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ALERT MEMORANDUM

Italian Competition Law Reform

August 16, 2022

On August 5, 2022, the Italian Parliament adopted Law No. 118, the "*2021 Annual Competition Law*" (the "ACL").

The ACL, which will enter into force on August 27, 2022, amends the Italian Competition Law (Law No. 287/90) to further align the Italian antitrust law to EU rules, which have evolved over the years. The changes concern, in particular, the substantive test for assessing mergers, the rules applicable to joint ventures, and the calculation of turnover for credit and financial institutions.

The ACL also extends the enforcement powers of the Italian Competition Authority (the "ICA"), through new provisions that raise potential concerns. Finally, the ACL introduces provisions empowering the ICA to review certain below-threshold mergers and to obtain information and documents that might be useful for investigative purposes at any moment, even outside of formal investigation proceedings.

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Overview

The ACL was adopted pursuant to Law No. 99/2009, which empowers the Italian Government to adopt a law, on an annual basis, to remove regulatory obstacles to the opening of markets, promote the development of competition and ensure consumer protection.[1]

Despite its name, this legislative instrument has only been used once previously (Law No. 124/2017).

In the National Recovery and Resilience Plan (the "NRRP"), the Italian Government committed to revamp this legislative instrument, ensuring that going forward the competition law will be adopted on an annual basis. It reasoned that this legislative tool was meant as "*essential to review on an ongoing basis the status of legislation, in order to verify – by taking into account the socio-economic framework – whether there were still regulatory constraints negatively affecting competition and the efficient functioning of the market.*" It asserted that an *"initial set of measures on competition would be provided in the Annual Competition Law for 2021, while others would be considered in the annual laws for the following years.*"

The ACL introduces various amendments in several areas: concessions for public assets, port areas, distribution of natural gas and large hydroelectric derivation;[2] local public services and transports;[3] a monitoring system for concessions of public assets;[4] acceleration of procedures for building up new digital infrastructures;[5] as well as simplification and modernization of the provisions concerning the release of administrative authorizations.[6]

In some areas, the ACL directly amends the current provisions, while in others it sets forth principles and guiding criteria that the Italian Government shall follow in order to reform the current regulatory framework.

With regard to competition law, the ACL reflects most of the proposals (the "ICA Proposal") submitted to the Italian Government by the ICA in March 2021.[7]

1. Review of below-threshold mergers

The ACL introduces the possibility for the ICA to: (i) request the notification of below-threshold mergers; and (ii) substantially review the transaction.

Under the previous system, mergers falling under the jurisdiction of the ICA had to be notified in advance only when two cumulative turnover thresholds were met.[8] The ACL gives now the ICA the power to request notification of below threshold concentrations when three cumulative conditions are met:

i) one of the two turnover thresholds provided for in Law No. 287/1990 (i.e., €517 million for the turnover achieved in Italy by all the undertakings concerned and €31 million for the total turnover achieved individually at national level by at least two of the undertakings concerned by the concentration) is

[1] See Art. 47, Law No 99/2009.
[2] ACL, Arts. 3-7.
[3] *Id*., Arts. 8-10.
[4] *Id*., Art. 8(2)(h).
[5] *Id*., Arts. 23-24.
[6] *Id*., Arts. 27-31.
[7] See ICA, *Proposals for competition reform for the purposes of the Annual Competition Law for 2021*, March 22, 2021. The ICA Proposal was issued by the ICA as requested by the Italian Prime Minister, Mario Draghi, during his speech addressing the Italian Parliament on February 17, 2021, which was followed by a formal request dated March 8, 2021.
[8] The turnover thresholds that trigger the obligation to notify a transaction were updated by the ICA on March 21, 2022 and amount to €517 million for the total turnover achieved at the national level by the group of companies involved and €31 million for the total turnover achieved at the national level by each of at least two of the companies concerned (see Art. 16 of Law No. 287/1900 and ICA Resolution No. 30060, *Provvedimento relativo alle soglie di fatturato vigenti*, March 15, 2022).

exceeded or in which the undertakings concerned jointly achieve a worldwide turnover in excess of €5 billion;

ii) the merger raises competition concerns in the national market, or in a substantial part of it, also taking into account possible detrimental effects on the development of small enterprises with innovative strategies; and

iii) the merger can be reviewed *ex post*, up to six months after its closing.

If these cumulative conditions are met, the ICA could request the companies to notify the transaction within 30 days.

This new rule, at least in principle, aims at strengthening the merger control system, preventing potentially problematic below-threshold transactions from escaping the ICA's scrutiny, particularly in the following areas:

- digital economy and pharmaceutical sector, where so-called "*killer acquisitions*" may occur, *i.e.* transactions involving small or medium-sized newly-established companies which, often having no, or very limited revenues, generally do not meet EU and national turnover thresholds;

- traditional sectors where mergers may have a significant impact on local markets, despite falling below notification thresholds.

