



## ITALY

### RUCELLAI & RAFFAELLI

🌐 <http://www.rucellaieraffaelli.it/>

#### 1. Relevant legislation

- Law No 287 of 10 October 1990 (the “Law”) contains the main rules governing merger control in Italy, including the definition of merger, the notion of control, and the substantive test to be applied for the assessment of a concentration and the powers.
- Procedural and enforcement rules are laid down in the Presidential Decree No 217 of 30 April 1998 (“Procedural Regulation”).
- Moreover, in 1996, the IAA provided further clarification on how to notify a concentration, issuing its Merger Notification Instructions (hereafter the “1996 Guidelines”), wherein a new version (further amended in the following years, most recently in 2017) of the form to be used by the notifying parties is provided, as well as specific guidelines which clarify a number of issues, including: the operations that are not considered to be concentrations within the meaning of the Law; how to calculate turnover; how to assess the relevant markets of the concentration and the notification procedures.
- The IAA also provides guidelines related to pre-notification discussions (*‘Comunicazione concernente alcuni aspetti procedurali relativi alle operazioni di concentrazione di cui alla Legge 10 ottobre 1990, no 287’*), calculation of turnover thresholds, and criteria for determine the filing fee.
- In addition, pursuant to Article 31 of the Law, in the application of fines, the IAA is to refer, where applicable, to the general rules contained in Law No 689 of 24 November 1981 (*‘Legge di depenalizzazione’*).
- Finally, in order to adapt the national thresholds to the European ones and also to increase the number of notifications to be submitted to the Italian Antitrust Authority, the Italian legislator adopted Law No 124/2017 (the so-called “*Legge Concorrenza 2017*”).

#### 2. Authority

Autorità Garante della Concorrenza e del Mercato (AGCM)

<http://www.agcm.it>

#### 3. Types of transactions caught

The Law - art. 5 - classifies the following transactions as concentrations:

- i) merger between two or more undertakings;
- ii) acquisition by one or more persons controlling at least one undertaking or one or more undertakings, of the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract or by any other means;
- iii) creation between two or more undertakings of a joint venture by setting up a new company.

In general, a concentration arises whenever a transaction involves a change in control on a lasting basis.

Article 5 of the Law also indicates some specific operations that do not give rise to a concentration within the meaning of the Law, i.e.:

- the acquisition of shares made by banks or financial entities in companies newly set up or through a capital increase – when that purchase is made only for resale (provided that the shares are resold within a period of 24 months, during which the relevant voting rights are not exercised);
- operations that have as their main object or effect the co-ordination of the behaviour of independent undertakings.

Similarly, the following operations do not give rise to a concentration:

- internal restructurings or reorganisations;
- transactions between undertakings that are part of the same group (except in specific circumstances indicated in paragraph 2 letter c) of the 1996 Guidelines);
- acquisition or incorporation of a company that does not carry out economic activities and does not hold, either directly or indirectly, any other undertaking (however, an operation of this kind qualifies as a concentration when the target company holds – or controls another company that holds – licences, permits, grants or other titles by which a business activity may be carried out).

#### 4. Thresholds

Law No 124/2017 provides that a concentration must be prior notified to the IAA when:

- i. the aggregated turnover, achieved at national level by all the companies involved in the operation, is more than EUR 492 million; and
- ii. the turnover achieved individually at national level by at least two of the companies involved in the operation is more than EUR 30 million.

It should be noted that on 15 March 2022, the Authority, as every year, modified the relevant thresholds, increasing the first one to **EUR 517 million**; the second threshold, instead, has been left unchanged at **EUR 31 million**.

The above-mentioned thresholds are exclusively based on nationwide revenues realized by the parties involved in an operation.

#### 5. Exceptions

Notification of the operations that are classified in Article 5 of the Law and that meet the thresholds laid down in Article 16 of the Law is compulsory and there are no exceptions to this rule.

#### 6. Notifying party(-ies)

In general, all the undertakings acquiring control are responsible for the filing; the filing can be made also by the company that directly or indirectly controls the acquirer.

- In the case of acquisition of control or creation of a joint venture, all the companies acquiring control are responsible.
- For mergers, all merging entities are considered responsible.

In these cases, the filing could be executed jointly by the parties.

