

RP1 – HERA-GAS METERING TENDERS/PAYMENT TERMS

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1. INTRODUCTION

On 23rd November 2016, the Italian Competition Authority (hereinafter, ICA) closed its proceedings RP1 finding that the application of illicit payment terms in tenders issued by HERA SpA (hereinafter, Hera) amounted to an abuse of economic dependence under article 9(3bis) of Law no. 192/1998 in the form of a reiterated and widespread violation of Legislative Decree no. 231/2002, as amended by Legislative Decree no. 192/2012. Hence, the ICA exercised its competence under the late payment legislative framework for the first time.

In fact, according to the last part² of article 9(3bis) of Law no. 192/1998, “[i]n the case of widespread and reiterated violation of Legislative Decree 231/2002 to the detriment of companies, with particular reference to small and medium-sized enterprises (SMEs), an abuse is configured regardless of the assessment of economic dependence.”³

The late payment regulatory framework set in Legislative Decree no. 231/2002 implements EU legislative measures in the context of the fight against late payments in commercial transactions. According to the latest assessment, for each day of reduction in payment delays, an estimated €158

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² This part of the provision was introduced by Law no. 180/2011. The first part of paragraph 3bis provides for the ICA, “if it considers that an abuse of economic dependence is relevant for the protection of competition and the market, also considering allegations by third parties and following the activation of its investigative procedural powers, to send warnings and lift sanctions provided for by article 15 of Law no. 287/1990 towards the undertaking or undertakings which have committed that abuse.” The original text in Italian: “qualora ravvisi che un abuso di dipendenza economica abbia rilevanza per la tutela della concorrenza e del mercato, anche su segnalazione di terzi ed a seguito dell’attivazione dei propri poteri di indagine ed esperimento dell’istruttoria, procedere alle diffide e sanzioni previste dall’articolo 15 della legge 10 ottobre 1990, n. 287, nei confronti dell’impresa o delle imprese che abbiano commesso detto abuso” (translation by the authors).

³ The original text in Italian: “In caso di violazione diffusa e reiterata della disciplina di cui al decreto legislativo 9 ottobre 2002, n. 231, posta in essere ai danni delle imprese, con particolare riferimento a quelle piccole e medie, l’abuso si configura a prescindere dall’accertamento della dipendenza economica” (translation by the authors).

million is saved by European companies in finance costs.⁴ As the entire European economy is negatively affected by late payments, comprehensive efforts are needed in order to ensure the proper functioning of the internal market and promote business competitiveness. Consequently, the EU legislator enacted Directives 2000/35/EC and 2011/7/EU urging for “[a] decisive shift to a culture of prompt payment” and a regulatory intervention by Member States which “should also include the introduction of specific provisions on payment periods.”⁵

Therefore, specific deadlines within which the payment is to be made were set by implementing national laws.⁶ Moreover, grounds for derogation from those deadlines were circumscribed within strictly defined limits. In particular, according to the Italian late payment regulatory framework, companies must provide due payments within 30 days (art. 4(2), Legislative Decree no. 231/2002). With specific reference to B-2-B commercial transactions, the new provision allows the parties to agree on payment terms above 30 days. However, “terms exceeding sixty days, provided they are not seriously unfair to the creditor within the meaning of Article 7, must be expressly agreed upon. The clause relating to the term must be evidenced in writing” (art. 4(3)). In commercial transactions where the debtor is a public administration, the Decree provides that the parties may agree to an “expressly provided” term of more than 30 days “where this is justified by the specific nature of the contract or certain of its features,” while stating that “in any case, the terms referred to in paragraph 2 may not exceed 60 days. The clause relating to the term must be evidenced in writing” (art. 4(4)).⁷ Finally, the period of 30 days is doubled for public companies which must comply with the transparency requirements of Legislative Decree no. 333/2003 (art. 4(5)).

2. BACKGROUND OF THE CASE

The RP1 case originated from a complaint submitted by the Italian Federation of National Associations of Mechanical and Engineering Industries (hereinafter, ANIMA).⁸ ANIMA claimed that Hera, the third major actor in the market of gas distribution in Italy, had repeatedly imposed payment terms of 120 days in certain tender procedures issued for the supply of gas meters. After a preliminary

⁴ EU Commission, Report COM(2016) 534 final on 'Implementation of Directive 2011/7', 26 August 2016, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0534&from=EN>

⁵ See recital n. 12 of Directive 2011/7/EU, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0007>

⁶ For a comprehensive overview of the Late Payments Directive implementation by Member States, please visit <http://ec.europa.eu/DocsRoom/documents/13601/attachments/1/translations>

⁷ Translation in the paragraph by the authors.

