The Merger Control Review

Fourteenth Edition

Editor
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The Law Reviews

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FOURTEENTH EDITION

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THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

ISBN 978-1-80449-190-4

PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction; however, there are some that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriarche group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for late notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

The role of third parties also varies across jurisdictions. In some (e.g., Japan), there is no explicit right of intervention by third parties but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal; the

Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In other jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

In large cross-border transactions raising competition concerns, it is becoming the norm for the US, Canadian, Mexican, EC and UK authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has consulted with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an acquisition of control. Many of these jurisdictions, however, will include, as a reportable situation, the creation of joint control, negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or de facto control (e.g., Turkey), or a change from joint control to sole control (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which an interest of only 10 per cent or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the effect that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has material influence (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers have also been the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an acquisition subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that structural remedies are preferable to behavioural conditions, a number of jurisdictions in the past few years have imposed a variety of behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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July 2023

Chapter 16

ITALY

Rino Caiazzo and Francesca Costantini[1]

I INTRODUCTION

The Italian merger control regime was implemented with Law No. 287/1990, entitled 'Provisions for the protection of competition and the market' (the Act). The Act was drafted on the basis of reciprocal exclusivity, or single barrier, principles. Therefore, it applied only to agreements, abuses of dominant position and concentrations that did not fall within the application of the treaties establishing the European Community, European Commission regulations or other acts of the European Commission having equivalent legal effect. Italian Legislative Decree No. 3/2017 implementing Directive 2014/104/EU[2] on antitrust damages actions introduced some changes. Section 1(1) of the Act now states that the provisions of the Act apply to 'any agreements, abuses of dominant position and concentrations', whereas Section 1(2) specifies that the Italian Competition and Market Authority (the Authority) may also apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and Sections 2 and 3 of the Act concerning agreements restricting competition and abuses of dominant position to the same cases, even in parallel. With specific reference to concentrations, even though the current version of Section 1 of the Act does not provide such a specification, we can conclude that the Act still applies to concentrations (exceeding the statutory thresholds set forth in the Act as described below or nonetheless considered relevant by the Authority pursuant to Section 16(1-*bis*) of the Act) that fall outside the scope of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation) and that therefore do not have to be notified to the European Commission. In this respect, reference is made to the combined effect of Section 1(4) of the Act, which specifies that its provisions shall be interpreted in accordance with the principles of European Community competition law, and the provision of Considerandum 18 of the EU Merger Regulation, which specifies that Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension.

In July 1996, the Authority issued guidelines providing the general conditions of applicability of the merger control laws, as well as regulating certain procedural aspects (the Guidelines).

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2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

Moreover, Decree of the President of the Republic No. 217/1998 sets forth the procedural rules that must be complied with in carrying out investigations, which ensure the parties' rights of due process, including the right to be heard and to have access to the documents of the proceedings.

The new Annual Law on Market and Competition (Law No. 118/2022), which entered into force on 27 August 2022, has introduced significant changes to the Act to further align Italian antitrust law to European Union rules.

The Authority is an independent body that deals with relevant concentrations. For certain industries, the provisions of the Act are enforced by the Authority with the cooperation of different government bodies. Section 20 of the Act provides that in reviewing concentrations involving insurance companies, the Authority must consult with the Institute for the Supervision of Insurance (IVASS), the sector regulator (which, according to Law Decree No. 95 of 6 July 2012, replaced the Institute for the Supervision of Private Insurance (ISVAP), the previous sector regulator), prior to rendering its decision. Section 20 of the Act (as amended by Law No. 303 of 29 December 2006) also provides that, with regard to banks, merger control is the responsibility of the Authority, whereas the Bank of Italy is requested to carry out its assessment of sound and prudent management and issue its own authorisation (with reference to the same transaction).

In the case of a concentration resulting from a stock exchange takeover bid, the Authority must receive notification at the same time as the securities regulator, the National Commission for Companies and the Stock Exchange, prior to the launch of the offer.

On 1 January 2013, a new merger control regime providing for cumulative turnover thresholds criteria for pre-merger notification was introduced by Section 5 *bis* of Law Decree No. 1/2012 (converted into Law No. 27/2012). Previously, the Act provided for alternative turnover thresholds. The regime prescribes that concentrations must be notified to the Authority when the aggregate gross turnover in Italy of the undertakings involved exceeds €532 million and the gross turnover in Italy of at least two of the participants exceeds €32 million.[3]

Notification thresholds are subject to an annual adjustment to reflect inflation. Filing fees are not required.

