The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Italy: Merger Control

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in Italy.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control-3rd-edition

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1. Overview

Substantive and procedural rules on Italian merger control are set forth by Law No. 287/1990 (the "Law"). Further procedural rules are established by Presidential Decree No. 217/1998.

The competent enforcement authority is the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato – the "ICA").

The definition of concentration largely mirrors that adopted by the EU Regulation No. 139/04. Under the domestic turnover thresholds, a concentration needs to be filed with the ICA (provided it has no Community dimension), if: (i) the combined aggregate Italian turnover of all the undertakings concerned is more than EUR 495 million; and (ii) the Italian turnover of each of at least two of the undertakings concerned is more than EUR 30 million.

A concentration that meets the above thresholds shall be filed prior to its execution. However, since the Italian merger control rules do not provide for a standstill obligation, the parties may choose, at their own risk, to close the transaction before the ICA's final decision.

As a general rule, Phase I has a duration of 30 calendar days (15 calendar days in case of public bids). Phase II has a duration of 45 calendar days (which can be extended by additional 30 calendar days if the parties fail to provide available information). Exceptions apply in case of concentrations involving the banking, insurance, media, telecommunication and broadcasting sectors.

With its final decision, the ICA can: (i) decide not to appraise the transaction (e.g., if it does not meet the local thresholds); (ii) unconditionally clear the transaction; (iii) clear the transaction subject to structural/behavioral remedies; or (iv) prohibit the transaction.

The ICA's decision is notified to the parties and published in the ICA's weekly Bulletin and website. It can be appealed before the Regional Administrative Tribunal for Latium within 60 days from its notification/publication. The decision of such Tribunal can be appealed before the Italian Supreme Administrative Court.

2. **Is mandatory notification compulsory or voluntary?**

   Pre-merger filing is compulsory, if the concentration has no Community dimension and the relevant turnover thresholds are met.

3. **Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

   Italian merger control rules do not provide for a standstill obligation. Accordingly, once the notification has been duly filed, the parties may execute the concentration before the final decision is adopted.

   If Phase II is opened, the ICA may order the parties to suspend the implementation of the concentration (see question 20). Such order does not suspend a public takeover bid, provided that the acquired voting rights are not exercised pending the ICA's review.

   Should the concentration be executed before the final decision, and should the ICA adopt a prohibition decision, the latter may order the unwinding of the concentration, or specific remedies to restore competition.

   The Law does not provide any guidance as to the possibility for the parties to carve out local completion. However, given the lack of a standstill obligation, the parties do not need to carve out local completion of a transaction to avoid a delay of the global completion.

4. **What types of transaction are notifiable or reviewable and what**

is the test for control?

The following transactions qualify as a “concentration” and are notifiable provided that the turnover thresholds are met: (i) a merger between independent undertakings; (ii) the acquisition of sole or joint control by an undertaking over another undertaking (on a de jure or de facto basis); and (iii) the establishment of a “concentrative” joint venture (see question 9).

On the contrary, the following transactions do not qualify as “concentrations” and do not fall within the scope of Italian merger control rules:

i. Purely financial acquisitions of shares by banks or financial institutions, provided that: (a) the shares are acquired, with a view to reselling them, when a company is incorporated or its share capital is raised; (b) the shares are resold within 24 months; and (c) the voting rights are not exercised;

ii. Transactions that have as their main object or effect the coordination of the business conduct of previously independent undertakings;

iii. Intragroup transactions;

iv. Acquisitions of (or mergers between) companies that do not perform, directly or indirectly, any economic activity;

v. Acquisitions carried out by entities (e.g., a natural person) that neither perform any economic activity, nor control any undertaking.

The notion of control is defined very broadly. In particular, control occurs when an undertaking has – on a de jure or de facto basis – the possibility to exercise, alone or jointly with other undertakings, decisive influence over another undertaking.

Since the Law is applied and interpreted consistently with EU competition law and principles (as stated in Art. 1(4) of the Law), the notion of control is consistent with the indications provided by the EU Regulation No. 139/04 and EU Commission Consolidated Jurisdictional Notice. For a recent application of these principles, see , e.g., ICA's decision of March 21, 2018, Case C12153 – Orefi Participation/Minetti, where the ICA confirmed that a casting vote over decisions concerning the strategic business of another undertaking (business plan, investments, and appointment of the management) confers sole control over that undertaking.

