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Italy Merger Control Rules

What Has Changed in 2022

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This guide provides a summary of the Italian merger control rules and covers the following most recent changes:

- The new test for the assessment of anticompetitive effects
- The new scope of the jurisdiction of the Italian competition authority, the Autorità Garante della Concorrenze e del Mercato (AGCM)
- The new methodology for the calculation of turnovers for companies in the financial sector
- New rules applicable to the assessment of joint ventures
- Extended investigative powers of the AGCM

The updates were introduced by Italy's Law No. 118 of 2022 on the market and competition (the "2022 Act"), which came into force on 27 August 2022. The 2022 Act amended several of the provisions of Law No. 287 of 1990 on the rules for the protection of competition and the market (the "1990 Act"), which contains the Italian merger control rules. These updates better align Italian merger control rules with the EU merger control rules and related EU case law.

A new Test for the Assessment of Anticompetitive Effects

Prior to the 2022 Act, the substantive test under Article 6.1 of the 1990 Act, to determine whether a concentration produced anticompetitive effects on the market, was based on "the creation or strengthening of a dominant position on the national market eliminating or substantially reducing competition on a lasting basis". This test mirrored that contained in Article 2 of the old 1989 EU Merger Regulation, which stopped applying at the EU level in 2004.

Article 32.1(a) of the 2022 Act updates the test to align it with that contained in Article 2 of the 2004 EU Merger Regulation (EUMR), currently applicable at the EU level. The AGCM now considers whether a concentration "would significantly impede effective competition in the national market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position". The new test allows the AGCM to challenge mergers creating unilateral negative effects on competition even if the mergers would not result in the creation of a single or collective dominant position. Such mergers are broadly referred to as "gap cases", because they are cases that would otherwise escape the prohibition of anti-competitive mergers under the old substantive test, even if they resulted in negative effects on prices and quality because of removing the close competition that existed between the merging parties prior to their merger. The new substantive test is intended to close this gap.

The 2022 Act also updates the factors that can be considered by the AGCM when determining whether a concentration would lead to a substantial impediment of competition in the relevant market under Article 6.1 of the 1990 Act. The AGCM is now expressly allowed to consider "the economic and financial power" of the undertakings operating on the relevant market, as well as "the interests of intermediate and final consumers". The AGCM can also now conduct a balancing exercise between the anticompetitive effects of a concentration and any merger specific efficiencies (e.g. "technical and economic progress"), "provided that it is to the advantage of consumers and does not constitute a restriction of competition".

Finally, Article 32.1(a) of the 2022 Act enables the AGCM to consider the anticompetitive effects of a concentration "on small firms characterised by innovative strategies, including in the field of new technologies". This wording provides a basis for the AGCM to prohibit or impose conditions on so-called "killer acquisitions", whereby companies with an entrenched position in digital and pharmaceutical markets acquire smaller companies, such as startups, that are developing new, innovative products or services, where they threaten to become more vigorous competitors if they remained independent.

Jurisdiction of the Italian Competition Authority

Article 32.1(b)(1) of the 2022 Act introduces a new Article 16.1-bis in the 1990 Act, broadening the scope of the AGCM's jurisdiction and enabling it to deal with so-called "killer acquisitions". Specifically, it allows the AGCM, within 30 days, to request the notification of a concentration, even if that concentration does not meet both of the jurisdictional thresholds contained in Article 16.1.

The AGCM can request such a notification if the concentration would give rise to "concrete anticompetitive risks in the national market, or in a relevant part thereof, given its detrimental effect on the development of small companies characterised by innovative strategies", and no more than six months have passed since the completion of the transaction. In addition, one of two following conditions must be met:

Either

- One of the two jurisdictional thresholds contained in Article 16.1 is met:
  - The combined total national turnover of all the undertakings involved in the concentration is higher than €492 million
  - The total national turnover of at least two of the undertakings involved in the concentration is higher than €30 million

Or

- The combined total worldwide turnover of all undertakings involved in the concentration is higher than €5 billion.

  This broadened jurisdiction of the AGCM reflects the recent position of the European Commission towards the referral mechanism in Article 22 of the EUMR, which provides that any Member State can make a referral to the European Commission if a proposed transaction affects trade between Member States and threatens to significantly affect competition within the territory of the Member State making the referral. The European Commission has indicated that such a referral would be particularly appropriate with regard to mergers in the digital and pharmaceutical sectors.

  As an example, the acquisition of Grail by Illumina, which did not exceed the jurisdictional thresholds of any Member State nor did it have an EU dimension, was nevertheless referred to the European Commission by the French competition authority, joined by Belgium, Greece, Iceland, the Netherlands and Norway. The European Commission's decision to accept the referral in April 2021 was upheld by the General Court in T-277/21 *Illumina v. Commission* on 13 July 2022, which Illumina appealed on 22 September 2022.

