NEWSLETTER

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# Annual Law for the Market and Competition: Antitrust developments

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This Newsletter deals with the antitrust developments introduced by the annual law for the market and competition (law No. 118/ 2022; the "**Law**") enacted on 5 August 2022.

The Law, which entered into force on 27 August 2022, significantly strengthens the competence of the Italian Antitrust Authority ("**AGCM**" or the "**Authority**"), broadening the scope of its jurisdiction as well as its investigative powers with regard to merger control, antitrust and abuse of economic dependence,[1] by amending law No. 287/1990 (the "**Antitrust Law**") and other provisions.

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[1] The Law introduces important changes also in other sectors (for example in the field of concessions, in the pharma sector, etc.), which are not addressed in this Newsletter.

# 01. AGCM's broadened competence under merger control rules

Article 32 of the Law empowers the AGCM to review transactions that are below the merger control notification thresholds. The AGCM may require to notify a concentration within 30 days of the request, in the event that:

- Only one of the two cumulative turnover thresholds set in Article 16 of the Antitrust Law is met (currently € 517 million for the combined turnover generated in Italy by the concerned undertakings and € 31 million for the turnover generated in Italy by each of at least two concerned undertakings); or
- If the total worldwide turnover generated by all the concerned undertakings exceeds € 5 billion;
- Provided that there are concrete risks for competition in the national market or in a part thereof and no more than six months have passed since closing of the transaction.

The Law strengthens the current merger control system, as requested by the AGCM in its S4143 report,[2] with the aim of preventing that potentially problematic below-the-threshold transactions escape the Authority's scrutiny. In the mentioned report, the Authority had expressed concerns that the previous rules might: (i) not capture perspective developments, in particular in the digital sector and in other sectors in which innovation is an important parameter of competition (*e.g.*, the so-called killer acquisitions or concentrations involving start-ups); or (ii) exclude from the Authority's scrutiny transactions that may have a significant impact on local markets although below the thresholds.

The extension of the AGCM's jurisdiction reflects a broader European trend towards greater flexibility and discretion in competition authorities' intervention in merger matters.[3] On 26 March 2021, the European Commission ("**EU Commission**") adopted guidelines on the application of the referral mechanism.[4] Departing from its previous practice, the EU Commission encourages national competition authorities to request referral to it (so-called upward referral) not only of concentrations that do not have an EU dimension, but also of concentrations that are below the national notification thresholds, provided that the requirements of Article 22 of the EU Merger Regulation[5] are satisfied (*i.e.*, that the concentration: (i) affects trade between Member States and (ii) threatens to significantly affect competition in the territory of the Member State or States submitting the referral request). In line with its new guidelines, on 19 April 2021 the EU Commission accepted, for the first time, a request for referral relating to a concentration that neither had an EU dimension nor fell within the competence of the requesting national authority, because it was below both sets of thresholds (case M.10188 - *Illumina/Grail*).[6]

[2] AGCM, report pursuant to Articles 21 and 22 of law No. 287/1990, S4143, of 23 March 2001 (the "**Report**").

[3] Other European countries (Germany, Norway, Sweden and Lithuania) have already adopted rules that allow the national competition authority to request to notify below-the-threshold mergers (see Report, p. 91). Ireland has also recently adopted similar rules.

[4] Communication from the Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, O.J. 2021/C 113/01.

[5] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings O.J. 2004/L 204/01 (the "**EU Merger Regulation**").

[6] The EU Commission's decision to accept the referral of the concentration has been recently upheld by the EU General Court (case T-227/21, *Illumina v. Commission*, judgment of 13 July 2022, ECLI:EU:T:2022:447).

The changes introduced by the Law, which have immediate effect (although the Authority will have to adopt a procedural regulation), give raise to some legal uncertainty for ongoing and future transactions (the amendment does not apply to transactions completed before the entry into force of the Law). This is because of (i) the wide margin of discretion that the Law grants to the AGCM in requesting notification of below-the-threshold concentrations and (ii) the length of the period within which the AGCM may request notification (six months from completion of the transaction). It will therefore be key to monitor the AGCM's practice to verify to what extent the Authority will make use of this power and what procedural rules the Authority will adopt (*e.g.*, the possibility for interested companies to consult the Authority in advance), as the Law expressly provides that the AGCM will have to define the applicable procedural rules.