⁸ ANIMA is an industry trade organization within Confindustria. Established in 1914, it represents companies operating in mechanical engineering. See more at <http://www.anima.it/>

evaluation of the available evidence, on 9th March 2016 the ICA launched formal proceedings against Hera in order to ascertain the existence of an abuse of economic dependence consisting in a reiterated and widespread violation of the late payment regulatory regime.

In order to comply with its gas regulatory obligations issued by the Italian Energy and Gas Authority (hereinafter, AEEGSI), Hera purchased products for gas measurement via approximately 40 private procurement tender procedures which led to roughly 81 contracts/orders, between March 2013 and November 2016. It was proven that all these contracts imposed a payment term of 120 days. The non-acceptance of the term by suppliers entailed a *de facto* exclusion from the procedure and, in some cases, Hera explicitly defined the acceptance of the payment term as a ground for exclusion.

Pursuant to article 4(5) of the Legislative Decree no. 231/2002, the applicable term to commercial transactions between Hera and third parties is 60 days. In fact, Hera meets the definition of 'public undertaking' referred to in articles 2 and 3 of the Legislative Decree no. 333/2003.

Moreover, it was proven that Hera applied the 120 days illicit term by virtue of an exclusively unilateral imposition. In fact, multiple attempts by both ANIMA and interested gas suppliers to have the legal term applied were frustrated by Hera through a firm and repeated refusal to negotiate the payment period.⁹

By resolution of 29th September 2016, the ICA rejected commitments offered by Hera,¹⁰ taking into consideration both the public interest in ascertaining the alleged violations and the unsuitability of the commitments to remove the effects of the conduct under investigation.

⁹ In that respect, it is to acknowledge that, according to the relevant case-law, the participation to a tender does not entail any acquiescence with reference to tender rules. In fact, "[T]he signing of acceptance declarations of tender participation rules does not imply any substantive barring of challenges to the "lex specialis" clauses which regulate the tender process being the last ones, by hypothesis, illegitimate as a contracting authority can never impose on a competitor any acquiescence to the proceeding clauses (see Council of State, sect. VI, 23/12/2008 n.6523). Such unreasonable foreclosure would be in fact contrary to article 24(1) and 113(1) of the Constitution" (see Council of State, sect. IV, 17/02/2014 sect. IV, n. 749).

¹⁰ On 16th September 2016, HERA submitted commitments pursuant to article 14-ter of Law no. 287/90, consisting in the provision of payment terms set at 60 days from the receipt of the invoice, both for future and present tenders, for gas measurement and other gas services, and the right of participants to expressly and voluntarily agree, during the presentation of the offer, to a more extended payment period, not above 120 days. In any case, failure to agree to a longer period would not constitute any grounds for exclusion. Whether expressed, voluntary adherence to a longer period (90 or 120 days) would be taken into account in the assessment of tenders. However, in any event, adherence could not have a weight higher than 5% of the maximum total score attributed to the offer. Hera also stated that the spontaneous implementation of its commitments was regardless of the fact that the Authority would make them mandatory.

3. PROCEDURAL EVIDENCE AND THE ICA'S LEGAL ASSESSMENT

As previously mentioned, Hera's conduct was proven to constitute a reiterated and widespread violation of Legislative Decree no. 231/2002, as amended by Legislative Decree no. 192/2012. In fact, Hera purchased gas meters via a significant number of tender procedures in a span of three and a half years. In each and every contract, a fixed payment term of 120 days was imposed. In particular, the ICA found that mandatory clauses were systematically inserted in tender specifications, contract schemes and invitations issued by Hera. In fact, Hera imposed a clause with the following wording: "[t]he payments of invoices are set at 120 days EOM.¹¹ It is to be expressly acknowledged that this period [120 days] is significantly lower than the one occurring in present commercial practices relating to payments by public entities amounting to date to 180 days."¹²

