

Merger Control

Second Edition

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Italy

Mario Siragusa & Matteo Beretta
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Overview of merger control activity during the last 12 months

The number of concentrations notified to the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, the “ICA”) in 2012 (434) was lower than in 2011 (532), and in 2010 (495) but, in absolute terms, remained quite high. For the period considered in this publication (June 2011 – December 2012, the “Reference Period”), the mergers reviewed by the ICA were 787.

These figures can be explained by the alternative nature of the two turnover thresholds set forth in Article 16(1) of Law No. 287/1990 (the “Antitrust Law”)¹ and by the fact that a mandatory notification is also triggered upon acquisition of targets with a trivial/negligible presence in Italy if the acquiring undertaking alone meets the first turnover threshold (which makes reference to the *aggregate* Italian turnover of all the undertakings involved).² As a result, undertakings are frequently subject to (barely justifiable) procedural burdens and related costs, including possible fines for violation of the reporting obligation, for transactions with little or no impact in Italy.

However, as of January 1, 2013, the turnover thresholds set forth in Article 16 of the Antitrust Law must be cumulatively met. In other words, an obligation to file a mandatory notification is triggered only when *both* thresholds are met. As a consequence, a considerable number of mergers will no longer be reportable to the ICA.³ (For a more comprehensive description of the new legislation, see below under ‘Key policy developments’).

In more detail, in the Reference Period:⁴

- 742 cases were cleared during the so-called “Phase I” (*i.e.*, the ICA issued a decision declaring that no further investigation was required because the notified transaction did not create or strengthen a dominant position as a result of which effective competition would have been significantly impeded);
- 21 notifications resulted in a decision of inapplicability⁵ (*i.e.*, a decision finding that the notified transaction: (i) did not fall within the scope of the Antitrust Law because it did not amount to a concentration within the meaning of Article 5 of the Antitrust Law; or (ii) had Community dimension and, thus, fell within the European Commission’s exclusive jurisdiction; or (iii) did not meet the turnover thresholds set forth in Article 16 of the Antitrust Law);
- in seven cases the ICA opened an in-depth investigation (so-called “Phase II”), because the notified transaction could have been prohibited under Article 6 of the Antitrust Law (6 of which were cleared subject to remedies);⁶
- in one case the ICA opened proceedings for failure to comply with the conditions imposed, pursuant to Article 19(1) of the Antitrust Law;⁷
- in 14 cases the ICA opened proceedings for failure to notify a concentration pursuant to Article 19(2) of the Antitrust Law;⁸ and
- in one case (*Compagnia Aerea Italiana/Alitalia Linee Aeree-Airone*)⁹ the ICA adopted a decision imposing post-transaction conditions under Law Decree No. 134/2008.¹⁰

Finally, in one case (*CVA-Compagnia Valdostana delle Acque/Deval-Vallenergie*), the ICA revoked a prohibition previously imposed. Particularly, on August 4, 2011, the ICA had prohibited the acquisition of sole control of Vallenergie S.p.A. (“Vallenergie”) and Deval S.p.A. (“Deval”) by CVA-Compagnia

Valdostana delle Acque S.p.A. (“CVA”)¹¹.

The proposed transaction concerned the markets for electricity in Valle d’Aosta, a region in the North of Italy. In particular, the ICA had found that the transaction raised a number of concerns with respect to the local markets for (1) the retail supply of electricity to domestic final users, and (2) the retail supply of electricity to non-domestic final users, *i.e.*, small businesses. The post-merger entity would have reached a share in excess of 90% in both markets, the remaining 10% being fragmented among several minor competitors.

The ICA also had found that potential competition was hindered by significant legal barriers to entry. To reduce the price of electricity, the local regulation granted distributors a 30% refund to be directly applied in the customers’ invoices, provided that they complied with local technical specifications. In the ICA’s view, to comply with these specifications, new entrant distributors would have had to implement substantial changes to their payment systems, which would have ultimately rendered the refund inefficient. Therefore, according to the ICA, new entrants would not have benefited from this policy and, as a result, entry into the markets by new operators and/or the migration of CVA’s customers towards other operators would have been highly unlikely.

Based on the foregoing, the ICA had concluded that the proposed transaction would have created a dominant position capable of substantially lessening or eliminating competition in the regional market for the retail supply of electricity to domestic and non-domestic customers.