5. **In which circumstances is an acquisition of a minority interest notifiable or reviewable?**

Consistently with EU competition law, the acquisition of a minority interest qualifies as a concentration only if it allows the acquiring party to exercise (sole or joint) control over the target undertaking. This happens, e.g., when the shareholding is widely dispersed, so that the acquiring party can exercise sole control even with a minority interest, or when the acquiring party holds veto rights over the target's strategic decisions (approval of the business plan, appointment of senior management, etc.).

Conversely, if the acquisition of a minority interest does not allow the acquiring party to exercise any means of control, the transaction falls outside the scope of the Italian merger control regime and is not subject to any duty to notify.

6. **How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

Consistently with EU competition law, turnover includes the amount derived in the last financial year from the sale of products or provision of services (to

customers located) in Italy. Turnover does not include intra-group sales, sales rebates, value added tax and other taxes directly related to it.

Special rules apply to banks, financial institutions and insurance companies. Pursuant to Art. 16(2) of the Law, the turnover of banks and financial institutions corresponds to one-tenth of their total assets, excluding memorandum accounts; while the turnover of insurance companies is equal to the total value of the collected premiums.

The turnover of the acquiring company corresponds to that of the entire group to which it belongs. The turnover of the target company does not include that of the seller.

7. **Is there a particular exchange rate required to be used to convert turnover and asset values?**

Foreign currency shall be converted into EUR using the average exchange rate of the reference year (data published by the European Central Bank are typically used).

8. **In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?**

Italian merger control rules apply to joint ventures, only if they have a "concentrative" nature, namely:

(i) They are intended to perform on a lasting basis all the functions of an autonomous economic entity (full function nature); and

(ii) Their object or effect is not the coordination of the competitive behavior of the parent companies.

As a result, a full function joint venture could fall outside the scope of the Italian merger control rules if, for example, the parent companies were active in the same relevant product and geographic market as that of the joint venture, or in upstream/downstream markets. Such joint venture would need to be (self-)assessed according to rules governing restrictive agreements (e.g., Art. 101 TFEU).

9. **Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?**

With respect to transactions initially entailing the acquisition of a temporary joint control, which is then converted into sole control, the ICA follows the principles applicable at the EU level (see, e.g., para. 34 of the EU Commission Consolidated Jurisdictional Notice).

10. **In relation to "foreign-to-foreign" mergers, do the jurisdictional thresholds vary?**

No, the same jurisdictional thresholds apply.

Furthermore, in light of the jurisdictional thresholds currently in force (and consistently with the EU Commission Consolidated Jurisdictional Notice), the creation of a concentrative joint venture, which will not operate in Italy, by parent companies that meet the cumulative thresholds, appears to be reportable to the ICA, despite the (potential) lack of local nexus.

11. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Not applicable.

12. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?**

A concentration is prohibited if it creates or strengthens a dominant position on the national market, thus eliminating or appreciably reducing competition on a lasting basis.

Notably, the national rule formally differs from the (more extensive) "substantial lessening of competition" test adopted at the EU level. However, the ICA tends to interpret the "dominance test" rather broadly, thus mirroring the approach followed by the EU Commission.

There are no different tests that apply to particular sectors. However, concentrations affecting the banking, insurance and media, telecommunication and broadcasting sectors need to be filed also with the competent regulatory authority (Banca d'Italia, IVASS, and AgCom, respectively), and be cleared according to the specific criteria set forth by the applicable regulatory provisions.

13. Are factors unrelated to competition relevant?

Pursuant to Art. 25(1) of the Law, the ICA can exceptionally authorize a concentration that would be otherwise prohibited, if relevant national economic interests are involved, provided that the concentration does not eliminate competition on the market or impose restrictions going beyond the national economic interests at stake. The Government sets forth the criteria based on which the ICA clears the transaction. The latter can anyway impose measures necessary to restore competition within a certain period.