Pursuant to Section 16(2), as amended by Law No. 118/2022, for credit institutions, such as banks, turnover should be considered as the sum of the following income (net of value added tax and of any other directly applicable tax):

a interest and similar income;

b revenues on shares, allowances, variable-yield securities, equities (even in affiliated companies) and on any other security;

c fee incomes;

d any profit gained from financial operations; and

e any other operating income.

For insurance companies, the relevant turnover is instead determined as the sum of all insurance premiums collected or to be collected under insurance contracts, including premiums transferred to reinsurers, subject to deduction of all taxes levied on the total amount of premiums.

3 These figures apply for 2023.

Moreover, Law No. 118/2022 has now granted the Authority the power to review below-threshold transactions (by introducing Section 16(1-*bis*)), if the following cumulative conditions are met: (1) one of the above-stated two cumulative turnover thresholds is exceeded or the combined worldwide turnover of all the undertakings concerned exceeds €5 billion; (2) the transaction could raise potential competition concerns in the national market or in a substantial part thereof, taking into account the possible detrimental effects on the development of small enterprises characterised by innovative strategies; and (3) the closing of the transaction did not take place more than six months earlier. If these conditions are met, the Authority has the power to request the parties to notify the transaction within 30 calendar days of the request. This new provision does not apply to operations that closed before 27 August 2022, the date on which the new Section16(1-*bis*) entered into force.

The Act defines 'concentrations' to include mergers, share or asset purchases resulting in the acquisition of control over another undertaking, and the creation of full-function joint ventures.

The Authority considers that a preliminary agreement is not sufficient to create a concentration for the purposes of the Act.

Section 7 of the Act adopts the definition of 'control' set forth by the Italian Civil Code for the purposes of Italian corporate law generally. Section 2359 of the Civil Code recognises both *de jure* control (i.e., when a majority of the voting rights are held) and certain cases of de facto control (i.e., when, by reason of either voting rights or contractual links, one company exercises a dominant influence over the other).

Section 7 expands the definition of 'de facto control' by providing that it may exist in a variety of circumstances giving rise to the right to exercise decisive influence over the productive activity of an undertaking. These rights may, inter alia, concern the ability to use all or a portion of the assets of the undertaking or involve special rights in terms of the composition of the administrative bodies of a company. The definition of 'control' in Section 7 may also cover persons who are indirect holders of such rights. In various cases, the Authority has considered that control over a company is created by means of shareholders' agreements, especially when a minority shareholder is given the right to appoint one or more members of the administration board, or when the by-laws require a certain voting quorum of the administration board that makes the participation and the vote of the director or directors appointed by the minority shareholder essential.

The Authority also considers the acquisition of a business division that may be deemed to constitute a going concern in itself as a concentration.[4] However, the Authority considers that no concentration takes place when the target company does not conduct (nor has conducted nor has plans to conduct) any economic activity, even if it owns some assets. However, should the non-active target company be granted authorisations or licences that are necessary to enter a given market, its acquisition is considered to be a concentration.[5]

4 The acquisition of intangible assets such as goodwill or trademarks could lead to a concentration. See the Authority's Annual Report of 1994, pp. 135, 136. In particular for the insurance sector, see Decision No. 11775 of 6 March 2003, *Nuova Maa Assicurazioni/Mediolanum Assicurazioni*, and Decision No. 1852 of 16 March 1994, *Ticino Assicurazioni/Sis*; in these cases, the contractual relationships of the companies were considered to be business divisions.

5 Decision No. 4516 of 19 December 1996, *Agip Petroli/Varie società*, and Decision No. 9529 of 17 May 2001, *Benetton Group/Vari*. However, the licences must be released at the time of the transactions: see Decision No. 15464 of 10 May 2006, *Enel Trade/Nuove Energie*.