Notably, the ICA prohibited the transaction notwithstanding the fact that CVA had undertaken not to modify the prices applied to customers for a period of two years, with a possibility for the ICA to require an extension of the commitments up to four years, maintaining that such proposed behavioural commitments concerning CVA’s future pricing policy did not address the competition concerns stemming from the transaction. In this regard, the ICA had expressly referred to paragraph 17 of the European Commission notice on remedies¹², pursuant to which: “*commitments in the form of undertakings not to raise prices [...] will generally not eliminate competition concerns resulting from horizontal overlaps*”.

However, following the amendment of the regional law regulating the market for electricity, the parties re-notified the transaction. On November 16, 2011, in light of the amended legal framework, the ICA cleared the transaction.¹³

In fact, on October 19, 2011, the local regulation was amended and the intermediation of distributors eliminated. According to the new provisions, the discount would directly be granted by the local authority to the customers requesting it. The ICA, thus, found that the new regulatory framework had eliminated the competitive disadvantage for new entrants. By allowing the distributors active in different geographic markets to benefit from the discount, the new provisions made their entry into the local market of Valle d’Aosta economically viable. The ICA, thus, considered that potential competition from other distributors was sufficient to significantly reduce any market power of the merged entity, regardless of its monopolistic market share.

New developments in jurisdictional assessment or procedure

In the Reference Period, no significant developments occurred. However, three ICA reform proposals concerning the jurisdictional assessment of certain concentrations and the substantive merger control test were recently brought to the attention of the Italian Government. Such reform proposals are aimed at putting an end to a number of inconsistencies between the Italian merger control regime and the system laid down at the EU level by Regulation 139/04¹⁴ (the “EU Merger Regulation”). (These reform proposals are described more in detail under ‘Reform proposals’, below).

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

During the Reference Period, the Italian transportation sector has been under the spotlight. Particularly, the ICA reviewed two mergers concerning operators active in air transportation for passengers,¹⁵ and two mergers between operators active in maritime transportation for passengers, vehicles, and

cargo.¹⁶ All these cases involved markets characterised by high administrative barriers to entry, limited resources and high startup costs. The main remedy imposed on notifying undertakings has been the divestiture of strategic slots, in order to facilitate access to the market by competitors and new entrants.

Key economic appraisal techniques applied

The substantive test under Article 6(1) of the Antitrust Law measures “*whether a concentration creates or reinforces a dominant position on the Italian market capable of eliminating or restricting competition appreciably and on a lasting basis*”.

The ICA’s substantive appraisal takes into account a number of factors including: (i) the position in the market of the undertakings concerned; (ii) the structure of the relevant markets; (iii) the existence of barriers to entry; (iv) the competitive position of the domestic industry; (v) the conditions of access to supplies or outlets; (vi) the alternatives available to suppliers and users; and (vii) the supply and demand trends for relevant goods and services. In assessing the competitive effects of a merger, the ICA employs a market-based approach that attempts to determine the existing parameters and dynamics of competition on the affected market, and predicts the effect of a given transaction on that market. The ICA compares the competitive conditions in the post-merger scenario with those that would prevail absent the merger, and endeavours to determine whether the merging firms will face sufficient residual competition to make it unprofitable to increase prices or decrease output.

The starting point in the ICA’s assessment is represented by the merged entity’s market shares. However, the ICA also takes into account other important factors including market concentration, number and strength of competitors, barriers to entry, characteristics of demand and the degree of vertical integration.

In *Bolton Alimentari/Simmenthal*,¹⁷ the ICA, for the first time, took into account the Gross Upward Pricing Pressure Index (GUPPI), a tool aimed at measuring the unilateral merger price effects in markets for differentiated products.¹⁸ In particular, the GUPPI measures the “*Upward Pricing Pressure*”, which reflects the unilateral incentive for the merged firm to increase prices, by calculating the value of sales diverted to one merging firm’s product (“*diversion ratio*”) due to a post-merger increase in price of the other merging firm’s product. The “GUPPI analysis” departs from the traditional structural approach focused on the assessment of the merged entity’s market shares.¹⁹ It may, thus, be used as a counter-argument in the hand of notifying parties charged with the finding of high market shares or, on the contrary, as a threat for merging parties whose products are regarded as very close substitutes (regardless of the merged entity market share).²⁰

