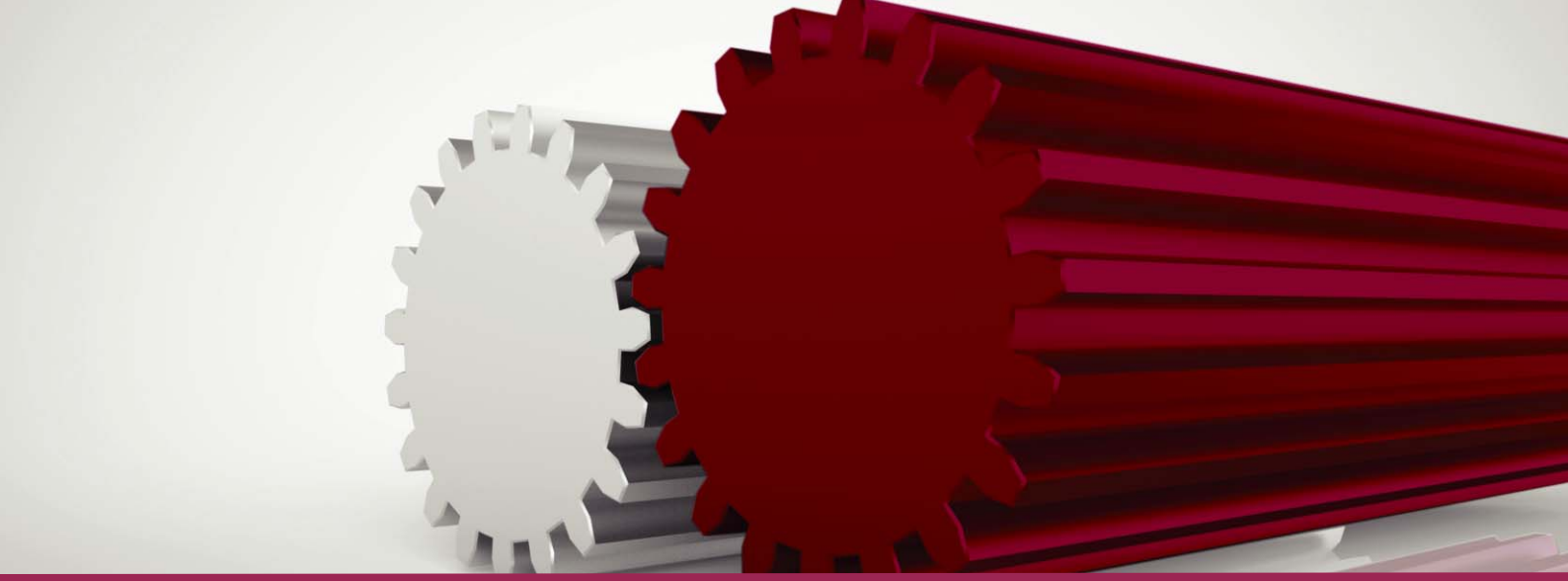

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The International Comparative Legal Guide to:

# Merger Control 2014

**10th Edition**

A practical cross-border insight into merger control

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## Country Question and Answer Chapters:



# EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 52 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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# Italy

Shearman & Sterling LLP

Francesco Carloni

## 1 Relevant Authorities and Legislation

### 1.1 Who is/are the relevant merger authority(ies)?

The *Autorità Garante della Concorrenza e del Mercato* (Italian Competition Authority or "ICA") is an independent administrative body established in 1990 with its seat in Rome. The ICA is also in charge of applying, *inter alia*, national and European competition law provisions and national legislation concerning consumer protection and unfair commercial practices.

The ICA's contact details are:

*Autorità Garante della Concorrenza e del Mercato*
Piazza G. Verdi, 6/a
00198 Rome, Italy
Tel.: +39 06 85 82 11
Fax: +39 06 85 82 12 56
URL: www.agcm.it.

### 1.2 What is the merger legislation?

Law No. 287 of 10 October 1990 (the "Italian Competition Act") sets forth the rules on merger control (in particular, Sections 5 to 7 and 16 to 19). Presidential Decree No. 217 of 30 April 1998 contains some procedural and enforcement rules applicable to merger control proceedings. The ICA has also issued guidelines as to the application of merger control rules, including the notification forms (unofficial English translations of these documents are available on the ICA's website).

The Monti government introduced significant changes to the Italian merger control rules (Law No. 27/2012). Effective as of 1 January 2013: (i) the bar above which mergers and acquisitions become reportable was raised, eliminating the need for smaller transactions to be notified; and (ii) merger filing fees for reportable transactions were abolished (see questions 2.4 and 3.10 below). As a result, a new financing regime has been introduced in order to cover the ICA budget. As of 1 January 2013, the new regime provides that, regardless of any merger activity, all corporations based in Italy with a total turnover of over €50 million have to pay an annual fee to the ICA amounting to 0.08 per thousand of their turnover in the last financial year (the minimum fee for each company is €4,000 up to a maximum amount of €400,000). For 2014, the ICA has set the annual fee at 0.06 per thousand (ICA Resolution of 9 May 2013, No. 24352).

Section 1(4) of the Italian Competition Act requires the ICA to interpret the national competition rules and merger control in accordance with the principles of EU competition law. In practice, the ICA follows the European Commission's approach on the most significant issues concerning merger control enforcement (with certain exceptions, notably joint ventures – see question 2.3 below). The European Commission's Consolidated Jurisdictional Notice ("EU Jurisdictional Notice") is generally applied by the ICA when assessing national merger cases.

