



The Legal 500 & The In-House Lawyer  
Comparative Legal Guide  
Italy: Merger Control (4th edition)

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in Italy.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control-4th-edition>



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## 1. Overview

Under Italian law, the Italian Competition Authority (Autorità della Concorrenza e del Mercato – the “ICA”), is in charge of reviewing concentrations that do not have Community dimensions (i.e., that do not meet the jurisdictional thresholds for mandatory notification to the European Commission (“Commission”), under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings).

Italian rules on the control of concentrations are set out in:

- Law No. 287 of 10 October 1990 (the Law);
- Presidential Decree No. 217 of 30 April 1998, setting forth the rules of procedure of the ICA in

antitrust matters including merger control cases (the Regulation);

- A number of notices and guidelines issued by the ICA on issues such as the calculation of parties' turnover in specific circumstances or providing guidance on how to fill in the notification forms.

In addition, Section 1 of the Law specifies that Italian substantive antitrust and merger control rules shall be interpreted in accordance with the principles of EU competition law. Therefore, the ICA largely relies on the EU courts case-law and Commission's decisions and guidelines, including for merger control purposes, the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Commission Consolidated Jurisdictional Notice").

As a consequence, the definition of concentration under Italian merger control rules largely reflects the one under EU merger control rules. However, differently from EU rules, under Italian merger control rules, there is no standstill obligation. Therefore, when the jurisdictional thresholds specified in Section 6 below are met, concentrations are subject to prior notification to the ICA, but there is no statutory requirement to obtain the clearance of the ICA before closing. Nevertheless, the parties often agree to condition the completion of the transaction to obtaining the authorization of the ICA in order to avoid the risk of having to comply with divestment orders by ICA.

Within 30 calendar days from notification (15 calendar days in case of public bids), the ICA must decide whether to clear the transaction or start an in-depth investigation. The duration of such in-depth investigation is of 45 calendar days (which can be extended by additional 30 calendar days).

In the final decision, the ICA can (i) find that the transaction does not fall within Italian merger control rules (e.g., because it does not qualify as a concentration or the jurisdictional thresholds are not met); (ii) unconditionally clear the transaction; or (iii) clear the transaction with remedies; (iv) prohibit the transaction. Such decisions can be challenged within 60 calendar days from notification before the Rome Administrative Court (TAR Lazio - Roma). The judgment of the Rome Administrative Court can be further appealed before the Italian Supreme Administrative Court (Consiglio di Stato).

## **2. Is notification compulsory or voluntary?**

Pre-merger filing before closing is compulsory, if the turnover thresholds as specified in Section

6 below are met and the transaction does not have Community dimension.

**3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?**

There is no statutory standstill obligation not to close the transaction prior to clearance. In practice, the parties often agree to condition the completion of the transaction to obtaining the merger control clearance by ICA when required, in order to avoid running the risk to have to comply with potential unwinding orders by the ICA as a result of a prohibition decision.

If the ICA does not clear the transaction within the initial 30 calendar days from filing and therefore decides to start an in-depth investigation, it may order the parties to stop the implementation of the transaction until its final decision . Such order does not undermine public takeover bids, provided that the acquired voting rights are not exercised pending the ICA's review.

Given that there is no statutory standstill obligation, there is generally no need for the parties to carve out local completion of a transaction to avoid a delay of the global completion.

**4. What are the conditions of the test for control?**

The test for control reflects the definition set out in EU Regulation no. 139/2004 and the Commission Consolidated Jurisdictional Notice.

The notion of control is therefore defined very broadly. In particular, control occurs when an undertaking has - de jure or de facto - the possibility to exercise, alone or jointly with one or more other undertakings, decisive influence over another undertaking's strategic management.

Transactions qualifying as concentrations under Italian merger control rules can be either a merger between two or more independent undertakings, the acquisition of control of whole or part of one or more undertakings or the creation of a full function joint venture.

The following transactions do not qualify instead as a “concentration”, given that they do not give rise to a change of control on a lasting basis:

i. Purely financial acquisitions of shares by banks or financial institutions, provided that: (a) the shares are acquired, with a view to reselling them, when a company is incorporated or its share capital is raised; (b) the shares are resold within 24 months; and (c) the voting rights are not exercised;

ii. cooperative (non-full function) joint venture;

iii. Intragroup transactions;

iv. Transactions between companies that do not perform, directly or indirectly, any economic activity;

## **5. What are the conditions on minority interest in your jurisdiction?**

The acquisition of a minority interest qualifies as a concentration if it allows the buyer to exercise (sole or joint) control over the target (for instance, when the acquiring party holds veto rights over the target’s strategic management (approval of the budget and/or business plan, appointment of senior management, etc.) or when the target’s shareholding is widely dispersed.

