

NEWSLETTER

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The Italian competition authority's new powers concerning mergers below the threshold

Legance

01. Introduction

On January 2, 2023, the Italian Competition Authority (“ICA” or “Authority”) published a notice (“Notice”) providing guidance for the exercise of its new power to require the notification of concentrations that are below the Italian turnover thresholds. This power was recently introduced by the Annual Law for the Market and Competition (see our previous newsletter available [here](#)) in Article 16(1-bis) of Law No. 287/90 (the “Antitrust Law”).

The main purpose of the Notice is to allow the ICA's scrutiny of potentially problematic transactions that are not subject to a notification obligation. The ICA reserves the right, in any event, to amend or integrate the Notice one year after its publication, in light of its future enforcement practice.

02. Requirements

The ICA's power to call in below-the-threshold mergers is subject to three cumulative conditions:

- no more than six months have elapsed since the completion of the transaction;
- one of the two turnover thresholds provided for in Article 16 of the Antitrust Law (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) is exceeded or the total worldwide turnover generated by all the undertakings concerned exceeds € 5 billion; and
- the Authority finds, on the basis of available evidence, that there are *prima facie* concrete risks for competition in the national market or in a part thereof.

03. Temporal scope of application

The new amendment applies to transactions completed after its entry into force on August 27, 2022.

As mentioned in the previous section, the ICA may request the notification of a below-the-threshold merger provided that no more than six months have elapsed since its completion (*i.e.* from closing).

04. Procedural aspects

When it becomes aware of a concentration that *prima facie* meets the three cumulative conditions set out in Section 2 above, the ICA may require, through a reasoned request, each of the undertakings concerned (e.g., not only the acquirer¹) to file the transaction².

¹ For the notion of “undertaking concerned”, reference is made to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (paragraphs 129-153). The ICA's Notice specifies that in case of acquisition of control, if the addressee of the Authority's request is not the undertaking acquiring control, the notification may also be made by the latter undertaking.

² In order to ascertain the existence and relevance of a below-the-threshold merger, the Authority may use its investigative powers (requests for information to undertakings) under Article 16-bis(1) of the Antitrust Law. In the event of non-

The filing must be made within 30 days from the ICA's request³. The Authority reserves the right, in exceptional cases, to extend this deadline by up to further 30 days on the basis of a motivated and timely request by the undertakings concerned. If the deadline is not respected, the addressee of the request is subject to a fine of up to 1% of the turnover generated in the previous year (see Article 19(2) of the Antitrust Law).

The Notice also allows the undertakings concerned to voluntarily file a merger below the threshold. This is done through the submission of a document containing information relating to the transaction and the markets concerned, specifying the reasons why they consider that the transaction may give rise to concrete risks for competition in the national market or in a relevant part thereof. Even if not expressly provided in the Notice, it is hoped that practice will develop in such a way that undertakings will be able to use this tool to indicate the reasons why they do not consider that a transaction is likely to give rise to concrete risks to competition, so to obtain legal certainty that the ICA will not call in the transaction. The Authority shall inform the parties whether it intends to request notification of the transaction within 60 days from receipt of a complete voluntary notification. This certainly appears to be a long time limit, particularly when compared to the ICA's ordinary time limits in the context of merger control.

05. Substantive aspects

In assessing whether there are concrete competitive risks that make notification necessary, the Authority may take into account all relevant characteristics of the undertakings concerned and the markets on which they operate, including, where available: (i) the structure of the markets, (ii) the characteristics of the operators involved, (iii) the nature of the concerned undertakings' activity and its relevance for consumers and/or other undertakings, (iv) the relevance of the innovative activity carried out, and (v) the competitive constraints exerted by one or more companies.

Market shares and market concentration often provide a useful first indication of the merging parties' and their competitors' market power and competitive relevance. Therefore, the Notice states that the Authority is unlikely to call in a transaction when the market share and concentration levels are below those that, also under EU rules, give rise to a presumption that a merger is not problematic⁴:

- for horizontal mergers, when the parties' combined market share is below 25% or the post-merger Herfindahl-Hirschman market concentration Index ("HHI") is (i) below 1,000, (ii) between 1,000 and 2,000 with a delta below 250, or (iii) greater than 2,000 with a delta below 150 (unless special circumstances exist);
- for non-horizontal mergers, where the new entity's market share on each of the affected markets is below 30% and the HHI is below 2,000.

Moreover, in order to cover also "killer acquisitions", the Authority may take into account further elements, such as whether the target is (i) a start-up or a new entrant with significant competitive potential that has yet to develop or generate significant revenues, (ii) an important innovator that is conducting relevant research activity, (iii) a significant actual or potential competitor, or (iv) a company that has access to competitively

compliance or provision of incomplete or misleading information or documents, the ICA may apply the sanctions set out in paragraph 2 of that Article.

³ The notification must be made according to Article 5 of Presidential Decree No. 217 of 30 April 1998.

⁴ See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5) (*Horizontal Merger Guidelines*) and Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008) (*Non-Horizontal Merger Guidelines*).

significant assets (such as raw materials, infrastructure, data or intellectual property rights) and/or provides products or services that are key inputs/components for other industries.

The Authority may also assess whether the value of the consideration received by the seller is particularly high compared to the acquired undertaking's turnover.

Finally, the Notice specifies that, in the event that the undertakings concerned generate turnover in Italy, it can be presumed that the transaction may have effects on the national market or a relevant part thereof. By contrast, in the event that none of the concerned undertakings achieves turnover in Italy, the ICA will assess whether the transaction appears, in light of the specific features and the undertakings concerned, likely to affect competition in the national market or in a substantial part of it.

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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