

**NEWS FROM THE FIRM**

**Chambers&Partners ranking released**

The specialist publisher Chambers&Partners lists the firm in the Corporate M&A and Intellectual Property categories in the Global Guide 2020, and in the Corporate M&A, Intellectual Property, TMT: Media and TMT: Information Technology categories in the European Guide 2020. Special mention is made of the firm's well-known media and copyright practice. Partners [Domenico Colella](#) (TMT: Information Technology), [Marco Consonni](#) (TMT: Information Technology), [Alessandro De Palma](#) (Employment), [Pierfrancesco Giustiniani](#) (Corporate/M&A), [Matteo Orsinger](#) (Band 1 in Copyrights; band 1 in TMT: Media; Intellectual Property), [Mario Ortu](#) (Corporate/M&A), and [Fabrizio Sanna](#) (Intellectual Property; Copyrights; TMT: Media) are among the leading names in their categories.

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**COVID-19 SPECIAL**

**IP**

**Measures to mitigate Covid-19's impacts on forthcoming Italian companies shareholders' meetings**

The EPO is extending all due dates for patents (including Patent Cooperation Treaty international applications in some instances) falling between March 15, 2020 and April 16, 2020 to April 17, 2020. The EPO notice further indicates that the extension period may be extended for additional periods of time. The EUIPO issued a decision stating that all due dates for trademarks falling between March 9, 2020 and April 30, 2020 are extended until May 4, 2020.

**DATA PROTECTION**

**The EC and the EDPB on contact tracing and warning mobile apps to counter Covid-19**

On 15 April 2020, the European Commission (the "EC") issued the [EU Toolbox](#) for the use of mobile applications for contact tracing and warning in response to the Covid-19 pandemic (the "Toolbox"). Under the Toolbox, contact tracing and warning apps should present all guarantees for the respect of fundamental rights and, in particular, privacy and data protection, the prevention of surveillance and stigmatization. Generally, those apps are to be (a) voluntarily adopted; (b) approved by the relevant national health authority; (c) privacy-preserving (by way of encryption of personal data); and (d) dismantled as soon as no longer necessary. The Toolbox was adopted immediately after the EDPB issued its [letter to the EC in relation to the EC's draft Guidance](#) on apps to counter the COVID-19 pandemic. The EDPB welcomed the EC's initiative to develop a pan-European and coordinated approach. With specific regard to tracing and warning apps, the EDPB clarified that their development should be made in such a way as to ensure accountability, documenting with a data protection impact assessment all implemented privacy by design and privacy by default mechanisms. In addition, the source code should be made publicly available for the widest possible scrutiny by the scientific community. Further, the EDPB is expected to provide guidance on (a) geolocation tools, (b) teleworking tools and practices and (c) the processing of health data for research purposes in the context of the COVID-19 outbreak.

**Statement on the processing of personal data in the context of the COVID-19 outbreak**

On 19 March 2020, the European Data protection Board ("EDPB") issued a [statement on the processing of personal data in the context of the COVID-19 outbreak](#). The EDPB underlines that, while EU data protection law does not stand in the way of the adoption of measures to combat COVID-19, data controllers and processors (including public authorities and employers) must ensure the protection of personal data of data subjects when adopting measures to counter the pandemic. The statement makes clear that the emergency is a legal context in which processing is lawful and may legitimize restrictions of freedoms (provided those are proportionate and limited to the emergency period).

**CAPITAL MARKETS**

**ESMA measures to mitigate the impact of COVID-19**

On 11 March 2020, the European Securities and Markets Authority ("ESMA") issued certain [recommendations](#) to financial market participants in relation to COVID-19 concerning (a) business continuity planning; (b) market disclosure of information regarding the impact of COVID-19 on their fundamentals, prospects or financial situation; (c) transparency as to the actual and potential impacts of COVID-19 in annual and interim financial reporting; and (d) fund management.

**ESMA measures to mitigate the impact of COVID-19 (2)**

On 18 March 2020, ESMA released a [public statement](#) concerning the postponement of reporting obligations under Regulation (EU) No. 2015/2365 of 25 November 2015 ("SFTIR") and Regulation (EU) No. 600/2014 of 15 May 2014 ("MIFIR").