The merger control provisions of the Act now apply to all full-function joint ventures. In this respect, to ascertain whether a joint venture is full-function, the Authority relies on the criteria set forth in Communication 2008/C 95/01 of the European Commission (i.e., 'performing on a lasting basis all the functions of an autonomous economic entity').[6] Moreover, with the 2022 reform, a new paragraph has been added to Section 5 of the Act (Section 5(3)), specifying that if the incorporation of a full-function joint venture has the object or the effect of coordinating the behaviour of independent undertakings, the anticompetitive effects of the operation shall be evaluated by applying the same parameters as those adopted for the assessment of restrictive agreements. The Act further specifies that, in making such an assessment, the Authority should take into due consideration the relevant and simultaneous presence of two or more of the parent companies in the same market of the joint venture, or in one situated upstream, downstream or even closely linked to the market of the joint venture, as well as the capacity of the parties, through the establishment of the new joint venture, to eliminate competition for a substantial proportion of the products and services at stake.

Section 6 of the Act, as amended by Law No. 118/2022, prohibits concentrations that significantly impair effective competition in the national market or in a substantial part of it, especially through the creation or the strengthening of a dominant position. A lessening of competition should be evaluated according to the substantial impediment of effective competition test, to protect and boost effective competition, given the peculiarities of the market involved, its actual and potential competitive dynamics, the characteristics of the parties and foreseeable technological developments, and benefits to consumers deriving from the transaction. The new regime responds to the need to adopt a merger assessment test that is in line with that of the European Commission, based on how effective competition is affected, and that allows a balance between the negative effects on competition and the efficiency gains that may be obtained only through the merger.

Unlike the EU Merger Regulation, the Act contains no general presumption that a concentration affecting less than a given market share (25 per cent, as established in Paragraph 32 of the Preamble to the EU Merger Regulation in the current version) is compatible with maintaining competition on the relevant market (this presumption is instead provided by the 'Notice on Application of Article 16, Paragraph 1-Bis, of Law No. 287 of October 10, 1990: Mergers Below the Threshold, Procedure, and Scope of Application' (see Section V, below).

Nevertheless, the Authority has clarified through the Guidelines that for product and geographical markets that exceed certain thresholds, certain information must be given in addition to that required under the synthetic notification form.

The Authority considers seven specific factors in determining whether a concentration would significantly impair effective competition in the national market or in a substantial part of it, especially through the creation or the strengthening of a dominant position, as stated in Section 6 of the Act:

a the structure of the relevant markets and the level of actual and potential competition in those markets;

b the market share of the parties involved in the concentration and their financial and economic power;

6 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2008/C 95/01), at [92].

c the range of choice available to suppliers and users and their actual capacity to have access to sources of supply or market outlets;
d the interests of intermediate and end consumers;
e barriers to entry into the relevant market;
f the trends in supply and demand for the products or services in question; and
g any technical and economic advancement, provided that the same will be beneficial to consumers and will not impair competition.

To date, the Authority's decisions show that it considers market shares, entry barriers and the degree of competitiveness in the relevant market to be the most relevant criteria in evaluating concentrations. The Authority also focuses on the opportunity for the parties to the concentration to preserve the market share that they would hold after the transaction as a factor to be taken into consideration in evaluating the competitive effects of a concentration. Such an opportunity depends not only on the degree of competitiveness on the market, and on the barriers to entry in the same, but also on other factors, such as the degree of evolution of the market or the retention of technological leadership, a vertical integration or important trademarks by the dominant operators. If the market share in question is substantial, the Authority tends to look first at the competitive structure of the market, including the number of competitors and barriers to entry. In determining the scope of its examination, the Authority looks at the relevant product and geographical markets that it considers to represent, respectively, the smallest group of products and geographical area for which it is possible, having regard to the existing possibility for substitution, to create or strengthen a dominant position.

The Act also provides some exceptions to the general rule.

