The Italian Competition Authority (AGCM) has fined the “Big Four” consultancy firms following a serious infringement of article 101 TFEU in a public tender for audit services

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1. Introduction

On 15 March 2016, the Italian Competition Authority (ICA) launched an investigation into certain practices of Deloitte & Touche S.p.A. (DT), Meridiana Italia S.r.l. (Meridiana), KPMG S.p.A. (KPMG), PricewaterhouseCoopers S.p.A. (PWC), PricewaterhouseCoopers Advisory S.p.A. (PWC Advisory), Reconta Ernst & Young S.p.A. (EY), to ascertain alleged infringements of Article 101 of the Treaty on the Functioning of the European Union (TFEU). On 4 August 2016 the proceedings were extended to KPMG Advisory S.p.A. (KPMG Advisory), Deloitte Consulting S.r.l. (DC) and Ernst & Young Financial Business Advisory S.p.A. (EYFBA). The consulting and auditing companies involved belong to the Deloitte, KPMG, Ernst & Young and PricewaterhouseCoopers networks (the so-called "Big Four"), with the exception of Meridiana, who mainly provides technical assistance, monitoring activities and management evaluation with regard to European Structural and Cohesion Funds, as well as technical assistance for their design, management, evaluation and reporting.

The alleged concerted practices investigated by the ICA concerned technical assistance services for the use of European Structural Funds set up by the European Union. In this respect, the relevant legislation is EU Regulation No 1303/2013 providing that, in order to ensure the proper use of the funds, Member States should carry out a series of activities to control and verify how they will be spent. To this end, Member States shall designate a Managing Authority and a Certifying Authority, respectively to manage the operational programme and to submit payment applications to the Commission certifying that they result from reliable accounting systems, are based on verifiable supporting documents and have been subject to verifications by the Managing Authority; they must also appoint an Audit Authority, independent from the Managing Authority and the Certifying Authority, to ensure that audits are carried out on the proper functioning of the management and control system of the operational programme and on an appropriate sample of operations. To carry out the controls provided by the

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2 See Articles 123 and 127 of the EU Regulation No 1303/2013.

3 These controls are:
   (a) “First level” controls regarding the financial management and control of the operational programme (Article 125 of the EU Regulation No 1303/2013), which are the responsibility of the Managing Authority;
   (b) Controls aimed at certifying the completeness, accuracy and veracity of the accounts and that the expenditure entered in the accounts complies with applicable law and has been incurred in respect of operations selected for funding in accordance with the criteria applicable to the operational programme and complying with applicable law (Article 126 of the EU Regulation No 1303/2013), which are the responsibility of the Certifying Authority;
   (c) “Second level” controls on the proper functioning of the management and control system of the operational programme and on an appropriate sample of operations on the basis of the declared expenditure (Article 127 of the EU Regulation No 1303/2013), which are the responsibility of the Audit Authority.
Authorities, Public Administrations are assisted by experienced professionals in the field. This activity is commonly referred to as "technical assistance".

In 2015, Consip\(^4\) launched two tendering procedures for technical assistance services: one for assistance to the Audit Authority, which is the subject of the proceedings, and one for assistance to the Managing and Certification Authority. In particular, the tender for the assistance to the Audit Authority was an open Community call for tenders divided into 9 lots and aimed at awarding technical assistance services in order to carry out and develop the monitoring and audit functions of the EU co-funded programmes.

2. The anti-competitive practices and their evaluation

On the basis of the evidence gathered by the ICA it emerges that the undertakings involved in the present case, which are part of their respective global networks (Deloitte, Ernst & Young, KPMG and PWC) agreed to allocate between them the different lots in the tender for the assistance to the Audit Authority. The same documents show that Meridiana was not part of the cartel.

The ICA found that the parties' bids are structured in such a way that, while they all tendered for all the lots, the most significant discounts offered by each of them, all of which range between 30% and 32.3%, never overlap in the 9 different lots. In addition, the common scheme of lots allocation also affected the level of discounts, as all the Big Four bids place these between two recurring percentage ranges (30-32% and 10-15%). This is anomalous, since it is implausible that four allegedly competing companies have exactly the same level of discounts both in the lots in which they are interested (30-32%) and in those where they claim to have no interest (10-15%).

Secondly, as well as agreeing exactly which lots each of them would submit the best offers for, the parties also submitted supportive bids in order to, on the one hand, conceal the cartel and, on the other, take best advantage of the economic score calculation mechanism. As the parties have admitted, in view of the low level of discounts, these bids could not have allowed them to be awarded the lot: even though they were aware that a discount of 10-15% was not competitive, they still submitted their bids.

Therefore, the parties had the joint goal of sharing the lots, avoiding competition and trying to secure the contracts with a maximum discount of 30-35%. In order to protect themselves against potentially aggressive bids from competitors outside the cartel, the parties submitted low discounts on lots in which they were not interested.

None of the undertakings involved provided any justification indicating that there was a real difference in cost structure or other rational logic behind the bids with low discounts in the tender for assistance to the Audit Authority.