**ESMA measures to mitigate the impact of COVID-19 (3)**

On 25 March 2020, ESMA issued a [public statement](#) on certain accounting implications, under IFRS 9, of the economic support and relief measures adopted by EU Member States in response to the COVID-19 outbreak. In particular, ESMA took into consideration accounting for modifications resulting from the introduction of support measures, assessment of significant increase in credit risk, expected credit loss estimation, public guarantees on issuers' exposures and transparency issues. Please note that this issue was also addressed by IOSCO (International Organization of Securities Commissions) in its [statement](#) dated 3 April 2020.

**ESMA measures to mitigate the impact of COVID-19 (4)**

ESMA also issued a [public statement](#) on 31 March 2020 to clarify issues regarding the publication by execution venues and firms of the general best execution reports required under RTS 27 and 28 of MiFID II, in the context of the COVID-19 pandemic.

**E-COMMERCE**

**The ICA suspends the marketing of an anti-viral drug**

On 17 March 2020, the Italian Consumer Protection Authority ("ICA") opened preliminary proceedings ([PS/11723](#)) and ordered, as an interim measure, the removal of a website and the suspension of the sale of the "generic Kaletra" antiviral drug. The ICA contested the advertising claims used to market the product, i.e. endorsing the product as the "only drug against the Coronavirus (Covid-19)" and the "only remedy to combat the Coronavirus (Covid-19)" even though, as confirmed by world health authorities, there is currently no effective cure against the virus.

**The ICA investigates a crowdfunding platform**

On 17 March 2020, the ICA ordered an interim measure ([PS/11726](#)) against GoFundMe, a crowdfunding platform which promotes voluntary donations, many of which are currently intended for hospitals and health units working in the areas most affected by the Covid-19 emergency. Those donations are marketed as being free of charge, without highlighting that commissions on each transaction are charged to finance the running of the platform. As a result, the ICA ordered the immediate removal of the pre-selection mechanism of the optional commission through the indication of the amount "zero" as a value that can then be changed during the transaction, so that donors may freely exercise their choice as to whether to pay a commission or not.

**The ICA on the marketing of health and hygiene products**

On 22 March 2020, the Italian Consumer Protection Authority ("ICA") started preliminary proceedings against Carlita Shop s.r.l. ([PS/11722](#)) for the alleged violation of Sections 20, 21, 23 and 25 of the Italian Consumer Protection Code. In particular, the alleged violations concern misleading claims made on the Carlita Shop website and through its Instagram profile as to the antibacterial and antiseptic properties of detergents, cosmetics and supplements marketed by the trader. As a result, the ICA considered it necessary to adopt an urgent interim measure ordering the immediate removal of any reference to the alleged preventive effect against Covid-19 of the products marketed both on the Carlita Shop website and on the related Instagram page.

**MEDIA**

**AGCOM measures against fake or incorrect news**

On March 18, 2020 AGCOM enacted the [Resolution no. 129/20/CONS](#) on measures aimed at countering fake or incorrect news relating to the health emergency caused by the COVID-19 pandemic. The Resolution urges audio-visual and radio media service providers to ensure adequate and complete information coverage of the COVID-19 topic, making every effort to guarantee testimony from scientific and medical experts so as to provide the public with verified and well-founded information. It also orders providers of video-sharing platforms to adopt all the necessary measures to contrast the dissemination online, and in particular on social media, of COVID-19 information which are incorrect or derived from non-accredited sources, including a system able to effectively detect and report violations and their perpetrators.

**CAPITAL MARKETS**

**Consob/Bank of Italy MOU on mutual cooperation activities**

On 19 March 2020, the Italian Companies and Stock Exchange Commission ("Consob") and Bank of Italy entered into a [memorandum of understanding](#) ("MoU") for the purpose of regulating mutual cooperation activities between the Financial Banking Arbitrator ("ABF") and the Arbitrator for Financial Disputes ("ACF"), the alternative dispute resolution systems between customers and banking and financial intermediaries. The MoU promotes the institution of coordination and information exchange mechanisms between the ABF and ACF on issues of common interest, as well as on public disclosure and financial education initiatives.