Approach to remedies

During the Reference Period, in one instance²¹ remedies were offered in Phase I, with a view to secure clearance, while, as seen above, six conditional clearance decisions were adopted following a Phase II investigation. More in general, the ICA has traditionally shown a particular favour for a “negotiated” approach with the notifying parties. This is true also with respect to procedures concerning abuses of dominance and (though, to a lesser extent) cartels, where the ICA makes large use of “commitments” under Article 14-*ter* of the Antitrust Law. The favour for a “negotiated” approach may be justified also in light of the importance that the ICA gives to the exposure of its activity to the media. In recent years, the ICA has made significant efforts to promote its achievements, especially among consumers, and the publicity normally given to remedies (and to their envisaged pro-competitive effects) serves this purpose. It will be interesting to see whether the favour for the “negotiated” approach will be confirmed under the presidency of the new ICA Chairman Mr Giovanni Pitruzzella, who has recently replaced Mr Antonio Catricalà.²²

As regards the analysis of the most important “remedy” cases dealt with by the ICA in the Reference Period, the following should be noted.

On November 30, 2011, the ICA opened an investigation into the merger between Italy’s flagship carrier Alitalia and its main competitor Air One²³ after expiry of the three-year suspension of the

operation of national merger control rules, provided for by Law Decree No. 134/2008.²⁴ Particularly, by means of Law Decree No. 134/2008, the Italian government had adopted *ad hoc* urgency measures exempting from merger control scrutiny those “concentration operations [that] fulfill major public interests”. The exemption was due to last for a period no longer than three years, after which, according to the law, “any possibly ensuing monopoly positions must end”.

The merger had taken place in December 2008 and involved a vehicle company owned by a group of Italian investors, Compagnia Aerea Italiana (“CAI”), which was established for that purpose. The transaction consisted in CAI’s acquisition of: (i) certain assets of the Alitalia Group (which at that time was under special administration); and (ii) sole control over the companies of the Air One Group. The ultimate aim of the merger was to prevent Alitalia’s default by creating a new Italian airline combining Alitalia’s main operating assets and Air One. Nonetheless, the transaction led to an overlap between the parties’ activities on a number of domestic and international routes, with very significant aggregated market shares on several routes, but only behavioural remedies could be imposed in order to “prevent the risk of prices or other contractual conditions being imposed that would be unduly burdensome for consumers”. The ICA, given the provisions laid down by Law Decree No. 134/2008, was in fact barred both from prohibiting the transaction and from imposing structural remedies such as the divestiture of airport slots. Accordingly, on December 3, 2008, the ICA adopted a decision ordering a number of price control and consumer protection remedies for a period of three years.²⁵ As the three-year suspension period was elapsed, the ICA opened an investigation to ascertain whether the 2008 transaction created or strengthened a dominant position on certain routes and whether any such dominant position persists to date.

The ICA first stated that the relevant markets should have been defined according to the Commission’s consolidated approach to market definition in air transport of passengers, the point-of-origin/point-of-destination pair approach (“O&D”), adding that, despite their proximity, the three Milan airports (Linate, Malpensa, and Orio al Serio) could not (either in 2008 or today) be considered substitutable and should have been therefore identified as distinct markets at least in relation to domestic flights. The ICA then identified seven international routes and 22 domestic routes where the transaction had determined an overlap between the parties’ activities.

Turning to the competitive effects of the merger, the ICA held that, as regards international routes, in light first and foremost of CAI’s limited market share and of the competitive pressure from other carriers, the transaction did not distort competition. As regards the domestic routes, the ICA relied on EU and national precedents, which consider the control of at least 60% of the daily flights operated on a given route to be a threshold of concern that may trigger the application of structural remedies.²⁶ The ICA identified 18 domestic routes where CAI came to operate at least 60% of daily flights post-merger (on most routes, CAI controlled 100% of the daily flights).²⁷ The ICA added that, of these 18 routes, those having Milan Linate as their origin or destination raised particular concerns due to the high entry barriers resulting from regulatory constraints on the allocation of slots at that airport, and in light of CAI’s 70% overall share of total available slots.

