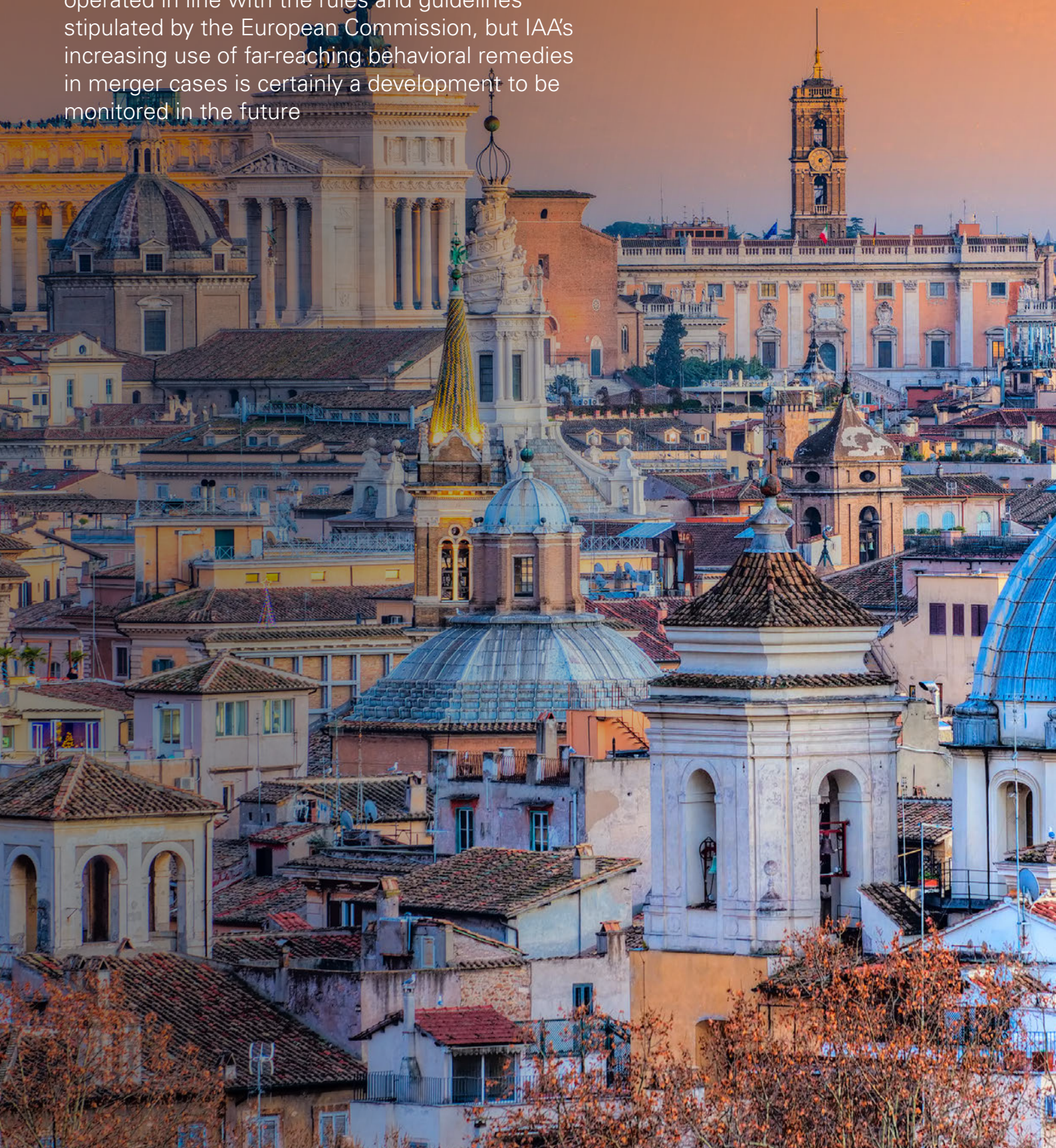

Global merger control: Italy

The Italian Antitrust Authority (IAA) has traditionally operated in line with the rules and guidelines stipulated by the European Commission, but IAA's increasing use of far-reaching behavioral remedies in merger cases is certainly a development to be monitored in the future



Italy

By Veronica Pinotti, Martino Sforza and Patrizia Pedretti



65

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6

In 2019, only six of the mergers reviewed by the IAA required in-depth investigations

Key developments

In 2019, the Italian Antitrust Authority (IAA) examined 65 mergers, six of which required an in-depth investigation in the sectors of natural gas distribution, media, banking and retail grocery distribution.