# 02. Amendments to the substantive test for mergers

Article 32 of the Law amends Article 6, paragraph 1, of the Antitrust Law by updating the substantive test applied in the context of the *ex ante* merger control procedure. Such amendments have the primary objective of aligning the substantive compatibility test applied at national level with that in force at EU level and in Member States other than Italy and Austria.

In particular, the previous version of Article 6 of the Antitrust Law mirrored the test of dominance provided under the former EU Merger Regulation, in force until 2003.[7] Such test allowed the AGCM to prohibit or approve a concentration subject to conditions – *i.e.*, subject to the implementation of remedies aimed at preventing anti-competitive effects – only where the transaction could result in "*the creation or strengthening of a dominant position on the national market as a result of which effective competition would be removed or significantly and permanently impeded*". Under the former regime, a negative finding in relation to a concentration could come as a result of any of the parties to the transaction holding a dominant position[8] in the affected markets *pre*- or *post*-closing. Transactions that could hinder or prevent effective competition in an appreciable and lasting manner without however giving rise to or strengthening a dominant position fell, in principle, outside of the scope of the prohibition.

The amendments to the Antitrust Law provided under Article 32 of the Law result in the powers of the AGCM being significantly increased in breadth, as well as in additional grounds for the companies concerned to put forward efficiency claims in connection with the merger. These changes include in particular:

- The adoption – in line with the recommendations of the AGCM and other national authorities –[9] of the broader test of the Substantial Impediment of Effective Competition (SIEC), with no prejudice to the former dominance test,[10] which continues to be the primary indicator of cases in which effective

[7] Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. 1989/L 395/01.

[8] An undertaking holds a dominant position when it is able to hinder effective competition on the affected market and can behave independently of its competitors, suppliers, customers and consumers (see judgment of the Court of Justice in Case 27/76, *United Brands Continental B.V. v Commission of the European Communities*, [1978] ECR 207). This generally occurs when the company holds high market shares in a market and current and/or potential competitors are not able exert sufficient competitive pressure.

[9] See *Proposte di riforma concorrenziale ai fini della Legge annuale per il mercato e la concorrenza anno 2013*, AS988; and the final report of the market investigation carried out by the AGCM, the AGCOM and the Data Protection Authority of 10 February 2020, *Indagine Conoscitiva sui Big Data*, available at https://www.agcm.it/media/comunicati-stampa/2020/2/Big-Data-pubblicata-indagine-Agcom-Agcm-e-Garante-privacy, *Linee guida e raccomandazioni di policy*, recommendation n. 8 ap. 119.

[10] In fact, the amended Article 6(1) enshrines the principle that concentrations that "*significantly impede effective competition in the national market or in a relevant part thereof, in particular as a result of the creation or strengthening of a dominant position*" may be prohibited or conditioned upon the implementation of structural or behavioral remedies.

competition may be significantly impeded.[11] The extension of the assessment to include the SIEC test is therefore aimed at filling a gap in the tools available to the Authority when assessing concentrations. The AGCM will, indeed, be allowed to impose remedies or prohibit transactions that, while not leading to the creation of a dominant position, may worsen the competitive conditions as a result, for example, of the oligopolistic but not collusive nature of the affected markets or of particularly complex vertical relationships.[12]