### 1.3 Is there any other relevant legislation for foreign mergers?

No. However, pursuant to Section 25(2) of the Italian Competition Act, the President of the Council of Ministers may prohibit, for "essential reasons of national economy", an acquisition of an Italian company by a foreign company if, in the country of origin of the prospective purchaser, Italian companies are subject to discrimination, in particular as regards their ability to acquire local companies. This provision is meant to ensure reciprocity between Italy and foreign states. However, it has not been applied to date.

In 2012, the Italian government introduced new "golden share" rules applicable to a broad range of M&A transactions relating to assets in defence and national security, energy, communications and transportation (Law No. 56/2012). These rules grant the Italian government – not the ICA – special powers to veto or condition the purchase of interests in the share capital of, or the implementation of certain extraordinary transactions by, Italian companies that are active in the above-referenced fields. This new legislation sets forth a comprehensive investment control regime in the affected sectors, imposing prior notice to the government and a waiting period (these rules were recently applied for the first time in connection with General Electric's $4.3 billion acquisition of the aviation business of Avio S.p.A., an Italy-based manufacturer of aviation propulsion components and systems for civil and military aircraft).

### 1.4 Is there any other relevant legislation for mergers in particular sectors?

Yes. There are specific rules applicable to certain sectors as further described below. The ICA's decisions on any merger or agreement concerning the telecoms, broadcasting and media sectors are subject to a mandatory but non-binding opinion of the Italian Communications Authority (*Autorità per le Garanzie nelle Comunicazioni*), which must be provided within 30 calendar days of transmission of the documentation from the ICA. During this period the deadline for a decision by the ICA is suspended. As a result, the ICA's review period to adopt a phase-one decision is extended to 60 calendar days. Furthermore, a 2006 resolution of the Italian Communications Authority (Resolution No. 646/06/CONS)

provides that, in addition to the ICA, reportable transactions involving companies active in the integrated communication system sector in Italy ("SIC" which includes press, TV (paid-for and free), radio broadcasting and other forms of communication) must be filed with the Italian Communications Authority, which will ascertain whether a dominant position in any of the SIC markets could be created as a result of the proposed transaction.

As regards mergers in the insurance sector, the ICA must seek the mandatory but non-binding opinion of IVAAS (Institution for the Supervision of Insurance, an independent authority supervising the insurance sector) before issuing its decision. During this period the deadline for a decision by the ICA is suspended. As a result, the ICA's review period to adopt a phase-one decision is extended to 60 calendar days.

In the banking sector, the Bank of Italy will assess the transaction from a regulatory perspective in parallel to the ICA assessing the competitive effects of the proposed transaction, both having a time limit of 60 calendar days to conduct their respective assessments.

The Monti government introduced in 2011, for the first time in Italy, a statutory provision expressly prohibiting interlocking directorships in the financial industry (Article 36 of Law No. 214/2011). The prohibition applies to holders of a seat in managerial, supervisory and control bodies, as well as officers charged with managerial duties in companies or a group of companies active in the banking, insurance and financial markets that hold, or exercise, similar offices in companies and/or a group of companies active in the same products and geographic markets. The Italian notification forms already provide for a section on interlocking directorships so that merger control rules will be used to ascertain compliance with the new law.

Specific rules on the calculation of the relevant turnover for merger control purposes for banks, financial institutions and insurance companies are provided in Section 16.2 of the Italian Competition Act (see also question 2.4 below).

Under Section 8 of the Italian Competition Act, undertakings entrusted by law with the operation of services of general economic interest or that operate under a statutory monopoly which intend to enter markets outside the scope of their current activities (so-called *New Markets*), are only permitted to do so through separate companies (corporate unbundling). Incorporation of such separate undertakings or acquisition of controlling interests in existing undertakings active on *New Markets* requires prior notification to the ICA (a notice regarding the formalities applicable has been published by the ICA), regardless of whether the turnover thresholds are met. Fines up to €51,645 can be imposed for failing to notify.

Transactions involving companies active in the distribution of movies and operation of cinemas are subject, in addition to the ordinary merger control rules, to an alternative set of thresholds. Irrespective of the turnover of the companies concerned, prior notification to the ICA is mandatory for acquisitions leading to the creation of a market share exceeding 25 per cent in one of the main Italian cities.

See question 3.11 below for rules applicable to the acquisition of control over listed companies.

## 2 Transactions Caught by Merger Control Legislation

### 2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The Italian Competition Act applies to transactions that constitute a "concentration" (Section 5) which occurs where:

(a) two or more undertakings merge (two or more undertakings amalgamate into a new undertaking (merger in the strict sense), or one or more undertakings are absorbed by another (merger through incorporation));

(b) undertaking or a physical person already controlling an undertaking acquire direct or indirect control of the whole or parts of one or more undertakings; or

(c) two or more undertakings create a joint venture through the establishment of a new company, provided that the joint venture is not of co-operative nature.

**Control**

Given the express general obligation contained in the Italian Competition Act to interpret its provisions in accordance with the relevant EU principles (see question 1.2 above), the notions of "undertaking" and "control" under Italian merger control rules are substantially construed in accordance with the EUMR.

The concept of "undertaking" includes virtually any legal entity having an entrepreneurial, business and/or commercial nature, and Article 7 of the Italian Competition Act contains a wide definition of control for the purposes of the enforcement of merger control rules. In particular, the provision expressly refers to the definition of "controlled companies" as provided by Article 2359 of the Italian Civil Code, namely:

(1) companies in which another company has the ability to control, directly or indirectly, including through fiduciary companies, the majority of votes at the shareholders' meeting;

(2) companies in which another company has, directly or indirectly, including through fiduciary companies, sufficient voting rights to exercise a dominant influence in its shareholders' meetings; and

(3) companies that are under the dominant influence of another company by virtue of contractual links.