Pursuant to Art. 25(2) of the Law, even if the clearance decision has been adopted by the ICA, the Italian Prime Minister may prohibit, for reasons of national economy, an acquisition of an Italian company by a foreign company. This may happen when, in the country of origin of such foreign company, Italian undertakings are discriminated, especially in connection with their ability to acquire local companies (sort of rule of reciprocity).

Finally, pursuant to Art. 20(5-bis) of the Law, upon request by the Bank of Italy, the ICA may clear a concentration involving banks, which creates or strengthens a dominant position, to protect the economic stability of one or more of the parties.

14. Are ancillary restraints covered by the authority’s clearance decision?

Parties are required to include in the notification a description of the ancillary restraints. Unlike the EU Commission, in the clearance decision, the ICA expressly indicates if such restrictions qualify as “ancillary” to the concentration and, thus, if they are covered by the clearance decision. In its assessment, the ICA fully applies the criteria laid down in the relating EU Commission Notice.

If the restraints do not qualify as “ancillary”, they fall outside the scope of the clearance decision and need to be self-assessed according to Art. 101 TFEU or the relating national provisions (Artt. 2 and 4 of the Law).

15. **For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

The concentration needs to be notified to the ICA prior to its execution. In particular:

i. In case of a merger, the concentration shall be notified before the merger deed is executed;

ii. In case of an acquisition of sole/joint control over an undertaking, notification shall occur before the deed becomes effective, i.e., before the concerned undertaking acquires the ability to exercise control over the business conduct of the target;

iii. In case of creation of a concentrative joint venture, notification shall occur before the memorandum of incorporation is filed with the Register of Companies.

16. **What is the earliest time or stage in the transaction at which a notification can be made?**

A notification can be filed once an agreement has been reached on the transaction’s essential terms and conditions. A letter of intent is typically sufficient to this effect, if the structure of the transaction is clearly defined.

Notably, in case of public takeover bids, merger control filing must occur simultaneously with the regulatory filing with the securities and exchange authority (CONSOB).

17. **Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?**

Typically, parties engage in pre-notification discussions with the ICA when the proposed concentration might raise competitive concerns. In particular, parties can send to the ICA a briefing memorandum or a draft notification and discuss, on a strictly confidential basis, the main terms of the concentration and its possible competitive impact.

The pre-notification aims at (i) speeding up the formal review process; and (ii) reducing the risk that further information be requested at a later stage of the proceeding (see question 20).

Even though there is no deadline to start the pre-notification, according to a specific ICA's notice, the latter should start at least 15 days before the formal filing. The duration of the pre-notification typically takes approximately 15 calendar days, but it can last longer, when the case is particularly complex.

18. **What is the basic timetable for the authority's review?**

The ICA has 30 calendar days (15 calendar days in case of public bids) from filing to decide to: (i) clear the concentration, if it does not raise competition concerns (Phase I); or (ii) open an in-depth investigation, if it deems that the concentration raises serious doubts as to its compatibility with the Law (Phase II). Phase II has a 45 calendar-day duration (which can be extended by additional 30 calendar days if the parties fail to provide available information).

Concentrations affecting the media, telecommunication and broadcasting sector, as well as those affecting the insurance sector, typically have a longer clearance process, as the competent regulatory authorities (AgCom and IVASS, respectively) shall issue a specific (non-binding) opinion. The regulatory authorities have 30 calendar days to issue their mandatory opinion. Meanwhile, the ICA's review period is suspended. Typically, the opinion is requested by the ICA before the adoption of the final decision (Phase I or Phase II).

Concentrations affecting the banking sector shall be assessed within 60 calendar days upon the receipt of a complete notification, with no distinction between Phase I and Phase II. In practice, when the ICA intends to open a Phase II investigation in connection with a concentration affecting the banking sector, it typically concludes Phase I within 15 calendar days from filing, so that a 45-day period is left to carry out the in-depth investigation.

19. **Under what circumstances may the basic timetable be extended, reset or frozen?**

Phase I can be interrupted by the ICA when parties fail to provide a complete notification or when, following a formal request for information, the parties fail to reply within the assigned deadline. However, most of the times, the ICA tries to obtain the missing information, without interrupting Phase I.

