CLIFFORD CHANCE

ITALIAN COMPETITION NEWSLETTER

4/2024

In this issue, dedicated to the ICA's decisions for the month of December 2024:

- Abuse of dominant position: the ICA accepted the set of commitments presented by Booking.com in the proceedings for abuse of dominant position in the online hotel booking and intermediary services market.
- Concentrations: the ICA has approved the merger between Vodafone and Swisscom, subject to commitments.
- Concentrations: the ICA authorised the sale of certain business units from Unicoop to PAC (Conad) with corrective measures.
- Unfair Commercial Practices: the ICA fines Poste Italiane for misleading advertising in postal savings.

In this issue, dedicated to the Administrative Judiciary's rulings in antitrust and consumer protection matters for the month of December 2024:

- The Council of State Upholds the ICA's decision to fine Apple for lack of transparency in data collection for commercial purposes.
- The Council of State overturns the ICA's decision to fine Sicily By Car, Goldcar Italy, B-Rent, Europcar Italia, and Locauto Rent for Unfair Clauses.
- The Administrative Court of Lazio (TAR) rejects the appeal against the ICA's decision to fine Samsung, Opia, and WB for unfair commercial practices regarding the "Samsung – Change with Galaxy" promotion.
- The Regional Administrative Court of Lazio (TAR) upholds the fine imposed on Google for failing to comply with the obligation to publish the ICA's decision on unfair clauses in its terms of service.

ABUSE OF DOMINANT POSITION: THE ICA ACCEPTED THE SET OF COMMITMENTS PRESENTED BY BOOKING.COM IN THE PROCEEDINGS FOR ABUSE OF DOMINANT POSITION IN THE ONLINE HOTEL BOOKING AND INTERMEDIARY SERVICES MARKET

On 17 December 2024 (decision no. 31412), the Italian Competition Authority (the "**ICA**" or the "**Authority**") accepted and made binding the set of commitments presented by Booking.com B.V. and Booking.com (Italy) S.r.l. (jointly referred to as "**Booking**") during a proceedings aimed at investigating a potential abuse of dominant position of an exclusionary nature in the national market for online intermediary and booking services for hotels and other accommodation facilities.

In March 2023, AICA - the Italian Association of Confindustria Hotels, and Federalberghi had filed a complaint regarding various practices adopted by Booking, which they argued restricted the autonomy of accommodation providers in determining the commercial conditions offered to customers.

In the communication to open the investigation, the ICA had hypothesised a violation of Article 101 TFEU, consisting of an abusive strategy aimed at (i) dissuading accommodation facilities from differentiating prices across various online sales channels, and (ii) excluding or marginalising the position of other online travel agencies (OTAs) and discouraging new competitors from entering the market, ultimately harming consumers through higher prices and reduced choice in online booking and intermediary services.

More specifically, the alleged abusive strategy is said to have been executed through the joint application of certain premium programmes, namely:

a) the "Partner and Preferred Plus" (PNP+) Programme", designed to boost the visibility of partners' properties on Booking's website in exchange for higher commission fees and a commitment to offer competitive pricing – i.e. prices no higher than those listed on other OTA platforms - while failing to provide any concrete evidence of the actual benefits or results experienced by the properties that joined the programme; and

b) the "Booking Sponsored Benefit" (BSB) Programme", which allowed Booking to unilaterally apply a discount whenever it deemed the prices set by structures were not competitive, based on the so-called external price overview (EPO) – a comparison with prices offered by competing OTAs – in order to reduce the price difference between what was visible on its platform and the lowest price available online.

Specifically, since participation in PNP+ was conditioned on achieving a performance score between 70% and 90%, based on the annual bookings of the structures, these would be incentivised to apply competitive prices to improve their performance and meet the requirements of PNP+. As a result, they were reluctant to offer lower prices than those of other OTAs, even when faced with lower commissions. Moreover, through the BSB programme, Booking could still replicate any better deals available on competing OTA websites.