## **6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?**

Concentrations are subject to mandatory prior notification to the ICA (if they do not have Community dimension), if: (1) aggregate turnover in Italy of all undertakings concerned above €498 million; and (2) individual turnover in Italy of at least two of the undertakings concerned above €30 million. Both thresholds are adjusted annually by an amount equal to the national GDP price deflator index (the latest adjustment took place on 25 March 2019).

## **7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

The turnover includes the revenues from the sale of products or provision of services to customers located in Italy in the last audited financial year. Turnover does not include intra-group sales, sales rebates, value added tax and other taxes directly related to it.

Special rules apply to banks, financial institutions and insurance companies. Pursuant to Art. 16(2) of the Law, the turnover of banks and financial institutions corresponds to one-tenth of their total assets, excluding memorandum accounts; while the turnover of insurance companies is equal to the total value of the collected premiums.

The turnover of the acquiring company corresponds to that of the entire group to which it belongs. The turnover of the target company does not include that of the seller.

## **8. Is there a particular exchange rate required to be used for turnover thresholds and asset values?**

Foreign currencies shall be converted into Euro with the average exchange rate of the reference year (generally referring to European Central Bank data).

## **9. Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business)?**

Italian merger control rules apply to full-function joint ventures - i.e., intended to perform on a lasting basis all the functions of an autonomous economic entity (full function nature).

Joint venture which do not qualify as concentrations, need to be (self-)assessed according to rules governing agreements between independent undertakings (i.e., Articles 2 and 4 of the Law and Article 101 TFEU).

10. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

No, the same thresholds apply.

11. **For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?**

Not applicable.

12. **What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?**


A concentration is prohibited if it “creates or strengthens a dominant position on the domestic market, with the effect of eliminating or appreciably reducing competition on a lasting basis” (Article 6 ICL).

Although the substantive test formally differs from the (more extensive) “substantial lessening of competition” test adopted at the EU level, the ICA tends to interpret the “dominance test” rather broadly, similarly to the approach adopted by the Commission.

13. **Are non-competitive factors relevant?**

Under Article 25 of the Law, “when major general interest are involved in the process of the European integration” the ICA can exceptionally authorize a concentration that would be otherwise prohibited, provided that the concentration does not eliminate competition on the market or impose restrictions going beyond the national economic interests at stake.

Pursuant to Art. 25(2) of the Law, even if the clearance decision has been adopted by the ICA,



the Italian Prime Minister may prohibit, for reasons of national economy, an acquisition of an Italian company by a foreign company. This may happen when, in the country of origin of such foreign company, Italian undertakings are discriminated, especially in connection with their ability to acquire local companies.

Finally, pursuant to Art. 20(5-bis) of the Law, upon request by the Bank of Italy, the ICA may clear a concentration involving banks, which creates or strengthens a dominant position, in order to protect the economic stability of one or more of the parties.

**14. Are there different tests that apply to particular sectors?**

There are no different tests that apply to particular sectors.

**15. Are ancillary restraints covered by the authority's clearance decision?**

Parties are required to include in the notification a description of the ancillary restraints. Unlike the EU Commission, in the clearance decision, the ICA expressly indicates if such restrictions qualify as “ancillary” to the concentration and, thus, if they are covered by the clearance decision. In its assessment, the ICA fully applies the criteria laid down in the Commission Notice on restrictions directly related and necessary to concentrations.

If the restraints do not qualify as “ancillary”, they fall outside the scope of the clearance decision and need to be self-assessed according to Articles 2 and 4 of the Law and/or Article 101 TFEU.

**16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?**

If the jurisdictional thresholds are met, concentrations need to be notified to the ICA prior to completion. Specifically:

i. In case of a merger, the concentration shall be notified before the merger deed is executed;

ii. In case of an acquisition of sole/joint control over an undertaking, notification shall occur before the deed becomes effective, i.e., before the concerned undertaking acquires the ability to exercise control over the business conduct of the target;

iii. In case of creation of a concentrative joint venture, notification shall occur before the memorandum of incorporation is filed with the Register of Companies.

