



Merger Control

First Edition

Contributing Editors: Nigel Parr & Catherine Hammon

Published by Global Legal Group

CONTENTS

Preface	Nigel Parr & Catherine Hammon, <i>Ashurst LLP</i>	
Australia	Elizabeth Avery & Gina Cass-Gottlieb, <i>Gilbert + Tobin</i>	1
Austria	Astrid Ablasser-Neuhuber & Florian Neumayr, <i>bpv Hügel Rechtsanwälte</i>	7
Brazil	Eduardo Molan Gaban, <i>Machado Associados, Advogados e Consultores</i>	11
Bulgaria	Peter Petrov, <i>Boyanov & Co.</i>	19
Canada	Michelle Lally & Shuli Rodal, <i>Osler, Hoskin & Harcourt LLP</i>	24
China	Susan Ning, Huang Jing & Yin Ranran, <i>King & Wood PRC Lawyers</i>	31
Colombia	Alfonso Miranda Londoño, <i>Esguerra Barrera Arriaga</i>	38
Cyprus	Thomas Keane & Christina Vgenopoulou, <i>Chrysses Demetriades & Co. LLC</i>	45
Czech Republic	Ivo Janda & Magdalena Ličková, <i>White & Case LLP</i>	50
Denmark	Christina Heiberg-Grevy & Malene Gry-Jensen, <i>Accura Advokatpartnerselskab</i>	54
Estonia	Kätlin Kiudsoo & Marti Hääl, <i>Attorneys at Law Borenius</i>	58
European Union	Alec Burnside & Anne MacGregor, <i>Cadwalader, Wickersham & Taft LLP</i>	63
Finland	Petteri Metsä-Tokila & Leena Lindberg, <i>Krogerus Attorneys Ltd</i>	71
France	Pierre Zelenko & Stanislas de Guigné, <i>Linklaters LLP</i>	78
Germany	Marc Besen & Dimitri Slobodenjuk, <i>Clifford Chance</i>	86
Greece	Emmanuel J. Dryllerakis & Cleomenis G. Yannikas, <i>Dryllerakis & Associates</i>	92
Hungary	Dr. Judit Budai & Dr. Bence Molnár, <i>Szecskey Attorneys at Law</i>	100
India	Farhad Sorabjee, <i>J. Sagar Associates</i>	107
Ireland	Helen Kelly & Bonnie Costelloe, <i>Matheson Ormsby Prentice</i>	113
Israel	Dr. David E. Tadmor & Shai Bakal, <i>Tadmor & Co.</i>	119
Italy	Mario Siragusa & Matteo Beretta, <i>Cleary Gottlieb Steen & Hamilton LLP</i>	126
Japan	Koya Uemura, <i>Anderson, Mōri & Tomotsune</i>	135
Korea	Sang-Mo Koo, Jeong-Ran Lee & Mi-Jung Kim, <i>Barun Law</i>	142
Netherlands	Kees Schillemans & Emma Besselink, <i>Allen & Overy LLP</i>	148
Portugal	Mário Marques Mendes & Pedro Vilarinho Pires, <i>Marques Mendes & Associados</i>	153
Romania	Silviu Stoica & Mihaela Ion, <i>Popovici Nițu & Asociații</i>	158
South Africa	Lesley Morphet & Desmond Rudman, <i>Webber Wentzel</i>	166
Spain	Jaime Folguera Crespo & Borja Martínez Corral, <i>Uria Menéndez</i>	171
Switzerland	Benoît Merkt & Marcel Meinhardt, <i>Lenz & Staehelin</i>	177
Turkey	Gönenç Gürkaynak & K. Korhan Yıldırım, <i>ELIG Attorneys at Law</i>	183
Ukraine	Denis Lysenko & Mariya Nizhnik, <i>Vasil Kisil & Partners</i>	189
United Kingdom	Nigel Parr & Mat Hughes, <i>Ashurst LLP</i>	196
USA	J. Mark Gidley & George L. Paul, <i>White & Case LLP</i>	207

Italy

Mario Siragusa & Matteo Beretta Cleary Gottlieb Steen & Hamilton LLP

Overview of merger control activity during the last 12 months

The number of operations of concentration notified in 2010 (495) was slightly lower than in 2009 (514), and significantly lower than in 2008 (842) but, in absolute terms, remained quite high.

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”), according to which an obligation to file 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).¹ 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.

In more detail, in 2010, the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, the “ICA”) reviewed 495 mergers²:

- 471 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).
- 23 notifications resulted in a decision of inapplicability (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; (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 one instance only 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. (This procedure was closed in January 2011 with a conditional clearance decision³.)