The IAA cleared five of these transactions subject to the adoption of corrective measures, while in the remaining case the investigation was closed for procedural reasons. In general, the decisions issued by the IAA in the past year highlight a trend toward far-reaching and innovative remedies.

The IAA conducted an extensive market investigation into the proposed acquisition of control of some business units of natural gas distribution company AcegasApsAmga by Ascopiave. Following its investigation, the IAA imposed remedies aimed at avoiding the creation of a dominant position, which would have permanently reduced competition in the market in the event of a future tender of the concession to manage natural gas distribution service in the Padua area.

The remedies imposed were aimed at reducing information and financial barriers; there were also organizational measures concerning employment. These remedies sought to provide incentives for potential external participants in the future tender, as well as off-setting the advantages linked to the incumbency of the acquired company, which back then held the largest part of the concessions in the area concerned.

In the media sector, the IAA cleared the acquisition by Sky Italian Holding of assets of the digital terrestrial pay TV service owned by Mediaset Premium, also subject to remedies. Specifically, the IAA found that the transaction led to a strengthening of Sky Group's dominant position on the retail pay TV market.

After the IAA issued a statement of objections, Sky indicated it wished to return the R2 technological platform and other assets to Mediaset. However, in view of the fact that the return of R2 was only partial and some RS assets would remain

Sky's property, and because the merger had already had an impact on the market, the IAA decided to complete its review of the deal.

The IAA determined that the transaction had generated specific anti-competitive effects, and had removed the existing and future competitive pressure that Mediaset had on Sky's pay TV offering. For this reason, it decided to impose, for a three-year period, measures to restore competition to the pay TV market.

Under these restrictions, Sky is prohibited from imposing exclusive rights for its audiovisual content and linear channels on internet platforms in Italy. The IAA authorized the merger subject to the full and effective implementation of the prescribed measures.

Despite Sky's successful appeal at a first instance administrative court, the Council of State annulled the judgment and restored the IAA's initial decision, banning Sky from acquiring exclusive broadcasting rights for audiovisual content and linear channels for internet platforms in Italy until 2022.

Also in the media sector, the IAA conditionally cleared the acquisition of sole control of digital terrestrial television network operator Persidera by F2i. The detailed investigation confirmed that the deal, due to F2i's control of TV and radio infrastructure company EITowers, would have strengthened the dominant position of the new entity in the television broadcast infrastructure market to such an extent as to eliminate, or substantially and permanently reduce, competition in that market. The IAA said there would be a similar impact on downstream markets including digital broadcasting, free television, pay TV and TV advertising.

In line with the findings and while approving the transaction, the IAA requested remedies. These consisted of obligations to provide access and deliver hospitality services and maintenance on fair, reasonable, transparent and non-discriminatory terms and in any case no worse than those currently applied by EITowers; and obligations to deliver full services on fair, reasonable and

non-discriminatory terms on the basis of an unbundled approach, in which the network operator is free to define the extent of the services offered and the degree of its technological autonomy.

The deal will create two Persidera divisions known as MuxCo and NetCo. MuxCo will hold intangible assets allocated to F2i, such as the rights to certain frequencies, as well as some network assets, and will also manage business relations with television broadcasters. NetCo will handle terrestrial broadcasting infrastructure.

The remedies included measures relating to MuxCo's independence; measures to reduce the risk of information exchange between MuxCo, NetCo, El Towers, F2i and Mediaset; measures changing the risk-sharing clauses between El Towers, NetCo and MuxCo and to assure the transfer of part of the efficiencies generated on NetCo to MuxCo, for the benefit of the latter's customers.