  The broadening of the AGCM's jurisdiction introduced by the 2022 Act raises legal uncertainty regarding the concentrations that must be notified to the AGCM. There is arguably a lack of clarity as to what exactly are "concrete anti-competitive risks" stemming from a "detrimental effect on the development of small companies characterised by innovative strategies". Although the intention of the legislator may have focused on so-called "killer acquisitions", the wording of the updates is arguably broader and applicable to any mergers involving a company meeting the new quantitative and qualitative thresholds.

Calculation of Turnovers for Certain Companies in the Financial Sector

The rules for the calculation of turnovers for banking and financial institutions and insurance companies have also been changed. Prior to the 2022 Act, Article 16.2 of the 1990 Act provided that "the turnover of banking and financial institutions is one-tenth of the value of their total assets, excluding memorandum accounts, and the turnover of insurance companies is the value of the premiums earned". Article 32.1(b)(2) of the 2022 Act updates the rules to align them with those contained in Article 5.3 of the EUMR, by providing that:

- For "credit and other financial institutions", their relevant turnover is the sum of the following items of income, excluding value-added tax and other taxes directly related to those items of income:
  - Interest and related income
  - Income from shares, stocks and other securities with a variable income, income from equity investments, income from equity investments in affiliated companies and other income from securities
  - Income from commissions
  - Profits from financial transactions
  - Other operating income
- For "insurance companies", their relevant turnover is the value of the gross premiums written, which includes all received and receivable amounts in respect of insurance contracts concluded by these companies, including premiums ceded to reinsurers after the deduction of taxes and parafiscal charges levied on the amount of the premiums

Rules Applicable to Joint Ventures

Article 32.1(c) of the 2022 Act introduces two amendments to the 1990 Act, updating the merger control rules applicable to joint ventures.

First, the 2022 Act specifies the types of joint venture that are subject to merger control by amending Article 5.1(c) of the 1990 Act. This provision used to limit itself to stating that a concentration arises "when two or more undertakings proceed, through the creation of a new company, to establish a joint venture". In its updated version, the rule now specifies that it is only joint ventures "that perform on a permanent basis all the functions of an autonomous entity" to be caught by Italian merger control rules. This amendment reflects the position at the EU level, expressed by the European Court of Justice in C-248/16 *Austria Asphalt v. Bundeskartellanwalt* on 7 September 2017, that a change of control over a joint venture is only a notifiable concentration under the EUMR if it results in a full-function joint venture; that is, an undertaking that performs, on a lasting basis, all the functions of an autonomous economic entity.

Second, the 2022 Act clarifies the types of joint venture that are not subject to merger control and the applicable rules that govern their compliance with competition law. Article 5.3 of the 1990 Act, which used to state simply that "transactions which have as their object or main effect the coordination of the behaviour of independent undertakings do not result in a concentration", has been amended in two significant ways:

- Article 5.3 no longer precludes transactions that result in the coordination of the behaviour of independent undertakings from constituting concentrations. Rather, it now states that, in circumstances where such transactions do constitute concentrations, "that coordination is evaluated according to the parameters adopted for the assessment of agreements restrictive of competition" to determine whether they should be prohibited or made subject to conditions.
- Article 5.3 now also provides examples of factors that the AGCM will consider when conducting that evaluation, namely:
  - "The significant and simultaneous presence of two or more parent undertakings on the same market as the joint venture, or on a market located upstream or downstream of that market, or on a neighbouring market closely related to that market"
  - "The possibility offered to the undertakings concerned, through their coordination directly resulting from the creation of the joint venture, to eliminate competition in respect of a substantial part of the products and services concerned"

Investigative Powers of the Italian Competition Authority

Finally, the 1990 Act has been amended to grant the AGCM extended investigative powers in relation to concentrations. Article 35.1(b) of the 2022 Act introduces a new Article 16-bis, which states that the AGCM "may at any time require undertakings or entities that are in possession of information or documents, which are relevant to the exercise of its powers, to produce them". The provision further specifies that the requests for information must "state the legal grounds on which they are based, be proportionate and not oblige their addressees to admit an infringement" of Article 101 or 102 of the Treaty on the Functioning of the European Union or their Italian competition law equivalents.

The addressees are granted "an appropriate period of time not exceeding 60 days, based on the complexity of the information requested, which can be renewed on a reasoned application" to respond to such requests. Failure to respond to a request, omitting information or providing untruthful information or documents can lead to a fine of up to 1% of the total worldwide turnover of the infringing undertaking.

The AGCM's ability to issue requests for information "at any time", including before a concentration is notified or a formal phase 2 investigation is opened, is a significant broadening of its investigative powers. Previously, the AGCM could only issue requests for information during an informal phase 1 investigation if the information provided was insufficient or defective, which was different to the position at the EU level, where the European Commission regularly issues requests for information during phase 1 investigations.

Overall, these updates better align Italian merger control rules with the EU merger control rules and related EU case law.

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