Under the ICA's merger guidelines, the notion of control also includes any legal or factual situation whereby one party can exercise (including jointly with another party) a decisive influence on the strategic commercial behaviour of a company. Relevant factual or legal elements include ownership or other rights over the assets or part of the assets of the target company, and any rights (including veto rights), contracts or other legal relationships that confer a decisive influence in determining the composition, resolutions or decisions of the corporate bodies of a target company. The ICA deems a merger or acquisition to have taken place when substantial changes in the structure of control occur, such as when joint control is replaced by sole control.

### 2.2 Can the acquisition of a minority shareholding amount to a "merger"?

No. However, the Italian Competition Act may apply to the acquisition of minority shareholdings which confer control (*de jure* or *de facto*) over another company.

While the determination of *de jure* control tends to be straightforward (e.g., a review of the company's by-laws and/or shareholding agreements is typically sufficient), assessing *de facto* control requires a much more granular exercise whereby the main factors are the size of the shareholding, the likelihood of achieving a stable majority at the target company shareholdings' meeting on the basis of past voting patterns, and the position of other shareholders.

Consistent with relevant European Commission practice, the following circumstances can give rise to control and (provided the turnover thresholds are met) trigger an Italian filing obligation if:

(a) a minority shareholding can confer joint control over the acquired company by virtue of the provisions of a shareholders' agreement or through other contractual or *de facto* mechanisms. For instance, the holder of the minority shareholding could exercise veto powers over certain strategic commercial decisions of the target company (e.g., approval of the budget, the business plan or the appointment of senior management); or

(b) a minority shareholding can confer sole control over a company in presence of certain factors, including the fact that the remaining shareholding is dispersed among a large number of shareholders or the minority shareholder is the only industrial shareholder so that the minority shareholder could exercise a decisive influence over the strategic commercial behaviour of the target company.

### 2.3 Are joint ventures subject to merger control?

Yes. The incorporation of a jointly controlled company or the acquisition of joint control over a previously existing company falls within the scope of the Italian merger control rules if the joint venture:

(a) is full-function (i.e., according to the EU principles, a joint venture capable of performing, on a lasting basis, all the functions of an autonomous economic entity); and

(b) does not have as its main object or effect the coordination of the competitive behaviour of the parent companies.

In particular, the Italian merger control regime retains the pre-March 1998 EU law definitions and the European Commission notice on the distinction between "cooperative" and "concentrative" joint ventures of 1994 applies. As a result, a joint venture that is "cooperative" does not constitute a concentration but a horizontal agreement which will be subject to Article 2 of the Italian Competition Act and/or Article 101 of the Treaty for the Functioning of the European Union. Reportable "concentrative" joint ventures must be notified to the ICA for appraisal under the merger rules and procedures described in this chapter.

The ICA has submitted a reform proposal aimed at updating the Italian merger control regime as regards the treatment of joint ventures in Italy (see question 6.2 below).

### 2.4 What are the jurisdictional thresholds for application of merger control?

Transactions must be filed with the ICA prior to their implementation if the following cumulative turnover thresholds are met:

(a) the turnover of all the companies in Italy exceeds €482 million; and

(b) the turnover of the target companies in Italy exceeds €48 million.

The turnover thresholds are updated each year to reflect adjustments in the GDP deflator index, and the new figures are published in the ICA's Bulletin and on its website (www.agcm.it). The above-referenced thresholds were updated by the ICA on 2 April 2013.

**Turnover**

Turnover is defined as the amount derived from the sale of products or the provision of services (excluding turnover taxes) in the preceding financial year. The Italian Competition Act provides for special rules as regards the turnover calculation of certain categories of undertakings. For banks and "financial institutions" (i.e., firms active in securities investment, asset management, consumer credit or leasing), the relevant turnover is equal to the value of one-tenth of their total assets, excluding memorandum accounts, and, in the case of insurance companies, the value of premiums collected. As regards the turnover of credit and other financial institutions, the ICA therefore still follows the European Commission's old notice of 1994 on the calculation of turnover (as part of its reform proposal the ICA has requested to amend the Italian Competition Act so as to align the method for calculation of turnover of banks and financial with that of the EUMR – see question 6.2 below).

On 5 August 2013 the ICA published a communication providing clarification on determining the second turnover threshold (turnover of the target company) under the amended Section 16, paragraph 1, of the Italian Competition Act in the case of newly established joint ventures and mergers. As regards the establishment of new joint ventures, the ICA considers that the turnover pertaining to any contributions to the joint venture made by the companies acquiring joint control shall be taken into account and that these contributions shall be deduced from the turnover of the companies acquiring joint control. Contributions deferred over time, which do not exceed the threshold individually, shall be considered as part of a single transaction if they are put into effect within two years of the establishment of the new joint venture. The companies concerned will be responsible for conducting such assessment. As regards mergers, the following distinction applies: (i) in the case of a merger through incorporation, the turnover of the absorbed company shall be taken into account; and (ii) in the case of a merger where two or more companies amalgamate into a new company, the turnover of all the companies concerned shall be taken into account.

### 2.5 Does merger control apply in the absence of a substantive overlap?

Yes. The Italian merger control rules apply in the absence of substantive overlaps amongst the merging parties' activities, provided that the transaction meets the relevant turnover thresholds.

### 2.6 In what circumstances is it likely that transactions between parties outside Italy ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

As noted above in response to question 1.3, transactions between foreign companies must be notified to the ICA if the turnover thresholds are met. The presence of assets or subsidiaries in Italy is not a relevant factor when determining reportability of the transaction. The jurisdictional nexus with Italy is established on the basis of the level of local sales alone, i.e. once the cumulative turnover thresholds are met.

### 2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The Italian merger control regime does not apply if the EUMR thresholds are met.