On April 11, 2012, the ICA closed its investigation.²⁸ The ICA found that the 2008 merger created a monopoly on the Linate (Milan)-Fiumicino (Rome) route, which, in the ICA’s view, was still the case. In this regard, the ICA held that currently “Alitalia-CAI [i.e., the merged entity] is free of competitive pressures from other airlines”, because of Linate’s specific administrative regulations which make it impossible for other companies to acquire slots on this airport. The ICA also found that high-speed rail transport services between Rome and Milan did not constitute a sufficient competitive constraint to Alitalia-CAI services on the Fiumicino-Linate route, as intermodal substitutability in the early morning and late evening slots would still be limited (i.e., the slots preferred by time-sensitive passengers).²⁹

Accordingly, the ICA concluded that the Alitalia-CAI monopoly persisted on the Linate-Fiumicino route. As a consequence, the ICA ordered Alitalia-CAI to adopt, within 90 days from the notification of the decision, all the necessary measures aimed at removing the monopoly. Although the ICA did not formally impose any specific remedy on Alitalia-CAI, the decision clearly spells out the ICA’s preference for structural remedies, namely the release of time-sensitive slots to a newcomer in the

market. According to the ICA, “the removal of Alitalia-CAI’s Linate-Fiumicino market power seems to require the introduction of a competitive restriction that could only be imposed by the presence of another airline that could compete with Alitalia-CAI on the time sensitive slots”, and, “to offer a credible alternative to the incumbent, a competing airline would need to have access to a number of time slots sufficient to ensure a minimum efficient offer and flight frequencies that could guarantee an adequate supply for the time-sensitive slots”.³⁰

Alitalia-CAI appealed the ICA’s decision before the Administrative Tribunal of Lazio (*Tribunale Amministrativo per il Lazio*, i.e., the court having exclusive jurisdiction over the appeals lodged against the ICA’s decisions, “TAR Lazio”). On October 10, 2012, the TAR Lazio rejected the appeal in its entirety.³¹

The other key merger reviewed during the Reference Period, and cleared by the ICA subject to an articulated set of remedies, involved the Italian insurance sector. The transaction at stake concerned Unipol’s €1.1bn acquisition of Fondiaria Sai (“Fonsai”), through the acquisition of Fonsai’s parent company Premafin.³² Notably, this case is one of the few instances in which the ICA, applying art. 17(1) of the Antitrust Law, ordered the merging parties to suspend the implementation of the transaction pending the expiration of the 45-day term envisaged for the phase II.³³

The clearance of the transaction was subjected to a twofold set of remedies which can be briefly summarised as follows.³⁴

First, Unipol was forced to divest certain assets (consisting of, among other things, companies, brands, insurance portfolios representing a significant amount of premiums, and infrastructures), in a “short time-frame” and through the supervision of an ICA-approved advisor, in order to reduce, below 30%, its share in a number of key insurance markets at both the national and provincial level.

Second, strict measures were taken in order to ensure the break of the direct and indirect financial and personal links existing between Unipol and Fonsai on the one hand, and, on the other hand, (i) the Generali group, i.e., the first Italian insurance group, and the merging parties’ closest competitor, (ii) Mediobanca, and (ii) the Unicredit group, i.e. other important Italian operators active in the Italian financial sector.³⁵

It is worth noting that the Italian government has recently enacted new legislation aimed at contrasting the same type of competitive constraints addressed by the ICA in the context of the review of the Unipol/Fonsai merger. Indeed, the ICA has always taken a very strict and critical attitude towards the numerous personal links traditionally characterising the Italian insurance, banking, and financial sectors, as the ICA considers that they contribute to a large extent to the lack of an adequate level of competition in the Italian market. Article 36 of the recently enacted Law No. 214/2011 addresses these concerns by preventing directors, auditors, and top executives of companies active on the banking, insurance and financial sectors from holding similar positions in competing companies.

In particular, in order to contrast the “web” of personal links in the financial sector, Article 36(1) of Law No. 214/2011 set forth new eligibility criteria for corporate governance bodies, providing that “no member of management boards, supervisory boards and statutory board of auditors, as well no executive officer, of undertaking or group of undertakings which are active on the markets for banking, insurance and finance” shall, at the same time, serve in “equivalent” positions in competing undertakings or groups of undertakings. Article 36(2) clarifies that “competing undertakings or groups of undertakings” means undertakings which are “active on the same product and geographic markets and which have no relationship of control” (with the undertaking in which a person already serves as an executive) within the meaning of Article 7 of the Italian Antitrust Law.

Pursuant to Article 36(2)-bis, failure to comply with the obligation to opt for one of the conflicting offices within 90 days from the appointment to the conflicting office will cause the automatic termination of both offices, with the competent corporate bodies formally declaring the respective termination of the relevant office within 30 days from the moment at which it acquires knowledge of the existence of the interlocking directorate. In case of failure to act by the competent corporate body, the sector-specific surveillance authority (i.e., the Bank of Italy of the Italian Insurance Authority) shall declare the termination of the office.

