

## Newsletter

Antitrust & EU Law

ICA publishes Notice on *below-threshold* transactions

In summary:

- The ICA was given the power to request the notification of transactions that do not meet the ordinary notification thresholds (so-called *below-threshold* transactions) and may pose tangible competitive risks in Italy.
- Parties should assess from the outset the degree of likelihood of the ICA's intervention and its consequences on the timing and success of the transaction.
- The impact of these new rules is expected to be felt especially in the area of digital and technology start-ups, in the pharmaceutical industry, as well as in those niche sectors where small turnovers are nevertheless matched by considerable market shares.

### INTRODUCTION

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On 27 December 2022, the Italian Competition Authority (“ICA” or “Authority”) published a notice (the “Notice” - [link](#)) in which it set out the principles that will regulate its power – assigned to the ICA by Law No. 118 of 5 August 2022 - to request the notification of so-called *below-threshold* transactions, meaning those that do not meet the ordinary turnover thresholds whence the obligation to notify the Authority arises.

The Notice not only clarifies the prerequisites to use this power but also provides valuable procedural guidance, contemplating the possibility for the parties to contact the Authority in advance.

## A. THE PREREQUISITES OF THE ICA'S POWER OF INTERVENTION

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In case a transaction does not meet the ordinary thresholds,<sup>1</sup> and thus is *below-threshold*, the ICA may request the undertakings concerned to notify such a transaction if *each* of the three conditions set out below is met.

**Condition 1** No more than six months have elapsed since the closing of the transaction. This period begins to run from the time when the acquisition of control occurs, which is generally the date of closing.

**Condition 2** Any of the following turnover thresholds is exceeded:

- the *combined worldwide* turnover of all the undertakings concerned (typically, the acquiring group and the target company) exceeds EUR 5 billion; *or*
- the *combined Italian* turnover of all the undertakings concerned exceeds EUR 517 million; *or*
- the *Italian* turnover of *at least two of the* undertakings concerned exceeds EUR 31 million.<sup>2</sup>

As can be seen, the first two thresholds can easily be met by taking into account the turnover (worldwide or domestic) of even just one of the undertakings concerned.

**Condition 3** The transaction poses tangible competitive risks within the national market or in a relevant part thereof. In assessing whether a transaction has a significant competitive impact, the ICA will first consider: (i) the structure of the markets (i.e., in principle, *market shares*), (ii) the characteristics of the players, (iii) the nature of the companies' activity, (iv) the significance of the innovative activity carried out (e.g., in case of technological and digital *start-ups*), and (v) the competitive constraint exerted by one or more companies beyond their market share.

However, the ICA deems it "unlikely" that a notification will be required if:

- in the case of **horizontal mergers** (between undertakings that are actual or potential competitors in the same relevant market), after the transaction (i) the parties' combined market share will be less than 25%; *or* (ii) the Herfindahl-Hirschman Index (HHI)<sup>3</sup> will be less than 1,000; *or* (iii) the HHI index will be between 1,000 and 2,000 and the gap in increase will be less than 250; *or* (iv) the HHI index will be above 2,000 and the gap will be less than 150, except in special circumstances;
- in the case of **non-horizontal mergers** (between companies operating in different markets), after the transaction the parties will have market shares of less than 30% in each of the markets concerned and the HHI will be below 2,000.

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<sup>1</sup> At the time of writing, the notification thresholds provided by Article 16(1) of Law No. 287/90 are as follows: (i) the aggregate domestic turnover achieved by all of the undertakings concerned is more than EUR 517 million, and (ii) the aggregate domestic turnover achieved individually by at least two of the undertakings concerned is more than EUR 31 million.

<sup>2</sup> Please note that the last two thresholds are subject to annual revaluation as they correspond to those provided for in Article 16(1) of Law No. 287/90.

<sup>3</sup> It is to be noted that the HHI is calculated through the *sum of the squares* of the individual market shares of all the companies in the market, whereas the delta (i.e. the variation) of the HHI can be calculated by doubling the product of the market shares of the merging firms.

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The ICA may consider certain additional factors. These include a **purchase price** that is particularly high compared to the turnover generated by the target company, as well as the fact that an undertaking:

- is a *start-up*, a new entrant with significant competitive potential, an important **competitive force** (even potential), an important innovator, or is conducting potentially important research;
- provides products or services that are **key components** for a given business;
- controls or has **access to significant assets** from a competition point of view (such as raw materials, infrastructure, data, or intellectual property rights).

A **competitive impact at the national level** is presumed if the undertakings concerned generate turnover in Italy. In the absence of domestic turnover, the ICA could however assess additional factors such as, e.g.: (i) the widespread use of the goods or services offered by the parties among Italian users, (ii) the performance of research and development activities potentially relevant to the Italian market, or (iii) the existence of a plan for entering the Italian market.

## B. PROCEDURAL ASPECTS

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If the transaction meets the criteria described above, the ICA may require each of the undertakings concerned (including the entity acquired or to be acquired) to notify the transaction.

The notification must be made no later than on the **30th day** after receipt of the request. In exceptional cases, and at the request of the undertakings concerned, this time limit may be extended by up to 30 additional days. Fines can be imposed in the event of late notification or where incorrect or incomplete information is provided.

Within 30 days of receiving the complete notification of the Transaction (subject to possible extensions), the Authority is required to inform the undertakings whether it intends to initiate a so-called Phase II review. In such case, the ICA has 45 days (subject to extension of up to 30 days) to adopt its final decision.

Notwithstanding the foregoing, the Notice provides that undertakings may **voluntarily inform** the ICA of transactions that meet the requirements described in Section A. The voluntary disclosure may also be made before the completion of the transaction, provided that the parties have reached an agreement on the *essential elements* of the transaction.

The ICA is then required to inform the undertakings whether it intends to request notification of the transaction **within 60 days** of receipt of the complete voluntary notification.

## C. PRACTICAL IMPLICATIONS

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The Authority's new power of intervention will require greater planning of M&A transactions, as well as more careful management - from a contractual perspective - of the antitrust risk.

In particular, the parties to a transaction should assess from the outset the likelihood of intervention by the ICA, since such a possibility could have a crucial impact on the timing of the transaction, as well as on its success: for

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example, in case after the *closing*, the ICA should require the purchaser to dispose of certain assets, without the parties having regulated this scenario by contract. The same applies to the extended timing of a transaction that must be notified and is also susceptible to Phase II review.

In this regard, although it is to be expected that the digital and pharmaceutical sectors will be the most exposed to the ICA's scrutiny, since these are industries where it is more frequent that a company's current turnover could not reflect its competitive potential, it is also true that the prerequisites for the ICA's intervention could be met in other industries, and in particular in niche sectors where companies or even only the acquired company may occupy a significant position or play a relevant role.

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