Among the most significant commitments made by Booking to address the issues identified by the Authority, the following are noteworthy: (i) the removal of the obligation to offer competitive prices and any reference to the performance score from the requirements for joining PPN+, (ii) the removal of the EPO from the relevant criteria for the BSB programme, and (iii) the provision to accommodation facilities of accurate and detailed information on the impact

and results achieved through participation in the aforementioned premium programmes.

CONCENTRATIONS: THE ICA HAS APPROVED THE MERGER BETWEEN VODAFONE AND SWISSCOM, SUBJECT TO COMMITMENTS

With decision no. 31416 of 19 December 2024, the Italian Competition Authority (the "**ICA**" or the "**Authority**") has authorised, subject to commitments, the acquisition of exclusive control of Vodafone Italia S.p.A. ("**Vodafone**"), active in the telecommunications sector for both mobile and fixed networks, along with its subsidiaries, by Swisscom Italia S.r.l. ("**Swisscom**"), the holding company of Fastweb S.p.A. ("**Fastweb**"), which operates in the provision of broadband and ultra-broadband telecommunications services as well as ICT services (the "**Transaction**").

The Authority first identified the following relevant markets:

a) the national wholesale active and passive fixed network access services market;

b) the national retail fixed network access services market for residential customers;

c) the national retail fixed network access services market for business customers; and

d) the national retail fixed network access services market for the Public Administration.

Based on the evidence gathered during the investigation, the Authority identified potential competition concerns arising from the Transaction in the retail residential, business and Public Administration markets.

In particular, the Authority noted that, without corrective measures, the national retail fixed network access services market for residential customers would likely consolidate into an oligopolistic structure, with the number of major players - TIM S.p.A. ("**TIM**"), Fastweb+Vodafone, and WindTre S.p.A. ("**WindTre**") - decreasing from four to three. Together, these companies would control over 80% of the market, which is characterized by significant rigidity due to high switching costs and bundling practices between fixed and mobile services that create lock-in effects. Furthermore, in line with the European Commission's Guidelines on horizontal concentrations, the ICA observed that, among other factors, the high substitutability between the services offered by Fastweb and Vodafone, coupled with the reduced competitive constraint between them, would allow Fastweb to strengthen its market position significantly, a position that could not be counterbalanced by the competitive pressure exerted by the other two remaining main operators post-Transaction (TIM and WindTre).

With respect to the national retail fixed network access services markets for business customers and for the Public Administration, the Authority also considered that the Transaction would be potentially harmful to competition, as it could lead to a duopolistic market contested between TIM and the combined Fastweb/Vodafone entity, which would be difficult to challenge due to high entry barriers. The Authority also highlighted TIM's declining market share in recent years in the segment of services for larger customers, compared to the potential growth of Fastweb and Vodafone. Furthermore, Vodafone's exit from the market would eliminate Fastweb's primary competitor in public tenders for fixed-line

telecommunications services for public administrations, a segment in which both companies had recently secured contracts.

Regarding the national wholesale active and passive fixed network access services market, however, the ICA found no significant concerns despite the objections raised by Open Fiber S.p.A. ("**Open Fiber**"), FiberCop S.p.A. ("**FiberCop**"), and other smaller operators (Sky, Poste, Retelit, and Colt), including: (i) the possibility that, following the Transaction, Fastweb might decide to stop providing wholesale access services to third parties, reserving them exclusively for its own use; and (ii) the risk that the Fastweb+Vodafone combination could benefit from advantageous access conditions to FiberCop's network, as set out in the pre-existing Fastweb Master Service Agreement, potentially leading to the migration of Vodafone's customers currently served via Open Fiber's networks.

In response to the communication to open the investigation, Swisscom proposed three commitments which the ICA deemed effective in mitigating the potential anticompetitive effects of the concentration, with oversight by an independent third-party trustee. Firstly, in order to counteract the anticipated oligopolistic scenario in the retail market for residential customers, Swisscom committed to ensuring that Fastweb would not terminate existing wholesale service contracts for access to ultra-broadband fixed networks and would negotiate new contracts in good faith, thereby facilitating the entry of new operators.