Key policy developments

As of January 1, 2013, Article 5-*bis* of Law Decree No. 1 of January 24, 2012 (the so-called “*Decreto Cresci Italia*”), as converted with modifications by Law No. 27/2012, introduced, *inter alia*, two significant amendments to the Antitrust Law.

First, the two turnover thresholds set forth by Article 16 of the Antitrust Law are no longer alternative, but *cumulative*. Therefore, only mergers meeting both thresholds are reportable to the ICA. This reform will eliminate the merger control administrative burdens and related costs for transactions with little or no impact in Italy. (In fact, a considerable number of mergers will no longer be required to be filed with the ICA.) Predictably, the reform will preclude to the ICA the possibility to carry out the traditional *ex ante* scrutiny of a not negligible number of potentially anticompetitive transactions. This will be the case, for instance, concentrations involving targets with a national turnover up to €47m, and operating exclusively at the local level.

Second, Law No. 27/2012, by amending Article 10-*bis* of the Antitrust Law, has repealed the traditional filing fees system and has introduced a new set of rules for the collection of the funds required to finance the ICA’s activities. Particularly, Article 10(7)-*ter* and Article 10(7)-*quater* of the Antitrust Law introduced an annual tax that will be levied on all Italian corporations (S.p.A., S.r.l., S.a.p.a.) which generate a total turnover above €50m.³⁶ The amount of the contribution is equivalent to the 0.08%³⁷ of the corporation’s overall turnover.³⁸ Pursuant to Article 10(7)-*ter* of the Antitrust Law and Article 2(2) of the “*Modalità di contribuzione*”, such contribution cannot exceed €400,000 which corresponds to 100 times the minimum contribution (€4,000). The contribution for 2013 was due by October 30, 2012, whereas, from 2013 onwards, it shall be paid by July 31.³⁹

A number of undertakings have challenged the new contribution system before the Administrative Tribunal of Lazio, alleging: (a) the breach of constitutional principles claiming that the functioning of the ICA and thus the “protection of competition” is a matter of public interest which should not be borne only by large-cap corporations; and (b) the violation of Article 5 of the Directive No. 2008/7/EC,⁴⁰ pursuant to which “*Member States shall not subject capital companies to any form of indirect tax whatsoever in respect of the following [...] c) registration or any other formality required before the commencement of business to which a capital company may be subject by reason of its legal form*”.

Reform proposals

Three reform proposals presented by the ICA with regard to the rules governing the merger review process are currently under the scrutiny of the Italian Government.⁴¹ The common aim of these proposals is to address and solve, via an amendment of Articles 6(1), 5, and 16(2) of the Antitrust Law, certain divergences between the Italian and the EU merger control regimes.

In particular, the reform proposals concern: (i) the substantive test under Article 6(1) of the Antitrust Law; (ii) the procedural and substantive rules applicable to “cooperative” joint ventures; and (iii) the calculation of the turnover thresholds in case of transactions concerning credit institutions, insurance companies and other financial institutions.

The first reform proposal is directed to align the Italian substantive test with the EU substantive test. According to the latter, an operation of concentration can be cleared if it does not “*significantly impede effective competition... in particular as a result of the creation or the strengthening of a dominant position*” (this is the so-called “Substantial Lessening of Competition Test” – the “SLC” Test – as opposed to the Italian “dominance test”).⁴² In practice, this means that the EU review process puts greater emphasis on the assessment of the likelihood that the transaction will create “market power” according to an “*effects-based-approach*”, as opposed to the current Italian test which – at least formally – still confers the central role of the assessment to the notion of “dominant position”.⁴³ With the aim of bringing the Italian test closer to the EU test, the ICA has also recommended the inclusion in the list of factors to be taken into account for the purpose of assessing concentrations, “*the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition*”, which is one of the factors expressly mentioned by Article 2(1)(b) of the EU Merger Regulation.

The second reform proposal concerns the so-called “cooperative” joint venture. Article 5 of the Antitrust Law refers to the situation in which two or more undertakings create a new company jointly controlled by the parents. Such transactions may have as their object or effect the coordination of the competitive behaviour of the parents. Where such coordination outweighs the structural effects of the transaction for the undertakings concerned, a joint venture is considered to be “cooperative”.⁴⁴ In Italy, cooperative joint ventures, even if full-function, are still subject to procedural and substantive rules applicable to restrictive agreements, rather than, as at the EU level, to those applicable to mergers.⁴⁵ As a result, the same transaction (namely the creation of a full-function cooperative joint venture) is reviewed under a different procedural and substantive framework depending on whether it falls within the ICA’s or the Commission’s jurisdiction. The ICA had thus proposed to add to Article 5 of the Antitrust Law an explicit reference to the applicability of merger control rules to full-function “cooperative” joint ventures.

