

# Merger Control

Third Edition

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# Italy

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## Overview of merger control activity during the last 12 months

In 2013, 59 concentrations were notified to the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* or “ICA”), a significant reduction compared to the numbers in 2012 (451) and in 2011 (514). During the first months of 2014 (January to April), the ICA reviewed and cleared unconditionally 14 concentrations.

This sharp reduction in the number of concentrations reported to the ICA was due to the impact of the Monti government reform on the Italian merger control regime which, as of 1 January 2013, led to: (i) the modification of the reportability requirements in Italy<sup>1</sup> which, by making the turnover thresholds cumulative rather than alternatives, introduced an effective mandatory local nexus requirement; and (ii) the abolition of the merger filing fees (“**Monti reform**”).<sup>2</sup>

The Monti reform attempted to reduce red-tape and unnecessary administrative burdens by correcting a longstanding anomaly of the ICA having jurisdiction over transactions that do not have an appreciable impact in Italy. A concurrent objective was to free up the ICA’s resources to ensure the ICA can focus on the fight against hard-core infringements. This objective appears notionally to have been met given the significant reduction in the number of reviewable transactions. As discussed further in the section ‘Key policy developments’ below, in order to assess the impact of the amendments in more detail and consider whether further adjustments are necessary, the ICA undertook a statistical analysis and then launched a public consultation to analyse and seek views on the potential effects of lowering the now cumulative Italian target turnover threshold from €49m to €10m so as to ensure that a non-insignificant number of potentially problematic transactions do not escape review (ICA’s *Comunicazione* of 10 February 2014).

From January 2013 to April 2014 (“**Relevant Period**”):

- 62 cases were unconditionally cleared by the ICA in Phase I<sup>3</sup> since they did not raise serious doubts as to their compatibility with the Italian Competition Act;
- one case (*M-DIS – Servizi Stampa Liguria – Società di Edizione e Pubblicazioni/GE-DIS*)<sup>4</sup> was unconditionally cleared by the ICA after an in-depth investigation (Phase II);<sup>5</sup>
- one case (*Italgas S.p.A. – Acegas-Aps S.p.A./Isontina Reti Gas*)<sup>6</sup> was prohibited by the ICA after Phase II since it would have created or strengthened a dominant position, as a result of which competition would have been eliminated or substantially reduced on a lasting basis in the Italian market (Article 18 of the Italian Competition Act);
- 21 cases resulted in a decision of inapplicability of the Italian Competition Act. The ICA adopts this sort of decision when the notified transaction: (i) does not fall within

the scope of the Italian Competition Act because it does not amount to a concentration within the meaning of Article 5 of the Italian Competition Act, e.g. the notified transaction did not result in a change of control; (ii) has a Community dimension and as a result falls within the scope of the EU Merger Regulation (“EUMR”); (iii) does not meet the cumulative turnover thresholds set forth in Article 16 of the Italian Competition Act; or (iv) is abandoned;<sup>7</sup>

- in five cases the ICA opened proceedings for failure to notify a concentration prior to implementation pursuant to Article 19(2) of the Italian Competition Act;<sup>8</sup>
- in one case (*Unipol/Fonsai*)<sup>9</sup> the ICA opened proceedings for failure to comply with the conditions imposed pursuant to Article 19(1) of the Italian Competition Law. In another case (*Moby/CIN/Tirrenia*),<sup>10</sup> the ICA imposed a fine of €500,000 on Moby and of €271,000 on CIN for breach of their commitments in connection with the acquisition of Tirrenia in June 2012; and
- in one case (*Telecom Italia/Seat Pagine Gialle*),<sup>11</sup> further to an application from Seat in October 2013, the ICA modified certain commitments given in connection with the *Telecom Italia/Seat Pagine Gialle* merger of 2000.