Critical issues

The ACL raises a number of issues:

- the criterion of the existence of "*real risks to competition*" in the national market, or in a substantial part of it, is rather vague and makes it complex for companies to self-assess whether the ICA might have an interest in reviewing the transaction;

- the possibility to review a transaction "*up to six months after its completion* " undermines the need for the parties to a transaction to secure legal certainty, which has traditionally inspired the Italian merger control regime.

To reduce uncertainty, it would therefore seem appropriate to:

- supplement the new rules with specific indications (which could be provided by means of guidelines issued by the ICA itself) on the factual elements that could make a below-threshold transaction a likely candidate for a notification request;

- ensure that companies can contact the ICA on a voluntarily basis, even before the closing, and obtain within a short timeframe the ICA's reaction on its willingness to request a notification.

2. Substantive test for assessing mergers

The substantive test which has been applied so far by the ICA to evaluate mergers is the traditional "dominance test" ("*creation or strengthening of a dominant position in the national market*").[9] The ACL[10] replaces this test with the so-called SIEC test ("*significant impediment to effective competition*"), as set out in Article 2(2) and (3) of the EUMR.

The adoption of the new test is a welcome amendment of the Italian antitrust law as:

- it fills the current enforcement gap, by allowing the ICA to effectively assess transactions in oligopolistic markets with differentiated goods or in the presence of particularly complex vertical relationships;

- it expressly takes into account the possibility of balancing the restrictive effects on competition with merger-specific

[9] Art. 6(1), Law No. 287/1990.

[10] ACL, Art. 32(1)(b).

efficiencies, provided that those benefits are significantly passed on to consumers;[11] and

- it reduces the risk of diverging merger control decisions adopted by competition authorities applying different substantive tests.[12]

3. Legal framework for joint ventures

The ACL provides for a further alignment of the Italian merger control rules with the EU standards. Indeed, all full-function joint ventures ("JVs") are now subject to merger control rules, regardless of their 'concentrative' and 'cooperative' nature.[13]

According to the ACL:

- a JV qualifies as a 'concentration' in all cases where it performs, on a lasting basis, all the functions of an autonomous economic entity (*i.e.* where it is a 'full-function' JV);
- where the creation of a concentrative JV has as its object or effect the coordination of the behavior of independent undertakings, such coordination must be assessed according to the rules on restrictive agreements, but always within the context of the merger control procedure. In this assessment, the ICA must take into account:
    - o whether, after the transaction, both parents will remain actual or potential competitors in the same geographical and product market as the JV, or in a market that is upstream, downstream or neighboring with respect to that of the JV; and
    - o the possibility for the undertakings concerned, through their coordination resulting *directly* from the creation of the JV, to impede effective competition for a substantial part of the products and services at stake.[14]

This amendment aims at eliminating the disparities in treatment between the different types of full-function JVs. The ACL provides all full-function JVs – regardless of whether they are cooperative or concentrative in nature – the legal certainty resulting from the *ex ante* mandatory notification system.

4. Power to request information outside of formal investigations

The ACL provides that, both for the purposes of the application of the rules on restrictive practices and abuse of dominant position, as well as the control of concentrations, the ICA may "*at any moment*" request information and documents.[15]

The ICA must provide the addressee of its request with a reasonable period of time to reply,

[11] Art. 2(1)(2)(a) and (b) EUMR. In particular, under the EUMR, the Commission must take into account: (a) the need to maintain and develop effective competition within the common market considering, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the EU; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition. These provisions are now reflected in the amended text of Article 6 of Law No. 287/1990.

[12] This risk is particularly heightened where the transaction is problematic in such a way as to lead to a prohibition or provision of remedies only on the basis of the more stringent SIEC test.

[13] ACL, Art. 32(1)(c). The national rules reflect the original approach of the former Regulation No. 4064/1989/EU, pursuant to which JVs (even full-function ones), if they were 'cooperative' in nature (i.e., when both parents remained actual or potential competitors in the same geographical and product market as the JV, or in a market that is upstream, downstream or neighboring with respect to that of the JV) were appraised under the (substantive and procedural) rules on restrictive agreements.

[14] ACL, Art. 32(1)(c)(2).

[15] *Id*., 35(1)(a).

also considering the complexity of the information requested. In any case, this period shall not exceed sixty days, renewable upon motivated request.[16]

This is a significant change because, under the previous regime, the ICA could request information only after serving the decision to initiate a proceeding.

Article 14(5) of Law No. 287/1990 allows the ICA to issue fines in the case of refusal or delay to provide information. The same applies in the case of incorrect, partial or misleading information being provided. Moreover, following the amendment introduced by Legislative Decree No. 185/2021 (implementing Directive (EU) 2019/1),[17] these fines may reach now 1% of the turnover of the company concerned.[18]

Empowering the ICA to request information and documents prior to the formal opening of a case, with potentially very high fines in the case of failure to comply, might raise issues in terms of procedural guarantees.

These new investigative powers are exercised at a stage when the undertaking has not yet received the decision to open the investigation, and therefore does not know what the allegations are. This has clear implications on the rights of defense (right to be heard by the hearing officers, access the file, and submit statements and opinions).

The ICA's request for information should therefore at least be accompanied by clear indications regarding the subject matter and purpose of the query.