In the banking sector, the IAA authorized, subject to conditions, BPER Banca's acquisition of Unipol Banca. Its investigation focused on the Sardinia region and covered local markets including private and commercial banking, as well as investment and asset management services to consumer households and small and medium-size enterprises. The investigation also covered the market for loans to public bodies and to medium-size and large businesses.

During the in-depth investigation, the IAA analyzed the post-merger increases in market share held on the various markets by BPER and Unipol, concluding that a joint share of at least 40 percent would cause significant obstacles to competition.

Based on its findings, the IAA said the merger was likely to result in the creation or strengthening of the dominant position of BPER in certain markets in Sardinia. Therefore, it decided to authorize the merger subject to measures aimed at eliminating the anti-competitive effects of the merger.

These included the sale of some Unipol branches to an independent company in geographical markets where the effects of the merger would affect competition. The independent company had to be capable of being an actual or potential competitor in the market and, eventually, the Unipol branches located in Sardinia were transferred to Banco di Sardegna.

There were also two cases concerning the retail grocery distribution



€29.1bn

Italian M&A deal value in Q1 – Q3 2020

Source: Mergermarket

sector. In the first of these, the IAA authorized subject to conditions the acquisition by Fratelli Arena of exclusive control over three groups of business branches: 33 supermarkets from the Simply network; eight supermarkets from Distribuzione Cambria; and 11 supermarkets from the Roberto Abate Group.

The IAA commissioned a market investigation, conducted with a national representative sample, in order to better understand the habits of consumers and the dynamics of demand in the retail grocery sector.

Following a quantitative analysis of the companies' positions on the relevant markets and the competitive

constraints exercised by the stores subject to purchase on those of the acquirer, and qualitative examination of the specific characteristics of each of the relevant markets, the IAA identified competition issues for eight local markets (two hypermarkets and five supermarket in Catania and one supermarket in Messina).

In order to prevent any reduction in competition, the IAA authorized the merger subject to behavioral and structural remedies including the sale of various stores and the signing of a lease agreement for a business branch.

Arena appealed the IAA's decision at a first instance administrative court. However, following Distribuzione Cambria's (the target) declaration of insolvency in August 2020, the court suspended its judgment in late November 2020. An application for interim measures lodged at a first instance administrative court on the same matter by target Distribuzione Cambria was dismissed.

Also in the retail grocery distribution sector, the IAA closed its investigation into the proposed acquisition by BDC Italia of the entire share capital of Auchan, since the scope of the transaction had substantially changed since its first notification. The companies continued their negotiations into 2020, filed the deal again, and the IAA eventually cleared the transaction subject to the sale of a number of stores to a third independent company.

Impact on merging parties

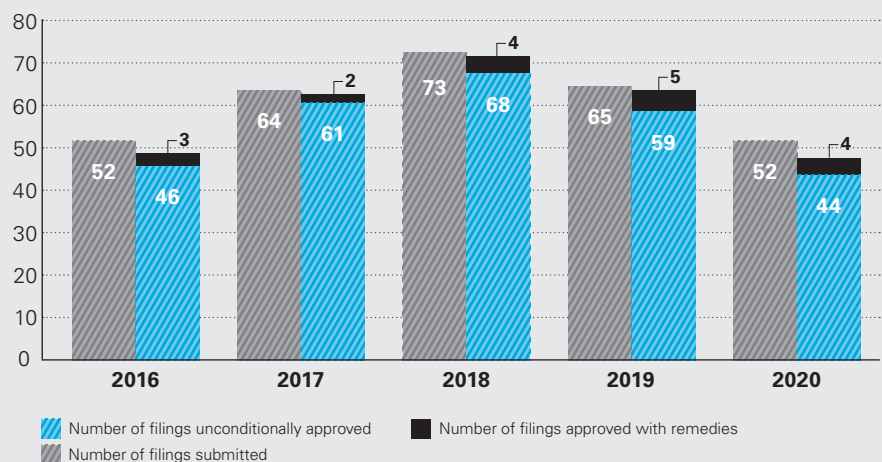
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Due to the increasing complexity and number of merger filing regimes worldwide, as well as the difficulties for authorities to progress with merger reviews in the COVID-19 context, merger timelines have become much more unpredictable

Merger filings at the Italian Antitrust Authority (IAA)*

*as of 3 December 2020





Applying a centralized approach to filing in the relevant jurisdictions is critical to obtaining quick and successful clearance

for authorities to progress with merger reviews in the COVID-19 context, merger timelines have become much more unpredictable and, in some cases, protracted.