According to Section 5(2) of the Act, equity positions held by credit institutions, including insurance companies that participate in the underwriting of shares on the occasion of the incorporation of a company or the launching of a capital increase, are excluded from the definition of concentration, provided that the shares in question are sold within two years and the voting rights are not exercised during the period of ownership. This exemption is more restrictive than that available under Community law. In fact, Section 3(5)(a) of the EU Merger Regulation refers in general to a temporary purchase of securities with a view to reselling them. The Act also requires that the bank or financial institution in question abstain from exercising the voting rights attached to its shares, whereas the EU Merger Regulation allows those rights to be exercised as long as they do not result in any influence over the competitive behaviour of the target, in certain circumstances in particular, such as to prepare the disposal of the shares. Note that the Authority has refused an application by analogy of Section 5(2) of the EU Merger Regulation in cases in which the temporary acquisition is made by an entity other than banks or financial institutions. Moreover, undertakings that operate a legal monopoly (e.g., before the 1999 liberalisation, Enel for electric energy distribution and, before the 1998 liberalisation, Telecom Italia for various telecommunications services) or under a special statutory mandate (or concession) are exempted from the provisions of the Act. However, this is true solely in respect of matters strictly connected to the performance of the tasks for which an undertaking has been granted its concession. In particular, Section 8 of the Act now provides that those undertakings shall operate through separate companies if they intend to trade on markets other than those on which they trade under monopoly. In addition, the incorporation of undertakings and the acquisition of controlling interests in undertakings trading on different markets require prior notification to the Authority. To guarantee equal business opportunities, when the undertakings supply their subsidiaries or controlled companies on different markets with goods or services (including information services) over which they have exclusive rights by virtue of the activities they perform, they shall make these same goods and services available to their direct competitors on equivalent terms and conditions.[7] Moreover, Section 25(1) allows the government to provide the Authority with guidelines to authorise potentially restrictive concentrations that would be in the general interest of the national economy within the framework of European integration (although this provision has never been used).

II YEAR IN REVIEW

Among the most significant decisions adopted by the Authority in the past year are the following two proceedings, one in which the Authority decided to authorise the merger subject to the adoption of corrective measures, and one in which it prohibited the merger.

On 2 December 2022, the Authority approved the merger between HIG Capital and Quattro Srl[8] upon the implementation of structural measures. The operation consisted in the acquisition of Quattro, a company owner of the Saponi&Profumi franchise, active in the retail distribution of home and personal care products market, by HIG, a private equity company, operating in the same market through its indirect subsidiary, Bubbles BidCo SpA, owner of the Acqua&Sapone franchise. In particular, the acquisition concerned the main franchise located in Sardinia (a region of Italy) by the company owning the main national franchise, Acqua&Sapone, both operating in the same relevant market. According to the Authority's assessment, the merger could have led to the creation of a dominant position in the relevant market. In fact, the post-merger company would have held a market share of more than 40 per cent, both in the geographical market, defined by the Authority in Sardinia, and in the product market, defined by the Authority in the market of retail distribution of home and personal care products by drugstores and large organised distribution operators, with the exclusion of discount stores, small supermarkets and the online trade. Moreover, the operation would also have been likely to result as an incentive to increase product prices (about 5 per cent) in nine local markets. To overcome the Authority's concerns about the merger, Bubbles proposed some corrective measures: (1) to divest 10 to 20 shops to other players, already active in the retail distribution of home and personal care products, thus allowing the strengthening of another player active in the same market; (2) to appoint an independent divestiture trustee if the divestitures were not completed within the time limit set by the Authority; and (3) not to repurchase the divested shops for a certain period after the notification of the merger authorisation.

7 The Italian Competition and Market Authority (the Authority) had interpreted this exemption narrowly. For example, in a decision involving an abuse of dominant position, the monopoly granted to the then state-owned telecommunications concern, SIP (now Telecom Italia), was interpreted by the Authority as not extending to non-reserved neighbouring markets (payment of voice telephone services by credit cards) exclusivity clauses in the franchise agreements of SIP concerning the distribution of mobile terminals and the new pan-European digital mobile telecommunications services.

8 Decision No. 30404 of 2 December 2022, Case C12488, *Bubbles BidCo/Quattro*.

In its decision of 20 September 2022, the Authority prohibited the merger between Enel Produzione SpA, a company active in the market for production and wholesale of electricity, and ERG Power Srl,[9] a company operating in the wholesale electricity market and owner of an important combined cycle plant in Sicily. The operation consisted of the acquisition by Enel Produzione of sole control of ERG Power, subject to certain conditions, including the merger authorisation by the Authority.