In 2010, the ICA carried out 7 proceedings for failure to notify a concentration pursuant to Article 19(2) of the Antitrust Law, and adopted a decision by which it revoked remedies previously imposed on a company and replaced them with other measures proposed by the latter.⁴

In 2011, as of June 13, the ICA reviewed further 180 transactions. The number of Phase I clearance decisions amounts to 178, while only one concentration was cleared following a Phase II investigation.⁵ The ICA has also imposed a fine equal to €5,000 for failure to notify a concentration pursuant to Article 19(2) of the Antitrust Law.⁶

New developments in jurisdictional assessment or procedure

In 2010/2011, no significant developments occurred in the *substantive* assessment of mergers notified to the ICA. This is mainly due to the fact that almost all the concentrations were unconditionally cleared by the ICA during Phase I.

By contrast, in *Brico Business Corporation*,⁷ the Administrative Tribunal for Latium (*Tribunale Amministrativo per il Lazio*, i.e., the court having exclusive jurisdiction over the appeals lodged against the ICA’s decisions, “TAR Lazio”) addressed two important *procedural* issues.

The proceedings were triggered by an appeal brought by Brico Business Corporation (“BBC”) against the decision by which the ICA conditionally cleared Adeo’s acquisition of Castorama, a competitor active in the *do-it-yourself* business and, in particular, in the distribution of these products through large outlets. BBC, the main competitor of the merging parties in Italy, deemed itself negatively affected by such merger, and filed an action for the annulment of the ICA’s decision based, *inter alia*, on a number of procedural pleas.

BBC’s initiative gave the TAR Lazio the opportunity to shed light for the first time on a number of important procedural issues related to the ICA’s merger control review. Unlike EU merger control rules,⁸ Italian merger control rules lack a comprehensive procedural framework. As a consequence, the ICA always enjoyed a certain degree of discretion in shaping

the terms of the merger control procedure and extending its rights and prerogatives, and the very limited number of appeals against merger control decisions⁹ hindered an effective and systematic jurisdictional review of the ICA's practice.

In detail, BBC's claims raised the following procedural issues: (i) the nature of Phase I and of its statutory 30-day duration; and (ii) the possibility to condition Phase I clearances to commitments proposed by the notifying party.

(i) Nature and duration of Phase I. Concerning the duration of Phase I, pursuant to Article 16(4) of the Antitrust Law, the ICA is required to render a decision within 30 calendar days of receipt of a complete notification.¹⁰ During such period, the ICA may request *informally* clarifications or additional information to the notifying parties. Indeed, it is actually quite frequent that the case handler contacts the notifying company's representative(s) or counsel to gather clarifications and/or additional information by phone. These informal requests do not stop the clock and the ICA remains bound to the obligation to adopt a decision within 30 calendar days of notification.

By contrast, pursuant to Article 5(3) of Decree No. 217/1998, when there are serious inaccuracies, omissions or untruths in the notification form, the ICA sends a *formal* request for information to the notifying party and the 30-day period commences upon the ICA's receipt of a correct and complete response.

In its practice, the ICA has traditionally made an extensive – and at times questionable – use of such instrument. In some instances, for example: (i) the type of additional information requested went well beyond those strictly required by the notification form; and/or (ii) the declaration of serious incompleteness – and the related request for additional information – was made shortly before the expiration of the 30-day statutory limit, thereby unduly extending the short time limit of the procedure.

These circumstances reveal the questionable attitude of the ICA to use this instrument as a tool to gain more time to review a notified concentration and to anticipate the in-depth substantive assessment which is typical of a Phase II investigation during Phase I. This consolidated practice, by extending the duration of Phase I, grants the ICA more flexibility in managing the merger control procedure. Absent a Phase II, third companies do not have formal procedural rights (e.g., to submit briefs, reply to a statement of objection, be heard in a formal hearing before the ICA's full body) and the ICA is thus free to capitalise on their contributions to the extent it considers it useful for its assessment. Moreover, as mentioned, the ICA enjoys a large degree of discretion in extending the duration of the Phase I. By contrast, when a Phase II is opened, pursuant to Article 16(8) of the Antitrust Law, its 45-day duration can be extended only by an additional 30-day period, if the parties fail to supply the information and data requested by the ICA.¹¹

In its appeal before the TAR Lazio, BBC contested, among others, the legality of the above practice. In particular, BBC argued that the review carried out during Phase I is *summary* in nature, since it shall be: (a) merely aimed at identifying potential competitive concerns justifying a more in-depth analysis (typical only of a Phase II procedure); and, for this reason, (b) concluded within the 30-day statutory term (save for the limited cases set forth in Article 5(3) of Decree No. 217/1998, when there are serious inaccuracies, omissions or untruths in the notification justifying an interruption of the 30-day term). In other words, in BBC's views, the Phase II investigation constitutes the correct (and only) legal framework to ascertain whether the likely competitive concerns identified in Phase I are indeed justified and well grounded.

In the case at hand, the artificial extension of such deadline went unacceptably beyond all limits and the ICA carried out a very detailed analysis without opening a Phase II investigation.

