

ANTITRUST LIABILITY FOR ABUSE OF RIGHT: THE COUNCIL OF STATE RULES ON COOP ESTENSE

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1 THE AUTHORITY'S RESOLUTION

In February 2011, the Italian Competition Authority ("ICA" or "Authority") launched proceedings *ex officio* (A437), pursuant to Article 3 of the Italian Competition Act 1990,² against Coop Estense, a member of the Coop Italia *consortium*, active in the retail distribution of food products and consumer goods. Coop Estense had allegedly abused its dominant position by delaying the entry and the expansion of its competitor Esselunga in the large retail distribution markets³ in the Province of Modena, in the North of Italy.

The evidence gathered by the ICA showed that from 2001 to 2009 Coop Estense adopted a complex strategy to prevent Esselunga's opening of new food shops in areas where Coop Estense was already present, in the Municipalities of Modena and Vignola. In particular, Coop Estense intervened in order to slow down the administrative procedures started by Esselunga to obtain the authorizations required for the commercial use of such areas.

In the Municipality of Modena, Coop Estense acquired in 2001 a small portion of the commercial site where Esselunga was to build a supermarket. This allowed Coop Estense to veto Esselunga's project. In Vignola, Esselunga agreed with the Municipality to build a school in the context of a framework agreement⁴ whereby it would be authorized to build also a new hypermarket, only 400 meters away from the existing Coop Estense outlet. One day before the Municipality's ratification of the agreement, Coop Estense sent a letter expressing its willingness to undertake the construction of the school; the

¹ Italian Competition Authority. The author wishes to thank Mr. Gianluca Sepe for his valuable comments.

² Law No. 287/1990.

³ Following Legislative Decree No. 114/1998, recalled by the ICA's resolution, a supermarket's dimension is comprised between 400 and 2500 square meters, while hypermarket's dimension is bigger than 2,500 square meters.

⁴ Under Article 18 of Regional Law No. 20/2000.

Municipality was therefore compelled to halt the procedure in order to assess such offer. In the end, Esselunga's project did not go through.

The Authority found that Coop Estense's conduct foreclosed an as efficient competitor (i.e. Esselunga), and could not be objectively justified. Moreover, the ascertained anticompetitive conduct was likely to cause consumer harm in terms of higher prices and/or lesser choice. The ICA observed that the impact of Coop Estense's strategy was amplified by significant barriers to entry in the relevant markets, flowing from limited availability of suitable areas and cumbersome administrative procedures.

The anticompetitive effects of the conduct could still be observed at the end of the investigation, as Esselunga had not been able to enter in the relevant markets of Modena and Vignola.

Therefore, on 6 June 2012, the Authority found that Coop Estense had abused its dominant position and imposed a fine of €4,600,000 as well as an injunction to remove the effects of its anticompetitive conduct.⁵

2 THE ANNULMENT OF THE AUTHORITY'S RESOLUTION

Upon Coop Estense's appeal, in August 2013, the ICA's resolution was squashed by the Regional Administrative Tribunal (Tribunale Amministrativo Regionale).⁶ While agreeing that Coop Estense was dominant in the relevant markets, the Tribunal considered that such position was not abused in the case at hand. In the Tribunal's view, the ICA did not adequately prove the existence of a causal link between Coop Estense's intervention in the mentioned administrative procedures and Esselunga's exclusion. In fact, the negative outcome of Esselunga's applications did not flow directly from the opposition of Coop Estense, since other circumstances, such as the opinion issued by other administrations involved, played a decisive role.

⁵ On the same day, the ICA adopted a separate decision to close a parallel investigation (A437B) concerning another cooperative, Unicoop Tirreno, due to the lack of sufficient evidence to establish an abuse of its alleged dominant position. The investigation, started in February 2011, was triggered by a complaint submitted by Esselunga, which contended that Unicoop Tirreno had abused its dominant position by impeding Esselunga's entrance in the markets of supermarkets and hypermarket in the Province of Livorno.