According to the Authority's assessment, the merger operation could have led to the establishment or strengthening of a dominant position that would have substantially and lastingly eliminated or reduced competition in two relevant markets: one was identified by the Authority in the market for production and wholesale of electricity and the second in the electricity transmission services market. The geographical market was limited by the Authority to the territory of Sicily. According to the Authority, the merger operation appeared suitable for determining significant increases in the already pre-eminent position of the Enel Group in both markets, owing to the acquisition of the main competitor active in them. The evidence resulted not only from Enel's post-merger market share (between 35 per cent and 40 per cent of the market for production and wholesale of electricity and not less than 60 per cent of the transmission services market), but also from the sophisticated pivotality analysis used by the Authority, which ascertained an increase in Enel's pivotality of between 7 per cent and 10 per cent in both relevant markets. The aim of the pivotality analysis is to measure the percentage of service hours in which the production capacity of an operator is indispensable for satisfying the demand for electricity in a given time slot (in which the operator, aware of being the only subject able to increase the production of electricity, can act as a monopolist in the demand for residual energy) given the hypothesis that all its competitors use their entire production capacity available in a given hour. The Authority, unlike Enel, conducted the pivotality analysis considering both relevant markets, concluding that Enel's post-merger pivotality share would have increased to 20 per cent. For these reasons, the Authority prohibited the merger, deeming it capable of causing prejudice to competition in the relevant markets. The relevance of this case illustrates the new approach of the Authority, which assessed the substantial effect of the concentration on competition, applying an economic analysis parameter with cross-effects in different relevant markets.

III THE MERGER CONTROL REGIME

Notification of a concentration must be filed prior to the execution of the deed of merger, the acquisition or the joint venture's creation. If the notification is requested by the Authority pursuant to Section 16(1-*bis*) of the Act (below-threshold transactions), the same should occur within 30 days of that request. Within 30 days of receipt of notification (Phase I), the Authority must either authorise the transaction or open a formal investigation. This 30-day period is reduced to 15 days for a domestic takeover bid, except for public bids on a foreign stock exchange, in which case the normal period applies.

If a formal investigation is commenced (Phase II), Section 16(8) of the Act provides that the Authority must inform the parties of its final decision within a maximum of 45 days, which may be extended by a maximum of 30 days in the event that the parties fail to provide

9 Decision No. 30306 of 20 September 2022, Case C12461, *Enel Produzione/ERG Power*.

any information that is available to them that has been requested by the Authority. Otherwise, the Authority may order suspension of the proceedings. The final decision prohibiting the concentration, clearing the concentration in its entirety or clearing the concentration with the imposition of remedies must be adopted within the above statutory time limit, but it may be communicated to the parties thereafter.

The undertakings may accelerate the proceedings by contacting the Authority prior to the formal notification of the transaction and filing an informal document providing information about the same. That procedure anticipates the request for information in a preliminary phase, thereby avoiding delays during the formal proceedings.

The Authority may be made aware of a concentration by interested third parties, which may file a claim against a company's failure to notify. In such a case, the opening of the investigation must also be communicated to the interested third parties.[10] In general, the Authority may also request hearings with third parties, which have the right to access the documents of the proceedings, with the exception of documents providing confidential data.

The Act provides the Authority with broad investigatory powers (Section 14). The Authority may request production of information and documentation which is 'useful' for the purposes of the investigation. Such requests may be made to any person or business in possession of the required information or documentation, whether or not a party to the proceedings. An unjustified failure to provide information requested by the Authority in connection with a formal investigation is subject to an administrative fine of up to 1 per cent of the previous year's global turnover. The provision of false information or documents is subject to an administrative fine of up to 1 per cent of the previous year's global turnover.

Furthermore, the 2022 reform of the Act granted the Authority the power to ask any undertaking or public or private entity, at any time, to disclose information and documents in its possession deemed useful to carry out the Authority's merger review duties. The request must indicate the legal basis of the disclosure, be proportionate and cannot oblige recipients to admit an infringement of Articles 101 or 102 of the TFEU or of Sections 2 or 3 of the Act. The recipients of the disclosure request are granted a reasonable amount of time, proportionate to the level of complexity of the request but not exceeding 60 days, to fulfil their obligations. In the event of non-compliance, the above-mentioned sanctions will apply.

Third parties that feel aggrieved by a decision of the Authority to permit a merger have the right to initiate an appeal against that decision before the Regional Administrative Court of Lazio. In this respect, the administrative courts have recognised that competing companies have a qualified interest to oppose the decisions of the Authority, as those decisions might have direct effects on their activity. Therefore, if the Authority authorises a merger that violates competitors' rights, the competitors may appeal the decision before the administrative judge.[11]

10 Decree of the President of the Republic No. 217/1998, Section 6(4).

11 As indicated by the Italian Supreme Administrative Court in Decision No. 280 of 3 February 2005, parties that are not directly involved in an antitrust procedure can also legitimately appeal a decision of the Authority if they have a different and qualified interest in the procedure, and if they can prove that the same interest has been damaged by a decision. In this respect, see also Regional Administrative Court of Lazio, Decision No. 10757 of 20 October 2006 and Supreme Administrative Court, Judgment No. 1113 of 21 March 2005.