According to BBC, the ICA's attitude had been particularly censurable in the case at hand, since:

- (i) the Phase I extended went well beyond its natural duration and lasted 100 days (i.e., even more than the combined duration of a Phase I and a Phase II investigation);
- (ii) due to the very complex substantive issues (including those related to market definition) stemming from the notified transaction (and acknowledged by the ICA itself), the latter was an inevitable candidate for a Phase II investigation; and
- (iii) this particular complexity of the case was indirectly confirmed by the tight negotiation conducted by the ICA and the notifying party with regard to the content of remedies.

In BBC's view, the failure to open a Phase II investigation, far from constituting a mere procedural misconduct, led to relevant practical consequences insofar as only during Phase II are third parties formally granted rights of defence¹² and the ICA enjoys coercive investigative powers¹³.

The TAR Lazio rejected BBC's appeal,¹⁴ maintaining that in Phase I the ICA does not merely carry out a *summary* assessment on the notified concentration, but must fully scrutinise the substantive effects of the notified concentration. This is so since, at the end of Phase I, the ICA has to determine whether the concentration: (a) does not significantly affect competition, and, thus, it may be cleared by providing adequate arguments supporting such conclusion; or (b) is likely to create or strengthen a dominant position, thus justifying the opening of a Phase II investigation *by means of a reasoned decision*. As a consequence, the Phase I assessment must be *sufficiently detailed*.

Conversely, if the ICA were strictly bound by the 30-day period, in cases in which, at the end of such period, it had no sufficient elements to conclude that the notified concentration does not raise significant anticompetitive concerns, it would have no other options than opening a Phase II investigation. In the majority of cases this would result in an inefficient use of the ICA's limited resources.

Finally, the TAR Lazio clarified that, in any event, the 30-day deadline *is set forth in favour of the notifying party*, in order to allow it to get the clearance of the transaction within a reasonable timeframe.

(ii) The possibility to accept Phase I commitments. Unlike the EU merger regulation, the Antitrust Law provides that a clearance decision may be conditioned upon undertakings only following a Phase II assessment. Notwithstanding the above, a number of Phase I clearance decisions have been adopted following the presentation of undertakings by the notifying party.

In such cases, the ICA artificially circumvents the legal provisions limiting the possibility to adopt commitment decisions to Phase II by qualifying the proposed remedies as “amendments to the originally notified transaction” or, put it differently, by considering the transaction net of remedies as a newly notified concentration. (Consistently with this approach, each time remedies are offered/amended, the 30-day period starts anew.)

This practice may be seen in breach of fundamental principles of law which impose strict limits to the administrative activity and provide that public authorities enjoy only the specific powers and prerogatives expressly conferred upon them. Moreover, third parties’ rights of defence are inevitably constrained by this practice since, as mentioned, they are granted no procedural rights during Phase I.¹⁵

In its appeal, BBC maintained that the ICA’s clearance decision had been conditioned to structural remedies proposed during Phase I by the notifying party and, thus, it qualified as a “conditioned” decision. Since the Antitrust Law does not provide for the possibility to accept remedies during a Phase I investigation, the ICA’s decision was illegitimate.

This claim was rejected by the TAR Lazio, which clarified that a clearance decision adopted in Phase I accepting and making binding the commitments offered by the notifying party does not represent a “conditioned clearance decision”.

The TAR Lazio reached this conclusion arguing that remedies offered by the notifying party during Phase I represent an expression of the right to entrepreneurial freedom. Each undertaking is free to amend the originally-conceived transaction by offering measures aimed at eliminating, at an early stage (i.e., in Phase I), the risks that the transaction may create or strengthen a dominant position. As a consequence, the decision adopted by the ICA in Phase I does not qualify as a conditioned decision pursuant to Article 6(2) of the Antitrust Law.

The TAR Lazio’s reasoning appears questionable. Leaving aside the issue of the correct qualification of a Phase I decision in cases where it is clear from a substantive standpoint that remedies (and not amendments) have been adopted following a proposal by the notifying party (the TAR Lazio’s arguments on this point appear very weak and unwarranted), the ICA’s practice raises relevant practical consequences.

First, third parties lack procedural rights in a Phase I procedure and, thus, they have very limited margins to influence the negotiation of remedies offered at this stage.

Secondly, and most importantly, the ICA lacks coercive powers in case of non-compliance with Phase I remedies. As mentioned, the Antitrust Law does not provide for the possibility to accept remedies during the Phase I investigation, and this explains why the law does not provide for fines/sanctions in case of non-compliance with them.¹⁶

* * *

Sanctions for failure to notify. The ICA does not actively monitor actual compliance with the notification duty and/or take initiatives to unveil instances of breach of such an obligation. However, when informed about a case of failure to notify (normally following a voluntary, albeit late, notification), it systematically fines the infringing company. (It is actually under an obligation to do so.) Between January 2010 and May 2011, the ICA levied fines on 8 companies for failure to notify.

