5th January 2023

MERGER CONTROL IN ITALY

ADOPTION OF THE SUB-THRESHOLD MERGER NOTICE

On January 2, 2023, the Italian Competition Authority ("**ICA**" or the "**Authority**"), after a public consultation started on October 27, 2022, issued the notice ("**Notice**") concerning the application of the amendments to Article 16 of Law No 287 of 10 October 1990 (in particular, para.1-bis), introduced by Law No. 118/2022 (the "**Annual Competition Bill**", which entered in force last August 28, 2022), and concerning the notification of mergers and acquisitions of undertakings which do not meet the turnover thresholds set out in Italy for the mandatory *ex ante* filing procedure[1].

Pursuant to the new provision, the undertakings concerned by the relevant transaction might be required by the ICA to notify a concentration (within 30 days from the request), when:

- **only one of the two Turnover Thresholds is exceeded**[2], or
- **the total worldwide turnover achieved by all the undertakings concerned exceeds EUR 5 billion,** and
- **the ICA is concerned that concrete risks for competition in the national market, or in a relevant part of it, may arise from the transaction**, also taking into account the detrimental effects on the development and diffusion of small undertakings characterised by innovative strategies.

The ICA is entitled to request the notification within six months from completion of the concentration.

The new powers attributed to the ICA are aimed at recovering the possibility to extend the ICA's scrutiny to potentially problematic transactions that, under the current system, would not undergo the ICA's control. In this context, the Notice aims at providing stakeholders with greater legal certainty as to how the ICA's intends to implement its new powers, as well as to limit the burden on companies facing the self-assessment of potentially reportable concentrations.

THE NOTICE: MAIN CONTENTS

The Notice offers useful guidelines for undertakings and practitioners assessing (i) the prerequisites for the application of the new Article 16, para. 1-bis, of Law No. 287/90, (ii) its temporal scope of application, (iii) the notion of the "*existence of concrete competitive risks*" and (iv) procedural aspects.

[1] Section 16 (1) of Law No 287 of 10 October 1990 requires a mandatory prior notification to the ICA of all mergers and acquisitions when the following thresholds are triggered:

- aggregate turnover in Italy exceeds 517 million euro; and
- aggregate domestic turnover of each of at least two of the undertakings concerned exceeds 31 million euro ("**Turnover Thresholds**").

Thresholds are adjusted every year to take account of increases in the deflator index (last update on 21 March 2022), and the resolution is published in the Authority's Bulletin after the increase in the index has been officially announced.

[2] See Note no.1.

The prerequisites for the application of the new Article 16, para. 1-bis, of Law No. 287/90

As regards the prerequisites for the application of the new Article 16, para. 1-bis, of Law No. 287/90, the power of intervention attributed to the Authority is limited to transactions for which the following conditions are cumulatively met:

i. no more than six months have elapsed since the completion;

ii. only one of the two Turnover Thresholds is exceeded, or the aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion; and

iii. the Authority, on the basis of the evidence in its possession, considers that there are real competitive risks in the national market (or in a substantial part of it).

The temporal and substantive scope of application

As regards the temporal and substantive scope application of the new rule, it is clearly stated by the Annual Competition Bill that the new powers will not apply to concentrations completed before the date of entry into force of the provision.

Moreover, transaction completed by more than six months fall likewise out of the scope of application of the ICA's new powers. In this regard, it is worth reminding that, according to the principles set out by the ICA, a concentration is deemed completed when the relevant modification of control occurs.

In general, this modification occurs at the closing date of the transaction, although in some cases the modification of control might occur in different moments, depending on the type of transaction and on the specific provisions of the parties (e.g., when material controlling actions are implemented before closing, or when the transaction does not consist in an ordinary shares purchase and is implemented in different ways).