**Brexit: Consob warns operators on measures to be taken by 2020**

On 26 March 2020, Consob published three warning notices specifying the measures to be adopted by the 2020 deadline by operators providing investment services in Italy following the approval of the agreement on the withdrawal of the United Kingdom from the European Union. The first warning ([no. 3/20](#)) simply clarifies that since a new "transition period" has begun, lasting until 31 December 2020, the previous Consob communications on Brexit are no longer effective. For trading venues, office managers have been similarly warned (warnings no. [4/20](#) and no. [5/20](#)) of the fact that if they intend to operate in Italy after the end of the transition period, they must promptly submit a specific request to Consob. Those that have already obtained authorization from Consob in 2019 in relation to a no-deal scenario (or filed a request for that purpose) have been invited to confirm whether or not they are still interested in obtaining the relevant authorisation for the extension of their activities.

**PATENTS**

**German ratification of the UPC Agreement is void**

On 20 March 2020, the German Constitutional Court ("GCC") issued its decision holding that the German act of approval of the [Agreement on a Unified Patent Court](#) ("UPC Agreement") was void since it was not passed with the required parliamentary majority. Specifically, the GCC ruled that, by providing that "a Unified Patent Court for the settlement of disputes relating to European patents and European patents with unitary effect is hereby established", the UPC Agreement determines a transfer of authority implicating a substantial amendment to the Basic Law which must be approved with a two-thirds majority in the Bundestag (i.e. the German Federal Parliament). In this respect, the GCC stressed that an act of approval of an international treaty that has been adopted in violation of the Basic Law cannot provide democratic legitimacy for the exercise of public authority by the EU or any other international institution supplementary to or otherwise closely tied to the EU. A detailed summary of the GCC's reasoning, in English, is available [here](#).

**The ECJ rules for the first time on "pay-for-delay" agreements**

On 30 January 2020, the EU Court of Justice ("ECJ") issued its judgment in [case C-307/18](#) (Generics UK and Others v. Competition and Markets Authority, in which it clarified the criteria for assessment of the potential violation of EU competition law as applicable to so-called "pay-for-delay" agreements (i.e. patent dispute settlement agreements whereby, in return for a value transfer, a generic manufacturer of medicines acknowledges the patent of the originator pharmaceutical company and agrees to refrain from marketing its generic version of said medicine for a specific period of time). The ECJ focused its analysis on the prohibition on practices or agreements that have as their object or effect (a) the restriction of competition and (b) the abuse of a dominant position. The ECJ ruled that "pay-for-delay" agreements may violate EU competition law where they are exclusively aimed at disguising a market-sharing agreement or a market-exclusion agreement. Among others findings, the ECJ specified that the fact that such an agreement involves transfers of value is not sufficient ground to classify it as a "restriction by object", since those transfers of value may prove to be justified (for example, to compensate litigation costs). Such transfer of value, however, is to be qualified as a "restriction by object" where the sole explanation is the commercial interest of both originator and generic.

**CORPORATE**

**A capital company exceeding the shareholders' life expectancy does not permit shareholders to exit at will**

On 28 June 2019 and 6 February 2020, the Court of Milan issued two judgments resulting in step changes in the interpretation of Article 2473.2 of the Italian Civil Code. Plaintiffs requested a declaration of the effectiveness of their withdrawal, based on the assumption that a capital company having a duration of approximately 100 years is equivalent to a company constituted on without term, since such a term is longer than the reasonable life expectancy of the shareholders. The Court of Milan rejected the requests, stating that Article 2285 of the Italian Civil Code - which provides that members partnerships (*società di persone*) may exit at will when the term of the company is equivalent to the length of the life of a shareholder - is not applicable by analogy to capital companies.

