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Italian Competition Law Newsletter

Highlights

- The ICA fines Hera and ComoCalor over abuse of dominant position for excessive pricing for district heating services, clears IREN of similar objections
- The ICA clears Swisscom's acquisition of Vodafone Italia subject to conditions
- ICA accepts Booking.com commitments and closes an abuse of dominance investigation

The ICA fines Hera and ComoCalor over abuse of dominant position for excessive pricing for district heating services, clears IREN of similar objections

In Case A564 – *Hera/District Heating Price* and Case A565 – *ComoCalor/District Heating Price*, the Italian Competition Authority ("**ICA**") found two undertakings operating as monopolies in the provision of district heating services in the municipalities of Ferrara and Como, respectively, to have infringed Article 102 TFEU by imposing excessive prices for the supply of such services. Hera S.p.A. ("**Hera**") was fined in the amount of nearly €2 million, whereas ComoCalor S.p.A. ("**ComoCalor**") was hit by a lower sanction) (almost €300,000).

The ICA's stance on district heating

The ICA decisions (the "**Decisions**")[1] recalled that district heating systems provide both heating and cooling services for buildings, as well as domestic hot water production, through the centralized generation of thermal energy, which is then transmitted via a network of pipes to multiple end users. These users are typically located in relatively close proximity to one another and connected to the local distribution network, although they may be situated several kilometers from the source of thermal generation.[2]

Given the vertically integrated structure of district heating supply, competition between providers of energy inputs is structurally absent. As a result, the only possible dimension of competition is between alternative heating systems themselves, rather than between competing suppliers of energy inputs within the same system.

[1] ICA, Decisions of November 26, 2024, No. 31385, A564 – *Hera/Prezzo del teleriscaldamento*, and No. 32386, A565 – *ComoCalor/Prezzo del teleriscaldamento*.

[2] Thermal energy is thus not produced at the end users' premises; rather, centralized plants generate it, often exploiting sources unavailable to individual self-generation systems, such as waste-to-energy plants or geothermal resources. In any case, natural gas-fired boilers are frequently integrated into centralized plants to complement or support generation from renewable sources.

According to the Decisions, competition between alternative heating systems occurs, if at all, at two critical stages: first, ex ante, when the user selects the heating system to be installed; and second, ex post, after the system has been installed, when the user evaluates the possibility of switching to an alternative heating solution. However, the ICA finds that in practice competition at both stages is severely constrained. At the system selection stage, the incentives for heating service providers to compete are limited, as the economic interests associated with exploiting the existing customer base over time tend to outweigh those linked to the acquisition of new customers. After installation, the possibility of switching to a different heating system is severely restricted by a series of factors identified by the ICA, including high switching costs associated with the technical burden of installing a new system, potential deterioration in the building's energy performance, and the financial and procedural burden of researching and assessing alternative systems. In addition, uncertainty regarding the timing and cost-effectiveness of switching, regulatory constraints such as condominium decision-making procedures, and the existence of State incentives favouring district heating further limit the actual substitutability of district heating services.

Moreover, the ICA observed that consumers perceive the connection to a district heating network as fundamentally different from the adoption of traditional heating systems, in particular due to the greater environmental sustainability associated with district heating solutions. This further reduces the degree of substitutability between district heating and other heating options.[3]

District heating in Italy and the complaints from which the ICA's procedures originated

In Italy, each district heating provider enjoys a dominant position stemming from its local monopoly over the management of a district heating network, typically established through concessions awarded by local authorities.[4]

Since October 2021, both Europe and Italy have experienced a sharp rise in natural gas prices, accompanied by significant price volatility, primarily as a result of the geopolitical uncertainty triggered by the Russian invasion of Ukraine.

Moreover, by a regulatory amendment enacted in April 2023,[5] the Italian Regulatory Authority for Energy, Networks and Environment ("**ARERA**") was granted the power to set the heat transfer price for the district heating sector. Since then, ARERA has approved a transitional price method applicable from January 2024 and currently extended until December 31, 2025. Until ARERA's intervention, however, the setting of district heating prices to the consumer was left to the operating companies within the framework of their concessions with local authorities.

Against this background, the ICA received complaints from users of the district heating networks of Ferrara (A564) and Como (A565), arguing that suppliers' price formulas imposed an undue and unjustified burden onto customers and exposed them to the risk of changes in the cost of natural gas to an extent that significantly exceeded the impact of such changes on the supply costs borne by district heating networks Hera and ComoCalor (which both relied mainly on heat sources alternative to natural gas). As a result, in the context of high natural gas prices, the two suppliers charged excessive prices to their respective users.