The EUMR establishes a system of referrals to ensure that a concentration is examined by the authority best placed to conduct the assessment. The EUMR contemplates pre-notification referral mechanisms at the initiative of the merging parties (Articles 4(4) and 4(5) of the EUMR), and post-notification referrals at the initiative of the European Commission and national competition

authorities (Articles 9 and 22 of the EUMR). Please see the chapter on the European Union.

### 2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The ICA's merger guidelines state that, if two or more transactions (each of them bringing about a change of control) take place within a two-year period between the same persons or undertakings, they shall be regarded as a single concentration finalised on the date of the most recent transaction. The ICA generally applies the principles set out in the EU Jurisdictional Notice.

## 3 Notification and its Impact on the Transaction Timetable

### 3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Reportable transactions must be notified to the ICA prior to their implementation, i.e., before the purchaser has acquired the ability to exercise decisive influence over the target.

There is no filing deadline. The parties can submit the notification as soon as they have reached an agreement on the essential aspects of the transaction so as to enable the ICA to fully appraise the proposed transaction. Generally, the ICA prefers notifications based on binding agreements. However, in exceptional cases the ICA has accepted notifications even before a definitive binding agreement is signed provided that the parties are able to demonstrate that they had already agreed on all the main terms of the transaction and that these terms would not change. In this respect, note that the ICA's practice varies from unit to unit and that it is advisable to speak to the relevant unit in advance so as to avoid having the filing rejected because it is not supported by a binding agreement.

As a general rule, a concentration is deemed to have been notified prior to its implementation if:

(a) in the case of a merger, the concentration is notified before the merger deed is drafted;

(b) in case of acquisition of control of a company by means of purchase of equities or shares in a company, the full effectiveness of the deeds establishing acquisition of control is made conditional on the ICA's approval; or

(c) in case of creation of a new joint venture, the concentration is notified before the memorandum of incorporation is filed with the Register of Companies.

### 3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The ICA's merger guidelines provide that certain mergers and acquisitions that meet the jurisdictional thresholds are not deemed to be a "concentration" and therefore do not have to be filed. These include:

(a) acquisition of equity holdings for purely financial purposes, i.e., the acquisitions of shares by banks or other financial institutions in companies undergoing incorporation or re-capitalisation, for the sole purpose of re-selling them within 24 months, provided that the acquirer does not exercise any voting rights;

(b) intra-group transactions;

(c) co-operative joint ventures (see question 2.3 above); and

(d) transactions involving "non-trading undertakings", i.e., companies that do not carry out any economic activity and that do not have direct or indirect control over another company (e.g., companies whose only assets are real estate and whose sole activity is managing these assets, provided that the acquisition is not carried out by companies operating on the real estate market), nor hold licenses, permits, concessions, or any other rights that would allow them to engage in business activities, nor have direct or indirect control over another company holding any of those rights.

### 3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Fines for failing to notify a reportable transaction may amount up to one per cent of the worldwide turnover of the notifying party or parties in the last financial year (Section 19(2) of the Italian Competition Act).

So far, in 2013, the ICA has imposed fines for failing to notify on two occasions and opened one proceeding. This compares with 2012, where five cases were closed. In both years, the level of fines ranged between €3,000 and €5,000 for each concentration not notified. Generally, the notifying parties spontaneously bring to the ICA's attention the failure to notify the reportable transaction and, if the transaction is not problematic, the level of fines is likely to be limited. However, fines for failing to notify can be significantly higher if the notifying parties are found to have intentionally circumvented the obligation to file reportable transactions prior to their implementation.

### 3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

The Italian implementation of reportable transactions, including foreign-to-foreign transactions, can occur after filing as the Italian Competition Act does not provide for a standstill obligation, except in cases where the ICA adopts a suspension order when opening phase-two proceedings (see question 3.7 below). Should the ICA issue the suspension order, the feasibility of "hold-separate arrangements" for the Italian part of the transaction will depend on the structure of the transaction, the geographic scope of the relevant markets and the impact of such arrangements on the perceived anti-competitive effects.

### 3.5 At what stage in the transaction timetable can the notification be filed?

A transaction can be notified as soon as the parties have reached an agreement on the essential aspects of the transaction so as to enable the ICA to fully appraise the proposed transaction. Generally, the ICA prefers notifications based on binding agreements and, in any event, reportable transactions must be filed before their completion (see question 3.1 above).

### 3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The notifying party may engage in pre-notification discussions with the ICA by submitting at least 15 calendar days before filing a briefing paper which describes the essential terms of the proposed

transaction and the market or markets potentially concerned. The parties and the ICA may then meet informally in order to discuss possible competitive effects stemming from the transaction and the scope of the information to be provided in the actual filing.

The phase-one investigation takes 30 calendar days, after which the ICA may:

(a) clear the transaction if it does not raise serious doubts as to its compatibility with the Italian Competition Act; or

(b) open second-phase proceedings if serious doubts concerning the compatibility of the transaction with the Italian Competition Act arise.

Typically, the ICA does not issue a phase-one decision much earlier than 30 days from receipt of notification. The ICA will more likely adopt a decision before the expiry of the phase-one review period in connection with unproblematic transactions.

The review period for phase-one in case of national public bids notified also to the Italian financial regulator ("CONSOB") is reduced at 15 calendar days, whereas in cases concerning the insurance, banking or media sector, the ordinary time-limits are typically extended (see questions 1.4 above and 3.11 below).

If the ICA considers the filing to be incomplete, it may issue a "stop-the-clock" letter formally requiring the parties to submit the missing information. Such a request has the effect of stopping the 30-day period; once the ICA is satisfied with the information received a new 30-day term will start running. In practice, particularly in relation to the least problematic cases and/or where the missing information is of minor importance, the ICA officials will try first to obtain the necessary information through informal channels (e.g., phone calls), although by setting tight deadlines so as to avoid suspending the proceedings.