- In the case of a public takeover bid, the responsibility is attributed to the bidder.

## 7. Submission deadline

There are no specific deadlines for notification, provided that it is lodged before the implementation of the transaction, and therefore:

- in the case of a merger, before the signing of the merger deed;
- in the case of the creation of a joint venture through the setting up of a new company, before the articles of association are filed with the Companies Registry;
- in the case of acquisition of control, before the purchaser has acquired the possibility to exercise a decisive influence on the behaviour of the target undertaking.

There is no the stand still obligation.

## 8. Filing fee

The payment of the filing fee is no longer required as of 1 January 2013 pursuant to Article 5-bis of Law Decree n. 1/2012 (as converted in law, with modifications, by Law n. 27 of 24 March 2012 on "*Urgent provisions for competition, infrastructure development and competitiveness*").

## 9. Proceedings timetable

The review process is divided into two phases that could be anticipated by pre-notification discussions with the IAA (see answer No 10 below).

1. In '*Phase I*', i.e. the period of **30 calendar days** from notification of the transaction, the IAA may adopt different decisions. For public takeover bids and for operations regarding the control of a bank, the term is reduced to 15 calendar days.

Firstly, the IAA can decide to:

- declare the inapplicability of the Law (e.g. when the operation has an EU dimension, the transaction does not achieve a concentration or the thresholds are not met);
- clear the transaction if the operation evaluation does not give rise to competition issues. The deal can proceed because it does not give rise to serious doubts about the respect of merger rules;
- open an in-depth investigation when it deems possible that the concentration may lead to a prohibition decision. This last decision opens "Phase II" of the review process.

The time limit of 30 calendar days is not applied when the information notified by the undertakings is seriously inaccurate, incomplete or untrue. In these cases, the time limit applies from the date on which the IAA received the notification complete with all the necessary elements.

It has to be noted that the parties to a transaction that could give rise to competition concerns may propose, during the "*first phase*" of the merger control proceeding, (not binding) measures deemed appropriate to address the aforesaid competition concerns. In this regard, as such a decision must be taken by the IAA jointly with the parties of the concentration, the IAA must open a proceeding.

2. Once the IAA has started the '*second phase*', it may adopt the final decision within **45 calendar days**. The IAA can decide for:
  - a. clearance;
  - b. clearance with necessary measures to avoid anti-competitive outcomes; or

- c. the prohibition of the transaction. If the merging entities do not make available the information or data requested by the Authority, the period for the final decisions may be extended by a further 30 calendar days.

When the IAA proceeds with the second phase of investigation, the overall time for clearance is normally 75 calendar days from the notification of the operation. However, the Authority often extends this period or uses the power to stop the time limit of the first phase or takes advantage of the 30 extra calendar days of Phase II.

During the 'second phase' of the merger control proceedings and if the IAA considers that the proposed transaction could be prohibited, the parties may propose binding remedies deemed appropriate to eliminate those elements of the transaction that could distort competition. Such remedies may be imposed also by the IAA itself, whether it considers that the transaction could create or strengthen a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis.

The IAA's decisions approving or prohibiting transactions may be appealed, by the addressees or other interested third parties, before the Regional Administrative Court of Latium ("TAR Lazio"), within 60 calendar days from the notification of the decisions.

The TAR Lazio may annul the IAA's decision, totally or partially, on points of law, for lack of jurisdiction or competence, violation of laws and abuse of power.

The TAR Lazio's judgment may be subsequently appealed before the Supreme Administrative Court ("Consiglio di Stato") within either 30 calendar days from the notification of the TAR Lazio's judgment, or within 3 months from the publication of this judgment in the TAR Lazio's registry.

The rulings of Consiglio di Stato can be challenged before the Court of Cassation – but only on jurisdictional grounds – within 60 calendar days from the notification or six months from the publication of the judgment, or be subject to revocation under specific and extraordinary conditions provided in Articles 395 et seq of the Italian Civil Procedural Code.

## 10. Availability of pre-notification/informal consultation

The pre notification discussion with the IAA consists in a preliminary and informal dialogue, the parties may submit an informal document, which will be treated as strictly confidential, at least 15 calendar days before the date of the formal notification. Such document shall include the following information:

- general data on the merger entities;
- a short description of the operation;
- indications on the affected markets;
- the relevant market shares of the parties; and
- other foreign antitrust authorities involved by notification.