Pursuant to Article 19(2) of the Antitrust Law, where companies fail, intentionally or negligently, to notify a concentration within due time, the ICA may impose fines on the company responsible for the notification of up to 1% of its turnover in the preceding year. Failure to notify is presumed to be at least a negligent violation, because the companies are expected to be aware of their legal duties.¹⁷

According to the latest decision practice, the fine imposed pursuant to Section 19(2) of the Antitrust Law amounts to an average of €5,000. Such a modest amount reflects a number of mitigating circumstances normally taken into account by the ICA for the purposes of assessing the gravity of the infringement, including: (i) the good faith of the undertaking; (ii) the substantial absence of any anticompetitive effects arising from the concentration; (iii) the fact that the undertaking, subject to the obligation to notify, eventually filed, on a voluntary basis, a delayed notification of the concentration; (iv) the cooperation of the undertaking during the ICA’s proceeding; and (v) the short period of time elapsed between the aforesaid notification and the closing of the transaction.

In more detail, in the reference period (January 2010-May 2011), the fines levied on the notifying parties varied from €3,000 to €10,000 for each concentration not notified. In a few cases, several transactions were notified at the same time and the ICA imposed an overall fine multiplying the modest amount of the fine for the number of concentrations notified.¹⁸

* * *

Pre-notification contacts. Another interesting feature is represented by the growing use of the pre-notification contacts. The ICA has from the outset encouraged the practice of holding informal pre-notification meetings, particularly in complex

cases, where it is advisable to share drafts of the filing with ICA staff and/or to discuss remedies at an early stage.

These contacts are triggered by the submission of a briefing memorandum (outlining the basic information regarding the deal structure, the parties, and the relevant markets)¹⁹ or, more frequently, of a draft notification form. This latter option, normally accepted by the ICA, also serves the purpose of reducing the risk of a subsequent formal declaration of incompleteness, since it allows the notifying party to amend and supplement the draft form in light of the competent officials' requests and suggestions.

The draft notification form (or the briefing memorandum) is preliminarily reviewed by a case-handler who, generally within a week, informally contacts the counsel representing the notifying company with a view to obtaining clarifications and further information on the proposed deal. Further information/clarifications may be requested before formal filing, in order to complete the form. In particularly complex cases, the pre-notification contacts can last several weeks and involve more than one meeting with the ICA staff.

The ICA, like the EU Commission, normally accepts to engage in pre-notification contacts even in connection with cases which do not present substantive issues but raises doubts as to their reportability under Italian merger control rules (i.e., as to their qualification as "concentrations" within the meaning of Article 5 of the Antitrust Law, or as to the calculation of the turnover for the purposes of assessing whether the thresholds set forth by Article 16 of the Antitrust Law are met). Based on our experience, the competent official reacts shortly, normally within 7-10 working days. Unfortunately, the ICA does not release any formal reply, and this hinders the need for legal certainty of the undertakings involved.

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

In 2010/2011, the ICA still focused on the banking sector. As a general rule, the ICA acknowledges the necessity of a dimensional growth of the banks, guaranteeing at the same time the competitiveness of the relevant product markets, also by way of eliminating cross-interest in the shareholding of the main Italian banks and interlocking directorship.²⁰

However, it is noteworthy that the recent financial turmoil which has seriously affected the market, lead the ICA to a more flexible approach towards mergers in the banking sector. (On one occasion, the ICA also agreed to review and amend the remedies previously accepted, taking into account the supervening financial difficulties, with a view to mitigating the burden imposed upon the companies.)

The steady interest of the ICA for the above-mentioned sector is a consequence of the merger wave that the Italian financial sector has been experiencing starting from 2005, and which caused a significant increase of the concentration level of the Italian banking sector.²¹

When assessing mergers in the banking sector, the ICA has paid (and continues to pay) particular attention to the implications of the network of structural, economic, and personal links traditionally characterising the Italian financial sector. In particular, the ICA has always taken a very strict and critical attitude towards these links, since it considers that they contribute to a large extent to the lack of an adequate level of competition in the Italian market.²² Accordingly, the ICA has leveraged on its merger control powers to dismantle these links, even by adopting a quite creative (and sometimes questionable) approach.

The focus on the negative implications of the competitive structure of the market stemming from structural, economic, and personal links has inspired also the decision adopted in 2011, with respect to the acquisition by Intesa SanPaolo of Banca del Monte di Parma.²³

In its review of the case, the ICA recalled the close shareholding links between Intesa SanPaolo and Gruppo Crédit Agricole, which were held for the first time in the 2006 decision *Banca Intesa/SanPaolo IML*, where the ICA had imposed on Gruppo Crédit Agricole an obligation to reduce its shareholding in Intesa SanPaolo and not to appoint anymore its representatives in the corporate governance's body of Intesa SanPaolo. (Since Intesa SanPaolo and Gruppo Crédit Agricole had not implemented the above-mentioned measures, the ICA opened a procedure for failure to comply with the binding remedies imposed in a decision. Such procedure is still pending²⁴.)