In the Relevant Period there was one Article 22 EUMR referral from the ICA to the European Commission (“**Commission**”). In *Canon/I.R.I.S.*, which concerned Canon’s proposed acquisition through its public bid of I.R.I.S. S.p.A. (“**IRIS**”), a developer of a broad range of capture software for multi-functional peripherals used in several document related-functions, such as scanning, copying and printing, the ICA and others joined the initial referral request made by the Belgian competition authority.<sup>12</sup> The Commission found that both legal requirements set forth by Article 22 EUMR were met, since: (i) the scope of the potentially affected markets was wider than national, if not EEA-wide, therefore it affected trade between Member States; and (ii) the concentration threatened to significantly affect competition in the market for portable document scanners in the EEA and in Italy (the requesting Member State). In particular, the concentration would have led to high combined market shares post-merger (50-60% in Italy and in the EEA) in the already oligopolistic market for portable document scanners (a niche market with a possible size of €10m to €20m in 2011 at the EEA level). As a result, the Commission reviewed the concentration which was subsequently unconditionally cleared in Phase I.

No referrals from the European Commission to the ICA under Article 9 EUMR have been made in the Relevant Period. However, the ICA has previously signalled its intention to review concentrations liable to potentially impact the Italian market. For instance, in *Lactalis/Parmalat* (2011), which concerned Lactalis’s unsolicited €3.4bn bid for Parmalat’s entire share capital and resulted in the creation of the largest dairy group in the world, there were indications concerning a potential Article 9 request as stated by the former Chairman of the ICA, Mr. Catricalà: “*They (Lactalis) can present a case to the EU (the European Union’s Commission) but if we see that there are competition problems for the Italian market, we will ask to see it*”.<sup>13</sup> Ultimately, the ICA did not submit a formal Article 9 request and the concentration was exclusively reviewed by the Commission who cleared it unconditionally in Phase I.

### **New developments in jurisdictional assessment or procedure**

With the exception of the implementation of the Monti reform which, as of 1 January 2013, introduced the cumulative turnover thresholds and abolished the merger filing fees (see section, ‘Key policy developments’ below for the ICA’s assessment of the impact of the

Monti reform), there has been no significant change as regards the substantive assessments of concentrations notified to the ICA or the procedural rules.

**Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition etc.**

As regards the sectors currently under scrutiny, the energy sector (in particular, gas distribution) appears to attract most of the ICA's attention. *Italgas-Acegas/Isontina Reti Gas* was the only concentration prohibited by the ICA in the Relevant Period and involved the transfer of joint control of Italian gas distributor Isontina Rete Gas from ENI and Acegas-Aps to Acegas-Aps (Hera Group) and Italgas, Italy's largest gas distributor. The concentration was blocked on grounds that it would have created a dominant position capable of eliminating or reducing competition in future tenders for natural gas distribution concessions in certain narrowly defined geographic markets. The ICA found that Italgas and Acegas would have participated jointly in tenders for gas distribution concessions in these geographic areas and would not have faced sufficient competitive constraint, post-transaction, from Isontina (now controlled by Italgas and Acegas) and other potential entrants. The ICA had also previously prohibited another concentration in the energy sector in 2011 (*CVA-Compagnia Valdostana delle Acque/Deval-Vallenergie*)<sup>14</sup> which subsequently was re-notified and authorised due to amendments in the applicable regional regulation concerning the electricity market.<sup>15</sup>

Other sectors under scrutiny are transport (*Moby/CIN/Tirrenia*) and insurance (*Unipol/Fonsai*) where the ICA imposed fines for breach of commitments and opened proceedings for failure to comply with the conditions attached to its clearance decision. In the telecommunications sector, the ICA modified certain commitments given in connection with the *Telecom Italia/Seat Pagine Gialle* merger of 2000 (see the section 'Key policy developments' below).

**Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers**

Whilst the ICA's substantive test (i.e., 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) mirrors that of pre-2004 EUMR reform, the ICA's decisional practice is generally in line with the current EUMR test.

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. The ICA relies on the substantive criteria adopted by the 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. Broadly speaking, when assessing the competitive effects stemming from a concentration, the ICA tends to rely on a market-structure based approach that attempts to determine the existing parameters and dynamics of competition on the affected market(s), and predicts the post-merger effects on that (these) market(s). The ICA compares the envisaged competitive conditions in the post-merger scenario with those that would prevail absent the concentration (i.e. the 'counterfactual'), and endeavours to ascertain whether the merging parties will face sufficient competitive constraints to make it unprofitable to engage in alleged anti-competitive behaviour post-merger.