During this pre-notification discussion or during the *first phase* (see answer No 9 above), the IAA may propose, with regard to transactions that could give rise to competition concerns, certain measures or remedies that are not binding for the parties.

In any case, it has to be noted that a transaction shall be notified prior to its implementation, i.e. before the purchaser has acquired the effective ability to exercise a decisive influence over the behaviour of the target, but after that the parties have agreed on the essential aspects of the transaction.

## 11. Test for clearance/prohibition

The IAA uses the so-called dominance test, on the basis of which a transaction is prohibited if it creates or strengthens a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis. If a transaction neither eliminates nor restricts competition appreciably and on a lasting basis, it is generally approved.

The assessment process is structured as follows.

1. The IAA firstly identifies the relevant product and geographic market(s). Considering that this is an 'ex ante' evaluation, the IAA will try to provide the competition constraints to which the undertakings concerned would be subject after the implementation of the transaction. In this analysis, the IAA substantially follows the European Commission's practice.
2. Secondly, the IAA proceeds with the evaluation of the effects of the notified transaction on the previously defined market(s). The IAA takes into account the possibilities of substitution available to suppliers and users, the market position of the parties, the access conditions to supplies or markets, the structure of the relevant markets, the competitive position of the domestic industry, barriers to the entry of competing undertakings and the evolution of supply and demand for the relevant goods or services.

## 12. Conditional clearance - remedies

The IAA has the power to adopt a prohibition decision if, following the *second phase*, it ascertains that a transaction creates or strengthens a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis.

The Authority may also clear the transaction imposing the measures that it deems necessary to prevent the negative consequences referred to above.

Moreover, the IAA, when opening a Phase II investigation, may also interfere with the transaction by ordering the undertakings concerned to suspend it until the end of that investigation. In addition, when the transaction has already been implemented and the final decision finds it to be prohibited, the IAA has the power to impose all the necessary remedies to restore conditions of effective competition in the market.

Remedies may include both behavioural and structural remedies, both if the IAA imposes measures on the parties to the transaction, as well as in case of parties' proposal of measures to address anticompetitive concerns.

- Structural remedies are generally preferred by the IAA and may include, for instance, divestiture of intellectual property rights, divestiture of assets or activities (e.g. slots in the airline sector), as well as divestiture of shareholdings.
- In spite of the IAA's preference for structural remedies, it may also accept behavioural remedies, such as, for instance, commitments to reduce presence of the same individuals in the managing bodies of competing banks in the banking sector, or commitments aimed at granting competitors' access to an essential resource/infrastructure, for instance in the telecommunications sector.

Generally, in the case of horizontal mergers, remedies are intended to reduce the resulting market share through divestments, whilst in vertical mergers, the most frequently used remedies are aimed at limiting foreclosure risks deriving from the operation.

### 13. Stand-still obligation

There is no standstill obligation under the Italian merger control regime.

### 14. Failure to notify/obtain clearance

Article 19 of the Law No 287/1990 sets out two kinds of **administrative fines** in case of implementation of a prohibited transaction (paragraph 1) and of failure to file a relevant transaction (paragraph 2).

1. Sanctions are applied in case of **implementation of a prohibited transaction or implementation of a transaction in breach of obligations or measures** imposed by the Authority's decision. In this event, the IAA may *i*) impose a fine from a minimum of 1% of the turnover of the business(es) involved in the transaction to a maximum of 10% and *ii*) require the parties to take certain measures in order to return to the status quo ante to re-establish effective competition and remove any anticompetitive effects of the transaction. This is because the remedies accepted by the IAA during the *second phase* (see answer No 9 above) are binding upon the parties.
2. If the responsible entities **fail to notify** a concentration that meets the turnover thresholds, the IAA may impose administrative fines to such undertakings, up to 1% of the undertaking's turnover in the financial year (generally, IAA's lump-sum fine amount to EUR 5,000 for each transaction).

In both cases, the IAA quantifies the fines taking into account subjective elements of the infringement, such as the wilfulness of the undertakings, the existence of the excusable errors, remedial actions or spontaneous notifications etc., as well as objective elements, such as the competitive impact, the duration of the infringement etc.