[3] Based on this analysis, the ICA concludes that district heating constitutes a separate product market, distinct from that of other heating systems, and that the relevant geographic market coincides with the coverage of the individual district heating network.

[4] Italian district heating networks, including those involved in the present proceedings, exhibit a vertically integrated structure whereby the provider injects heat into its network and supplies end users with thermal energy either generated internally or procured from affiliated companies, under the terms of specific intra-group agreements.

[5] Law No. 41 of April 21, 2023 (converting into law the Decree Law No. 13 of February 24, 2023).

A564 – The Hera case

Hera's pricing methodology was based either on the principle of the avoided cost of natural gas heating, or on a base price indexed to wholesale gas market trends. As a result, the price of district heating in Ferrara was determined by reference to the price of a fuel—natural gas—that played only a minor role in the generation of heat within the network.

The ICA emphasized in its decision that the focus of the case was not on the avoided cost pricing methodology per se. Rather, the ICA's concern was Hera's failure to incorporate adequate correction or safeguard mechanisms reflecting the structural decoupling of Ferrara's heat generation costs from wholesale natural gas prices. Given that the majority of thermal energy supplied was generated through geothermal and waste-to-energy sources largely unaffected by gas price volatility, Hera's pricing method enabled it to capture substantial economic rents disconnected from actual cost movements.

The ICA's analysis revealed that Hera's sales revenues—indexed to natural gas prices—experienced a sharp increase during the 2021–2023 period, while the underlying costs of heat production and distribution remained relatively stable. This resulted in a significant widening of the margin between average revenues and average costs, particularly in 2022.

Moreover, the ICA noted that Hera's returns on net assets within the Ferrara network exceeded not only the returns recorded across Hera's other district heating networks but also the typical profitability levels recognized for operators active in energy infrastructure services (such as electricity and natural gas networks).

Applying the *United Brands* two-pronged test established by the EU Court of Justice for excessive pricing, the ICA first assessed whether there was a significant difference between costs incurred and prices charged. The multiple cost/revenue analyses conducted yielded clear evidence of an excessive price-cost margin for 2022, although results for 2023 were less conclusive. Accordingly, the ICA confined the infringement period to the year 2022.

As to the second limb of the analysis, concerning the unfairness of Hera's excessive pricing, the ICA concluded that Hera's conduct was aimed at appropriating the surplus generated by the Ferrara consumers' high willingness to pay for an essential service in conditions of inelastic demand, exacerbated by the high switching costs and structural lock-in effects inherent to district heating networks.
Instead of allowing end-users to benefit from the availability of low-cost renewable heat sources, Hera appropriated these advantages, allegedly reallocating the surpluses to subsidize other district heating networks operated by the group elsewhere in Italy, as part of a broader internal price equalization strategy.

A565 – The ComoCalor case

In its decision concerning the provision of district heating services in Como, the ICA rejected ComoCalor's reliance on the so-called "state action defense," noting that under the concession in force the company was empowered to propose modifications to the pricing formula established in agreement with the Municipality,[6] but failed to do so, thereby voluntarily maintaining a pricing mechanism that gave it unjustified economic advantages.

Applying the analytical framework developed in the *United Brands* case law, the Authority established the existence of clear and consistent evidence of a substantial divergence between revenues and costs in 2022. In its view, the prices charged by ComoCalor doubled compared to the previous year, without any corresponding improvement in service quality, increase in demand, or cost justification (total revenues

[6] The parameters and the updating mechanisms of ComoCalor's pricing formula were defined – linking prices to the natural gas reference price – within the original concession. Although the pricing formula dated back to 1986 and had never been revised, the concession expressly granted ComoCalor the ability to modify the pricing methodology, should market conditions warrant such a change.

increased by over 75%, whereas total costs rose by only around 15%, resulting in a substantial and unjustified increase of the price-cost margin).

Moreover, the ICA held that the prices charged by ComoCalor in 2022 were also unfair in absolute terms, given that the price increases bore no reasonable relation to cost developments. The Authority further found that ComoCalor's continued reliance on a pricing formula linked to the avoided cost of natural gas, despite the fact that the vast majority of the heat supplied in Como was produced from waste-to-energy sources largely independent of natural gas costs, resulted in the imposition of an undue and disproportionate burden on consumers.