In the assessment of the substantive impact of Intesa SanPaolo's acquisition of Banca del Monte di Parma, the ICA found that Gruppo Crédit Agricole held a very significant position in the relevant banking markets in the two Italian provinces (Parma and Piacenza) where Banca del Monte di Parma was mainly active.

In light of the fact that Gruppo Crédit Agricole could not be considered as an independent and effective competitor of Intesa SanPaolo, the transaction would have resulted in Intesa SanPaolo and Gruppo Crédit Agricole having a combined share exceeding 50% in most of the relevant markets affected by the transaction. In other words, *post*-transaction, Intesa SanPaolo and Gruppo Crédit Agricole would have held a collective dominant position in such markets and would have had the chance to coordinate their respective commercial strategies in the relevant market affected by the transaction.

In the framework of the parallel procedure opened for failure to comply with the ICA's decision, Intesa SanPaolo and Gruppo Crédit Agricole submitted to the ICA a number of measures aiming at guaranteeing the independency with Intesa SanPaolo. In particular, Gruppo Crédit Agricole committed to reduce its shareholding in Intesa SanPaolo through a

divestiture trustee and not to exercise the voting rights attached to such shareholding. Although the procedure for failure to comply, in which such measures were submitted, is still pending, in the context of the assessment of the *Intesa San Paolo/Banca del Monte di Parma* concentration the ICA deemed such measures capable of ensuring the independency between Gruppo Crédit Agricole and Intesa SanPaolo and, hence, to remove the competitive concerns which could have arisen in the banking markets in the provinces of Parma and Piacenza. In light of the above, the ICA cleared the acquisition by Intesa SanPaolo of Banca del Monte di Parma subject to the implementation of the above-mentioned remedies.

Finally, in 2010, the ICA also re-assessed a particular issue of the 2006 merger *Banca Intesa/SanPaolo IMI*.²⁵ Once again, the presence of interlocking directorships and cross shareholdings among competing companies played an important role in the ICA's assessment. In June 2009, Intesa SanPaolo, the legal entity resulting from the above-mentioned merger, filed a request with the ICA, with the aim of obtaining a partial review of some of the remedies imposed by the ICA in 2006, concerning the life insurance markets. In particular, Intesa SanPaolo asked the ICA to revoke the obligation to dismiss its activities relating to some life insurance markets and to allow it to distribute the life insurance products identified in the 2006 conditional clearance decision.

First of all, the ICA confirmed the findings laid down in the 2006 decision, stating that in such relevant markets competition was still affected by the close links between Intesa SanPaolo and Assicurazioni Generali, both in terms of interlocking directorships and shareholding, which – together with a strong presence in such markets – granted them a collective dominant position.

Taking the above into account, the ICA carefully reviewed the new remedies proposed by Intesa SanPaolo. In particular, Intesa SanPaolo proposed to adopt several compliance provisions relating to its corporate governance especially with respect to the life insurance sector, with the aim of reducing the influence of Assicurazioni Generali and of avoiding that the representatives of the latter in the Intesa SanPaolo's governance bodies could have access to confidential information and could participate in the adoption of the strategic decisions relating to the life insurance sector. Furthermore, Intesa SanPaolo committed itself to implement a vertically-integrated captive business plan in the distribution of insurance products capable of excluding any commercial relationship between Intesa SanPaolo and Assicurazioni Generali in the life insurance sector.

The ICA deemed such measures capable of removing the anticompetitive effects in the life insurance markets stemming from the close links between Intesa SanPaolo and Assicurazioni Generali and upheld Intesa SanPaolo's request, therefore amending the 2006 clearance decision.

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 that would follow the merger with those that would prevail in its absence, 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 merging parties' post-transaction market shares. However, the ICA also takes into account other important factors including market concentration, the number and strength of competitors, barriers to entry, characteristics of demand and the degree of vertical integration.

In the reference period (January 2010/May 2011), no significant developments occurred, as all the mergers were cleared in Phase I, with the only exception of (i) the above-described acquisition by Intesa SanPaolo of Banca del Monte di Parma, and (ii) Edenred Italia's acquisition of Ristochef.²⁶

This latter case is quite instructive since it provides a good example of the standard merger control assessment carried out by the ICA in connection with a horizontal merger.

The case mainly concerned the market for the supply of the so-called “ticket restaurant”, i.e., prepaid meal vouchers given by organisations/companies to their employees to have a meal at their convenience.

After defining the relevant market (identified as the Italian market for ticket restaurants), the ICA took into account the shares of the parties and their main competitors. Then it assessed the structure of the market and its current trend in order to ascertain the existence of lively competition.