By way of illustration, in *AtlantiaGemina*, which concerned the substitution of one operator (Roma/ADR, the company that manages the Rome airports) by another (Autogrill, a company active in the catering and retail services, including airports) in relation to the management of airport facilities and ground-handling services, the ICA appraised the vertical effects in the travel retail and catering markets. As regards these markets, the ICA took into account: (i) the presence of established competitors at the global level (Adita, Dufry, Nuance Group, Gbr. Heinemann, etc.) which had the ability to discipline Autogrill, post-merger; and (ii) the fact that the procedures for the award of sub-concessions for the provision of catering services in the airport ensured equal and non-discriminatory access for Autogrill's competitors.

In *M-DIS-Servizi Stampa Liguria-Società di Edizione e Pubblicazioni/GE-DIS*, which concerned the markets of newspapers and periodicals distribution, the ICA conducted an in-depth review of the horizontal and vertical effects of the concentration. Within the market of periodicals distribution, the ICA considered local distribution markets in which the merging parties would have had a combined share of 80-85% post-merger. At the end of Phase II, the ICA unconditionally cleared the concentration given that the merging parties' market power would not increase *inter alia* as a result of the fact that they were subject to regulatory obligations incumbent on national and local distributors which made it impossible for the merging parties to influence the parameters of competition. Whilst the ICA's decisional practice<sup>16</sup> does not attribute particular relevance to efficiency arguments, in *M-DIS-Servizi Stampa Liguria-Società di Edizione e Pubblicazioni/GE-DIS*, in its assessment the ICA took into account cost-efficiencies resulting from the concentration in the context of difficult market conditions for newspapers and periodicals distribution.

### **Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation**

As regards the ICA's approach to remedies, it should be noted 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 phases of review, the ICA may set out its competition concerns and ask the merging parties to address such concerns. Importantly, the merging parties cannot formally submit remedies during Phase I; however, they can modify the structure of the proposed transaction in order to dispel the perceived competition concerns. In fact, since the ICA cannot accept binding commitments in Phase I and cannot fine the merging parties for failing to comply,<sup>17</sup> the ICA is normally reluctant to accept remedies in Phase I unless clear-cut and undoubtedly effective.<sup>18</sup>

Whilst the ICA has not imposed any decisions with remedies during the Relevant Period, the ICA has opened proceedings for breach of the commitments given by the merging parties in *Moby/CIN/Tirrenia* and *Unipol/Fonsai*. In *Telecom Italia/Seat Pagine Gialle*, the ICA modified certain commitments given in connection with the *Telecom Italia/Seat Pagine Gialle* merger of 2000.

In *Moby/CIN/Tirrenia*, at the end of its proceedings for breach of the commitments, the ICA imposed a fine of €500,000 on Moby and €271,000 on CIN. The commitments requested Moby/CIN to stop operating the routes in which the merged entity would be dominant (in certain cases above 80%), ceasing code-sharing agreements with competitors on the most concentrated routes and offering discounts on the actual list prices for 2012 and 2013. The ICA found that Moby/CIN misrepresented compliance with the commitments and that, in particular, they failed to: (i) cancel – effective immediately as of the date of the ICA

decision – any code-sharing agreements; and (ii) maintain for the summer 2012 season fares after promotions at a level that was pre-determined by the ICA.<sup>19</sup>

In *Unipol/Fonsai*, the ICA started proceedings against Unipol for failing to comply with the conditions set forth in the ICA's *Unipol/Fonsai* decision. On that occasion, the ICA imposed the reduction of the merged entity's market share in the non-life (notably motor insurance) and life insurance markets, and in 93 provincial markets for the distribution of the policies to no more than 30% post-merger (or elimination of the merger-specific increment if a share of 30% was held prior to the merger). The divestiture of the insurance assets should have occurred within a specified timeframe. The ICA monitored the remedies' implementation process by requesting the information directly from Unipol and through regular reports sent by KPMG (which acted as a monitoring trustee) to the ICA. Despite the ICA's request to enter into a signed divestiture contract together with the final identification of the scope of the assets to be divested, Unipol failed to comply with the conditions imposed within the relevant timeframe.