**17. What is the earliest time or stage in the transaction at which a notification can be made?**

A notification can be filed once the parties have reached an agreement on the essential terms of the transaction. A letter of intent is typically sufficient to this effect, if the structure of the transaction is clearly defined.

In case of public takeover bids, merger control filing must occur simultaneously with the regulatory filing with the securities and exchange authority (CONSOB).

**18. What is the basic timetable for the authority's review?**

Within 30 calendar days from notification (15 calendar days in case of public bids), the ICA must decide whether to clear the transaction or start an in-depth investigation. The duration of such in-depth investigation is of 45 calendar days (which can be extended by additional 30 calendar days).

In the final decision, the ICA can (i) find that the transaction does not fall within Italian merger control rules (e.g., because it does not qualify as a concentration or the jurisdictional thresholds are not met); (ii) unconditionally clear the transaction; or (iii) clear the transaction with remedies; (iv) prohibit the transaction.

In case of concentrations between companies active in the insurance sector, the ICA must request a (non-binding) opinion of the insurance regulatory authority (IVASS). The opinion shall be issued within 30 calendar days. In the meanwhile, the deadline for ICA's review of the



transaction is suspended.

Acquisitions of banks shall be assessed within 60 calendar days upon the receipt of a complete notification, with no distinction between phase I and in-depth investigation.

19. **Under what circumstances the basic timetable may be extended, reset or frozen?**

Phase I can be interrupted when the parties do not provide ICA with a complete notification or fail to adequately respond to a request for information from ICA.

The in-depth investigation can be extended up to 30 (additional) calendar days, if the parties fail to provide available data/information requested by the ICA.

20. **Are there any circumstances in which the review timetable can be shortened?**

In less complex cases, the parties may receive the clearance decision before the expiration of Phase I. However, there is no accelerated procedure or right to obtain clearance in a shorter period.

21. **Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?**

In case of acquisition of sole control over an undertaking, the duty to notify rests upon the acquiring undertaking. The notification may be filed directly by the company acquiring control, or by any of its controlling entities.

In case of mergers, the duty to notify rests upon the merging parties.

In case of acquisition of joint control by several undertakings, or creation of a concentrative joint venture, each undertaking acquiring control is responsible for filing.

When the duty to notify rests upon more undertakings, they can jointly submit a single notification and appoint a common representative.

## 22. **What information is required in the filing form?**

Notifications are filed using either a short form or a long form. Both forms require detailed information on the parties, the transaction, and its competitive impact.

The full-form notification, which includes in-depth information on the relevant markets, is required when:

(i) Two or more undertakings concerned are active on the same affected market and the concentration results in a combined market share of 25% or more; and/or

(ii) Any party to the concentration, following the transaction, will hold a market share of 40% or more, and at least another party is active on an upstream or downstream market.

The full-form notification is not required, however, when the market share of the target or merged company is less than 1%.

## 23. **Which supporting documents, if any, must be filed with the authority?**

Notifying parties are required to produce all the transaction documents, the annual reports of the parties of the last three years, and a power of attorney for the representative signing the notification. Parties can also enclose any documents deemed useful to support their assessment of the proposed transaction (e.g., market reports, economic studies, surveys, etc.).

The notification must be in Italian. The supporting documents can be submitted also in English.

24. **Is there a filing fee? If so, please specify the amount in local currency.**

As of 2013, there is no filing fee to be paid to the ICA in connection with a merger control filing.

25. **Is there a public announcement that a notification has been filed?**

The ICA publishes a notice on its website providing a short description of the parties, the concentration and the relevant market(s) involved. Upon filing, the parties are required to consent to the publication of the notice and may submit a reasoned confidentiality request asking the ICA not to publish the above notice.

26. **Does the authority seek or invite the views of third parties?**

Third interested parties (including customers, consumer associations and competitors), may submit observations within 5 calendar days from the publication of the notice of notification submission.

In case of in-depth investigation, third interested parties may request to intervene within 10 calendar days. If admitted, they can access the file, submit written comments and documents, request a formal hearing and participate in the final hearing before the ICA.

Additionally, especially in case of in-depth investigation, the ICA usually sends requests for information to the main customers and competitors, on its own initiative, in order to better assess the potential effects of a notified concentration.

