

National update from Italy for AECLJ meeting June 2017 ⁽¹⁾

CASE NOTE ON:

Italian Competition Authority (ICA) Decision 19.4.2016 n. 25966

(I790 Vendita Diritti Televisivi Serie A 2015–2018)

Latium Administrative Tribunal (TAR) Decisions 23.12.2016, nn. 12811, 12812, 12814 and 12816

The case at stake is relevant because it concerns a major Italian controversy resulting from the application by the Italian Competition Authority (“ICA”) of a huge fine (over 66 million euros) on the main television operators in the pay-tv market Sky and RTI/Mediaset Premium, and on the Italian Football League (“Lega Calcio”) and its advisor, Infront (the "Parties") for an alleged violation of Art. 101 TFEU, consisting in entering into a bid-rigging agreement concerning the award of the Italian Premier League “Serie A” broadcasting rights for the years 2015-2018 and altering the outcome of the tenders for the A, B and D lots, following the presentation of their bids.

1. *Introduction* ⁽²⁾

¹ Intervention presented at the annual Conference of AECLJ in Wien, June 10, 2017.

² “Italy: Antitrust fines Sky in football TV rights case”, in Competition Policy International, April 20, 2016; M. Amorese, “Italian competition report – Case I790 – 2015-2018 Serie A media rights”, AMSL Avvocati, May 22, 2016; V. Pinotti, “Sale of Serie A Broadcasting Rights, the Regional Administrative Court of Lazio Annuls the Decision of the Italian Competition Authority”, EC Developments, Italian Developments, December 23, 2016; G. Giunta, “Sale of Serie A Broadcasting Rights, the Regional Administrative Court of Lazio Annuls the Decision of the Italian Competition Authority”, Mc Dermott Will & Emery, 2017; B. di Sano “Diritti televisivi: il Tar Lazio annulla il provvedimento di accertamento dell’intesa restrittiva della concorrenza”, Osservatorio permanente sull’applicazione delle regole di concorrenza, January 14, 2017; A. Biondi, “Diritti del calcio, il Tar annulla la multa Antitrust a Mediaset, Sky, Infront e Lega”, Il Sole 24 ore, December 23, 2016.

It is a topical case and, additionally, the only genuine case that so far has come to the attention of the administrative judge falling not too far outside the scope of the digital markets – the topic of our present Conference - because it has to do with the digital pay-tv market and the television platforms and, more generally, with communication platforms and a procedure for awarding the broadcasting rights organized on a platform-based criterion, as we shall briefly see.

2. The legal framework of the case

Before focussing down the case, we must consider that the Legislative Decree n. 9/2008 has introduced a centralized marketing system of the media rights related to the sport events organized by the Italian Football League. According to the European Commission a centralized marketing system is not in violation of the rules on competition (see UEFA Champions League, Bundesliga, Premier League), provided that a commitment is taken to put up diversified packages of rights for auction so that more than one operator may enter the market.

On its part, “Lega Calcio” has the exclusive right to sell the league media rights and is required to offer them to all media companies and for all the communication platforms by means of open tender procedures.

Fairness, transparency and equal treatment must be granted to all participants to such procedures. To this end, “Lega Calcio” must predetermine guidelines for the commercialization of the media rights.

The Italian Competition Authority (AGCM) and the Italian Authority for the Communications (AGCOM), each for its area of competence, must then verify that the proposed guidelines comply with the rules set by the Legislative Decree n. 9/2008.

Unless specifically authorized, the winner of the bid cannot sublicense the broadcasting rights.

3. *The case*

In this peculiar legal background “Lega Calcio”, in order to offer diversified bundles of media rights, decided to make a mixed offer by platform and by product, offering five Packages of rights ⁽³⁾.

On the first round of bids, only four bidders participated (Sky, Fox, Eurosport and RTI/Mediaset).

Sky and Fox made bids for the Packages A, B, C and D.

Eurosport only made a bid for the Package D.

RTI/Mediaset made bids for the Packages A, B and D. However, it made conditional bids.

No bids were made for the Package E.

As a result, Sky’s unconditional bids for the Packages A and B were the highest bids except for Mediaset’s conditional bid for the Package B.

However, the rules of the tender procedure did not allow conditional offers.

And as to Sky’s unconditional bids, “Lega Calcio” and Infront believed that awarding the Packages A and B to the same operator (Sky) would be against the rules on competition as it could create a market concentration.

As a consequence, “Lega Calcio” did not immediately award the packages A and B to Sky.

³ The **package A** comprised the audio visual rights relative to the matches of eight major clubs (248 events) for the satellite, internet, IPTV and mobile platforms. The **package B** contained the media rights of the same major clubs but relative to digital tv, internet, IPTV and mobile platforms. The **package C** included the ancillary rights to the above-mentioned matches such as interviews and images from the locker rooms. The **package D** consisted of the broadcasting rights on all platforms for the remaining clubs (132 matches). The **package E** comprised the right to broadcast 3 matches to be chosen among the events held on Sundays over the internet.