The third reform proposal concerns the method for calculation of turnover of banks and financial institutions. Article 16(2) of the Antitrust Law currently provides that, for banking and financial institutions, “turnover is considered to be equal to 10 per cent of [their] total assets, minus memorandum accounts”. Based on the ICA’s proposal, the new version of Article 16(2) should substantially mirror Article 5(3)(a) of the EU Merger Regulation.

Endnotes

1. Article 16(1) of the Antitrust Law provides that a concentration must be notified to the ICA prior to its implementation if, in the last fiscal year: (1) the parties’ combined Italian turnover exceeded €474m; or (2) the target’s Italian turnover exceeded €47m.
2. According to the ICA, concentrations involving foreign companies which did not achieve any turnover in Italy in the last three financial years (including the year in which the concentration takes place), are not reportable. However, this exemption from the duty to notify does not apply “when it is likely that, post-transaction, the target company will start achieving turnover in Italy” (*Notification Form*, Supplement to the Bull. 19/1996, as amended, §3). This latter provision severely restricts the scope of the above-mentioned exemption, since in many cases it is difficult to rule out in advance the possibility that, post-merger, the target company will still not realise turnover in Italy.
3. Article 5-bis of Law Decree No. 1 of January 24, 2012, converted with modifications by Law No. 24 of March 24, 2012.
4. Source: ICA’s official website (www.agcm.it). Please note that official figures are not yet available, as they will be included in the ICA’s 2012 Annual Report, which will be published approximately in March 2013.
5. In one case, the inapplicability decision required a Phase II investigation: Decision No. 22839, Case C1109, *Oviessa/Ramo di Azienda di Flli Giuliani, Medi & C.*, in Bull. 46/2011.
6. Only *Bolton Group International/Luis Calvo Sanz* (decision No. 23876, Case C11589, in Bull. 36/2012), was cleared without remedies. In the six following cases remedies were imposed: decision No. 22622, Case C11072, *Moby/Toremara-Toscana Regionale Marittima*, in Bull. 29/2011; decision No. 23138, Case C11205, *Elettronica Industriale/Digital Multimedia Technologies*, in Bull. 50/2011; decision No. 23542, Case C11461, *Conad del Tirreno/Nove rami di azienda di Billa*, in Bull. 19/2012; decision No. 23670, Case C11613, *Compagnia Italiana di Navigazione/Ramo di azienda di Tirrenia di Navigazione*, in Bull. 25/2012; decision No. 23678, Case C11524, *Unipol Gruppo Finanziario/Unipol Assicurazioni-Premafin Finanziaria-Fondiarria SAI-Milano Assicurazioni*, in Bull. 25/2012; and decision No. 24102, Case C11799, *Bolton Alimentari/Simmenthal*, in Bull. 49/2012.
7. Decision No. 22590, Case C8027B, *Banca Intesa/Sanpaolo IMI*, in Bull. 28/2011.
8. Out of this total, only one case was closed without a finding of violation (decision No. 22765, Case C11105, *Esselunga-Talvera-Quadrilatero/8 punti vendita (Livorno)*, in Bull. 37/2011). In 13 cases the investigation confirmed the violation and the ICA fined the undertakings concerned (see, e.g. decision No. 23796, Case C11354, *Società Italiana Acetilene e Derivati SIAD/Rami di*