The ICA acknowledged that the market is driven by competitive dynamics, having taken into account the following circumstances. Firstly, the total turnover and the overall number of final customers showed a market-growth trend. According to the ICA, market dynamism also emerged from the frequent bids characterising the market and significantly affecting the shares of the players, which thus face relevant fluctuations. This is confirmed by the outcome of the latest bid called by Consip S.p.A., the main publicly-owned client, whose total value, equal to €820 million, was approximately equivalent to one third of the total market value. In such occasion, none of the parties to the concentration was awarded any contract and, as a consequence, both Edenred and Ristocheff's market shares significantly decreased, while certain competitors' shares experienced a material increase.

In addition to the above, the ICA considered that the introduction of electronic vouchers by Edenred as an alternative to paper vouchers did not represent a suitable instrument of customer loyalty nor caused management costs increases. On the contrary, according to the ICA customers enjoy a strong market power, since from the demand side the market is highly aggregated, due to the fact that bids called by Consip gather several public administrative bodies.

Finally, the ICA noted that barriers to entry did not play a significant role in the market. On the one hand, since the supply of 'ticket restaurant' does not require specific administrative authorisations, any person is allowed to enter the business. On the other hand, the creation of a network of shops/restaurants in partnership with the ticket supplier does not entail high business risk nor investment costs insofar as those shops/restaurants are not bound to exclusive obligations *vis à vis* a single supplier.

Considering also that during the market test, conducted by means of requests for information to competitors and public as well as private clients, no significant objections were raised *vis-à-vis* the proposed transaction, the ICA cleared it without imposing any remedies.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

No significant developments occurred in the reference period (January 2010/May2011). In no instance were remedies offered in Phase I, with a view to secure clearance and only two decisions were adopted following a Phase II investigation.

In one case,²⁷ no remedies were imposed. Conversely, in the *Intesa SanPaolo/Banca del Monte di Parma* case,²⁸ the ICA accepted the commitments offered by Intesa SanPaolo and Gruppo Crédit Agricole (in a different, parallel, merger procedure) aiming to eliminate the close links between them. (For a more comprehensive description of the case, see above under "Key industry sectors reviewed".)

In general, the ICA has traditionally showed a particular favour for a "negotiated" approach with the parties. This is true also with respect to procedures concerning abuses of dominance and 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.

Key policy developments

There have been no key policy developments in Italy over the past year.

Reform proposals

There have been no reform proposals in Italy over the past year.

* * *

Endnotes

- 1 According to the Italian Competition Authority, 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 hardly possible to rule out in advance the possibility that, post-merger, the target company will still not realise turnover in Italy.
- 2 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 2011 Annual Report, which will be published approximately in June 2011.
- 3 Decision No. 22013, Case C10773, *Edenred Italia/Ristocheff*, Bull. 2/2011.