The ICA, like the European Commission, allows the merging parties to modify the commitments under certain conditions (e.g. where the market circumstances have changed significantly and on a permanent basis). Further to the request, the ICA can either waive or modify the measure. In a previous case, the ICA accepted Intesa Sanpaolo's request (2010) to review the measures relating to its life insurance activities imposed in the ICA's 2006 conditional clearance in *Intesa/Sanpaolo IMI*. On that occasion, the ICA replaced some of the 2006 measures with new ones.

In *Telecom Italia/Seat Pagine Gialle*, SEAT Pagine Gialle asked the ICA to consider whether certain commitments given in connection with the *Telecom Italia/SEAT Pagine Gialle* merger of 2000 were still warranted. In particular, the ICA was requested to assess whether SEAT Pagine Gialle and Telecom Italia had still to "*maintain unchanged their relationships as regards the separate distribution of their telephone directories*" in light of the development of the Italian annual directories market. On 29 January 2014, the ICA accepted SEAT Pagine Gialle's request and repealed the prohibition on the joint sale of alphabetical and categorical telephone directories given the changes in the market conditions that occurred since 2000.

### Key policy developments

In its *Comunicazione* of 10 February 2014, the ICA's statistical assessment of the Monti reform confirmed that the introduction of the cumulative thresholds materially reduced the number of yearly reportable transactions in Italy, which dropped from 843 (highest) in 2007 and 451 in 2012 (the year before the reform came into effect) to just 59 in 2013. This dramatic reduction of reportable transactions led the ICA to undertake a simulation exercise to assess the impact of the Monti reform in terms of problematic transactions "lost", i.e., transactions that would have been scrutinised but for the changes to the merger filing thresholds. The ICA noted that if the cumulative thresholds had applied during the period 2000-2012, the number of Phase II transactions "lost" would have been 13 out of 45 (i.e., approximately 30% out of total Phase II cases). By contrast, if during the same period the Italian target turnover threshold had been set at €10m instead of €49m (as it remains following the change from the alternative to the cumulative thresholds), the number of problematic transactions "lost" would have been substantially lower. The ICA further considered that a reduction of the Italian turnover threshold for the target at €10m would not require significant additional resources since the incremental amount of yearly transactions

that would fall under the scrutiny of the ICA would be well below the pre-reform level.

The Monti reform also prompted an internal debate within the ICA as to whether Italy's new merger filing thresholds could be too high and failing to capture potentially problematic transactions, as stated by Mr. Roberto Chieppa, ICA's secretary general, at a conference in Rome on 27 June 2013. From an enforcement perspective, the key question concerned the ICA's ability to review transactions in narrowly defined markets where the strong market power of small and medium enterprises ("SMEs") could give rise to anti-competitive effects. Mr. Chieppa added that this was particularly true for a country like Italy where SMEs account for a large part of the economy.

The ICA's proposal to lower the Italian turnover threshold of the target at €10m to address the above-referenced shortcomings was subject to a public consultation. Based on the results of the public consultation,<sup>20</sup> the ICA decided to wait until the end of 2014 to delineate the precise scope of the legislative proposal to the Italian turnover thresholds.

### Reform proposals

In addition to the possible legislative amendment to the Italian turnover threshold, 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 Section 4 above); (ii) the procedural and substantive rules applicable to "cooperative" joint ventures (the Italian Competition Act still retains the old distinction between "cooperative" and "concentrative" joint ventures); and (iii) the calculation of the turnover as regards transactions involving credit institutions, insurance companies and other financial institutions.

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 in practice the ICA has shown a willingness to depart from a pure formalistic test). As part of the reform proposal, the ICA has also recommended adding 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. 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 make 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.



