The Italian Competition Authority fines three companies and a multi-firm agent for concerted practices in the healthcare insurance sector (Campanian insurance tenders)

Valerio Cosimo Romano
The Italian Competition Authority sanctioned three companies and a multi-firm agent for concerted practices in the healthcare insurance sector (*Campanian insurance tenders*).
Concerted practices
Cooperation agreement
Hardcore restriction Joint tender submissions
Mitigation of the fine
Relevant market
Tender procedures

12. Text of the case/text commented

http://www.agcm.it/concorrenza/intese-e-abusi/open/41256297003874BD/188B6174A325C8A8C125792E0040429A.html

13. Comment

On September 28th, 2011 the Italian Competition Authority (hereinafter ICA) sanctioned with a total fine of EUR 13.583.515 three insurance companies \(^{1}\) and a multi-firm agent \(^{2}\) for concerted practices in the healthcare insurance sector.

Object of the proceeding, whose investigation activity started in 2009, was the existence of a complex and continuous agreement between the companies, startED in 2003 and ended in late 2008, concerning the distribution of market share for insurance on civil liability towards third parties (italian acronym RCT) \(^{3}\) and insurance on civil liability towards employees (RCO) \(^{4}\) in Campanian local health authorities (ASL) and public health corporations (AO).

The agreement was characterized by the repetition in the course of time of a behavior characterized by a pactum criminis with the same anticompetitive aim and different

---

2 Primogest S.r.l.
3 With the insurance on civil liability towards third parties, the insurance company is obligated to indemnify the contractor for the amount that he is obliged to pay in compensation for damages involuntarily caused to third parties for death, personal injury and damage to property, occurred in relation to the activity.
4 With the insurance on civil liability towards employees the insurance company is obligated to indemnify the contractor for the amount that he is obliged to pay for injuries suffered by his employees operating in the sector for which the insurance is provided.
degrees of participation, and consisted in participating to eighteen competitive public tenders called by the ASL and AO, in order to partition the latter among the companies.

All of these conducts, favored by the active role of a multi-firm agent based in the geographical area where the tenders were called, were finalized to alter the tender’s outcome by both an ex ante and ex post subdivision of quotas, or to avoid the execution of new tenders by succeeding in coinsurance in case of cancellation.

In this case ICA argued that, given the circumstances, in order to apply art.101, par. 1, TFEU it is superfluous to consider the effects of the agreement because of the pacific configuration of bid rigging agreements as hard core restrictions of competition under both the national and the European case law.

On a procedural viewpoint, the Authority also opined inconsistent the reconstruction proposed by the undertakings on prescription, with the argument that there was not a plurality of single behaviors, but an only and global anticompetitive behavior.

Consequently, the prescription period has been computed starting from the last act ascribable to the cartel.

After this procedural issue, the following substantial discussion points have been addressed:

1) Relevant market

Strong points of criticism can originate from the reconstruction of the relevant market operated by the ICA.

For a better comprehension, it should be highlighted that in this sector the demand is expressed by two monopsonistic buyers, LHA and PHC, and characterized by a relatively low elasticity of demand.

The required coverage is strongly linked to the activity of the contracting authorities and characterized by specific risk factors like those linked with the practice of medical profession. Those services imposes the use of public procedures, and the relative tenders are designed to aggregate lots or single-risk insurance.

In the ICA's view the characteristics of demand are appropriate to identify a distinct relevant market for each tender and for each authority. On the point, ICA recalls its own precedents, stating that the detection of relevant market is necessary to evaluate the
conditions of competition, which in turn are one of the elements to be evaluated with regard to the relevant market.

But immediately after that, the Authority makes a questionable remark, stating that (par. 222) in the proceeding under consideration tenders have an European relevance, thus ingenerating the idea that, while on the one hand there is a danger for the structure of competition in the common market, on the other hand the relevant market is identified in very small environments.

Consistent with the above mentioned argument, the sanctioned undertakings stigmatized this reconstruction, assuming that it neglects analogues competitive procedures, and having the calls for bids an European relevance, each of the European companies had the possibility to participate to the tender.

In consequence of that, the geographical market must coincide with the entire European Economic Area, or the national market and the practice should not be considered able to alter competition.

The parties also argued (maybe a bit too recklessy) that in a market characterized by an high degree of liability to accidents, the Campanian market appeared to be an interesting portfolio. This consideration seems to be a bit too incautious because in doing it, the same companies are individuating a reference point for the reconstruction of the relevant market that is notably smaller than the one previously assumed.

II) Risk levels and insurance premiums

A focal point stated by the undertakings, with regard to the assessment of risk levels and insurance premiums, is that the crisis of the relationship doctor-patient (due to the growing expectations of the latter) determined an higher number of law suits and higher condemnations for the former.

This was the main reason for having stricter conditions in tenders, which in turn determined a strong selection in entrance, thus reducing the numbers of participating companies. Insurances started to go outside of this business sector, non being profitable anymore and this determined - ça va sans dire - a shifting in the equilibrium point of supply and demand.

Recurring to the use of a multi-firm agent the undertakings can instead divide the risk quotas. According to the companies, this was the only reason that determined the sharing
and historicization of quotas between the undertakings and the loyalization of public authorities towards the agent.

It is evident, however, that this practice determines an unfair tradeoff between risk and return. To this extent, ICA considered irrelevant that insurance premiums paid by some authorities after the cartel’s conclusion raised in price.

It should also be noticed that the presence of a multi-firm agent is in principle able to reduce the firm’s transaction costs (mainly research costs), and the deriving increase in efficiency may well determine, in a competitive scenario, a reduction in prices.

III) Relationship between coinsurance, reinsurance and competition

Two of the main techniques used by the undertakings to assess the risk were coinsurance and reinsurance.

The legal advice given by the Italian Institute for vigilance on Private Insurances (ISVAP), recognized that generally speaking, given the peculiar levels of risk in this sector, coinsurance and reinsurance may well help a wise management of the undertakings and a widening of supply.

However, in this case ISVAP recognized a distortion in the use of coinsurance and a coordination between undertakings that exceed the normal procedures of risk sharing.

Those indexes have been considered - and this proves consistent also under a game theoretical analysis - detective of an agreement aimed at sharing market quotas without any form of competition. The concrete economic rationale of the agreement was to capture surplus from public authorities and transfer it to the members of cartel.

In fact, the parties signed coinsurance contracts before the submission of offers (with the explicit intent to guarantee themselves market quotas before the competitive participation to the tenders), after the submission of offers but before the adjudication, and after the adjudication in order to alternate the profits among the members of cartel.

Beyond this, coinsurance after adjudication is inadmissible because it consent to bypass the principle of public evidence, consenting to undertakings that never won a tender to supply the service, without any valid economic justification.
IV) Determination and economic rationale of fines

In conclusion, ICA remarks that the sanctioned behaviors are not - for their inner nature - able to generate revenues only in the year taken in consideration, but given the situation of losses in the financial statements of some companies and the compulsory liquidation of others and in application of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, a variable reduction of the sanction (up to 80% of the fine) has been applied in order to not irreparably impair the companies’ economic profitability.