With regard to the national retail fixed network access services markets for business customers and t for the Public Administration, Swisscom committed to ensuring that the entity resulting from the Transaction would make its infrastructure available to retail competitors. Moreover, to promote competition in public tenders and ensure a level playing field among competitors in the fixed-line telecommunications market for public administrations, Fastweb and Vodafone agreed to provide contracting authorities and competitors with detailed, disaggregated information on the services they provide to each public administration, thus reducing the informational asymmetry between winning operators and new entrants, while contributing to the growth and participation of alternative operators.

CONCENTRATIONS: THE ICA AUTHORISED THE SALE OF CERTAIN BUSINESS UNITS FROM UNICOOP TO PAC (CONAD) WITH CORRECTIVE MEASURES

Last September, DOC Roma S.r.l., a subsidiary of Unicoop Firenze soc. coop. ("**DOC**"), transferred the ownership of thirteen DOC-branded stores located in the Rome area to PAC 2000A Soc.coop. ("**PAC**"), the largest cooperative within the Consorzio Nazionale Dettaglianti CONAD S.c.a.r.l. ("**CONAD**") (the "**Transaction**").

As Italian competition law on concentrations (Law No. 287 of 10 October 1990) does not require a standstill obligation – meaning the suspension of the transaction's effects and a prohibition on its implementation before receiving the Authority's approval, as required for EU-level concentrations under Regulation (EC) No. 139/2004 – the parties proceeded with the closing on 16 September, without waiting for the completion of the antitrust procedure.

In this context, the ICA has proposed introducing a standstill obligation as part of the Proposals for Pro-Competitive Reform for the 2024 Annual Market and Competition Law, with the aim of aligning national regulations with EU

standards. Indeed, "if, at the conclusion of the investigation, the transaction already completed were found to harm the competitive dynamics in the affected markets and were subsequently prohibited, restoring the previous competitive status quo could prove challenging, if not impossible".

Upon recognising that the Transaction could significantly hinder competition in the retail markets for food and non-food consumer goods, the Italian Competition Authority (the "**ICA**" or the "**Authority**") imposed corrective measures ex post, through decision no. 31424 of 17 December 2024.

Among the various pieces of evidence gathered by the ICA during the investigation that support this conclusion, two points stand out, particularly regarding several local geographical areas, identified through isochrones:

i. the competitive proximity, driven by both structural factors, such as combined market shares exceeding 30%, and commercial factors, including the similarity in store formats and quality between DOC and PAC-branded outlets; and

ii. the clear incentives for PAC to raise prices, with the ICA observing that nearly half of customers, if a DOC store were to close, indicated they would turn to PAC.

To restore effective competition, the ICA determined that PAC must divest two stores strategically located – as proposed by PAC itself – to address concerns across all three geographical areas identified by the ICA and it will not be allowed to buy back the points of sale involved in the transfer for a period of ten years from the authorization of the Transaction. This divestment must be made (a) to a third party that is commercially independent of PAC, with the incentive and the technical and financial capacity to maintain and grow the business, (b) based on agreements previously submitted for the ICA's approval, and (c) under the oversight of a specially appointed trustee (monitoring trustee) to ensure the correct implementation of the corrective measures.

UNFAIR COMMERCIAL PRACTICES: THE ICA FINES POSTE ITALIANE FOR MISLEADING ADVERTISING IN POSTAL SAVINGS

With decision no. 31409/2024,, dated 3 December, Poste Italiane S.p.A. ("**Poste**") was fined €540,000 by the Italian Competition Authority (the "**ICA**" or the "**Authority**") for disseminating misleading advertising messages concerning the "Libretto Smart" as part of its postal savings systems in collaboration with Cassa Depositi e Prestiti S.p.A.

The conduct, dating back to 2015 and initially sanctioned with decision no. 25758/2015 – later annulled due to the failure to acquire Italian Securities and Exchange Commission's (CONSOB) mandatory opinion during the investigation – involved the dissemination of promotional messages through various channels (including television networks, Poste's website, and print media) that highlighted the advantageous features of the Libretto Smart product, including the 1.5% interest rate. However, these messages failed to disclose crucial information about the conditions and limitations attached to the associated services.