In Italy, COVID-19 initially led to a severe disruption in merger review processes. However, it appears that, as of the time of writing, the IAA is working at its normal level again. In general, a centralized and consistent approach for all merger filings worldwide is the best way to streamline the process and achieve the required clearances as quickly as possible.

Recent changes in priorities

There have been no noticeable changes in merger enforcement priorities in the past year in Italy. The IAA remains an aggressive enforcer toward any merger that could potentially lead to competition concerns, across all industries, as evidenced by the variety of sectors subject to in-depth investigation in 2019.

Consistent with the broader European trend, we expect that the IAA will increasingly focus on mergers in digital and IT industries.

Key enforcement trends

The IAA has in the past year conducted extensive investigations into several proposed mergers, all involving behavioral remedies. This does suggest a trend toward far-reaching and innovative remedies.

The IAA appears to not shy away from detailed market investigations in order to be able to identify the feasibility of proposed remedies in various sectors.

In 2019, the IAA conducted a study analyzing the implementation and the degree of effectiveness of the measures imposed in merger control, on the basis of the information contained in its case files and collected from purchasers of divested assets through an online questionnaire.

The review focused on structural remedies, especially the divestiture of

assets, imposed by the IAA between 2007 and 2017. In order to adequately assess their effectiveness, the IAA sent the purchasers of the divested assets questionnaires—which had a relatively high response rate.

In order to maximize the effectiveness and efficiency of the IAA's activities, in line with international best practice, the study suggests that preference should be given to structural remedies while behavioral remedies should be limited to cases in which the former are not feasible. The results of the review will be used to draft an internal operating manual that also takes into account best international practices.

Recent studies and guidelines

In July 2019, the IAA, together with the Italian Data Protection Authority and the Italian regulator for electronic communications, adopted a joint document laying down guidelines and policy recommendations concerning Big Data, and addressing some of the concerns raised by the digital economy with regard to privacy.

The underlying study that informed the guidelines focused on assessing market power in digital ecosystems characterized by the exploitation of Big Data. An important element in this assessment is the vertical and conglomerate integration of digital operators.

This amplifies the ability to capture, process and exploit data in providing services to consumers and businesses, and allows for incredibly accurate profiling.

Another significant element in assessing market power on data-driven markets is also represented by external growth, such as acquisitions by dominant players of potentially disruptive startups—so-called "killer acquisitions."

The guidelines recommended a change in the standard of review of concentrations. In particular, a change in the law is proposed to

allow the IAA to review transactions that may have the effect of restricting potential competition.

The guidelines also suggest the possibility of including an additional value-based threshold, which would allow the authority to review smaller transactions that take place in the digital sector and that are not captured by current thresholds.

Looking ahead

Other than the possible development described above, no significant changes to Italian merger control rules are expected in the near future.

However, as the IAA has traditionally operated in line with the rules and guidelines stipulated by the European Commission, the latter's revision of the Market Definition Notice, initiated earlier this year, is likely also to impact how the IAA will eventually define markets in merger control cases.

Clearer guidelines and the use of more robust economic evidence for market definition purposes in the future would be welcomed by practitioners.

Accurate as of January 2021

THE INSIDETRACK QUESTIONS

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

Parties should leave enough time for the merger control filing process when eyeing new deals. This is not only because of the increasing complexity of merger control regimes worldwide, but also due to the administrative delays flowing from the authorities' internal work reorganization following the COVID-19 crisis. There may also be delays due to the increased workload of regulators having to deal with a backlog of cases in a few months.

In your experience, what makes a difference in obtaining clearance quickly?

The possibility of applying a centralized approach to filing in the relevant jurisdictions is critical to obtaining quick and successful clearance. This ensures consistency in arguments and efficiency in merger control workstreams.

What merger control issues did you observe in the past year that surprised you?

As described before, the increasing use of far-reaching behavioral remedies in merger cases is certainly a development to be monitored in the future.