\(^4\) Consip is a company owned by the Italian Ministry of Economy and Finance. It carries out activities in consulting, assistance and support in procuring goods and services for Public Administrations.
Other participants to the tender did not differentiate (or differentiated only marginally) their discounts depending on the lot they tendered for. Moreover, the weighted average discounts they offered were always significant (equal to or higher than 40%), with the only exception of one bidder (Cogea) which has offered very low discounts in all lots.

In the light of the above, the ICA found that the behaviour taken into consideration constitutes an agreement between undertakings contrary to article 101 of the TFEU, as it consists of a coordinated participation in the tender for assistance to the Audit Authority. The agreement was fully implemented and has produced effects on the market, negatively affecting the outcome of the entire tender procedure and the award of the lots in a proper competitive environment.

It should be recalled that, in order to fall within the scope of Article 101 (1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must have, as its object or effect, the prevention, the restriction or the distortion of competition within the internal market. According to the Court of Justice of the European Union, certain types of coordination between undertakings reveal a sufficient degree of harm to competition that examining their effects would be superfluous. Indeed, certain collusive behaviours, such as horizontal price-fixing, market sharing or customer allocation agreements resulting from a cartel, have such a negative impact on the price, quantity or quality of products and services that it may be deemed useless, for the application of Article 101 (1) TFEU, to demonstrate that such behaviour has also a tangible effect on the market. Such behaviours generally reduce output and raise prices, leading to a misallocation of resources, to the detriment of consumers in particular\(^5\).

In the present Big Four case, the object of the agreements is clearly anti-competitive, since they are intended to affect the outcome of the tender for assistance to the Audit Authority through the allocation of the lots. Moreover, the agreements were fully implemented with the submission of coordinated bids, influencing the outcomes of the procedure with respect to all nine lots.

The object of the concerted practices, namely the coordinated participation in the tender for assistance to the Audit Authority was found to be anticompetitive in itself; this means that, in order to establish their illegality, it is unnecessary to show they had any restrictive effects. In fact, the investigation showed that the major market players, with experience and economic capacity far superior to others operating in the field, completely eliminated any reciprocal competitive pressure by allocating in advance the lots they were interested in. Although an evaluation of the restrictive effects was unnecessary, the investigation nevertheless found that the agreements had produced significant impacts on the market causing the tender to be awarded on terms less favourable than if there had been a fully competitive scenario.

3. Evidence of the alleged conducts

During the investigations, a series of documents emerged showing horizontal contacts and meetings between KPMG, KPMG Advisory, PWC, PWC Advisory, Deloitte & Touche, Deloitte Consulting, EY and EYFBA, as well as indicating the allocation of the lots.

Among the documents collected there were various exchanges of correspondence to arrange meetings relating to the tender for assistance to the Audit Authority (the object indicated in the emails is "EU fundraising"). These email exchanges took place between the submission of the market consultation document by Consip (in July 2014) and the call for tender on 19 March 2015.

Moreover, it should be noted that all the undertakings belonging to the same network share a single department dealing with tenders; from the evidence gathered it emerges that the decision to make a bid is taken at network level, taking into account the respective expertise and interests, and possible conflict of interests between audit and consultancy activities.

Finally, the ICA found a document at EY offices, dated before the submission of bids, called "Preliminary Simulations of the tender for assistance to the Audit Authority". In this document, for each of the nine lots, next to the column with the lot value there is another column headed "Competence" that indicates for each lot the acronym of a Big Four firm. In another table of the same document, alongside the nine lots of the tender, there is an "Interest" column, also indicating for each lot the acronym of a Big Four firm. From a comparison of this simulation, which during the inspection was dated by EY "November-December 2014", with the bids submitted, it emerges that the results of the column "Interest" match with the results of the actual bid (considering as "winning bids" the bids with a discount of over 30%) in six cases out of nine (lots 2 and 5 to 9).

4. Relevant market and cross-border effects

The definition of the relevant market is essentially aimed at identifying the legal and economic context in which the concerted practices or the agreements between undertakings have taken place. The definition, therefore, is necessary in order to circumscribe the area potentially impacted by the agreement and its distortion of the competition and identify the extent of its negative effects.

The relevant product market for the agreement analysed hereby is the market for services providing technical assistance to the Audit Authority and to the Managing and Certification Authority. The demand in this product market typically comprises Public Administrations organising public tenders characterized by particular requirements spelt out in the call for tenders. In the present case, the relevant market corresponds to the call for tender organized by Consip to acquire technical assistance services for the Audit Authority.

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6 See paragraphs from 81 to 92 of the ICA’s decision.
According to the European Commission\(^7\), the concept of effect on trade between EU Member States should be interpreted also taking into account the direct or indirect, actual or potential influence on intra-Community trade flows. The tender in the present case has an EU-wide relevance, the services tendered with the call are to be rendered on a national scale and the companies that submitted bids have an international standing. Consequently, the concerted practices put in place by the Big Four have been assessed pursuant to article 101 TFEU, given their possible effects on trade between Member States.

