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Italian Competition Law Newsletter

Highlights

- The ICA finds Bancomat’s proposed new remuneration model for circular withdrawals anticompetitive
- The Council of State partially upholds an appeal against a TAR Lazio judgment that confirmed an ICA decision concerning two cartels in the corrugated cardboard sector

The ICA finds Bancomat’s proposed new remuneration model for circular withdrawals anticompetitive

On November 30, 2022, the Italian Competition Authority (the “ICA”) closed the proceedings initiated on December 1, 2020 against Bancomat S.p.A. (“**Bancomat**”). Bancomat is an Italian company that operates the Bancomat and PagoBancomat circuits, which can be used to make withdrawals at Automated Teller Machines (“**ATMs**”) as well as cashless payments through so-called Points of Sale. In its decision, the ICA found that Bancomat’s proposed new remuneration model for circular withdrawal (the “**Proposal**”), brought to attention of the ICA by Bancomat itself on October 22, 2022, infringed Article 101 of the Treaty on the Functioning of the European Union (the “**TFEU**”).¹

Background

The proceedings concerned the services for cash withdrawal from the Bancomat circuit (the

“**Circuit**”) through ATMs owned by a bank other than the one at which the cardholder has his or her current account (so-called circular withdrawal).

The currently applicable rules for circular withdrawals establish a remuneration system that provides for the payment of an interchange fee (Multilateral Interchange Fee, “**MIF**”) by the cardholder’s bank to the bank that owns the ATM, the fixed amount of which is determined by the Circuit. The payment of the MIF is followed by the payment of a fee by the cardholder to his or her bank (the so-called withdrawal fee), the amount of which is determined by the bank of the cardholder. For a circular withdrawal to take place, the bank that owns the ATM advances the cash to the cardholder and performs certain preparatory activities (such as, for example, verifying the availability of the amount in the cardholder’s bank account). The amount withdrawn is then returned

¹ Decision No. 30381 of November 30, 2022, I849 – *Bancomat-prelievi contanti*.

by the bank of the cardholder along with the payment of the MIF, aimed at remunerating the service rendered.

Alongside this model, currently in force in Italy, there is an alternative remuneration model based on the Direct Access Fee (“**DAF**”), under which the bank that owns the ATM charges a fee directly to the cardholder, regardless of the type of contract with his or her own bank

The Proposal

Bancomat proposed to change the current model of remuneration for circular withdrawals. Its proposal consisted of eliminating (i) the MIF, and (ii) the prohibition on ATM-owning banks charging a DAF directly to the cardholder at the time of withdrawal. In doing so, the ATM-owning bank would no longer be remunerated by the bank of the cardholder, but by the cardholder, who would pay the fee directly to the ATM-owning bank, instead of his or her own bank. The amount of the fee would be shown to customers at the ATM only at the time of authorization of the withdrawal transaction.

According to Bancomat, the proposed change was justified by the increased costs incurred by banks in the management of ATMs, related to the technological evolution of the equipment and the increased risks associated with more sophisticated fraudulent initiatives. According to Bancomat, those costs may in fact be even higher than the amount of the interchange fee. In Bancomat’s view, moreover, the Proposal was likely to produce efficiencies that would actually benefit both competition and consumers. In particular, the Proposal would ensure that a sufficiently widespread network was maintained to serve customers, thus allowing them to continue to have widespread access to cash.

The findings of the ICA

The ICA had several concerns in relation to the Proposal, insofar as the Proposal envisaged rules for the members of the Circuit that would likely alter competitive dynamics, with possible negative effects on both the demand and supply sides.

In particular, according to the ICA, the Proposal could lead to:

- i. a significant increase in average circular withdrawal fees for customers;
- ii. an obstacle to competition among banks in the provision of services to customers, since the banks would be deprived of a competitive tool (i.e., the ability to determine the circular withdrawal fee);
- iii. an increase in incentives for collusion between the banks belonging to the Circuit, as price homogeneity at national level would prevent the diversification of the price structure, which by its nature is an obstacle to collusive equilibrium.

The ICA expressed concerns especially with reference to the fact that, by changing the current model, in which the MIF is limited to the relationship between banks (as an intermediate cost), the Proposal would allow the ATM-owning banks to directly charge a price to customers, who may not have the possibility to withdraw elsewhere, at least in some situations.

In addition, the Proposal envisaged the setting of an “*extremely high*” cap for the withdrawal fee (€1.50), thus potentially distorting competitive dynamics among banks, which could have the incentive to set the circular withdrawal fee at or near the cap amount to maximize their revenues.

Moreover, the ICA had concerns as to the possible impact of the envisaged system on minor competitors. Small to medium-sized banks usually offer the circular withdrawal service without charging a direct fee or with economically advantageous terms to attract new customers. Under the Proposal, these banks could be deprived of such competitive leverage, and could lose some of their customers, who might decide to move their current accounts to the banks owning major ATM networks, in order not to pay the fees imposed by these banks.