Second-phase proceedings must be closed within 45 calendar days. During phase-two, the ICA has the possibility to extend the above-referenced 45-day term for a maximum of 30 additional calendar days if the parties fail to provide relevant information that is available to them. This extension can be made just once.

Accordingly, provided that the 30-day phase-one period is not interrupted for incompleteness of the information, a phase-two decision shall be issued between 75 (30+45) and 105 (30+45+30) calendar days from notification.

The ICA will adopt a decision of inapplicability if the notified transaction: (i) did not fall within the scope of the Italian Competition Act because it did not amount to a concentration within the meaning of Section 5 of the Italian Competition Act; (ii) had Community dimension and, thus, fell within the European Commission's exclusive jurisdiction; or (iii) did not meet the turnover thresholds.

### 3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Reportable transactions must be notified to the ICA prior to their implementation. The parties can complete the transaction immediately after filing without waiting for clearance as the Italian Competition Act does not provide for a stand-still obligation (however, as a matter of practice, in most cases the parties make clearance by the ICA a contractual condition of closing).

However, closing a transaction after filing but prior to clearance can raise serious risks, as the ICA could adopt a prohibition decision or authorise the transaction subject to behavioural or structural remedies. If the transaction has already taken place, the ICA may order any measure to restore effective competition and remove any anti-competitive effect (in addition to fines, the ICA can impose dissolution orders). Depending on the contractual provisions, the entire commercial risk might be borne by the purchaser only (e.g., hell or high water provision).

Pursuant to Section 17 of the Italian Competition Act, when opening a phase-two proceeding, the ICA can request the parties not to implement the transaction until its final decision is issued. However, such a suspension order must be justified on the grounds that implementing the transaction would raise serious competition concerns. So far the ICA has rarely issued suspension orders. One of the few instances in which the ICA ordered the suspension of the implementation concerned the Italian insurance sector (Unipol's €1.1 billion acquisition of Fondiaria Sai ("Fonsai"), through the acquisition of Fonsai's parent company Premafin (2012)).

A public takeover can be completed even during the suspension period imposed by the ICA order during the phase-two proceeding, provided that the acquirer does not exercise its voting rights within the target shareholders' meeting until clearance is obtained.

### 3.8 Where notification is required, is there a prescribed format?

Yes. The notification must be submitted in accordance with the Notification Forms issued by the ICA that are available on its website (including unofficial English versions).

The scope of the information requirements is wide and the parties must provide a significant amount of information about their activities, the structure of the transaction and the affected markets and competitive landscape. In particular, the Notification Forms include the concept of "affected markets" which triggers further information requirements if:

(a) two or more of the parties are active on the same relevant market and, post-transaction, they will hold a combined market share of 15 per cent or more;

(b) one of the parties will have, post-transaction, a market share of 25 per cent or more, provided that at least one other party is active on an upstream or downstream market (which will also be considered an affected market); or

(c) the target holds a market share of 25 per cent or more, irrespective of whether the other parties do operate in the same market, or upstream or downstream markets.

There are two Notification Forms: Long-Form and Short-Form. The difference between the two resides in the scope of the information requirements.

A Long Form must be submitted when:

(a) two or more parties are active in the same affected market and, post-transaction, they will hold a combined market share not less than 25 per cent; and/or

(b) one of the parties will have, post-transaction, a market share not less than 40 per cent, provided that at least one other party is active in an upstream or downstream market.

The Long-Form is not required where the market share of the target is below 1 per cent.

The ICA can require the parties to submit a Long Form if the ICA considers that the information provided in the Short-Form does not enable it to fully appraise the effects of the transaction. The review period will start when the Notification Form is submitted. Pre-notification discussions with the ICA will clearly help minimise the risk of such requests which inevitably impact the transaction timeline.

The ICA requires two copies of the filing to be delivered by hand or

by registered post. The supportive documents and annexes (section F of the Notification Forms) can be submitted by CD-ROM (again, two copies are required). The Notification Form must be submitted in Italian while other attached documents (e.g., the relevant contracts or agreements, the parties' annual reports, etc.) can be provided in the original language.

### 3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Yes. A Short-Form can be submitted when the transaction does not meet the conditions set forth for the Long-Form (see question 3.8 above). In less problematic cases, it is possible to obtain the ICA's clearance decision before the expiry of the 30 calendar days of phase-one.

### 3.10 Who is responsible for making the notification and are there any filing fees?

In the case of acquisition of sole control, the purchaser is responsible for the notification. In the case of a merger or acquisition of joint control, each party that merges or acquires joint control is responsible for filing. The parties may, however, file jointly using the same Notification Form by appointing a common representative.

As of 1 January 2013, merger filing fees for reportable transactions have been abolished. The ICA's activities are financed through a compulsory contribution system (see question 1.2 above).

### 3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Where a reportable transaction involves a public takeover bid of a company listed on the Italian stock exchange, the notification must be submitted simultaneously to the ICA and CONSOB prior to completion. In such cases, the review period for phase-one before the ICA is reduced to 15 calendar days instead of 30 calendar days. Furthermore, a public takeover can be completed even if the ICA decides in the phase-two proceeding to issue a suspension order, provided that the purchaser does not exercise its voting rights within the target shareholders' meeting until clearance is obtained.

Non-national public takeover bids (i.e., public takeovers not regulated by Italian capital market regulations) are subject to the general provisions of Italian merger control rules.