27. **What information may be published by the authority or made**

## **available to third parties?**

The ICA publishes the notice of notification submission on its website. Moreover, all relevant decisions adopted by the ICA in relation to a concentration are published in the ICA's Bulletin and stored in the database accessible on the ICA's website. Parties may indicate at the time of filing or during the proceedings, which information/documents shall be kept confidential. If confidentiality is granted, the ICA publishes a non-confidential version of the decision.

Third parties having a direct and immediate interest in the concentration may request to access the file. However, access is not granted to confidential information/documents.

## **28. Does the authority cooperate with antitrust authorities in other jurisdictions?**

The ICA actively cooperates with competition authorities of other jurisdictions (including, in particular, the Commission) and is an active member of both the European Competition Network (ECN) and the International Competition Network (ICN).

## **29. What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?**

Parties may negotiate with the ICA both structural and behavioral remedies. Similarly to the EU Commission, in past cases, the ICA has showed strong preference for structural remedies (see however case C12207 - SKY ITALIA/R2 (decision of May 20, 2019), in Section 34 below, for a recent case of behavioral remedies imposed by the ICA).

## **30. What procedure applies in the event that remedies are required in order to secure clearance?**

Remedies are typically proposed by the parties, negotiated with the ICA, and formally imposed by the latter. If the ICA believes that the remedies offered by the parties do not eliminate all the

competitive concerns, it can also impose further measures.

Remedies can be offered during Phase I or after an in-depth investigation is started. However, the ICA can enforce the adoption of remedies in case of in-depth investigation only (and impose fines in a range of 1-10% of the parties' turnover for failure to comply with such remedies in the implementation of the transaction). Accordingly, if the concentration is cleared in Phase I also based on remedies offered by the parties, such remedies are not enforceable by the ICA. This means that the ICA cannot impose any fines in case the parties violate the remedies, but can only argue that the clearance decision was adopted based on a different factual scenario and open new proceedings.

**31. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

If an undertaking fails to notify a concentration, the ICA can impose a fine up to 1% of the undertaking's turnover achieved in the previous financial year.

In principle, the same sanction applies in case of late notification. However, the ICA usually imposes symbolic fines (generally between EUR 5,000 and EUR 20,000) if the concentration did not raise any competition concerns and the late notification was submitted on a voluntary basis.

A concentration implemented in breach of a prohibition on closing, results in a sanction between 1% and 10% of the turnover of the business activities which are part of the concentration (i.e., in case of acquisition of an undertaking, of the target's turnover).

**32. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?**

Failure to provide the requested information/documents, without a legitimate justification, may result in a fine up to EUR 25,823. Providing false information/documents may result in a fine up to EUR 51,645.

**33. Can the authority's decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?**

ICA's merger control decisions can be challenged within 60 calendar days from notification or publication, before the Rome Regional Administrative Court (TAR Lazio - Roma) by the merging parties or by any third parties claiming to be harmed by the decision. The judgment of first instance can be further appealed before the Italian Supreme Administrative Court (Consiglio di Stato).

**34. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?**

In recent cases of in-depth investigation, the ICA confirmed its preference for structural remedies (see, e.g., the ICA's decision of July 17, 2019, Case C12231 - BPER BANCA/UNIPOL BANCA). In case C12207 - SKY ITALIA/R2 (decision of May 20, 2019), the ICA imposed however behavioral remedies for a period of 3 years in order to restore competition in the market following the implementation of the transaction by the parties (prior to obtaining clearance). These remedies consisted of a ban for the Sky Group to acquire exclusive broadcasting rights for audiovisual content and linear channels for internet platforms in Italy.

**35. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

On 10 July 2019, the ICA, the Italian Communications Authority and the Italian Data Privacy Authority published the guidelines and policy recommendations for Big Data. In light of a perceived concern about so-called "killer acquisitions", which are believed to be made by large players in the digital sector towards smaller, innovative start-up entities, the agencies recommend a revisiting of the Law. Accordingly, the guidelines suggest that modifications to Article 6 of the Law, changing the standard through which concentrations are evaluated, should be enacted. In particular, it is suggested that a new approach to merger control ought to be adopted into law, allowing the authority to focus on the substantial impediment to effective competition test (SIEC). Such an approach would enable the review of transactions, which may



have the effect of restricting potential competition. Moreover, the Guidelines suggest the possibility of including an additional value-based threshold which would allow the authority to review smaller transactions which occur in the digital sector and which are not captured by the current thresholds. This concept is not entirely new. Indeed such "value" thresholds have already been implemented by the German and the Austrian competition authorities, and are being considered by the Commission as well.