5. Assessment of the sanction

Article 15, paragraph 1, of Italian Law No 287/90 provides that the ICA, in case of serious infringements and considering the gravity and duration of the infringement, may impose an administrative fine of up to 10% of the total turnover of each undertaking involved in the last fiscal year before the notification of the order adopted at the end of the investigation. To evaluate the seriousness of an infringement, various factors must be taken into account and weighed depending on the nature of the breach and its circumstances. Particular importance should be given to the nature of the competition restriction and to the role and market position of the undertakings involved.

The concerted practice in the present case consists of a horizontal and secret\(^8\) agreement aimed at conditioning the dynamics of the tender at issue, in order to avoid competition in the award of contracts. The agreement was implemented and led to the allocation of the lots, as planned by the parties, in 5 lots out of 9, influencing the overall outcome of the tender. The grave distortion of competition resulting from the behaviour of the undertakings involved did in fact affect the outcome of the tender, undermining the process for selection of the best contractual counterparty to provide on the best terms the services envisaged by the call for tender.

This behaviour is deemed to be one of the most serious infringements of the antitrust rules since, if the contract is awarded, by its very nature such behaviour will distort normal competition for the entire duration of the contract thus awarded. Therefore, it is an extremely grave violation of article 101 TFEU.

In order to determine the penalties, legal references are Article 11 of Italian Law No 689/1981, as recalled by Article 31 of Law No 287/90, and the interpretation criteria set out in the "Guidelines on how to apply the criteria for quantifying monetary financial sanctions imposed by the Authority pursuant to Article 15, paragraph 1 of Law No 287/90" (hereinafter referred to as “Guidelines”), approved by the ICA on 22 October 2014.

According to points 7 ff. of the Guidelines, the turnover to take into account to determine the basic amount of the fine is calculated by multiplying a percentage

\(^7\) Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJEU C 101 of 27.04.2004.

\(^8\) Contrary to what the parties argue, the agreement has been considered as secret in the light of the ways it was implemented, since it involved only the undertakings concerned, in particular through the organization of non-public meetings, as well as the use of bogus bids.
of the sales volume of products and services directly or indirectly deriving from the illegal behaviour, established on the basis of the seriousness of the infringement, by the duration of each undertaking’s participation in the infringement. Pursuant to point 18 of the Guidelines, if the object of the infringement is related to the participation in a public tender, the basic fine amount is the allotment value of each lot influenced by the agreement. If a lot is not awarded, the basic fine amount corresponds to the starting bid price of the lot.

In the present case, on the basis of the allocating scheme identified, the allotment amount is determined by the award value for each lot actually awarded. With regard to the lots that the parties were not awarded, the value of sales is identified as being the value of the bid made by the undertaking to which, according to the allocation scheme, the lot would have been awarded. This solution, which uses the sales value valuation criterion, has been considered more favourable to the parties who were not awarded the lots than the starting bid criterion.

Given that the undertakings concerned in the proceedings are part of a global network as a single economic entity, the ICA has decided to impose a single fine on each network. Each undertaking and the network it belongs to will be jointly and severally liable for paying the penalty.

The initial allotment amounts have thus been multiplied by a percentage reflecting the gravity of the infringement. Since the behaviour led to a serious breach of Article 101 TFEU (a secret horizontal agreement aimed at allocating the lots and price fixing) point 11 of the Guidelines provides for an increase of the initial allotment amounts of between 15% and 30%. In the present case, given that the infringement involved the largest consulting and auditing companies in the world, that handle at least 70% of the value of the assistance services to the Audit Authorities and since the concerted practices have been fully implemented and have produced significant market effects, the initial allotment amounts have been multiplied by 30% for all participants.

Furthermore, pursuant to article 17 of the Guidelines “... to confer to the [ICA’s] sanctioning power the necessary deterrent effect with regard to the most severe competition restrictions, regardless of their duration or actual implementation, the [ICA] shall consider adding to the basic amount of the fine, an additional sum consisting of between 15% – 25% of the sales value of the products or services object of the infringement...”. In this context, the sales value has been increased by a so called entry fee of 25%, considering the need to guarantee the effective deterrence of the penalty.

Finally, the Guidelines provide that the base amount of the fines may be reduced to take into account specific attenuating circumstances. In the present case, the adoption by all parties of specific antitrust compliance programs has been evaluated⁹. However, the ICA found that only the EY, Deloitte and PWC policies are in line with the provisions of point 23 of the Guidelines; therefore, the ICA granted them a reduction of 5% of the fine. The ICA did not recognize any attenuating circumstance for KPMG, since it adopted a compliance program only

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⁹ See point 23 of the Guidelines.
on 8 September 2017, and communicated it to the ICA only on 22 September 2017, making it impossible for the Italian Competition Authority to assess the effectiveness of its implementation.

In light of the above, the ICA imposed administrative fines amounting to a total of more than 23 million euro\(^\text{10}\) divided as follows: 7,659,966 euro to KPMG and KPMG Advisory, 5,955,011 euro to Deloitte & Touche and Deloitte Consulting, 8,563,021 euro to Ernst & Young and EYFBA and 1,516,218 to PWC and PWC Advisory.

\(^{10}\) I796 - Servizi di supporto e assistenza tecnica alla PA nei programmi cofinanziati dall’UE. Only the Italian text is available at the following \text{LINK}.