### 3.12 Will the notification be published?

Subject to the parties' consent, the ICA publishes a "notice of merger submission" on its website which contains a short description of the parties, transaction and the economic sectors concerned by the transaction. Third parties are then entitled to submit their observations to the ICA within five business days from the date of publication.

The ICA's phase-one decision is published on both the ICA's weekly Bulletin and on the ICA's website. In case of phase-two decisions, the ICA will publish on its Bulletin and website both its decision opening the proceedings and its final decision. The ICA will also publish on its website a non-confidential version of the final decision.

## 4 Substantive Assessment of the Merger and Outcome of the Process

### 4.1 What is the substantive test against which a merger will be assessed?

A concentration is prohibited whenever it creates or strengthens a dominant position as a result of which competition is eliminated or substantially reduced on a lasting basis in the Italian market (Section 18 of the Italian Competition Act).

Notwithstanding the fact that the wording of the ICA's substantive test mirrors that of pre-2004 EUMR reform, the ICA's decisional practice is generally in line with the current EUMR test and with the substantial criteria adopted by the European Commission, including appraisal of market shares of the parties and their competitors, the alternative choices available to suppliers and customers, the existence of entry barriers, access to sources of supply or market outlets, structure of the relevant markets, supply and demand trends and overall competitive situation of the market concerned.

In assessing the competitive effects of a transaction, the ICA tends to rely on a market-based approach that attempts to determine the existing parameters and dynamics of competition on the affected market, and predicts the post-transaction effects on that market. The ICA compares the envisaged competitive conditions in the post-transaction scenario with those that would prevail absent the transaction (counterfactual), and endeavours to ascertain whether the parties will face sufficient competition to make it unprofitable to engage in anti-competitive behaviour post-transaction.

For instance, in 2013 the ICA prohibited a transaction which involved the transfer of joint control of Italian gas distributor Isontina Rete Gas (IRG) from ENI and Acegas-Aps to Acegas-Aps (Hera Group) and Italgas, Italy's largest gas distributor, on grounds that the transaction would have created a dominant position capable of eliminating or reducing competition in future tenders for natural gas distribution concessions in certain geographic areas. The ICA found that Italgas and Acegas would have participated jointly in tenders for gas distribution concessions in these geographic areas, with the effect of eliminating the main potential competitors (Italgas and Hera/Acegas-Aps whereas no other company would have had an interest in participating in the tenders).

However, there have been cases in which the ICA has shown willingness to take into account in its assessment a more economic-oriented effects-based approach (e.g., *Bolton Alimentari/Simmenthal* (2012) where the ICA relied on the Gross Upward Pricing Pressure Index (GUPPI) to measure the parties' post-transaction incentives to engage in price increases).

The ICA's substantive test is equally applicable to concentrative joint ventures whereas cooperative joint ventures are appraised under the rules applicable to horizontal restraints (see question 2.3 above).

### 4.2 To what extent are efficiency considerations taken into account?

The ICA's decisional practice does not attribute particular relevance to efficiency arguments, nor does the Italian Competition Act mention efficiency gains as a relevant factor in the assessment of the transaction (Section 6). However, developments at the EU level concerning the treatment of efficiencies may have some positive spill-over effects on the relevance of efficiencies in the ICA's assessment.

### 4.3 Are non-competition issues taken into account in assessing the merger?

The ICA may exceptionally authorise a prohibited transaction to be carried out on the basis of "general interests of the national economy" (Section 25(1) of the Italian Competition Act). Such authorisation cannot be granted where the transaction is liable to eliminate competition in the relevant market or where it implies restrictions which are not strictly justified by the protection of the above-referenced general interests (proportionality test). Even when such authorisation is granted, the ICA can still impose conditions necessary to fully restore competition within a specific timeframe deadline. At present, however, this possibility is purely theoretical, as the Italian government has not yet issued the necessary general guidance criteria pursuant to which the ICA is entitled to grant such an authorisation. As a result, this exception has never been applied. Similarly, the exceptional power of the President of the Council of Ministers to prohibit the acquisition of an Italian company by a foreign entity has never been applied (see question 1.3 above).

A unique case of interference of the Italian government is the *Alitalia/Air One* case (2008) where the ICA was forced to clear what essentially amounted to a merger to monopoly on certain highly profitable routes between the two major airline companies in Italy. The Italian government introduced an *Alitalia ad hoc* law (Law Decree n. 134/2008, tellingly denominated "Urgent measures concerning the restructuring of large companies in crisis") which *inter alia* partly amended the applicable merger control provisions. Pursuant to this legislation, the ICA was deprived of its powers to impose structural remedies (i.e., divestitures) but could only impose behavioural remedies for mergers between, or relating to, large companies in administrative receivership. The "Alitalia law", however, also provided that after the three-year period, any monopoly situation that might have arisen should be removed. In the autumn of 2011 the ICA opened an investigation and in April 2012 found that the 2008 transaction between Alitalia and AirOne gave the merged company a monopoly on flights between Milan-Linate and Rome-Fiumicino. The ICA requested Alitalia to eliminate the monopoly position acquired as a result of the 2008 *Alitalia/AirOne* transaction on the route Milan Linate-Rome Fiumicino by October 2012. The ICA communicated on 25 October 2012 that, pursuant to the procedure of the monitoring trustee, EasyJet was the assignee of the slots in the route Milan Linate-Rome Fiumicino that Alitalia had divested.

### 4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

When a notice of notification is published on the ICA's website (see question 3.12 above), third parties are invited to submit their observations within five business days of the date of publication. Generally, customers and competitors are also contacted directly by the ICA in connection with the market test. Third parties can lodge a complaint against a competitor that a reportable transaction has not been notified.