5. Introduction of the settlement procedure

The ACL introduces a settlement procedure which can be used in cases concerning restrictive agreements and abuse of dominant position. The ICA, during the investigation and until the notification of the statement of objections, may set a deadline within which the companies involved may express in writing their willingness to participate in discussions in order to reach a settlement agreement with the ICA.[19]

The ICA may inform parties participating in settlement discussions about:[20]

- the allegations it intends to raise against them and the evidence used to support the allegations;
- a non-confidential version of any accessible document within the case-file, in order to enable the requesting party to ascertain its position regarding a particular period of time or any other particular aspect of the alleged infringement;
- the range of the fine potentially being imposed.

Such information shall not be disclosed to third parties, unless the ICA has explicitly authorized its disclosure.[21]

If the outcome of these discussions is favorable, the ICA may fix a time limit within which the undertakings concerned may submit settlement proposals which reflect the results of the discussions held and in which they acknowledge the infringement of Article 101 and/or 102

[16] *Id.*, Art 35(1)(a) and (b).

[17] Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, PE/42/2018/REV/1, OJ L 11, January 14, 2019 ("ECN+ Directive"), pp. 3-33.

[18] ACL, Art. 35(1)(a) and (b). The ICA must set out the legal basis of the requests for information and/or documents. Such requests must also be proportionate and not oblige the addressees to admit an infringement of Articles 101 or 102 TFEU or Articles 2 or 3 of Law No. 287/1990 (*Id.*, Art. 35(1)(a) and (b)).

[19] *Id.*, Art. 34(1).

[20] *Id.*, Art. 34(2).

[21] *Id.*, Art. 34(2).

TFEU (or of the equivalent national provisions) and their respective liability.[22]

The ICA may decide at any moment to stop the discussion about settlement if it believes that the attempt to settle is compromised.[23]

Before the ICA sets a time limit for the submission of a settlement proposal, the parties concerned have the right, to be informed in due time, upon request, of the allegations and the evidence supporting these allegations.[24]

The ICA is not obliged to take into account settlement submissions received after the expiry of the time limit.[25]

Lastly, the ACL entrusts the ICA with the task of defining through its own internal provisions (to be adopted in the upcoming months) the procedural rules and the extent of the fine reduction in the event of successful conclusion of the settlement procedure.[26]

6. Calculation of the turnover of credit and other financial institutions

The ACL also introduces new criteria on the calculation of the turnover of credit and other financial institutions for merger control purposes. These new criteria are fully aligned to the ones set out in the EUMR.[27]

In particular, the ACL provides that for credit institutions and other financial institutions, the turnover is replaced by the sum of the following income items: (a) interest income and similar income; (b) income from shares and other variable yield securities, income from participating interests, and income from shares in affiliated undertakings; (c) commissions receivable and net profit on financial operations; and (d) other operating income.[28]

Concerning insurance companies, the ACL clarifies the previous calculation criterion and explicitly provides that the turnover is replaced by the value of gross premiums written, comprising all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums.[29]

7. Strengthening action against abuses of economic dependence

The ACL also amends Law No. 192/1998 on abuse of economic dependence.[30]

First of all, the ACL introduces a rebuttable presumption of economic dependence when dealing with digital platforms that play a "*key role*" in reaching end-users and/or suppliers (so-called "gatekeeper" platforms).[31]

Secondly, the ACL amends the non-exhaustive list contained in Law No. 192/1998 of relevant practices which amount to abuses of economic dependence. In particular, the following may amount to abuse of economic dependence: (i) the provision of insufficient data or information concerning the scope or the quality of the service provided; (ii) the request of undue one-sided obligations that are not justified by the nature or the scope of the activity performed; (iii) the adoption of practices that inhibit or hinder the use of different providers for the same service, also through the application of unilateral conditions or additional costs not

22 *Id.*, Art. 34(3).
23 *Id.*, Art. 34(4).
24 *Id.*, Art. 34(4).
25 *Id.*, Art. 34(4).
26 *Id.*, Art. 34(5).
27 *Id.*, Art. 32(1)(b)(2).
28 ACL, Art. 32(1)(b)(2).
29 *Id.*, Art. 32(1)(b)(2).
30 *Id.*, Art. 33.
31 *Id.*, Art. 33(1)(a).

provided for by the contractual agreements or licenses in place.[32]

The purpose of this amendment is to modernize the Italian rules on abuse of economic dependence so as to catch abusive practices in the digital sphere.[33]

8. Conclusions

The ACL amends several areas of competition law by further aligning national competition law with EU rules. It also introduces other significant changes, not least in the field of merger control.

Overall, it is expected that the ACL will have a significant impact on the enforcement activity of the ICA.

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32 *Id.*, Art. 33(1)(b). The ICA Proposal also proposed to make it clear that a decision to deny interoperability of products and services or data portability might constitute an abuse of dominance (ICA Proposal, p. 56). However, this proposal was not included in the ACL.

33 The effect of this change is to pre-empt one of the points of the DMA, which aims to ensure fair competition within the market in which digital service providers, defined as "*gatekeepers*", operate.