- In the context of the substantive assessment of concentrations, the parties to the transactions may now advocate in favour of and the AGCM may carry out a balancing test between the restrictive effects that the transaction may generate and the efficiencies that it may lead to in terms of "*interests of wholesale and final customers*" and "*technical and economic progress*" provided that such efficiencies are to the benefit of consumers and the concentration does not impair the level playing field in the affected markets. It should be emphasised, however, that, at both EU and Italian level, merger-specific efficiency claims are rarely considered sufficient to outweigh hurdles created by a merger.[13]
- Last, the Law extends the AGCM's jurisdiction to the assessment of "*the anticompetitive effects of acquisitions of control over small-size firms characterized by innovative strategies, also in relation to new technologies*". This amendment aims at providing adequate grounds for the substantive analysis of so-called "killer acquisitions". As a result of this amendment, transactions whereby large companies – typically, digital, technology and pharmaceutical companies – acquire smaller undertakings (*e.g.*, start-ups) that have been developing competing innovative products and/or services, would be subject to careful substantive examination. Such provision therefore purports to prevent concentrations which may result in innovative projects being abandoned or in innovative products or services being included in the acquirer's offer, thereby eliminating a potential competitor and/or slowing down the technological and economic development on the relevant market.

The amendments summarised above provide additional clarity and a more uniform framework of assessment for companies notifying a concentration in several Member States. It is expected that the AGCM will apply its new powers in accordance with the practice that has been developed in the last twenty years at EU level.

## 03. Calculation of turnover for banks, financial institutions and insurance companies

Article 32 of the Law changes the criteria to calculate the turnover of banking and financial institutions for merger control purposes, bringing them in line with the EU ones. Previously, the relevant turnover of banking

This, "*because of the need to preserve and develop effective competition taking into account the structure of all affected markets and actual or potential competition*", as well as other factors largely already outlined by the previous wording of the article.

[11] Like the test adopted by the EU Merger Regulation, the new SIEC test represents a trade-off between the test used in the US system (*i.e.*, the test of the significant lessening of competition (SLC) or the significant reduction of competition) and the dominance test.

[12] Report, page 89.

[13] As regards the EU Commission practice on the efficiency test, see the Communications of the EU Commission, respectively of 5 February 2004 and 18 October 2008, providing Guidelines on the assessment of horizontal mergers pursuant to the Council regulation on the control of concentrations between companies (O.J. 2004/C 031/5) and Guidelines on the assessment of non-horizontal mergers pursuant to the Council regulation on the control of concentrations between companies (O.J. 2008/C 265/6).

and financial institutions was equal to the value of one-tenth of the total assets, excluding off-balance sheet commitments (*conti d'ordine*); for insurance undertakings, it was equal to the value of the premiums collected.

In line with the provisions of the EU Merger Regulation, the Law sets forth that for credit institutions and other financial institutions, the turnover is replaced by the sum of the following income items, after having deducted value added tax and other taxes directly associated with the said income:

a) interest income and similar income;

b) income from shares and other variable yield securities, income from participating investments, income from shares in affiliated undertakings, and other income from securities;

c) commission receivables;

d) profits from financial transactions;

e) other operating income.

As noted by the AGCM in its recent Report, the change results in the relevant turnover being calculated on the basis of the income deriving from operations that reflect the scope of the activity carried out by the bank or financial institution, as opposed to its asset value.

With regard to insurance undertakings, the Antitrust Law previously contained only a brief provision stating that the relevant turnover was represented by the value of the premiums collected. Similarly to the EU Merger Regulation, the Law specifies that the relevant turnover is equal to the value of gross written premiums.

# 04. Treatment of joint ventures

Article 32 of the Law revises the provisions on joint ventures and aligns them with the most recent European framework.[14]

Article 5 of the Antitrust Law, as amended, provides that the notion of "joint venture" includes not only joint ventures deriving from the establishment of a new company, as previously set forth, but also joint ventures that exercise on a lasting basis all the functions of an autonomous entity (paragraph 1, letter c).

Furthermore, pursuant to Article 5, paragraph 3, of the Antitrust Law, in the event that a joint venture qualifying as a concentration has as its object or effect the coordination of independent companies' behaviour, this coordination shall be reviewed according to the parameters for the assessment of restrictive agreements. The AGCM shall consider the substantial and simultaneous presence of two or more parent companies on the same market where the joint venture is active, or on a market that is upstream or downstream, or contiguous and closely related. The Authority shall also evaluate the possibility for the parent companies to eliminate competition for a substantial part of the market through their coordination resulting directly from the establishment of the joint venture (paragraph 3).