Although the introduction of such notice of notification had the effect of further increasing the numbers of third-party interventions during the phase-one process, involvement of third parties or complainants is more frequent in phase-two proceedings. The ICA's decision to start phase-two proceedings is published on its Bulletin and website so as to enable third parties representing public or private interests (e.g., customers or competitors) which may be directly and immediately harmed by the proposed transaction or by any measure adopted in connection with the proceedings to intervene in the process. In particular, such third parties can submit briefing papers, have access to the case file (non-confidential version) and submit a reasoned request to be heard at a hearing before the ICA. Admitted third parties can also discharge the burden of proof that they have been harmed by the ICA's decision and therefore bring an action for annulment before the Regional Administrative Tribunal of Lazio (or "TAR", see question 5.9 below).

Third parties must be granted access to the relevant documents under the regulations relating to the transparency of conduct of public bodies.

### 4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

Parties must provide to the ICA all the necessary information to enable the ICA to review the transaction (see question 3.8 above as regards the scope of the information requirements set forth by the Notification Forms). The ICA can contact the notifying party to ask for further clarifications or explanations in relation to the submitted data/information or informally contact competitors, customers or suppliers in order to gauge their views or to verify whether the information submitted is accurate.

During phase-two proceedings, the ICA has wide-ranging powers to gather information from the parties and from third parties, to order the production of documents, to order surprise inspections ("dawn raids") and to make copies of corporate documents. Additionally, the ICA can require any company, public body or natural or legal person to provide information, documents or data in its possession which are necessary for the purpose of the investigation. The ICA can impose fines of up to €25,823 for failure or refusal to provide information and up to €51,645 for supplying false information.

### 4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The notifying party should indicate at the time of filing which information constitutes confidential information. Similarly, during phase-two proceedings as regards the documents in the ICA's case file, the parties must indicate which information is to be regarded as confidential. The ICA's decisional practice draws heavily on the EUMR rules regarding the treatment of confidential information. The parties must state the reason why certain information shall be considered as confidential. If the confidentiality claim is accepted, the ICA will make available a non-confidential version of the decision/document as required (e.g., publish on its website a non-confidential version of the decision with the agreed redactions).

## 5 The End of the Process: Remedies, Appeals and Enforcement

### 5.1 How does the regulatory process end?

Should the ICA believe that the transaction raises serious competition concerns, it opens phase-two proceedings within 30 calendar days from the date of notification (see question 3.6 above).

The in-depth investigation can lead to the adoption of:

(a) an unconditional clearance decision;

(b) a prohibition decision; or

(c) a conditional clearance decision.

If the ICA adopts a prohibition decision after the transaction has

already been implemented by the parties, the ICA may order all measures necessary to restore conditions of effective competition. Should the parties implement the transaction despite a prohibition decision or fail to comply with the relevant conditions attached to the ICA's conditional decision, the ICA may also impose fines of between one per cent and 10 per cent of the turnover of the businesses party to the transaction (i.e., the turnover generated by the parties' activities in the concerned markets).

### 5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes. The ICA has traditionally shown a preference for a "negotiated" approach with the notifying parties. However, remedies can also be unilaterally imposed by the ICA in a phase-two decision (Section 6(2) of the Italian Competition Act) (see question 5.4 below).

### 5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The ICA has accepted commitments in at least one foreign-to-foreign merger (ICA decision n. 4862 of 10 April 1997, in case C2626B *Solvay/Sodi*).

### 5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

There are no specific rules concerning the timing of the submission of remedies and it is advisable to liaise with the case-team to discuss the issue. During both stages of the proceedings, the ICA may set out its competition concerns and ask the parties to address such concerns. The parties cannot formally submit remedies during phase-one; however they can modify the structure of the proposed transaction in order to dispel the competition concerns. In fact, since the ICA cannot accept binding commitments in phase-one and cannot fine the parties for failing to comply, the ICA is normally reluctant to accept remedies in phase-one unless clear-cut and undoubtedly effective. This explains why phase-one remedies are rare and the parties may consider re-notifying the transaction as modified to take into account the ICA's observations.

Formal commitments can be offered by the parties and made binding by the ICA through a phase-two decision. Negotiations are carried out between the parties and the ICA to identify the most appropriate remedies (whether behavioural and/or structural) which can be offered by the parties. However, in a phase-two decision the ICA can also unilaterally impose remedies/measures upon the parties to eliminate the competition concerns.

Generally, structural remedies are considered to be the preferred solution as they create the conditions for the emergence of a new competitive entity or the strengthening of an existing competitor. The ICA relies upon the principles laid down by the European Commission in its 2008 Remedies Notice.

### 5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The ICA typically sets out the terms and conditions, and timing of divestments in its final decision.

The ICA has increasingly relied on the appointment of an independent advisor of international standing (trustee) who will oversee the monitoring and sale of the divestment business. In its decisions, the ICA can also set out the trustee's mandate (e.g., oversee compliance with the commitments and sale of the divestment business, submit written detailed reports about progress and implementation of the commitments). For instance, the clearance of the merger between insurance companies *Unipol/Fonsai* (2012) was subjected to a two-fold set of remedies which consisted of both divestiture and severance of links. First, Unipol had to divest certain assets (e.g., companies, brands, insurance portfolios representing a significant amount of premiums, and infrastructures) in a "*short time-frame*" and through the supervision of an ICA-approved advisor in order to reduce below 30 per cent its share in a number of key insurance markets at both the national and provincial level as regards the distribution of insurance products. Secondly, strict measures were taken in order to ensure the break of the direct and indirect financial and personal links existing between Unipol and Fonsai on the one hand, and, on the other hand; (i) the Generali Group (Italy's largest insurance group and the merging parties' closest competitor), and (ii) Mediobanca and the Unicredit Group (important Italian companies active in the financial sector).