In case of interruption, the Phase I review period starts running again when the parties provide the requested information/documents.

Phase II can be extended up to 30 (additional) calendar days, if the parties fail to provide available data/information requested by the ICA.

Finally, the ICA's review period is suspended (up to a maximum of 30 days) until

the adoption of the mandatory non-binding opinion by the telecommunication and insurance regulatory authorities (see question 19).

20. **Are there any circumstances in which the review timetable can be shortened?**

In less complex cases, the parties may receive the clearance decision before the expiration of Phase I. However, there is no accelerated procedure or right to obtain clearance in a shorter period.

21. **Which party is responsible for submitting the filing?**

In case of acquisition of sole control over an undertaking, the duty to notify rests upon the acquiring undertaking. The notification may be filed directly by the company acquiring control, or by any of its controlling entities.

In case of mergers, the duty to notify rests upon the merging parties.

In case of acquisition of joint control by several undertakings, or creation of a concentrative joint venture, each undertaking acquiring control is responsible for filing.

When the duty to notify rests upon more undertakings, they can jointly submit a single notification and appoint a common representative.

22. **What information is required in the filing form?**

Notifications are filed using either a short form or a long form. Both forms

require detailed information on the parties, the transaction, and its competitive impact.

The full-form notification, which includes in-depth information on the relevant markets, is required when:

(i) Two or more undertakings concerned are active on the same affected market and the concentration results in a combined market share of 25% or more; and/or

(ii) Any party to the concentration, following the transaction, will hold a market share of 40% or more, and at least another party is active on an upstream or downstream market.

The full-form notification is not required, however, when the market share of the target or merged company is less than 1%.

23. **Which supporting documents, if any, must be filed with the authority?**

Notifying parties are required to produce all the transaction documents, the annual reports of the parties of the last three years, and a power of attorney for the representative signing the notification. Parties can also enclose any documents (economic studies, surveys, etc.) useful to support their views.

The notification must be in Italian. The supporting documents can be submitted also in English.

24. Is there a filing fee?

As of 2013, there is no filing fee to be paid to the ICA in connection with a merger control filing.

25. Is there a public announcement that a notification has been filed?

The ICA generally publishes a notice on its website providing a short description of the parties, the concentration and the relevant market(s) involved. The parties may submit a reasoned confidentiality request asking the ICA not to publicly disclose the above notice.

26. Does the authority seek or invite the views of third parties?

In Phase I, any interested parties, including customers and competitors, may submit observations within 5 days from the publication of the notice of notification submission.

If Phase II is opened, within 10 days, third parties may formally intervene by submitting an application, if their interests might be directly harmed by the final decision. If admitted to the procedure, third parties can access the file, submit written comments and documents, request a formal hearing and participate in the final hearing before the ICA.

Additionally, the ICA may contact customers and competitors, on its own initiative, and request information useful to better assess the potential effects of a notified concentration. Market tests are generally carried out in Phase II proceedings.

27. **What information may be published by the authority or made available to third parties?**

The ICA publishes the notice of notification submission on its website. Moreover, all relevant decisions adopted by the ICA in relation to a concentration are published in the ICA's Bulletin and website. Parties may indicate at the time of filing or during the proceedings, which information/documents shall be kept confidential. If confidentiality is granted, the ICA publishes a non-confidential version of the decision.

Third parties having a direct and immediate interest in the concentration may request to access the file. However, access is not granted to confidential information/documents.

28. **Does the authority cooperate with antitrust authorities in other jurisdictions?**

The Authority actively cooperates with competition authorities of other jurisdictions (including, in particular, the EU Commission) and is a member of both the European Competition Network (ECN) and the International Competition Network (ICN).

29. **What kind of remedies are acceptable to the authority?**

Parties may negotiate with the ICA both structural and behavioral remedies. Alike the EU Commission, the ICA has a very strong preference for structural remedies.

30. **What procedure applies in the event that remedies are required in order to secure clearance?**

Remedies are typically proposed by the parties, negotiated with the ICA, and formally imposed by the latter. If the ICA believes that the remedies offered by the parties do not eliminate all the competitive concerns, it can also impose further measures.