Based on the above considerations, the ICA held that the Proposal constituted a restrictive

agreement under Article 101(1) TFEU. Furthermore, according to the ICA, the agreement could not benefit from an individual exemption under Article 101(3) TFEU, as Bancomat had allegedly failed to provide sufficient evidence that the four requirements laid down in this provision were met. In particular, with regard to the requirement that consumers should be allowed a fair share of the benefits resulting from the agreement, Bancomat claimed that the cost of a single withdrawal would decrease, as more than 50% of consumers currently pay amounts higher than the cap for the withdrawal fee provided for in the Proposal. However, the ICA found some inconsistencies in certain figures provided by Bancomat during the

investigation, and estimated that, if the Proposal were implemented, up to 70% of the circular withdrawals could have become more expensive, also in light of the significant difference between the average cost of withdrawal incurred by banks (€0.80) and the cap for the withdrawal fee (€1.50). Furthermore, according to the ICA, consumers would not benefit from the Proposal in terms of transparency either, as they would be shown the amount of the withdrawal fee only at the time of withdrawal at the ATM.

In light of the above, the ICA ordered Bancomat to refrain from engaging in future conduct similar to that described in the Proposal.

The Council of State partially upholds an appeal against a TAR Lazio judgment that confirmed an ICA decision concerning two cartels in the corrugated cardboard sector

In a judgment delivered on November 18, 2022 (the “**Judgment**”),² the Council of State partially upheld an appeal against a judgment of the Regional Administrative Tribunal of Lazio (the “**TAR Lazio**”) that had confirmed an ICA decision imposing a €2,817,890 fine on a company (MS) for an anticompetitive agreement in the corrugated cardboard packaging market (the “**Decision**”).³ The Judgment is the first to be delivered in as many as 25 parallel appeals against the Decision.

Background: the Decision

The ICA’s investigation, which involved over 20 undertakings, arose from a complaint filed in October 2016 by a trade association of non-vertically integrated box manufacturers, concerning alleged anticompetitive agreements in the corrugated cardboard sector. Before and during the formal investigation opened by the ICA in March 2017, four companies submitted leniency applications.

In the Decision, the ICA concluded that the parties’ conduct amounted to two separate, complex and continuous infringements, implemented in two different markets, which were vertically related to each other, namely the (upstream) market for corrugated cardboard sheets and the (downstream) market for corrugated cardboard boxes. The two cartels took place from 2004 and 2005, respectively, to 2017.

The finding of two distinct infringements led the ICA to impose two sets of fines: (i) a total fine of approximately €110 million on the companies that participated in the upstream cartel; and (ii) a total fine of approximately €178 million on the members of the downstream cartel.

The rulings of the TAR Lazio

All the investigated parties (except for the leniency applicant that was granted full immunity from

² Council of State, Judgment No. 10159 of November 18, 2022.

³ ICA Decision No. 27849 of July 17, 2019, I805 - *Prezzi del cartone ondulato* (the Decision is discussed in the July 2019 issue of this Newsletter: <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italiancompetitionlawnewsletterjuly2019pd-pdf.pdf>).

finer) applied to the TAR Lazio for annulment of the Decision. In the rulings on the merits of the applications, however, the TAR Lazio rejected nearly all of them.⁴

In particular, the TAR Lazio confirmed that: (i) the fact that the parties could access the leniency statements only after they received the statement of objections did not breach their rights of defense, as the parties were given approximately 60 days to prepare their written replies; (ii) the fact that a company participated in some but not all aspects of a complex infringement was irrelevant, to the extent that such company was or should have been aware of the other aspects of the infringement in which it did not participate directly; and (iii) the ICA could lawfully establish a company's participation in an infringement based on either a leniency statement corroborated by documentary evidence, or two converging leniency statements.

The judgment of the Council of State

In the Judgment, the Council of State partially upheld the appeal of MS against the TAR Lazio ruling concerning it, in relation to the imposition of the fine.

In particular, the Council of State agreed with almost all conclusions reached by the TAR Lazio, finding that MS was aware of the infringement and did not seriously dissociate from it. Therefore, MS's liability for the infringement could not be questioned.

However, the Council of State found that the ICA and the TAR Lazio had failed to give due consideration to the fact that MS's participation in the alleged infringement consisted only in attending two of the different meetings among competitors found by the ICA. In other words, in terms of duration and intensity, MS's participation in the alleged anticompetitive conduct lasted little more than a year, against an overall duration of the cartel of about 12 years. Therefore, MS only played a marginal role in the infringement.

Based on the above, the Council of State held that the fine imposed on MS had to be reduced by 20%.

⁴ TAR Lazio, Judgments Nos. 6040, 6044, 6047-6055, 6072-6076, 6078-6080, 6082-6085, 6087 and 6090 of May 24, 2021. Only four applicants were acquitted by the TAR Lazio. These companies were found by the ICA to have participated in only one of the two cartels and, in any event, for a very short period. The TAR Lazio concluded that, all things considered, the evidence against these four companies was mainly circumstantial and, in any case, was not objective, precise and consistent enough to establish an infringement of Article 101 TFEU (the judgements are discussed in the May 2021 issue of this Newsletter: <https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter--may-2021-pdf.pdf>).

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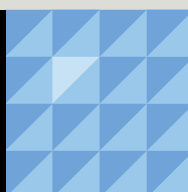
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