The requisite of a "concrete risks for competition"

As noted above, the new paragraph 1-bis of Article 16 of Law No. 287/90 provides, however, that the Authority may require to notify the concentration only if there are concrete risks for competition in the national market, or in a relevant part thereof. This is a crucial aspect, actually making substantial difference in the assessment of a transaction and, of course, implying the highest margin of uncertainty. The Notice seems to rescue companies on this point, setting out the criteria according to which it may deem that "*concrete risks for competition*" occur in the case at hand. The ICA clarifies, in this regard, that it may take into account all the relevant characteristics of the undertakings concerned and the markets in which they operate, and, where available, elements such as:

i. the structure of the markets;

ii. the characteristics of the operators involved;

iii. the nature of the activity carried out by the undertakings concerned and its relevance for consumers and/or other undertakings;

iv. the relevance of the innovative activity carried out;

v. the competitive constraints exerted by one or more firms beyond market shares.

Market shares and the degree of concentration - measured, for example, through the Herfindahl-Hirschman Index (**HHI** – to which the Notice makes express reference) - often provide a useful first indication of the market power of both the merging parties and their competitors[3].

In any event - especially where turnover is not indicative of the competitive constraint which an undertaking exerts or may exercise in the future in the national market or in a substantial part thereof - the Authority may take into account further elements, such as whether an undertaking:

i. is a start-up company or a new entrant with significant competitive potential that has yet to develop or adopt a business model that generates significant revenues (or is still in the early stages of implementing such a model) model);

ii. is an important innovator or is conducting a potentially important research activity;

iii. is a significant current or potential competitor;

iv. has access to competitively significant assets (such as raw materials, infrastructure data or intellectual property rights); and/or

v. provides products or services that are key inputs/components for other industries.

The Authority may also consider whether the value of the consideration of the transaction is particularly high compared to the current turnover of the acquired undertaking.

Procedural aspects

As regards the procedural aspects the ICA may make use of its investigative powers in order to retrieve the elements to understand whether a concentration meets the aforementioned conditions and criteria and, when it is *prima facie* the case, require the undertakings concerned to notify the transaction.

The notification must be made no later than 30 days after receipt of such a request. However, in exceptional cases, on the basis of a motivated and timely request by the undertakings concerned, the Authority may extend the aforementioned deadline by up to further 30 days. If the deadline is not respected, or if the undertakings even partially omit to provide the information or documents requested, or if they provide untrue information or documents, the ICA may fine the undertakings involved.

If the Authority considers that the notified concentration is liable to be prohibited pursuant to Art. 6 of the Law no. 287/90, it would launch the "phase 2" investigation within 30 days of receipt of the complete notification, as per the ordinary rules applicable to the merger control procedure for above-threshold transactions.

[3] For instance, the Authority is unlikely to require notification of a horizontal merger where, post-merger, the market share of the undertakings concerned as a whole is less than 25%. Furthermore, it is unlikely that, in the context of a merger of a horizontal nature, the Authority considers that there is a concrete risk to competition:

a. in a market where, post-merger, the HHI is below 1,000;
b. if, post-merger, the HHI is between 1,000 and 2,000 and the delta is less than 250;
c. if, post-merger, the HHI is greater than 2,000 and the delta is less than 150, unless there are special circumstances.

The request pursuant to Article 16, para. 1-bis, does not exclude the possibility of referral under Article 22 of Regulation (EC) No 139/2004, if the requirements provided therein are met.

Lastly, where the undertakings concerned consider that a concentration, that does not have to be notified to either the European Commission or the Authority, might however fall within the scope of application of the new Article 16(1-bis), they may **voluntarily inform the Authority**.

Although such notification may also take place prior to the completion of the transaction, it is necessary that the parties have already reached an agreement on the essential elements of the transaction, so as to allow the Authority a full assessment.

In such case the ICA, having assessed the information provided, will inform the undertakings whether it intends to request a notification of the transaction pursuant to Article 16(1-bis) within a period of sixty days from receipt of the complete voluntary notification.

CONCLUSIONS

The Notice is going to have a great impact, granting the ICA with brand new powers, similar to the ones attributed to the European Commission by Article 22 of Regulation (EC) No. 139/2004.

In this regard, the Notice provides both undertakings and practitioners with guidelines aimed at reducing the legal uncertainty for merging companies, although concrete application of the new rules and of the clarifications contained in the Notice is awaited to understand their effectiveness.

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