There is no standard procedure. Remedies can in principle be offered either during Phase I or Phase II. However, the ICA has the legal power to impose remedies in Phase II only. Accordingly, if the concentration is cleared in Phase I also based on remedies offered by the parties, such remedies are not enforceable by the ICA. This means that the ICA cannot impose any fines in case the parties violate the remedies, but can only argue that the clearance decision was adopted based on a different factual scenario and open new proceedings.

In light of the above, the ICA is generally more inclined to open a Phase II investigation, when it deems that remedies are necessary to clear the concentration.

Executing a concentration without complying with the remedies imposed by the ICA may result in a sanction between 1% and 10% of the turnover of the business activities that form the scope of the concentration.

31. **What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

If an undertaking fails to notify a concentration, the ICA can impose a fine up to

1% of the undertaking’s turnover achieved in the previous financial year.

In principle, the same sanction applies in case of late notification. Thus far, however, the ICA has imposed symbolic fines (generally between EUR 5,000 and EUR 20,000) if the concentration did not raise any competition concerns and the late notification was submitted on a voluntary basis.

A concentration executed in breach of a prohibition on closing, results in a sanction between 1% and 10% of the turnover of the business activities which form the scope of the concentration (i.e., in case of acquisition of an undertaking, of the target’s turnover).

32. **What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?**

Failure to provide the requested information/documents, without a legitimate justification, may result in a fine up to EUR 25,823. Providing false information/documents may result in a fine up to EUR 51,645.

33. **Can the authority’s decision be appealed to a court?**

An ICA’s merger control decision can be appealed before the Regional Administrative Tribunal for Latium (TAR Lazio – Roma) by the merging parties or by third parties claiming to be harmed by the decision. The appeal shall be brought within 60 days from the publication (or notification) of the decision.

The judgment of first instance can be further appealed before the Italian Supreme Administrative Court (Consiglio di Stato).

34. **What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

The recent amendment of the jurisdictional thresholds, which entered into force in August 2017, has led to a slight increase of the number of merger control notifications. In fact, from September 2017 to August 2018, the notifications filed with the ICA were approximately 69. By contrast, in 2016, only 54 notifications were filed with the ICA, whereas, from January to August 2017, the notifications were just above 30.

Recent Phase II investigations have been characterized by a more in-depth assessment of the geographic market definition. Especially with respect to retail markets (banking outlets and retail stores), which typically have a limited geographic scope, the ICA did no longer exclusively rely on a market definition corresponding to the administrative boundaries of a specific territory (e.g., a particular province), but carried out an analysis based on “catchment areas” (see, e.g., ICA’s decisions of January 17, 2018, Case C12109 – Profumerie Douglas/La Gardenia Beauty-Limoni; of April 24, 2018, Case C12139 – Noah 2/Mondial Pet Distribution; and of May 23, 2018, Case C12138 – Cassa Centrale Raiffeisen dell'Alto Adige/Gruppo Bancario Cooperativo delle Casse Raiffeisen).

A similar approach was followed in a concentration involving two competing cement manufacturers (see the ICA’s decision of November 8, 2017, Case C12113 – Italcementi/Cementir Italia).

Finally, in recent Phase II cases, the ICA confirmed its strong preference for structural remedies (see, e.g., the ICA’s decision of January 25, 2018, Case C12125 – 2I Rete gas/Nedgia), also imposing measures going beyond the scope of the undertakings voluntarily offered by the parties (see, e.g., the ICA’s decisions of January 17, 2018, Case C12109 – Profumerie Douglas/La Gardenia

Beauty-Limoni, and of January 25, 2018, Case C12125 – 2I Rete gas/Nedgia).

35. **Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

As noted, and despite the expectations, the 2017 amendment of the jurisdictional thresholds only led to a slight increase of the number of merger notifications. This is probably due to the fact that the first cumulative threshold is still set at a quite high level (i.e., the parties' combined Italian turnover should be greater than € 495 million). For this reason, some practitioners are arguing that the Italian legislator should further intervene by reducing the value of the first threshold. That said, however, no reforms have been announced for the near future.