The Authority may also impose conditions on the authorisation of the proposed merger. These conditions can be directly imposed by the Authority or as a result of negotiations. The Act does not provide for the Authority to enter into any such negotiations with the parties, although, in practice, this might happen.

In general, should the Authority consider that a concentration is forbidden under the Act, an authorisation may be granted provided that the parties undertake to fulfil some specific undertakings, which can be divided into structural and behavioural remedies. Considering the cases that have been dealt with by the Authority, the following remedies can be envisaged:

a structural remedies:
- divestiture of business or branches: this may be imposed to reduce the market share created by the concentration or, more narrowly, with regard to some geographical areas where the overlaps arising out of the concentration are deemed to be incompatible with the Act. In general, the Authority requires that divestiture be made to an undertaking with no structural, financial or personal links to the parties, and with financial resources and expertise in the involved market. The reacquisition of the divested business may be forbidden indefinitely or for a limited period. The Authority may also provide for a temporary moratorium on any further acquisition of third parties operating in the relevant market;
- undertaking to reduce production capacity: the Authority may ask the parties to divest production capacity and related assets and personnel necessary to operate in a given market. The same objective can also be attained by means of a conduct remedy, consisting of an undertaking by the parties to reduce production capacity for a given period;
- reduction of the scale of the business acquisition;
- an undertaking by the parties not to commercialise products under a certain trademark; and
- transfer of brands and other intellectual property rights; and

b behavioural remedies:
- grant competitors access to essential facilities and know-how; and
- create an internal committee responsible for the future compliance of the interested company with competition law.

The Authority may expressly reserve the right to revoke its decision to clear the concentration and to impose fines for any failure to observe the prescribed undertakings.

Finally, the Authority must prohibit a concentration that significantly impairs effective competition in the national market or a substantial part of it, especially through the creation or the strengthening of a dominant position. If the Authority has not issued a suspension order and finds that a merger violates the provisions of the Act, it may issue an order to restore competition in the market. Such an order may require divestiture of a company, business or assets that have been acquired.

Decisions of the Authority may be appealed within 60 days of their adoption before the Regional Administrative Court of Lazio, which also has exclusive appeal jurisdiction over administrative fines for infringements of the Act.

Appeals of the Authority's decisions may be made either by the parties to the merger in the case of an adverse decision or by third parties, including competitors, affected by a decision to permit a merger.

The Lazio court may review the merits of the decision, but it may only uphold or overturn it; it may not amend or alter the Authority's decision. In fact, the Lazio court, as with all other regional administrative tribunals of its kind in Italy, is able to undertake judicial review only in respect of the legitimacy of the administrative decision referred to it (i.e., determining whether the Authority has correctly applied the Act in each particular case). Decisions of the court must take the form of either an approval of the decision of first instance or an order quashing the decision.

Appeals of judgments of the Regional Administrative Court of Lazio may be filed with the State Council.

IV OTHER STRATEGIC CONSIDERATIONS

Under Section 1 of the Act as amended, the Authority is no longer required to suspend its own proceedings if the European Commission has already commenced an investigation. This obligation, which was provided by Section 1(3) of the Act, has been repealed. Note, however, that this amendment specifically refers to proceedings concerning cartels and abuses of dominant position (in relation to which the Act now provides the application, even in parallel, of Articles 101 and 102 of the TFEU and Articles 2 and 3 of the Act). With specific regard to concentrations, and considering the combined effect of Section 1(4) of the Act and Considerandum 18 of the EU Merger Regulation, we can conclude that the old regime still applies. In other words, the Authority's jurisdiction is still limited to concentrations that fall outside the scope of the EU Merger Regulation.

Moreover, the Act has been interpreted as having extraterritorial application. If a concentration involves companies without a permanent establishment in Italy but that have sales in Italy exceeding the statutory thresholds, the concentration must be notified. The approach taken by the Authority is in line with European Union competition rules and the approach of both the European Commission and the European Court of Justice, which have adopted the effects test regardless of where companies are based. When the companies involved in a concentration have subsidiaries in Italy, the Authority adopts the business unit approach taken at the EU level, whereby the subsidiary's behaviour is deemed to be decided by the parent company.