A565 – The Iren case

The third Article 102 investigation of the ICA (Case A563) concerned several companies of the IREN Group ("**Iren**"), operating in the district heating ecosystem of Parma and Piacenza, spanning activities from waste collection to the operation of waste-to-energy and gas-fired generation plants, and the supply of thermal energy to end users.

The contractual arrangements between Iren and the relevant Municipalities left the company free to determine district heating tariffs, which it did based on the principle of the avoided cost of natural gas heating.

The ICA found that Iren held a monopoly in the district heating markets of Parma and Piacenza. In order to assess the complainants' allegations of excessive pricing, the ICA applied the *United Brands* test, comparing the prices charged to end users against the underlying cost of production.

Unlike in the two other cases, however, the ICA concluded that the evidence did not substantiate a finding that Iren's pricing was excessive and unfair. The comparison between revenues and costs did not reveal a significant and unjustified difference, nor did the ICA find sufficient indicators of unfairness in absolute terms.

Accordingly, the ICA closed the investigation without a finding of any infringement.

The ICA clears Swisscom's acquisition of Vodafone Italia subject to conditions

The ICA authorized Swisscom Italia's acquisition of Vodafone Italia, subject to a package of behavioral remedies designed to address competition concerns arising across certain key telecommunications markets.[7]

Background

Swisscom Italia S.r.l. ("**Swisscom Italia**") is the Italian subsidiary of Swisscom Group and operates through Fastweb S.p.A. ("**Fastweb**") to provide telecommunications, ICT, and wholesale fixed-line access services in Italy. Vodafone Italia S.p.A. ("**Vodafone Italia**") is the Vodafone Group company active in Italy in the provision of mobile and fixed telecommunications services to both consumer and business customers. On August 12, 2024, Swisscom Italia notified the ICA of its agreement to acquire the entire share capital of Vodafone Italia (the "**Transaction**"). Following a preliminary assessment, the ICA opened a Phase II investigation on September 10, 2024, on the ground that the Transaction could significantly impede effective competition in various wholesale and retail markets.[8]

7 ICA, Decision of December 19, 2024, No. 31416, in case C12659 – *Swisscom Italia/Vodafone Italia*.

8 ICA, Decision of September 10, 2024, No. 31320, in case C12659 – *Swisscom Italia/Vodafone Italia*.

Relevant Markets

The ICA identified five relevant markets impacted by the Transaction: *(i)* wholesale fixed-line access services: enabling operators without their own network to offer fixed voice and data services to end users. This is an highly concentrated market, characterized by the presence of two main players (FiberCop S.p.A. and Open Fiber S.p.A.), with Fastweb being the leading alternative operator; *(ii)* wholesale dedicated-capacity network access services: non-shared, high-capacity access services mainly for businesses and public administrations, technically distinct from mass-market access services; *(iii)* retail fixed-line services for residential customers: a market characterized by players' uniform pricing strategies, where Vodafone and Fastweb held a combined share of approx. 25–35%, competing with TIM and WindTre; *(iv)* retail fixed-line services for business customers: connectivity services for SMEs and large enterprises, where Fastweb and Vodafone together represented a significant competitive constraint against incumbent TIM; *(v)* retail fixed-line services for public administrations: a market shaped by public procurement tenders, with major entry barriers linked to infrastructure, technical specialization, and knowledge of client configurations.

The ICA's Concerns

Vertical Effects

As far as the wholesale fixed-line access and dedicated-capacity access markets were concerned, the ICA expressed its concern that the merged entity could favor Vodafone Italia by selectively offering access to Fastweb's wholesale services, thereby disadvantaging other retail competitors. Given Fastweb's role as a provider of flexible active access, any foreclosure strategy by the merged entity could severely restrict its competitors' ability to structure their downstream retail offerings, especially in markets where alternative wholesale options (such as those offered by FiberCop and Open Fiber) are limited or technically less advantageous.

Horizontal Effects in Retail Markets

In the residential retail fixed-line market, the Transaction would lead to a reduction from four to three major players. The ICA underlined that: *(i)* barriers to entry, both infrastructural and reputational, remain high; *(ii)* demand inertia, due to limited consumer propensity to switch providers, would exacerbate the effects of the reduction of competitive pressure in the market; *(iii)* TIM and WindTre, despite their respective size, would not exert sufficient competitive constraints, especially given their relatively stable market shares and limited disruptive strategies.

In the ICA's view, the elimination of competition between Vodafone and Fastweb would entail the removal of an important dimension of market rivalry, notably in pricing and bundled service innovation, thereby resulting in a stronger oligopolistic structure likely to facilitate coordinated behavior.

