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ANTITRUST, DECISION OF TAR LAZIO-ROMA, N. 4478/2013: THE LAWFULNESS OF THE PARTICIPATION IN TENDERS IN A SO CALLED "OVERABUNDANT" TEMPORARY GROUPING OF COMPANIES¹.

With the decision of 7 May 2013, the Administrative Court of Lazio-Rome², annulled the decision of the Antitrust Authority (AGCM) "Municipality of Casalmaggiore – tender for the award of Gas Distribution Services", with which the Authority had fined Linea Distribuzione ("LD") and 2iGas (at the time E. On Rete), as well as their parent companies, for infringing Article 2 of the Law 287/90.

According to AGCM, 2iGas and LD had restricted competition in the natural gas distribution market by creating a temporary grouping of companies to take part in a public tender called by the Municipality of Casalmaggiore and seven other neighboring municipalities, despite the fact that each one of the companies in question had the formal (technical and economic) requirements to compete individually.

The relevance of the decision of TAR Lazio-Roma, which annuls AGCM's provision, extends beyond the specific case brought to the attention of the Administrative Judge: in the specific case of tenders organized for groups of 50+ Municipalities (*"ambiti territoriali minimi"* or ATEM), the use of temporary grouping of companies is a key tool to allow medium-sized (and larger) operators to compete with major national operators. The Authority's decision to ban this economic option, had it been upheld by the administrative court, would have had a serious impact on competition in future calls for tenders.

The so called "Overabundant" temporary grouping of companies has always been in the crosshairs of the Antitrust Authority, which - in the past - has on several occasions pronounced them anti-competitive. The Administrative Court has now explicitly dismissed this view -which was not based on the letter of the law, The judges held that an "Overabundant" temporary grouping of companies cannot be considered collusive for the mere fact of their participation to a public tender. Proof of the illegality of the agreement *"should be found outside the agreement itself in order to demonstrate the use of an instrument - otherwise lawful - for anti-competitive purposes"* (the legal principle had already been spelt out in a number of earlier decisions).

In the judgment at hand, the *TAR Lazio-Roma* expresses the view that none of the observations stated by AGCM in support of the fine justifies the assumption that the temporary grouping between 2iGas and LD was established in the pursuit of an unlawful purpose. In particular, the Administrative Judge excluded that i) the fact that the plaintiffs individually possessed all the technical and financial requirements for the participation in the tender, and ii) the absence of an industrial and managerial justification to the establishment of the temporary grouping of

¹ "Raggruppamento temporaneo di imprese" or "RTI".

² "Tribunale Amministrativo Regionale del Lazio, Roma", or "TAR Lazio-Roma".

companies, are in themselves sufficient to demonstrate the intent of eliminating competition by joining forces.

In addition, TAR Lazio-Roma found that the act of the Antitrust Authority does not present sufficient arguments to demonstrate that the temporary grouping was expressly aimed at limiting access to the selection process, on equal terms, to other economic actors: according to the Court, the perverting use of an otherwise perfectly legitimate instrument must be adequately demonstrated also with reference to the effect that its use is likely to produce, *"if we are to avoid the conclusion, paradoxical indeed, of the illegality of the agreement itself."*



The Court clearly adopted a more pragmatic perspective, noting that there are not sufficient external elements to prove the unlawfulness of the grouping agreement and that, furthermore, the grouping did not create any restrictions to the entry in the market. This leads to the conclusion that other companies were in the position to take part in the tender, presenting their offers, and that therefore the offer of the temporary grouping, calibrated on the minimum level, was most probably due to the fact that the activity – on the basis of the call for tender conditions – had a low return of investment. The Court adopted a more convincing approach, based on the mechanisms of the market and refutes the (more complex) reconstruction offered by the Antitrust Authority, and – in accordance with the principle of "Occam's Razor" – is to be preferred.

The Administrative Court, therefore, looks beyond the formal possession of the capacity requirements, correctly recognizing the difference between the illicit collaboration *"in the pursuit of a broader strategic understanding, aimed at the alteration and / or restriction of competition"* and the possibility for enterprises to resort to temporary groupings between them for *"reasons of corporate policy"*.

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Todarello & Partners provides legal assistance on all issues relating to topics covered in this article. The lawyers of the Firm have significant experience in the related field, regularly assisting some of the major market players and representing them in legal proceedings before all competent courts.

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