The ICA's investigation revealed that the 1.5% interest rate was subject to a range of detailed conditions (such as the activation of an electronic card) and strict time constraints. Additionally, the ability to access the interest was conditional upon maintaining a balance of at least 90% of the initial deposit,

effectively making the Libretto Smart incompatible with the advertised flexible withdrawal features.

The Authority noted that Poste's overall presentation was likely to mislead consumers regarding the true nature of the product, which, contrary to its promotion, was heavily restricted and carried significant usage limitations. Therefore, despite the conduct being nearly a decade old, the ICA deemed it necessary to pursue the public interest by addressing the unfair practices and imposing the relevant sanctions, in order to provide greater legal certainty for both consumers and businesses, guide their market behaviour, and prevent the recurrence of illegal conduct.

THE COUNCIL OF STATE UPHOLDS THE ICA'S DECISION TO FINE APPLE FOR LACK OF TRANSPARENCY IN DATA COLLECTION FOR COMMERCIAL PURPOSES

On 2 December 2024, the Council of State partially upheld the appeal filed by the Italian Competition Authority (the "**ICA**" or the "**Authority**") against ruling no. 10015/2022, in which the Regional Administrative Court of Lazio ("**TAR**") had annulled the ICA's decision no. 29888/2021. Indeed, the Authority had previously imposed two fines of €5,000,000 on Apple Distribution International Limited ("**Apple**") for two unfair commercial practices, deemed misleading and aggressive. Specifically, Apple:

a) when creating an Apple ID, required to access the App Store and other related services, did not adequately inform users about the collection of their personal data for commercial purposes. Instead, it presented this data collection as beneficial to users, claiming that it would result in more personalised services, and referred to another source for further details;

b) preselected consent for this data collection, with an opt-out option available only through a complex and non-immediate deactivation procedure, improperly influencing users' choices.

Regarding the first practice, the TAR Lazio had initially ruled that the collection of data provided for creating the account did not imply immediate or direct commercial exploitation by Apple, meaning that the data would only be monetised if users later interacted with the App Store (e.g., downloading an app or subscribing to a service).

As for the potentially misleading terms used to describe the data processing purposes, the TAR had argued that, as an online store, users were fully aware that terms like "personalisation," "suggestions," and "recommendations" could conceal commercial purposes. Finally, the TAR considered Apple's profiling activity via emails or communications containing suggestions and recommendations not to be misleading, as users still retained the final decision to make a purchase, thus ruling out undue influence.

During the second-instance proceedings, the ICA reiterated that the key issue was not the commercial use of the data itself, but the failure to directly inform users from the outset about the specific purpose of the data collection. The ICA argued that the TAR's approach placed an unreasonable burden on average consumers, who, simply by accessing an online store, would be expected to independently recognise the commercial purposes of data collection. Furthermore, the ICA emphasised that the TAR's interpretation would significantly limit the responsibility of a global operator like Apple, undermining consumer protection.

As for the second practice, the Authority argued that among the commercial decisions for which consumer freedom of choice must be ensured, regardless of any purchases, should also be the expression of consent for the use of data for commercial purposes. This is because such data inherently holds significant economic value and, therefore, can be subject to capitalization. In this context, pre-selected consent would undermine the aforementioned freedom.

The Council of State partially upheld the ICA's appeal, confirming the fine regarding the first practice but annulling the fine imposed for the second one.

In its ruling, the Council of State endorsed the Authority's conclusions, whereby the granting of consent is to be considered a commercial decision. Therefore, in order for consumers to make an informed choice, they should have had all the necessary information from the outset, while mere references to secondary sources would not have sufficed. Considering the increasing importance consumers place on their privacy, the Council of State noted that it was reasonable to assume that, had consumers been fully informed about how their data would be used for profiling, they might have chosen not to create an Apple ID in the first place.

Conversely, the Council of State rejected the ICA's arguments regarding the second practice, aligning with its previous judgment no. 2631/2016, stating that the mere preselection of consent by Apple did not, in itself, constitute an aggressive practice, "as there was no element which would result in a form of concrete manipulation or subtly anesthetize the user's will, not merely affecting their right to access the necessary information to make a free and informed choice, but rather resulting in conduct that could even coerce the user's behaviour (and thus their freedom of choice)". In other words, although the deactivation procedure was considered complex and not immediate, it was deemed free from manipulative intent and, therefore, did not involve the aggressive conduct alleged by the ICA.