A more difficult question is that of the effective extraterritorial application of the various monetary sanctions set forth in the Act for failure to notify or for providing false or incomplete information. The Authority has fined foreign companies in some cases for failure to notify a concentration.

It should be noted that some of the new aspects introduced by Law No. 118/2022 expressly respond to some critical issues raised with regard to digital markets.

In 2007, the Authority launched a joint sector inquiry with the Italian electronic communications authority and the data protection authority to develop a deeper understanding of the effects of big data on the protection of personal data, market regulation, consumer protection and antitrust law. The results of the inquiry were published in February 2020. As a result, guidelines and recommendations of policies for big data have been issued to improve the effectiveness of intervention by the three authorities. Merger regulation was also considered. Specifically, the authorities recommended a reform of the rules on merger analysis to provide for examination of those concentrations that do not meet the prior notification thresholds (as in digital markets, where big operators frequently acquire (small) potential future competitors) but are capable of reducing potential competition, with particular reference to 'killing acquisitions' (i.e., acquisitions by major digital firms of innovative start-ups). The three authorities also recommended the amendment of Article 6(1) of Law No. 287/1990 to introduce an evaluation standard grounded in the significant impediment of effective competition criteria, which might be more suitable in challenges involving the digital economy.

After the 2022 reform, Section 6(1) of the Act now also expressly imposes on the Authority the duty to assess the anticompetitive impact of the acquisitions of small but highly innovative enterprises, including those active in the field of new technologies. This innovation, combined with the new Section 16(1-*bis*) concerning the notification of mergers that do not meet the turnover threshold tests, shows the great attention given by the Italian legislature in 2022 to the effective tackling of the phenomenon of 'killer acquisitions', whose importance is also testified, at European Union level, by the innovative approach to the application of the referral mechanism set out in Article 22 of the EU Merger Regulation adopted by the Commission in its Communication No. 2021/C 113/01 of 31 March 2021.

V OUTLOOK AND CONCLUSIONS

On 2 January 2023, the Authority issued the 'Notice on Application of Article 16, Paragraph 1-Bis, of Law No. 287 of October 10, 1990' to better specify the scope and the operative aspects of this newly introduced monitoring system for mergers not meeting the jurisdictional thresholds.

In particular, the Notice clarifies that the request to notify will be issued by the Authority on the basis of prima facie indications of a risk to competition and that special attention will be given to detect 'killer acquisitions'. Therefore, especially when turnover may not be a significant indicator of the actual relevance of a small target company for future competition, the effects of the acquisition will be assessed by the Authority focusing on other factors, such as the potential competitive power of the undertaking involved or the fact that the same is a start-up that has not yet fully developed its business potential. Significant attention will be given also to whether the target offers innovative services, products or strategic components (vital for the supply of downstream products), or has access to strategic input, such as data. Furthermore, the Authority may infer the significance of the commercial relevance of the target operation from the value of the acquisition, especially when compared with the annual turnover of the target company.

The Notice specifies, also, that it is unlikely that the Authority will ask for the notification of a horizontal merger resulting in a combined market share of the parties not exceeding 25 per cent or, for non-horizontal mergers, 30 per cent, together with a level of market concentration of below 2,000 points on the Herfindahl-Hirschman Index (HHI). In addition, the Notice also specifies the HHI thresholds below which it is considered improbable for a horizontal merger to pose significant risks to competition.

Once the order has been issued, the parties must notify the merger within 30 days (an extension of up to 30 days might be granted in exceptional circumstances). The Authority must open the investigative process within the subsequent 30 days, following the ordinary procedure.

Finally, the Notice expressly allows the parties to inform the Authority voluntarily of a transaction that presents some risks to competition and, therefore, may fall within the scope of Section 16(1-*bis*) of the Act. This communication should be filed at a sufficiently advanced stage of negotiation and should contain the following information:

a the identities of the parties to the acquisition or merger;
b a short description of the acquisition or merger;
c an indication of the relevant markets;
d the shares held by the parties in these markets;
e whether one of the threshold tests is met or the global aggregate gross turnover of the undertakings involved exceeds €5 billion;
f whether or not the transaction has been or must be notified to the authorities in any other country; and
g the potential risks to effective competition that may be posed by the merger in the national market or in a substantial part of it.

Within 60 days of receiving the communication, the Authority will notify the parties of its intention to ask for notification of the merger.