In the business fixed-line retail market, the competitive concerns were even stronger. The ICA observed that Fastweb and Vodafone had historically acted as independent, vigorous competitors to TIM. Their combination would create a market structure verging on duopoly, where TIM and the merged entity would share the vast majority of demand, and smaller providers would remain fringe competitors unable to exert significant pricing discipline.

This risk was compounded by the characteristics of business customers, who require complex, customized solutions with high reliability standards, which only operators with extensive proprietary infrastructure and expertise can supply.

Concerns in Public Administration Market

The ICA took the view that the public administration fixed-line retail market is contestable through public tenders. However, two crucial elements threaten effective competition: *(i)* Potential entrants rely on competitive wholesale active access to build tender bids. Any foreclosure or degradation in access conditions indirectly affects the number and quality of bidders; *(ii)* Incumbent operators have a superior knowledge of customers' technical configurations and service evolution needs, giving them a decisive advantage in formulating bids, unless such information asymmetry is overcome by making detailed information equally available to rivals. Although tender design (*e.g.*, division into lots, award limits per operator) promotes participation, structural disadvantages would persist absent remedies to address input access and information gaps.

The ICA's Assessment of Swisscom's Proposed Remedies

The package of behavioral commitments submitted by Swisscom was structured along three axes:

i. **Wholesale Access:** The post-merger entity will grant non-discriminatory access to Fastweb's active network infrastructure for business and public administration customers located within reach of Fastweb's assets. This commitment was intended to maintain input available to competitors and enable them to continue offering services in the business and public sector markets without suffering undue cost disadvantages.

ii. **Tender Information Disclosure:** With regard to the public contracts for which Fastweb or Vodafone is the incumbent provider, the merged entity must provide detailed, disaggregated information about network configurations and service features to public administrations and all qualified bidders. This measure seeks to eliminate the competitive advantage conferred by the incumbent's knowledge, enhancing bid quality and promoting contestability in future public procurement tenders.

iii. **Turnkey Access Services for Residential Operators.** Swisscom undertook to offer standardized, ready-to-use wholesale active access services targeting service-based operators in the residential market. By facilitating the entry and expansion of smaller Internet service providers, this remedy aims to prevent further market concentration and to stimulate competitive offerings to end-users, ensuring continued innovation and price competition.

The remedies will be binding for a period of three years, which the ICA deemed proportionate considering the nature of wholesale contracts and the timing of public tenders and other upcoming market developments). An independent **monitoring trustee** will be appointed to oversee the implementation of the commitments and report any non-compliance.

Final Decision

In light of the comprehensive remedy package addressing both horizontal and vertical concerns, the ICA authorized the Transaction, subject to full and strict compliance with the commitments.

The ICA's decision shows that behavioral remedies may play a crucial role in safeguarding competition in concentrated and infrastructure-heavy sectors, against the background of the ongoing consolidations in the Italian telecoms market.

Other developments

ICA accepts Booking.com's commitments and closes an abuse of dominance investigation

In March 2024, the ICA initiated a formal investigation into the conduct of several companies belonging to the Booking.com group ("**Booking**"), following complaints submitted by two trade associations representing the tourism and hospitality sector in Italy.

The investigation focused on alleged exclusionary practices by Booking allegedly imposing contractual conditions that restricted the pricing freedom of Italian hotel facilities across different online sales channels, thereby harming actual and potential competition from online travel agencies (OTAs).

According to the ICA, Booking's "Preferred Partner" and "Preferred Plus" programs (the "**Programs**") enhanced the visibility of participating hotel facilities in search results in exchange for a commitment to offer "competitive" prices on Booking.com. Participation also required acceptance of the "Sponsored Benefit" mechanism, whereby Booking unilaterally applies discounts on hotel rates on the platform.

Booking proposed a package of without-prejudice commitments aimed at addressing the ICA's preliminary concerns. In particular, Booking committed not to gate entry to the Programs on the prices hotels offered elsewhere. Additionally, Booking committed to implement measures aimed at increasing transparency vis-à-vis hotels regarding the mechanics, costs, and benefits of participating in the Programs.

Following a market test and the assessment of third parties' feedback, the ICA concluded that the commitments offered by Booking were appropriate to eliminate the competition concerns identified at the opening of the proceedings. According to the ICA, the commitments will safeguard the hotels' commercial autonomy in pricing decisions and will enhance competitive dynamics among OTAs in the provision of online intermediation and booking services. Moreover, the ICA concluded that increased transparency measures will enable hotels to make more informed strategic choices regarding participation in the Programs.

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