The reform expands the category of reportable joint ventures to include cooperative joint ventures generating a structural effect (*i.e.*, joint ventures with functional autonomy). Therefore, all full-function joint ventures are now subject to the merger control regime, and any risk of coordination between the parent companies is assessed on the basis of the legal test applicable to restrictive agreements.

[14] *I.e.*, the EU Merger Regulation. Prior to this modification, the Italian statutory provisions on joint ventures were modelled on those of the previous Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings (O.J. 1989/L 395/01), which distinguished between joint ventures of a concentrative nature, subject to merger control rules, and joint ventures of a cooperative nature, subject to the rules on restrictive agreements.

# 05. Settlement of antitrust proceedings

Article 34 of the Law introduces a settlement procedure in Article 14-*quater* of the Antitrust Law. The undertakings that acknowledge their involvement in an antitrust infringement may benefit from a reduction of the fine, with a mechanism aiming at achieving procedural efficiencies.

The settlement procedure introduced by the Law differs from that applied at EU level[15] among others because it will apply not only to cartels but also to abuse of dominance cases.

The settlement procedure is structured around three main phases:

1. A preliminary phase, in which the AGCM may explore the parties' willingness to enter into settlement discussions, setting a deadline to apply for the procedure. There is therefore no "right" for the parties to settle. It is up to the Authority to decide whether to start the settlement procedure or not. Moreover, the Authority may at any time decide to interrupt the discussions, even only with respect to one or more specific companies, if it considers that the effectiveness of the procedure is compromised.
2. An explorative phase, during which the AGCM may, but is not obliged to: **a)** inform the undertakings that participate in the settlement procedure of the objections that it intends to raise and the supporting evidence; **b)** provide them with a non-confidential version of any specific document that forms part of the investigation file, at the party's request. Such a request must be aimed at allowing the party to ascertain its position *vis-à-vis* any aspect of the conduct being investigated (*e.g.*, the alleged duration of its participation in the cartel[16]);**c)** inform them of the range of the potential fines.
3. Submission of settlement proposals in the event of a favourable outcome of the explorative phase and within the deadline set by the AGCM. The Authority is not compelled to take into account settlement proposals received after the expiry of the deadline. The deadline therefore has a sort of binding nature, as it is binding on the parties, while the AGCM remains free to take into account settlement proposals received after the deadline.

The procedural rules for the presentation and assessment of the settlement proposals are delegated by the Law to the AGCM. The Authority will therefore have to set, through a general decision, the rules regulating this phase, in compliance with the adversarial principle. Such decision will also determine the amount of the fine reduction to be granted in the event a settlement is reached.

The Authority's power in defining the procedural rules for the presentation and assessment of the settlement proposals is quite broad, as it concerns not only the amount of the fine reduction, but also procedural aspects that may directly affect the undertakings' rights, such as, for example, the possibility of withdrawing a settlement proposal.

From a private enforcement perspective, pursuant to Article 5 of Legislative Decree No. 3/2017, judges cannot order a party, or a third party, to disclose evidence relating to statements issued in connection with a settlement proposal, which, therefore, cannot be exploited as a confession against the undertaking who made them (with the exception of the disclosure of withdrawn settlement proposals, which is possible pursuant to Article 4, paragraph 4, letter c) of the said decree).

[15] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, O.J. 2008/C 167/01.

[16] It is unclear whether the reference to "cartels" is a terminological oversight or is deliberately aimed at excluding access to documents on file in cases of abuse of dominance.

Furthermore, pursuant to Article 31-*ter*, paragraph 2, of the Antitrust Law, introduced by the Legislative Decree No. 185/2021, the parties who have obtained access to the file may use information obtained from the settlement proposals as far as necessary for the exercise of their rights of defence before the judicial authority in proceedings that are directly connected to the case for which the access to the file has been granted.

This will therefore be an additional aspect to be taken into account for the purpose of deciding whether to join the settlement procedure.