- 4 Decision No. 21966, Case C8027C, *Banca Intesa/SanPaolo IMI*, Bull. 50/2010.
- 5 See again Decision No. 22013, Case C10773, *Edenred Italia/Ristocheff*, Bull. 2/2011.
- 6 Decision No. 22283, Case C10883, *Bridgepoint Capital/Histoire D'Or Europe*, Bull. 14/2011.
- 7 Judgment No. 31278/2010 of August 24, 2010, *Brico Business Corporation S.r.l. v. Autorità Garante della Concorrenza e del Mercato*.
- 8 Reference is made, in particular to the: Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2004 O.J. (L 24) 1); Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 (2004 O.J. L 133); Consolidated Jurisdictional Notice under Council Regulation (EC) No. 134/2004 on the control of concentrations between undertakings (2008/C 95/01); and Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (2008 OJ C 267/1).
- 9 In 2004, with its landmark judgment, *Motorola v. Autorità Garante della Concorrenza e del Mercato* (judgment No. 3685 of June 14, 2004), the Supreme Administrative Court overturned the traditional position of the Administrative Courts, under which only the addressees of the ICA's decisions had *locus standi* to seek the decisions' annulment. In *Motorola*, the Court clearly stated that a rule precluding persons other than those to whom a decision is addressed from appealing would infringe the fundamental constitutional principle of the effectiveness of judicial protection. Therefore, persons other than addressees may be entitled to appeal a decision, provided that such persons are directly and individually prejudiced by it. In *Fondiarie Industriale Romagnola* (judgment No. 1113 of March 21, 2005), the Supreme Administrative Court explicitly extended the scope of the *Motorola* judgment (which concerned a decision exempting a restrictive agreement under Section 4 of the Antitrust Law, reaching the same conclusions in the area of merger control and holding that third parties can challenge merger clearance decisions. Based on the then-settled case law, the TAR Lazio had initially rejected as inadmissible Fondiarie Industriale Romagnola's (FIR) appeal against a decision authorising, subject to certain conditions, the acquisition and the subsequent division in two separate corporate entities of Eridania, the largest sugar producer in Italy, by Seci-Sadam, Co.prob and Finbieticola. The Supreme Administrative Court reversed this judgment, holding that third parties (such as competitors or consumer associations) have standing to appeal such decisions if they can demonstrate that their interests can be directly and immediately harmed by the Authority's decision. The Court noted that its ruling was in line with the EC courts' case law on direct actions under Article 230 of the EC Treaty (now Article 263 TFEU), and was also consistent with the rationale behind the Supreme Civil Court's (*Corte di Cassazione*) landmark judgment on consumers' standing to claim damages from undertakings violating Italian competition law (Judgment of the Italian Supreme Civil Court, *Unipol v. Ricciardelli*, 4 February 2005, No. 2207). As it was clear that the appellant was the main competitor of the companies involved in the transaction authorised by the Authority, the Supreme Administrative Court found that FIR had a direct interest in the outcome of the merger control proceedings.
- 10 In case of public offers, this time limit is reduced to 15 calendar days (see Article 16(6) of the Antitrust Law). Although, pursuant to Article 16(4) of the Antitrust Law, the clearance letter must be communicated to the notifying parties within 30 days of a complete notification; in practice, it may happen that the notifying parties receive such formal letter a few days after this time limit.
- 11 Notwithstanding this narrow scope for an extension of the 45-day period, the ICA relies on such provision as a legal basis to extend the duration of the investigation also when the notifying parties offer undertakings or propose to amend the notified agreements (see, for example, Case C3037, *Schemaventuno-Promodès/Gruppo GS*, May 20, 1998, Bulletin No. 21/1998, where the parties agreed to modify the structure of the proposed concentration and the ICA postponed its decision by 30 days in order to evaluate their new proposal; and Case C2227, *Fiatimpresit-Mannesmann-Techint/Italimpianti*, January 26, 1996, Bulletin No. 4/1996, where the ICA deemed it appropriate to postpone its decision for 30 days to allow the parties to finalise their undertakings).
- 12 These third-party procedural rights include: (i) the right to participate in the proceedings; (ii) the right to be notified of the ICA's decision to open an investigation; and (iii) the right to participate in the final hearing before the ICA's Board. See Presidential Decree No. 217/1998, §§ 6(4), 7 and 14(5).
- 13 When opening a Phase II investigation, the ICA has the power to order the undertakings concerned not to proceed with the concentration until the investigation is concluded and to issue a prohibition decision.
- 14 BBC appealed the TAR Lazio judgment. The appeal is still pending before the Supreme Administrative Court (*Consiglio di Stato*).
- 15 Before the ICA's 2006 adoption of a notice according to which at least in certain cases a public communication of a new filing is given on the ICA's website (see *Comunicazione concernente alcuni aspetti procedurali relativi alle operazioni di concentrazione di cui alla Legge 10 ottobre 1990*, No. 287, May 1, 2006, Bull. 22/2005, amended by the ICA's resolution of September 26, 2006, Bull. 35-36/2006), interested third parties did not even have the right to be informed about the notification of a concentration. Indeed, until then the ICA never provided public information regarding the receipt of the notification of a concentration. If they happened to be informed about the