**TRADEMARK**

**EU Court of Justice on Coty II case**

On 2 April 2020, the ECJ issued its judgment in [case C-567/18](#) (Coty Germany GmbH v Amazon Services Europe S.a.r.l. et al.) in response to a request for a preliminary ruling made by the *Bundesgerichtshof* (i.e. the German Federal Court of Justice). The issue raised at the ECJ was whether a company, which, on behalf of a third party, stores goods infringing trademark rights without having knowledge of that infringement, stocks those goods for the purpose of offering or putting them on the market. In the affirmative, the company would be making use of the infringed trademarks pursuant to Article 9(2)(b) of the [Regulation \(EC\) No. 207/2009 of 26 February 2009](#) on the Community trademark, as currently replaced by the analogous provision of Article 9(3)(b) of the [Regulation \(EC\) No. 2017/1001 of 14 June 2017 on the European Union trademark](#). The ECJ found that the company providing the storage infringes third-party trademark rights if it pursues the aim of offering the goods for sale or putting them on the market. By considering the factual background outlined by the *Bundesgerichtshof*, it is apparent that the third-party seller alone pursued the aim of selling or putting the infringing goods on the market. It follows that the companies providing the storage have not themselves pursued that aim and, therefore, have not used the relevant trademarks.

**INDUSTRIES**

**BANKS**

**The ICA fines four banks for unfair practices**

The ICA concluded four separate proceedings (PS/11453, PS/11454, PS/11455 and PS/11456, all published in [Bulletin No. 11 of 16 March 2020](#)) against four major Italian banking institutions and issued fines exceeding Euro 20 million in total for the violation of Articles 24 and 25 of the Italian Consumer Protection Code. The main unfair practice implemented by the banks related to the marketing of loan agreements combined with the consumer's subscription to various insurance policies offered by the same bank in such a way that the subscription serves as a condition for the granting of the loan. Specifically, such conduct was deemed as considerably limiting consumers' freedom of choice in relation to the financing products in question since the bank institutions implemented a forced pairing of the two types of products. Two players were also challenged regarding the unfair practice of granting loans combined with the opening of new current accounts with the same banks, making such opening a condition for the granting of the loan.

**E-COMMERCE**

**The ICA accepts Booking's commitments**

On 17 March 2020, the ICA accepted the commitments proposed by Booking.com B.V., Booking.com B.V. International and Booking.com Italy (hereinafter collectively referred to as "Booking") and closed the investigation into those companies opened on 20 November 2018 ([PS/10769](#)). The proposed commitments specifically apply to the information made available to consumers through the [www.booking.com](#) website promoting reservation options for travelling purposes. Those commitments were regarded by the ICA as capable of correcting the previously challenged unfair practices by providing consumers with clear and transparent information on: (a) prices, (b) the sorted results presented on the website, (c) the discounts offered and (d) the availability and popularity of the proposed accommodation, as well as the implied costs of bookings with deferred payment.

**MEDIA**

**The AG on open Internet access and traffic management measures.**

On 4 March 2020, the Advocate General Campos Sánchez-Bordona (the "AG") issued his [Opinion](#) (the "Opinion") in joint cases C-807/18 and C-39/19 (*Telenor Magyarország Zrt. v. Nemzeti Média-és Hírközlési Hatóság Enőke*). The cases were referred to the ECJ for a preliminary ruling to ascertain whether mobile phone subscriptions providing for a data usage threshold applicable to certain mobile applications only and a zero-rate tariff applicable to other mobile applications breach [Regulation \(EU\) No. 2015/2120 of 25 November 2015](#) on open Internet access (the "Regulation"). The Regulation aims at ensuring equal and non-discriminatory treatment of traffic in the provision of Internet access services. In case C-807/18, the provider of Internet access services permitted subscribers to surf the Internet up to the threshold of 1GB, above which access to the Internet slowed down for certain mobile applications only. In addition, the data usage related to other mobile applications was not considered in calculating the consumption of the threshold applicable to the subscription. A similar mechanism was run in case C-39/19. The AG concluded that agreements between providers of Internet access services and subscribers under which a zero-rate tariff is applied to certain mobile applications while access to others is slowed down (once the applicable data usage threshold is exceeded) qualify as an unlawful "traffic management measure" pursuant to Article 3.3 of the Regulation.

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