- azienda di Azienda di Martinelli-I.G.C.-Stella Gas-Zanutto (4 rami di azienda)*, in Bull. 31/2012, where the ICA imposed an overall fine of €20,000 (for failure to notify four concentrations); decision No. 23797, Case C11355, *Rivoira/Rami di Azienda di Brennero gas-Nicheri-Blugas (3 rami di azienda)*, in Bull. 31/2010, where the ICA imposed an overall fine of €15,000 (for failure to notify three concentrations); and decision No. 23163, Case C11070B, *Finifast/5 aree di servizio "Calaggio Sud"- "Campagnola Est"- "Sesia Est"- "Valle Scrivia"- "Arda Est"*, in Bull. 1/2012, where the ICA imposed an overall fine of €30,000 (for failure to notify six concentrations).
9. Decision No. 23496, Case C9812B, *Compagnia Aerea Italiana/Alitalia Linee Aeree-Airone*, in Bull. 15/2012. For a more comprehensive description of this case, see below under 'Approach to remedies'.
 10. Law Decree No. 134/2008, concerning "*Urgent measures for the restructuring of large companies in a state of crisis*", converted into Law No. 166/2008.
 11. Decision No. 22683, Case C11082, *CVA-Compagnia Valdostana delle Acque/Deval-Vallenergie*, in Bull. 31/2011.
 12. Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, in OJ C 267, 22.10.2008, p. 1-27.
 13. Decision No. 23003, Case C11315, *CVA-Compagnia Valdostana delle Acque/Deval-Vallenergie*, in Bull. 46/2011.
 14. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, in OJ L 24, 29.1.2004, p. 1-22.
 15. Decision No. 23496, Case C9812B, *Monitoraggio Post-Concentrazione Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane-Airone*, in Bull. 15/2012; Decision No. 23739, Case C11608, *Alitalia-Compagnia Aerea Italiana/Ramo di azienda di Wind Jet (NEWCO)*, in Bull. 28/2012.
 16. Decision No. 23670, Case C11613, *Compagnia Italiana di Navigazione/Ramo di azienda di Tirrenia di Navigazione*, in Bull. 25/2012; and Decision No. 22622, Case C11072, *Moby/Toremara-Toscana Regionale Marittima*, in Bull. 29/2011.
 17. Decision No. 24102, Case C11799, *Bolton Alimentari/Simmenthal*, in Bull. 49/2012.
 18. The GUPPI is a revised version of the Upward Pricing Pressure Index (UPPI), introduced by the 2010 U.S. Horizontal Merger Guidelines (see <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>).
 19. See, U.S. Horizontal Merger Guidelines, section 6.1, page 21: "[i]n some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration" (emphasis added).
 20. In *Bolton Alimentari/Simmenthal*, the merged-entity market share was extremely high (70-80%, based on volume of sales/80-90%, based on value of sales) and, according to the ICA, the GUPPI analysis confirmed the likelihood of a price increase following the completion of the transaction. The transaction was, thus, cleared but subject to remedies.
 21. Decision No. 23739, Case C11608, *Alitalia - Compagnia Aerea Italiana/Ramo di azienda di Wind Jet (NEWCO)*, in Bull. 28/2012.
 22. On November 18, 2011, the Chairmen of the Italian Parliament, Camera dei Deputati and Senato della Repubblica jointly appointed Giovanni Pitruzzella as the new chairman of the ICA (effective November 29, 2011). Mr Pitruzzella replaces Antonio Catricalà (in office since March 2005), who in turn has been appointed as a member of the newly-formed Italian Government led by Mario Monti. Moreover, as of December 19, 2011, the ICA has a new Secretary General: Roberto Chieppa. Mr Chieppa replaces Luigi Fiorentino who has also been appointed as a member of the new Italian Government.
 23. Case C9812B, *Monitoraggio Post-Concentrazione Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane-Airone*, in Bull. 46/2011.
 24. See *supra*, note 11.
 25. Decision No. 19248, Case C9812, *Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane-Airone*, in Bull. 46/2008.
 26. According to that approach, every combination of point-of-origin and point-of-destination should be considered to be a separate market from the customer's point of view. See, e.g., Commission Decision in Case No IV/JV.0019, *KLM/Alitalia*.
 27. The routes concerned are: Rome Fiumicino-Bari, Rome Fiumicino-Brindisi, Rome Fiumicino-