Afterwards, “Lega Calcio” - advised and supported by Infront - engaged in a negotiation with the bidders, aimed at reviewing the outcome of the tender.

The negotiation brought to an agreement between Sky and Mediaset that mirrored the distribution of media rights already in place during the years 2012-2015.

In the end, “Lega Calcio” awarded the Package A to Sky, the Package B to Mediaset, the Package D to Mediaset with the understanding that some rights of the latter package would be sublicensed to Sky.

In support of the agreement, “Lega Calcio” authorized the sublicense and engaged on seeking the required authorizations from AGCOM and AGCM. During the negotiation, Infront played an important role to broker the deal.

3. The ICA’s final decision

In its decision, the ICA found that the broadcasting rights related to football matches of national club teams that are regularly held over the year such as Serie A (or Serie B, Coppa Italia, Europe League or Champions League) constitute a single product market.

Such a market was different from the one of other sports’ broadcasting rights concerning events not held on a regular basis (such as the World Cup).

The geographic market was identified with the nation, having considered that consumers traditionally follow the tournaments of their national club teams.

The fact that two of the four companies were not competing in the same market of the main television operators nor operating in markets that are upstream or downstream one to the other - Infront is an advisory company and “Lega Calcio” is the association that has

the exclusive right to commercialize Serie A football media rights- did not preclude the ascertainment of the existence of a cartel among the four companies.

As a consequence, the ICA stated that the anticompetitive agreement, as far as it altered the outcome of the tender thwarting the procedures set by Decree no. 9/2008, affected the allocation of strategic resources in the pay TV and advertising markets. Therefore, the agreement was deemed to be restrictive of competition by object and very serious, in line with the national and European case law.

The agreement led to the apportionment of the relevant market between the two incumbents, thus frustrating the objectives pursued by the legislator through the provision of a competitive procedure.

In the opinion of the Antitrust Authority, though the case referred to a restriction by the object and did not require any proof of the effects of the agreement on the market, nevertheless the result was that, at present, both the incumbents were awarded television rights and new market entry was foreclosed; in the future, there would be a reputational barrier owing to the effect of discouraging competition on the merits.

4. The TAR decisions n. 12811, 12812, 12814, 12816/2016

After the closing of the proceeding, all the Parties appealed the ICA's final decision.

TAR upheld such appeals upon the following substantial grounds.

The Authority had failed to consider the alleged conduct as a market sharing agreement and the agreement as a restriction “by object.”

In particular, the Authority had not carried out a thorough analysis of the relevant market and had not followed the recent European case law, according to which “in order to determine whether an agreement between undertakings reveals sufficient degree of harm that it may be considered a ‘restriction of competition by object’

within the meaning of Article 101 (1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part” (Court of Justice of European Union, case C-373/14 P, Toshiba Corporation v European Commission, 20 January 2016).

According to the Court, the alleged conduct was not a forbidden market sharing agreement, since it had prolonged competition which in case of the awarding of the best packages to SKY according to the outcome of the auction would not have survived.

As a matter of fact, the Authority had not proved that the agreement revealed a sufficient degree of harm in terms of market sharing, where the market itself was characterised by the absorbing presence of Sky and RTI/Mediaset (97% of the market), and that the market share of each participant had not been ascertained ex ante whereas the customers were all fully contestable.

The reasons for to sublicensing package D were fully lawful, as it aimed at avoiding future litigation, market stall and further inconvenience for customers, as well as maintaining effective competition in case new operators really interested in entering the specific market should lack.

Besides, the Authority had not shown elements to back up the conviction that, in the absence of the contested conduct, the market would have benefited from an increase of competition in broader terms than those effectively realised, with corresponding benefits for the League and the customers.

Eventually, the final setting seemed to be respectful of the legal framework.

5. Closing remarks

The case at hand is peculiar, since it clearly shows that the duly application of the result of the auction would have lead to award the best Packages (A and B) to the same operator and create a thick market concentration.

It is also worth mentioning that no bids for the Package E had been made. This is an additional sign of the failure of the auction to award the single packages to the different participants to the tendering procedure.

The contested conduct of the Parties was, after all, a sort of remedy to the failure of the auction having platforms as an object and parameter of reference.

We could say that a satisfying result could be obtained only thanks to a subsequent, weird renegotiation of the outcome of the tendering procedures.

Sorry to conclude that, in time of promoting digital markets, the recourse to open tender procedures having communication “platforms” as an object for the commercialization of the media rights has proved to be unsatisfactory.

Cons. ROSA PERNA
Administrative Judge in Rome