⁶ Judgment of the Administrative Regional Tribunal of Lazio – Roma, I, 2 August 2013 No. 07826.

3 THE COUNCIL OF STATE'S JUDGMENT OVERTURNING THE TRIBUNAL'S RULING

The ICA lodged an appeal before the Council of State (Consiglio di Stato), the supreme administrative court in Italy. The first instance Tribunal's ruling was reversed by the Council of State⁷.

In fact, the judges held that the ICA did not err in defining the relevant market and in finding Coop Estense's dominance thereon.

As for the abusive nature of Coop Estense's conducts, the Council of State recalled the consolidated case law of the Court of Justice (see Tomra case, C-549/2012, on 9 April 2012), clarifying that a finding of abuse does not require the proof of the actual effects of the conduct. Indeed, in order to establish such an infringement it is sufficient to prove that the contested conduct is merely capable of restricting competition. On the contrary, the first instance Tribunal appeared to require evidence of an actual exclusionary effect flowing from the conduct of the dominant undertaking. According to the Council of State, since exclusionary effects are only potential and need not to be concretely observed for an infringement to be found, it is unnecessary to look for a causal link between the conduct and the actual exclusion (as required by the first instance Tribunal). Therefore, the fact that other circumstances concurred in determining the actual foreclosure of the competitor cannot relieve the dominant undertaking from its antitrust liability.

The Council of State also quoted the AstraZeneca judgment to confirm (as it also stated in the Pfizer case, judgment No. 693/2014 of 12 February 2014) that the illegality of an abusive conduct is unrelated to its compliance or non-compliance with other legal rules. In many cases, in fact, abuses of dominant positions consist of a behavior which is otherwise lawful under branches of law other than competition law. Indeed, the judge held that otherwise legal conducts might still breach competition rules, where the circumstances of the case suggest that a dominant undertaking actively sought competitors' foreclosure through the adoption of commercial strategies which cannot be economically justified. Therefore, the Supreme Court required a careful assessment of the intent of the dominant company, in light of the "special responsibility" associated with dominance. Against this background, the Council of State carefully reviewed the ICA's assessment of the facts and found that the Authority convincingly demonstrated that Coop Estense – rather than merely protecting its commercial interest – actively strived to exclude Esselunga from the market. According to the Council of State, the ICA correctly found that, following its special responsibility, Coop Estense should have behaved differently and, in particular, it should have not interfered in the administrative procedures with a view to create a barrier to entry to Esselunga.

Finally, the Council of State confirmed the amount of the fine imposed by the ICA in the light of the seriousness and duration of the infringement. Moreover, the judge recognized the legality of the

⁷ Judgment No. 01673 of 8 April 2014

Authority's injunction, inasmuch as it required Coop Estense not only to discontinue its opposition to Esselunga's opening of a new supermarket (the typical negative content of an antitrust injunction), but also to cooperate actively with Esselunga with a view to allow its market entry within six months. In the judge's view, both orders, in the specific circumstances of the case, are to be considered covered by Article 15 of Competition Act 1990, in the light of the principles of proportionality and of effectiveness.

In conclusion, the Coop Estense judgment represents a significant development in Italian antitrust law, since it consolidates the existing case law on "abuse of right", emerging both at European (Astra Zeneca) and national (Pfizer) levels as a new frontier of antitrust enforcement in unilateral conduct cases.^{8 9}

⁸ For an interesting development at European level in this area, see the European Commission's memo on the resolutions recently adopted in the Samsung (39939) and Motorola (39985) cases concerning the enforcement of standard essential patents by means of injunctions before national courts, at: http://europa.eu/rapid/press-release_MEMO-14-322_en.htm.

⁹ Angeli M., *Antitrust liability for abuse of right: the Council of State rules on Coop Estense*. DOI: 10.12870/iar-10204.