# 06. Further extension of the AGCM's investigative powers

Article 35 of the Law broadens the Authority's investigative powers, allowing it to request from companies or entities "*at any time*" – also outside of formally opened proceedings – information and documents that are useful for the enforcement of:

- national and European rules prohibiting cartels and abuses of dominant position (new paragraphs 2-*bis* and 2-*ter* of Article 12 of the Antitrust Law);
- merger control law (new Article 16-*bis* of the Antitrust Law).

Requests for information issued before the opening of proceedings will be compulsory. Failure to comply with such requests, or the supply of misleading or false information "*without justified reason*" will result in the AGCM imposing a fine of up to 1% of the total worldwide turnover of the group to which the company belongs. However, the Law does not specify what could be the "*justified reason*" on the basis of which the recipient of the request for information is entitled not to provide the requested information.

The fact that a company may be the recipient of a formal request for information or documents by the AGCM even before the formal opening of the investigation is a novelty compared to the previous system in which the AGCM could impose a fine only in the event of requests for information issued during the investigation (*i.e.*, after the opening of the formal investigation procedure). The amendment therefore brings the Italian public enforcement system closer to the European one, where the EU Commission may send requests for information even before the formal opening of the proceedings, and may impose fines if the addressees provide misleading or untrue information or, in the case of a request adopted by decision, do not provide the requested information.

Similarly, in the context of merger control, undertakings may be the recipients of requests for information which, in the event of a failure to reply or an untruthful reply, will entail the application of the fine set forth by Article 14, paragraph 5, of the Antitrust Law. This even before the concentration is notified or the investigation phase is opened (so-called Phase 2). Under the previous system, the AGCM could impose such fines only if the request for information was issued during the investigation, *i.e.*, during the so-called Phase 2.

Therefore, the Law empowers the Authority to adopt binding requests for information already in the pre-investigation phase (so-called Phase 1) and without interrupting the Phase 1 deadline. Under the previous system, the Authority could only send formal requests for information in Phase 1 if the notification of the concentration was inaccurate, incomplete or untruthful, with interruption of the review deadline. Also in this case, the amendment brings the Italian merger control regime closer to the European one, where the EU Commission makes extensive use of the power to send requests for information during Phase 1.

The amendment could also be of particular importance to obtain preliminary information on non-compliance with the notification obligation or with remedies imposed to clear a concentration or to verify the fulfilment of the conditions allowing the AGCM to request notification of a below-the-threshold transaction.

According to Article 35 of the Law, requests for information must have three main characteristics: (i) indicate the legal basis which they are grounded on; (ii) be proportionate; and (iii) not compel the addressees to admit an infringement of the prohibition of restrictive agreements or abuse of dominant position.

## 07. Strengthening of the rules against abuse of economic dependence

Article 33 of the Law supplements the provision on abuse of economic dependence, by introducing a rebuttable presumption of economic dependence from digital platforms, and provides an indicative list of practices in which such abuse can materialize.

Specifically, Article 9 of Law No. 192/1998[17], as amended by the Law, sets forth that:

- unless proven otherwise, economic dependence is presumed in cases where an undertaking uses the intermediation services of a digital platform that plays a decisive role in reaching end users or suppliers, including in terms of network effects or data availability; and
- abusive practices carried out by digital platforms may also consist in:
  - ✓ providing insufficient information or data regarding the scope or quality of the service provided and requiring undue unilateral benefits not justified by the nature or content of the activity; or
  - ✓ adopting practices that inhibit or hinder the use of different providers for the same service, including through the application of unilateral conditions or additional costs not included in existing contractual agreements or licenses;
- civil actions for abuse of economic dependence must be brought before specialised commercial courts.

With the aim of smoothing the application of the new provisions, preventing litigation and promoting good market practices in the field of competition and free exercise of economic activity, the Presidency of the Council of Ministers, in agreement with the Ministry of Justice and after consultation of the AGCM, can adopt specific guidelines in line with EU law principles[18].

[17] The new provision will be effective as of 31 October 2022.

[18] Article 33, paragraph 3, of the Law.

# EU, Antitrust and Regulation Department

The EU, Antitrust and Regulation Department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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