

The Italian Competition Authority fines three operators in the Southern Italian electric market for undertaking a concerted practice aimed at sharing the market for certain dispatch services (Repower Italy Dispatch Price)

Italie, Ententes, Ententes (appel d'offres), Répartition de marché, Limitation de l'offre, Entente sur les prix, Marché géographique, Justification objective, Groupe d'entreprises, Restriction caractérisée, Définition du marché, Cartel, Energie

Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), 30 May 2012, I736 - Act No. 23623, Repower Italia S.p.A., EGL Italia S.p.A., Tirreno Power S.p.A.

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Three electricity generators active in the Southern Italian area - *Repower Italia S.p.A.*, *EGL Italia S.p.A.* and *Tirreno Power S.p.A.* - have been sanctioned by the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition Authority - ICA) for undertaking a concerted practice in violation of Art. 2 of Law 287/1990 (Italian Competition Act). The concerted practice consisted in sharing the market for providing certain dispatch services during holidays in the areas of Naples from April to August 2010. The three generators have been fined for the following amounts :

- ▶ Eur. 106,156 for Repower ;
- ▶ Eur. 136,586 for Tirreno Power ;
- ▶ Eur. 80,389 for EGL.

The market for dispatch services is one of the regulated exchanges in which electricity generators can offer their capacity. Once power generation has been allocated in the day-ahead and the infra-day market, *Terna S.p.A.*, the Italian Transmission System Operator (ITSO), buys dispatch services in the ancillary service market [1]. In the former market, power plants meeting certain technical requirements can offer (some of) the following services :

- ▶ provision of secondary and tertiary reserve margins ;
- ▶ provision of additional power supply/retrieval of allocated power supply for congestion management ;
- ▶ provision of additional power supply/retrieval of allocated power supply for ensuring that the

electric grid works within a predetermined voltage range.

Repower, *Tirreno Power* and *EGL* own one power plant each in the area of Naples, the so-called Campania cluster. Due to their geographic location, these three power plants are the only ones able to ensure that the electric grid in that area works within the admissible voltage range during very off-peak hours, *i.e.* during holidays. This grid bottleneck has been publicly acknowledged by the ITSO in its investment plans.

Given the technicalities of the sector, the ICA defined the relevant market in an extremely narrow sense, slicing the market threefold :

- ▶ along the product dimension, by separating services for grid tension maintenance from other dispatch services (and *a fortiori* from the market for electricity in general) ;
- ▶ along the geographical dimension, by separating the Campania cluster from the rest of the Southern Italian electric market ;
- ▶ along the temporal dimension, by considering holidays as a distinct market from working days.

The defendants hold 100% of the market for grid tension maintenance in the Campania cluster during holiday, and each participant has rather similar market shares (between 30% and 41%, depending on the period). This market definition has been contested by the parties. Nevertheless, as the charge is that of a concerted practice, different - but reasonable - market definitions would not prevent the ICA from reaching the same conclusions. In any case, the market share has been considered an aggravating circumstance when assessing the extent of the practice.

The ICA notices that this relevant market features a close-to-perfect mix of characteristics facilitating collusion. It is a narrow oligopoly, where only three players operate. There are no perspectives of entry in the short term, and the operators are symmetrical, as their power plants are very similar in terms of technologies and size. Then, market interactions among players are very frequent, repeated and transparent, as the grid manager publishes bid results after only 8 days, allowing to immediately detect deviations from any practice. Any deviation from the collusive behaviour can be retaliated by lowering the bid in the next holiday. Finally, the demand is stable, as the ITSO calls for grid tension maintenance services in the area of Naples during almost every holiday.

The case was initiated based on an anonymous whistleblower, but the ICA could not find direct proof of the agreement. Therefore, it had to infer the anticompetitive conduct from the behaviour of the firms. According to the analysis of the ICA, the parties rigged the bids for dispatch services with the aim of equally allocating the market, and therefore increasing the price. From April to August 2010, in three consecutive holidays each player was able to win the auction once, and therefore was allocated once the provision of services by the ITSO. This market regularity is almost perfect. The parties exited the alleged agreement only after a deviation by EGL. The ICA proposes three rules which would be followed by the firm to comply with the concerted practice. These rules require no further contacts and no exchange of information among the parties, as they use the public results of past auctions as reference price. The conducts of the firms are not 100% consistent with the identified rules, as pointed out by the defendants.

Italian Courts require that when an agreement cannot be proved, a practice can be considered anticompetitive if a two-prong test is fulfilled : i) the conduct cannot be explained as a series of

competitive and independent behaviors ; ii) there are additional probationary elements, such as contacts among the parties. As for the former, the ICA does not consider the alternative explanations given by the parties as sufficient. Most importantly, if the practice were the result of competitive adaptive behaviors, there would have been a transition period, in which firms strived to reach a stable equilibrium. On the contrary, firm behaviors were instantaneously adjusted to the alleged practice. As for the latter, the ICA could find proof of contacts and a meeting between *EGL* and *Repower* (whose 21% is owned by *EGL* itself) right before the start of the practice. The staff of *EGL* and *Repower* responsible for submitting offers in the ancillary services market met to discuss issues closely related to the matter, although they both claim that the discussion did not concern the alleged practice. Any proof of contacts among *Tirreno Power* and the other parties could not be found.

The anticompetitive practice has been considered serious by the ICA, since market sharing and bid rigging are among the most blatant violations of Art. 2 of Law 287/1990. In addition to that, the practice concerned the whole relevant market, and resulted in a mark-up between price and variable costs of 16%. The cost incurred by the ITSO in this relevant market was increased by 5%. This additional cost is eventually passed on to consumers, but the ICA notices that in this respect the final impacts are marginal. Besides, the duration of the concerted practice is limited. Given all these factors, the three firms have been fined by 0.5% of their revenues in the relevant market. The fine for *Tirreno Power* has been reduced by 15% due to a limited participation to the agreement.

It is yet to be seen whether this decision will stand the first and second instance appeal courts. The regularity of market sharing in the contested period is striking. Nevertheless, the construction by the ICA of the behavior of the firms as a concerted practice following three defined rules is far from being perfect. On the contrary, the parties failed so far to provide any alternative explanation. In any case, Italian Courts are more strict when proofs of direct contacts could be found, and the *EGL-Repower* meeting right before the start of the practice could tip the balance in favour of the ICA [2]. The situation of *Tirreno Power* seems different. As no proof of direct contact among *Tirreno Power* and its competitors could be found, it could, theoretically, escape the two-prong test. However, if anti-competitiveness is considered as proved for *EGL* and *Repower*, it is hard to see how *Tirreno Power*, which carried out the same practice, could not be sanctioned. The court could accept the solution by the ICA to consider that *Tirreno Power* violated Art. 2 of Law 287/1990, but to reduce the sanction due to the lack of proof of direct contacts.

Finally, it is worth underlying that the markets for electricity, and in particular the market for ancillary services, is plagued by a high risk of collusion. Although the Campania cluster represents an extreme case in terms of easiness of collusion, in general electricity markets are highly segmented for geographic and technical reasons, there are few firms operating, and the level of transparency is very high. For these reasons, signaling that the ICA is willing and able to prosecute concerted practices even when a smoking gun is missing could have a deterrent effect.

[1] *Gestore dei Mercato Energetici* - <http://www.mercatoelettrico.org/en/...>

[2] Osti C. (2007), *Diritto della Concorrenza*, Bologna : Il Mulino.

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