THE COUNCIL OF STATE OVERTURNS THE ICA'S DECISION TO FINE SICILY BY CAR, GOLDCAR ITALY, B-RENT, EUROPCAR ITALIA, AND LOCAUTO RENT FOR UNFAIR CLAUSES

Last December, the Council of State upheld the appeals filed by B-Rent S.r.l., Goldcar Italy S.r.l., Sicily By Car S.p.A., Europcar Italia S.p.A., and Locauto Rent S.p.A. (the "**Companies**") (judgments no. 9659/2024, no. 9660/2024, no. 10001/2024, no. 10039/2024, no. 10162/2024), which operate in the car rental sector, thereby annulling the decisions of the Italian Competition Authority (the "**ICA**" or the "**Authority**") that found certain clauses in their rental contracts to be unfair.

Specifically, these contracts required a payment ranging from €40 to €55 as a fee for managing any administrative fines imposed on consumers.

According to the ICA, these clauses did not represent a simple fee, but rather penalties. The amounts charged were deemed excessively high in relation to the actual costs incurred by the companies for managing the fines. Indeed, the investigation revealed that these costs were primarily limited to retrieving the personal details of the customer responsible for the infraction - information already stored in the company's database—and transmitting it to the relevant authority, allowing them to contact the drivers for payment.

In the first-instance rulings, the Regional Administrative Court (TAR) upheld the ICA's findings, first acknowledging that the clauses in question were penalties and secondly, their unfairness. In this regard, The Court noted that the alleged fees (i) were primarily intended to provide an advance, lump-sum settlement for damages, and (ii) in light of the costs incurred by the Companies in managing the fines, appeared to be grossly disproportionate, resulting in a significant imbalance of rights and obligations for consumers under the contracts.

Upon review, the Council of State upheld that the clauses in question were intended to pre-determine damages and, given the consumer's contractual obligation to comply with traffic regulations, they functioned as a response to a breach of contract - similar to penalty clauses. However, in accepting the Companies' arguments regarding the potential unfairness of the clauses, the Council of State concluded that the evidence presented by the ICA was insufficient to demonstrate that the amounts charged were manifestly excessive.

The Council of State clarified that manifest excessiveness should be assessed under Article 1384 of the Italian Civil Code, taking into account the creditor's interest in ensuring compliance, rather than other factors such as the costs incurred by the Companies. In this case, the Companies' interest was not only to avoid higher administrative costs related to handling the violations but also to prevent potential damage to the vehicles caused by road accidents.

THE ADMINISTRATIVE COURT OF LAZIO (TAR) REJECTS THE APPEAL AGAINST THE ICA'S DECISION TO FINE SAMSUNG, OPIA, AND WB FOR UNFAIR COMMERCIAL PRACTICES REGARDING THE "SAMSUNG – CHANGE WITH GALAXY" PROMOTION

On 14 December 2024, the Regional Administrative Court of Lazio (TAR) ruled on the appeals filed by Samsung Electronics Italia S.p.A. ("**Samsung**"), World Business S.r.l. ("**WB**"), and Opia Limited ("Opia" and, together with Samsung and WB, the "**Companies**") against decision no. 30671/2023 issued by the Italian Competition Authority (the "**ICA**" or the "**Authority**"), whereby the ICA had found that Samsung's "Samsung – Change with Galaxy" promotion constituted an unfair commercial practice. As a result, Samsung was fined €3,000,000, while the other two companies received fines of €300,000 each.

As part of the promotion, consumers purchasing a Samsung smartphone or other Samsung product were presented with the opportunity to have their old device evaluated by third-party professionals - WB and Opia - in order to exchange it for a new Samsung product at a discounted price. Promotional slogans included: "Changing your old Galaxy has never been easier" and "Find out in just a few steps how to buy it with the evaluation of your old device."