### 5.6 Can the parties complete the merger before the remedies have been complied with?

Unless an upfront buyer requirement is imposed (i.e., where the parties cannot close the transaction without first entering into a binding agreement with a purchaser that has been approved by the ICA), the parties can complete the concentration provided that they give appropriate assurances that commitments will be implemented and that they will swiftly take the necessary actions to comply with the conditions imposed within the deadline set forth by the ICA.

### 5.7 How are any negotiated remedies enforced?

Failure to comply with the conditions set forth in the commitments made binding by the ICA may entail the imposition of fines of between one per cent and 10 per cent of the turnover of the businesses party to the transaction (i.e., the turnover generated by the parties' activities in the concerned markets).

Failure to comply with remedies negotiated in phase-one (although rather unusual – see question 5.4 above) does not result in the imposition of fines as such remedies are not binding under the Italian Competition Act. However, the ICA is theoretically allowed to open a new proceeding, starting phase-one afresh, on the basis that the factual information submitted did not correspond to the actual structure and characteristics of the implemented transaction.

### 5.8 Will a clearance decision cover ancillary restrictions?

The ICA will generally evaluate ancillary restrictions together with the assessment of the notified transaction and will expressly analyse the compatibility of restrictions with the European Commission Notice on Ancillary Restrictions (2005) in its final decision. In practice, the ICA strictly enforces the principles laid down in the above-referenced notice.

### 5.9 Can a decision on merger clearance be appealed?

Yes. The ICA's decisions are subject to a double level of judicial review. Interested parties may file an appeal before the TAR within 60 days from receiving notification of the ICA's decision. The

TAR's rulings can be appealed within 60 days from receipt of notification of the ruling before the Council of State (the Italian Supreme Administrative Court).

### 5.10 What is the time limit for any appeal?

The above-mentioned term (question 5.9 above) of 60 days is suspended between 1 August and 15 September of each year. Similarly, the term of appeal before the Council of State is suspended between 1 August and 15 September of each year.

### 5.11 Is there a time limit for enforcement of merger control legislation?

The ICA may, at any time, open an investigation concerning a reportable transaction that was not notified in order to assess its impact on competition (e.g., following a complaint). However, the ICA's current approach is that it will not impose fines for failing to notify as regards transactions implemented more than five years prior to the opening of the proceeding as they are considered to be time-barred.

The ICA will open a second proceeding if its original decision was based on erroneous information supplied by the parties or if the parties have failed to comply with the binding commitments.

## 6 Miscellaneous

### 6.1 To what extent does the merger authority in Italy liaise with those in other jurisdictions?

The ICA is part of the European Competition Network ("ECN"), a network comprising the European Commission and the national competition authorities of the 28 Member States of the EU. The ICA receives notice of all transactions notified to the authorities of other Member States and of those notified to the European Commission. Given the frequency of such informal contacts, the ICA may therefore become aware of a reportable transaction that was not notified in Italy or ask for more information regarding transactions that, although filed with the European Commission under the EUMR, have a substantial impact on the Italian market (e.g., such discussions can potentially trigger an Article 9 EUMR referral request from the European commission to the ICA).

The ICA is also a member of the European Competition Authorities network ("ECA"), which includes the competition authorities of the European Economic Area (EU Member States and the European Commission, Norway, Iceland, Liechtenstein and the EFTA Surveillance Authority). The ECN and the ECA exist in parallel and there are no formalised links between the two networks.

As regards cooperation outside the EEA, the ICA is a member of the International Competition Network ("ICN"), which aims at promoting the development and promotion of best practices.

### 6.2 Are there any proposals for reform of the merger control regime in Italy?

Yes. There are three reform proposals presented by the ICA which aim at resolving certain divergences between the Italian merger control rules and the EUMR. In particular, the reform proposals deal with: (i) the substantive test for mergers under the Italian Competition Act (as noted above, the ICA relies on the pre-2004 EUMR substantive test – see question 4.1 above); (ii) the procedural and substantive rules applicable to "cooperative" joint ventures (as noted above, the Italian Competition Act still retains the old distinction between "cooperative" and "concentrative" joint ventures – see question 2.3 above); and (iii) the calculation of the turnover as regards transactions involving credit institutions, insurance companies and other financial institutions (see question 2.4 above).

The first reform proposal intends to align the Italian substantive test with that of the EUMR. The EUMR substantive test consists of the significant impediment to effective competition ("*significantly impede effective competition… in particular as a result of the creation or the strengthening of a dominant position*") and therefore relies on an effects-based approach as opposed to the Italian substantive test, which is structure-based by conferring a central role to the notion of "dominant position" (although the ICA has also shown willingness to depart from a pure formalistic test – see question 4.1 above). As part of the reform proposal, the ICA has also recommended to add the following factor to the list that it typically considers when conducting its assessment: "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition*" (this factor is expressly mentioned by Article 2(1)(b) of the EUMR).

The second reform proposal concerns the treatment of joint ventures under Italian merger control rules, particularly the "cooperative" joint venture. As mentioned in question 2.3 above, in Italy, "cooperative" joint ventures, even if full-function, are still subject to procedural and substantive rules applicable to restrictive agreements. The ICA has therefore requested that the Italian Competition Act makes an explicit reference to the applicability of merger control rules to full-function "cooperative" joint ventures.

The third reform proposal concerns the method for calculation of turnover of banks and financial institutions (in Italy, "*turnover is considered to be equal to 10 per cent of [their] total assets, minus memorandum accounts*") which should be aligned to and mirror that of Article 5(3)(a) EUMR.

The above-referenced proposals are currently being considered by the Italian authorities.

### 6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of 18 September 2013.

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