of associations of undertakings to maintain a certain price level may well amount to price-fixing.

In addition, with respect to Babcock International, which had been fined by the ICA jointly and severally with its subsidiary Babcock Mission Critical Services Italia S.p.A., the Council of State reaffirmed the principles established by another recent decision on group companies.[10] In particular, it confirmed that, in the case of a parent company involved in an infringement together with one of its subsidiaries, for the purpose of calculating the joint and several fines, the ICA cannot take into account the turnover of the other group companies that did not operate in Italy and did not carry out the infringement, nor they could have prevented it.[11]

[6] Council of State, Judgment No. 6134//2021.

[7] Council of State, Judgments of May 20, 2021, Nos. 3900 and 3901/2021, both analyzed in our Italian Competition Law Newsletter, May 2021.

[8] Council of State, Judgments of August 18, 2021 Nos. 5918 and 5920; August 20, 2021, Nos. 5972 and 5973; and August 23, 2021 No. 5992.

[9] Council of State, Judgments of May 6, 2021, Nos. 3555 and 3566. See our Italian Competition Law Newsletter, May 2021.

[10] Council of State, Judgment of July 2, 2021, No. 5058.

[11] Council of State, Judgment of August 18, 2021, No. 5918.

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