The ICA deemed the promotion both misleading and aggressive. The offer was structured in two stages: first, the consumer would pay the full price for the new product, and only afterward would they send in their old device for evaluation. If the evaluation was favourable, the consumer would receive credit for the value of their old device, along with a discount on the new product. However, if the evaluation was negative, the only option available was to have the old device returned, with no possibility of cancelling the contract or receiving a refund. The ICA also pointed out that the lengthy timeframes involved in the process—waiting for the evaluation, receiving the discount, or returning the device—

meant that consumers could not easily access the promised refund or reclaim their property in a reasonable period.

Before the TAR, Samsung argued that the responsibility for issues related to refunds or returns lay with Opia and WB, asserting that the promotion itself was not misleading as it directed consumers to other sources for informational purposes. In contrast, Opia and WB claimed that, as partners solely tasked with evaluating the products, they were not involved in the creation of the offer or the communication strategies, and therefore should not be held accountable.

The TAR, in line with the ICA's previous findings, determined that all three companies were equally responsible for the contested actions. The Court highlighted that each of the Companies had played a role in defining the contractual, operational, and promotional aspects of the initiative, regardless of the fact that the promotion was exclusively advertised on Samsung's website. Upholding the ICA's conclusions, the TAR ruled that Samsung's claims misled consumers into believing they could easily access the discount through a straightforward process, while failing to clarify the actual details of how the promotion worked. This omission deprived consumers of the essential information needed to make an informed decision.

THE REGIONAL ADMINISTRATIVE COURT OF LAZIO (TAR) UPHOLDS THE FINE IMPOSED ON GOOGLE FOR FAILING TO COMPLY WITH THE OBLIGATION TO PUBLISH THE ICA'S DECISION ON UNFAIR CLAUSES IN ITS TERMS OF SERVICE

On 4 December 2024, the Regional Administrative Court of Lazio (TAR Lazio) rejected the appeal filed by Google Ireland Limited ("Google" or the "Company") and upheld the decision (no. 30076/2022) issued by the Italian Competition Authority's (the "ICA" or the "Authority"), which had imposed a €50,000 fine on Google for failing to comply with the obligation to publish a decision that found certain clauses in its Google Drive terms of service to be unfair.

Indeed the ICA, in its decision no. 29817/2021, had previously found certain clauses in Google Drive's terms of service to be unfair and had ordered the publication of an excerpt of that decision on the Italian homepage of the website www.google.com for twenty consecutive days, pursuant to Article 37-bis of the Consumer Code,.

In its compliance report, Google explained that it had created an information box on its homepage, allowing users to access the excerpt prepared by the ICA by clicking "Read here," to dismiss the banner by clicking "Close." Specifically:

a) for users without a Google account, those who had not logged in, or those who had deleted their cookies, the banner would appear both on their first visit to the site and on all subsequent visits, even if they had previously clicked "Read here" or "Close";

b) however, for users who had logged into their Google account and clicked either "Read here" or "Close," the banner would no longer be displayed.

In the appeal, the Company argued that the purpose of Article 37-bis was simply to inform consumers about the existence of the decision finding the clauses unfair, and did not require constant reminders. In Google's view, the ICA had imposed the fine without assessing the actual effectiveness of the communication methods it had adopted.

However, in its ruling, the TAR upheld the ICA's decision, observing that the publication order is intended to enable consumers to view the excerpt of the decisions for the entire period specified by the ICA, rather than simply informing them superficially about the existence of the decisions. The administrative judge concluded that selective visibility of the decision based solely on the possession of a Google account or log-in could not be deemed compliant with the ICA's order.

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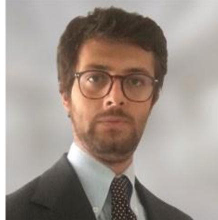
ITALIAN ANTITRUST TEAM

Luciano Di Via

Partner, Head of Antitrust in Italy



Antonio Mirabile

Senior Associate

Maria Bazzini

Associate

Eleonora Zappalorto

Associate

Alessandra Oliva

Associate

Luca Borin

Associate

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www.cliffordchance.com

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