According to the ICA's legal assessment of article 9(3bis) of Law no. 192/1998, such imposition of a 120 day payment term in reiterated and widespread violation of the 60 day legal term imposed on public companies entails an abuse of economic dependence *per se*. In fact, the legislator clearly provided for the Authority to sanction such abuse "regardless of the assessment of economic dependence." Therefore the legislator, by providing such an easy way to ascertain the infringement, meant to provide *per se* weaker creditors with a strong protection, in accordance with the European legislative framework and case-law against "the abuse of freedom of contract to the detriment of creditors."¹³

Consequently, it follows that the relevance of late payment policies for competition and the market is due to the concept of "reiterated and widespread violation" (*i.e.* not isolated) that the ICA is to ascertain. In fact a single late payment, while being of relevance in protecting individual commercial transactions, has no impact on the proper development of competition dynamics at different levels of the industry where the parties to the transaction operate.

Furthermore, in absence of any expressed acceptance of a payment term above the one provided for by the law, the legislator does not require for the ICA to ascertain the iniquity of the conditions imposed by the client in comparison with common commercial practices.¹⁴

¹¹ End of the month from invoices.

¹² The original text in Italian: "I pagamenti delle fatture sono fissati a 120 gg fine mese dalla data della fattura. Si prende espressamente atto che tale termine è significativamente inferiore al termine che si riscontra nella prassi commerciale esistente in materia di pagamenti da parte di soggetti pubblici pari ad oggi a 180 giorni?" (translation by the authors).

¹³ See Recital no. 29, Directive 2011/7/EU and Council of State, sect. IV, 02/02/2010, n. 469, according to which the European law on late payments meant to introduce a "discipline for the rebalancing of different positions of strength" (translation by the authors).

¹⁴ See article 7 of Legislative Decree no. 231/2002.

As to the RP1 case, formal investigations positively established that the 120 day period applied by Hera is in no way justifiable under the legislation on late payments, which requires public companies under article 4(5) of the Decree to apply a 60 day term. The investigation also revealed that even a broader interpretation of the relevant provision - *i.e.* that public companies are in principle allowed to agree to terms over 60 days, as also suggested by Hera - could not discharge the company. Indeed, the 60 day term can be derogated provided that the longer payment term remains fair and is expressly agreed upon. However, these conditions were not met. Moreover, the ICA, in line with a reasoned opinion by the National Anticorruption Authority (ANAC), condemned the application of conditional incentives based on payment terms exceeding 60 days in the context of tender procedures, as advanced in the commitments submitted by Hera.¹⁵

Although not required, the ICA noted that terms imposed by Hera were grossly and manifestly unfair to suppliers. In fact, serious iniquities can be proven by "*all the circumstances of the case, including the serious deviation from commercial practice contrary to the principle of good faith and fair dealing, the nature of the goods or service under contract [...]*." Incidentally, it was found that the common practice consists of payment terms of 80 days on average.¹⁶ Thus, Hera's payment policy constituted a manifest and serious deviation from practice in the sector.

4. CEASE-AND-DESIST ORDER AND SANCTIONS

In conclusion, for the first time, the ICA ascertained a serious abuse of economic dependence pursuant to article 9(3-bis) of Law no. 192/1998 in reiterated and widespread violation of the late payment regime according to Legislative Decree no. 231/2002, as amended by Legislative Decree no. 192/2012, with reference to an imposition of illicit payment terms enacted by Hera in the context of tenders issued to purchase gas-metering products and services.

In particular, according to evidence in the proceedings RP1, the ICA ascertained that Hera is liable of a serious infringement of the late payment normative framework which lasted for more than three years. Moreover, the infringement was deemed to be serious by reason of the entity of the delay and reiteration despite the overall legal context of renovated efforts in protection of creditors.

Consequently, a cease-and-desist order was imposed on Hera with the view to prevent further violations of the late payment in the commercial transaction normative framework. It is noteworthy to

¹⁵ Considered the *per se* leading position of the procuring entity, according to ANAC, broader payment terms cannot be negotiated in the context of tender procedures (see Determination No. 4 of 7th July 2010 "*Payment rules on public supply and service contracts*").

¹⁶ See Intrum Justitia, *European Payment Reports*, 2014, 2015 and 2016.

highlight, in consideration of the fact that the case is the first application of the ICA's competences in the context of late-payment surveillance, that the Authority decided to grant a significant reduction of the fine to be imposed on Hera (about 75% of the total amount), and thus issued a final fine amounting to EUR 800,000.