- Catania, Rome Fiumicino-Genoa, Rome Fiumicino-Lamezia Terme, Rome Fiumicino-Palermo, Rome Fiumicino-Pisa, Rome Fiumicino-Turin, Rome Fiumicino-Trieste, Rome Fiumicino-Venice, Milan Linate-Bari, Milan Linate-Brindisi, Milan Linate-Lamezia Terme, Milan Linate-Naples, Milan Linate-Palermo, Milan Linate-Rome Fiumicino, Naples-Turin, and Naples-Venice.
28. Decision No. 23496, Case C9812B, *Monitoraggio Post-Concentrazione Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane-Airone*, in Bull. 15/2012.
 29. According to the ICA, “for passengers who tend to prefer these time slots, however, rail still appears to offer a limited degree of substitutability with air so that it is only partially able to constrain the market power of Alitalia-CAI”.
 30. The same approach has been endorsed by the ICA with respect to the clearance of the acquisition of Wind Jet by Alitalia/CAI (Decision No. 23739, Case C11608, *Alitalia-Compagnia Aerea Italiana/Ramo di azienda di Wind Jet (NEWCO)*, in Bull. 28/2012).
 31. Judgment No. 4964/2012 of October 10, 2012, *Soc. Alitalia spa-Compagnia Aerea Italiana spa v. Autorità Garante della Concorrenza e del Mercato*. An appeal against the TAR judgment is currently pending before the Supreme Administrative Court (*Consiglio di Stato*).
 32. Decision No. 23678, Case C11524, *Unipol Gruppo Finanziario/Unipol Assicurazioni-Premafin Finanziaria-Fondiarria SAI-Milano Assicurazioni*, in Bull. 25/2012.
 33. Under the Antitrust Law there is no “standstill” obligation for the notifying parties. The parties are therefore free to implement the transaction at any time after the merger filing without waiting for ICA approval. However, most parties choose not to implement their transactions pending review by the ICA. Pursuant to art. 17(1) of the Antitrust Law, the ICA may adopt a suspension order before opening phase II. This is usually the case where the transaction is particularly complex, it is highly likely to raise competitive concerns and be prohibited by the ICA, which may thus order the restoration of conditions of effective competition, including the divestiture of the acquired business.
 34. A comprehensive summary (in English) of the remedies imposed can be found on the ICA’s internet website at the following URL: <http://www.agcm.it/en/newsroom/press-releases/2001-c11524-conditional-go-ahead-for-ugf-premafin-operation.html>.
 35. Is currently pending before the TAR Lazio the appeal brought by Unipol against the ICA’s clearance decision.
 36. See, also decision No. 23787 of July 18, 2012, *Contributo all’onere derivante dal funzionamento dell’Autorità della Concorrenza e del Mercato per l’anno 2013*, with two attached documents (‘*Modalità di contribuzione agli oneri di funzionamento dell’Autorità Garante della Concorrenza e del Mercato per l’anno 2013*’ and ‘*Istruzioni relative al versamento del contributo agli oneri di funzionamento dell’Autorità Garante della Concorrenza e del Mercato per l’anno 2013*’), in Bull. 32/2012. In the FAQ section of the ICA website, it is clarified that the annual tax also applies to limited liability cooperative companies notwithstanding the fact that the latter are not “corporations” (i.e., capital companies) under Italian civil law.
 37. Under Article 10(7)-*quater*, the ICA may increase such value up to a maximum of 0.5%.
 38. In this respect, reference shall be made to the “item” listed under Letter A1 of Articles 2425(1) and 2425-*bis*(1) of the Italian Civil Code.
 39. Parent companies can pay the contribution separately for each of the subsidiaries which fulfill the requirements.
 40. Council Directive No. 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital.
 41. See, ICA Recommendation No. AS988, *adopted pursuant to Articles 21 and 22 of the Antitrust Law, concerning reform proposals for the 2013 annual competition law*, addressed to the Chairmen of “Senato della Repubblica” and “Camera dei Deputati”, to the Prime Minister and to the Minister for the Economic Development, Infrastructure and Transports, available online (in Italian) at the ICA website <http://www.agcm.it/segnalazioni/legge-annuale.html>.
 42. See Article 2(2) and (3) of the EU Merger Regulation.
 43. The “Italian test” as spelled out in the wording of Article 6(1) of the Antitrust Law, still mirrors the test applied at the EU level before the entry into force of the EU Merger Regulation, under Council Regulation No. 4064/89 of 21 December 1989 *on the control of concentrations between undertakings*, in OJ L 395, 30.12.1989.
 44. To assess the cooperative or concentrative nature of a joint venture, the ICA continues to apply the criteria set forth in the Commission’s *notice on the distinction between concentrative and cooperative joint ventures*, in O.J. 1994 O.J. (C 385) 1. At the EU level, the 1994 notice

was replaced in 1998 with the notice on the concept of full-function joint ventures, 1998 O.J. (C 66) 1, which, in its turn, has been replaced by the Jurisdictional Notice (*Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, in O.J. C95 of 16.04.2008).

45. See, Articles 2(4) and (5) of the EU Merger Regulation, pursuant to which: “[t]o the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market. In making this appraisal, the Commission shall take into account in particular: – whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market – whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question”.

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