## Endnotes

1. Currently, concentrations must be filed with the ICA prior to their implementation if the following cumulative turnover thresholds set forth in Article 16(1) of Law No. 287/1990 (the “Italian Competition Act”) are met:
  - the turnover of all the companies in Italy exceeds €489m in the last financial year; and
  - the turnover of the target companies in Italy exceeds €49m in the last financial year.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](http://www.agcm.it)). The above-referenced thresholds were updated by the ICA on 10 March 2014.
2. Mr. Monti’s liberalisation decree converted into law No. 27 of 24 March 2012. Further to the abolition of the merger filing fees, 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 total turnover of over €50m have to pay an annual fee to the ICA. For 2014, the ICA has set the annual fee (ICA Resolution of 22 January 2014, No. 24766) amounting to 0.06 per thousand of their turnover in the last financial year (the maximum contribution is capped at €300,000).
3. The Phase I investigation typically takes 30 calendar days. In case of national public bids, Phase I lasts 15 calendar days. The ICA may issue a “stop-the-clock” letter if the information provided is deemed to be incomplete. Once the ICA is satisfied with the information received, a new 30-day term will start running.
4. Case C11824, ICA decision of 20 February 2013, *M-DIS – Servizi Stampa Liguria – Società di Edizione e Pubblicazioni/GE-DIS*.
5. The Phase II investigation takes 45 calendar days. The ICA has the possibility to extend the 45-day period for a maximum of 30 additional calendar days if the parties fail to provide the relevant information that is available to them. This extension can be made just once.
6. Case C11878, ICA decision of 17 April 2013, *Italgas S.p.A. – Acegas-Aps S.p.A/Isontina Reti Gas*.
7. The majority of decisions of inapplicability were due to the target turnover not satisfying the requisite national threshold. When finding a notified transaction not to constitute a “concentration”, the ICA explicitly referred to the European Commission’s Consolidated Jurisdictional Notice (“EU Jurisdictional Notice”) (see case C11914, ICA decision of 24 July 2013, *Sestant S.p.A. – Fondo Strategico Italiano/Kedrion Group*, where the ICA found that there was no change in the quality of control based on the EU Jurisdictional Notice).
8. Fines for failure to notify may amount to up to 1 per cent of the worldwide turnover of the notifying party or parties in the last fiscal year. In the Relevant Period the fines ranged from €3,000 to €10,000.
9. Case C11524B, ICA decision of 19 February 2014, *Unipol/Fonsai*.
10. Case C11613B, ICA decisions of 18 June 2013 and 20 December 2013, *Moby/CIN/Tirrenia*.
11. Case C3932B, ICA decisions of 17 October 2013 and 29 January 2014, *Telecom Italia/Seat Pagine Gialle*.
12. Case No COMP/M.6773, Commission decision of 26 November 2013, *Canon/I.R.I.S.* Canon held a 17% non-controlling interest in IRIS and intended to acquire sole control by purchasing all outstanding shares through a public bid. Other EU Member States (Austria, France, Ireland, Portugal and Sweden) joined the referral request.

13. <http://m.foxbusiness.com/quickPage.html?page=32811&content=49833193&pageNum=-1>.
14. Case C11082, ICA decision of 4 August 2011, *CVA-Compagnia Valdostana delle Acque/Deval-Vallenergie*.
15. Case C11315, ICA decision of 16 November 2011, *CVA-Compagnia Valdostana delle Acque/Deval-Vallenergie*.
16. Nor does the Italian Competition Act mention efficiency gains as a relevant factor in the assessment of the transaction.
17. Failure to comply with the conditions set forth in the commitments made binding by the ICA may entail the imposition of fines of between 1 per cent and 10 per cent of the turnover of the businesses party to the transaction (i.e., the turnover generated by the merging parties' activities in the concerned markets).
18. This explains why Phase I remedies are rare and the merging parties may consider re-notifying the concentration as modified to take into account the ICA's observations.
19. The pre-determined tariff was based on Moby's average per unit gain for the summer 2009 season, when consumer prices were especially favourable, with the exception of a direct increment designed to compensate for the fluctuations in average fuel prices between 2009 and Q1 of 2012. A similar fare restriction should have been implemented in 2013 as well.
20. 17 stakeholders responded (10 law firms, 6 trade associations and 1 company) to the public consultation. The responses encouraged the ICA to adopt changes that concerned not only the Italian turnover threshold of the target at €10m but also other key areas of the Italian merger control rules which include the substantive test and the treatment of joint ventures (i.e., to ensure that they are fully aligned with that of the Commission), the Italian combined turnover threshold and the duration of the merger proceedings.

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