- notified transaction through other means, interested third parties could spontaneously file written observations with the ICA expressing their position on the notified concentration that the ICA was free to take into account for purposes of its evaluation.
- 16 In this respect, it is noteworthy that the ICA did not raise any concern with regard to the fact that, ultimately, one of the four outlets which had to be divested by Adeo (after the adoption of the clearance decision of January 29, 2009) in order to duly implement the ‘amendments’ to the transaction originally conceived, was not sold insofar as no acquirers were found on the market. As a result, the outlet at stake has remained under the full control of Adeo. In its decision dated November 24, 2010, the ICA held that such circumstance did not have any material effect on the competitive assessment of the transaction and, therefore, the clearance decision of January 29, 2009 could be confirmed (decision No. 21829, Case C9738, *Groupe Adeo/Castorama Italia*, Bull. 46/2010).
 - 17 Currently, the ICA contends that the principles of merger control should be familiar to undertakings and is not inclined to accept justifications based on wrong understanding of these principles. The ICA did not impose fines only in very limited cases, when there were strong faith grounds for ignoring or questioning the obligation to notify (e.g., due to the complexity of facts or new questions of law).
 - 18 Decision No. 20992, Case C10363, *Esselunga/21 Punti vendita (59 rami di azienda)*, Bull. 14/2010, where the ICA imposed an overall fine of €105,000 (for failure to notify 35 concentrations); decision No. 21724, Case C10653, *Eurospin Lazio/15 rami d’azienda*, Bull. 28/2010, where the ICA imposed an overall fine of €50,000 (for failure to notify 10 concentrations); and decision No. 20963, Case C10380, *Billa/6 punti vendita di Esselunga*, Bull. 13/2010, where the ICA imposed an overall fine of €30,000 (for failure to notify 6 concentrations).
 - 19 *Comunicazione concernente alcuni aspetti procedurali relativi alle operazioni di concentrazione di cui alla legge 10 ottobre 1990*, No. 287, Bull. 22/2005. An English translation of the Notice is available online at the ICA’s website <http://www.agcm.it/en/competition--mergers-and-acquisitions/notice-june-2005.html>.
 - 20 See ICA’s 2010 Annual Report, page 12.
 - 21 In particular, the two most important transactions concluded in the last years (namely, the *Intesa/Sanpaolo* and *Capitalia/Unicredito* mergers – respectively, decision No. 16249, Case C8027, *Banca Intesa/San Paolo IMI*, Bull. 49/2006; and decision No. 17283, Case C8660, *Unicredito Italiano/Capitalia*, Bull. 33/2007) led to the consolidation of four independent Italian banking groups into two new entities. These two main transactions were accompanied by other important mergers (decision No. 16673, Case C8277, *Banche Popolari Unite-Banca Lombarda e Piemontese*, Bull. 13/2007; decision No. 17859, Case C8939, *Intesa SanPaolo/Cassa di Risparmio di Firenze*, Bull. 2/2008; and decision No. 18327, Case C9182, *Banca Monte dei Paschi di Siena/Banca Antonveneta*, Bull. 18/2008).
 - 22 The ICA’s negative and strict attitude towards these links has been formally confirmed in its 2006 Annual Report, available at http://www.agcm.it/legal_index.htm. During the presentation of the 2006 Annual Report, the Chairman of the ICA emphasised the existence of “a strong network of structural links, participations and financing relationships among banks, as well as among banks and insurance companies” and affirmed that “this market equilibrium may lead to conflicts of interests and, in some cases, may represent a serious pathology. The convergence of interests between competing undertakings lessens competition”. Accordingly, the Chairman communicated the ICA’s intention to initiate a sector investigation aimed at analysing in more detail the drawbacks of these links. See IC 36, *La corporate governance di banche e assicurazioni*, 23 Dec. 2008, Bull. 49/2008.
 - 23 Decision No. 22240, Case C10910, *Intesa SanPaolo/Banca del Monte di Parma*, Bull. 12/2011.
 - 24 Decision No. 19874, Case C8027B, *Banca Intesa/SanPaolo IMI*, Bull. 19/2009, by which the ICA initiated proceedings against Intesa SanPaolo for failure to comply with the undertakings imposed in the 2006 conditional clearance decision.
 - 25 Decision No. 21966, Case C8027C, *Banca Intesa/SanPaolo IMI*, Bull. 50/2010.
 - 26 Decision No. 22013, Case C10773, *Edenred Italia/Ristocheff*, Bull. 2/2011.
 - 27 Decision No. 22013, Case C10773, *Edenred Italia/Ristocheff*, Bull. 2/2011.
 - 28 Decision No. 22240, Case C10910, *Intesa SanPaolo/Banca del Monte di Parma*, Bull. 12/2011.

**Mario Siragusa****Tel: +39 06 6952 21 / Email: msiragusa@cgsh.com**

Mario Siragusa is a partner of Cleary Gottlieb Steen & Hamilton LLP, based in the Rome office. His practice focuses on corporate and commercial matters and he specialises in EU and Italian competition law and complex commercial litigation. He lectures regularly at conferences throughout the United States and Europe and has published numerous articles in U.S. and European legal journals. He is a professor at the College of Europe in Bruges and lectures at the Catholic University in Milan. He graduated with honours from the Law School of Rome University in 1970 and received a Diploma of High European Studies from the College of Europe in Belgium in 1971. He received an LL.M. degree from Harvard in 1972. Mr. Siragusa is a member of the Commission on Law and Practices Relating to Competition of the International Chamber of Commerce in Paris. He is also a member of the Rome Bar.

**Matteo Beretta****Tel: +39 02 7260 8242 / Email: mberetta@cgsh.com**

Matteo Beretta is a counsel of Cleary Gottlieb Steen & Hamilton LLP, based in the Milan office. His practice primarily focuses on EU and Italian competition law, a practice area in which he advises numerous major international companies in regards to merger control procedures, and cartel and abuse of dominant position matters. He regularly lectures at the Catholic University in Milan and has published numerous articles in U.S. and European legal journals. He is distinguished as a leading Competition/European Law (Italy) professional by Chambers Europe. He graduated from the University of Milan in 1991; obtained an LL.M. degree from the Institut d'Etudes Européennes de l'Université Libre de Bruxelles in 1992 and an LL.M. from the New York University School of Law in 1999. He is a member of the Bergamo Bar.

Cleary Gottlieb Steen & Hamilton LLP

Piazza di Spagna, 15, Rome 00187, Italy

Tel: +39 06 6952 21 / Fax: +39 06 6920 0665 / URL: <http://www.clearygottlieb.com>

Strategic partners:



www.globallegalinsights.com