CONCENTRATIONS: RECENT DEVELOPMENTS IN ITALY

Claudio Tesauro¹,²

Keywords: Concentrations, remedies, revision, threshold, Feltrinelli

Abstract: Recent Italian developments in antitrust concentrations was the topic I was assigned to address at the conference held on 23 April to celebrate the first anniversary of the Italian Antitrust Review. What is immediately clear is that far fewer concentrations have been notified over the last few years. This is probably due to the economic crisis, which caused a reduction in corporate transactions; but also the changes to the turnover thresholds for notification seem to have had a significant impact. Consequently, an interesting debate is underway regarding the need for further changes to the threshold system. Moreover, the drastic market developments and the subsequent increased number of decisions to revise remedies should also be further examined. These two issues are the subject of this paper.

1. THE REFORM OF THE THRESHOLD SYSTEM

Last year, the ICA took action to resolve the ambiguities in the reformed turnover thresholds, which were adopted in 2012 (perhaps with undue haste) and became effective in 2013. Indeed, a public consultation has launched, with the ultimate aim of identifying further changes to present to the Parliament and the Government.

As is well known, with Law Decree No. 1/2012, which amended Article 16 of Law No. 287/1990, the two turnover thresholds used to identify concentrations subject to notification changed from being alternative to cumulative. The first threshold relates to the annual turnover of all the undertakings involved in a transaction (currently EUR 492 million); the second, to the annual turnover of the target undertaking (currently EUR 49 million).

The reform was aimed at reducing workload of the ICA, which, until the reform, had to examine a high number of concentrations -very few of which raised competition concerns or could lead to the creation or strengthening of a dominant position. Indeed, according to ICA, investigations were opened for only 0.6% of the notified concentrations before the reform, whereas the percentage considered acceptable at international level is between 2% and 5%.³ This situation caused considerable and unnecessary strain on the ICA in terms of having limited resources available to analyse the most critical concentrations; companies also felt the burden in terms of the legal costs and

¹ Lawyer.

³ ICA, Communication of 10 February 2014, para. 10.
human resource costs entailed to notify a large number of transactions. Indeed under the old system, all concentrations that involved even only one undertaking with an annual turnover above the first threshold had to be notified, regardless of whether the target undertaking was very small and, therefore, irrelevant from an antitrust perspective.

In this respect, there is no doubt that the reform has achieved the objective of reducing the number of concentrations to be notified. Before the reform, about 500 concentrations were notified annually, compared to only 80 in 2013 and even fewer in 2014. However, as the ICA admitted, two critical issues have arisen: one concerning the effectiveness of the preventive antitrust control over concentrations, and one concerning the interpretation of the new legislation.

In fact, under the new system, many concentrations that might be relevant from an antitrust standpoint (especially when the relevant markets have a local geographic dimension, but also in niche markets) escape the obligation to notify. This often happens in Italy because Italian markets are characterised by SMEs, which are often active in very restricted geographic areas.

With regard to the interpretation issue, based on a literal interpretation of the new rules, some forms of concentration (mergers and the formation of new joint venture companies) seem totally beyond antitrust control, regardless of the size of the undertakings involved. In fact, a new joint venture has no previous turnover by its very nature, and in mergers no target undertaking exists to apply the second threshold. The ICA has tried to remedy this legislative gap with an interpretative communication\(^4\) regarding the second threshold, according to which the following must be taken into account: i) new joint ventures: the turnover of assets contributed by the jointly controlling undertakings on incorporation or in the following two years; ii) mergers by incorporation: the turnover of the merged company; and iii) mergers in the strict sense: the turnover of the assets of the merged companies. Although this interpretation does fill a legislative gap and is consistent with the rationale of antitrust rules, it contrasts with the provision’s wording. Consequently, administrative courts might well consider the communication contrary to the law and disregard it when deciding cases. Moreover, not all the interpretation issues have been resolved: it is still unclear whether a joint acquisition of an existing undertaking whose annual turnover does not exceed the second threshold must be notified in case the controlling undertakings later transfer considerable additional assets to it, thus circumventing the obligation to notify.

To solve all these problems, the ICA has launched a public consultation to identify further amendments to present to the Parliament and the Government. The two amendments under consultation are to: i) reduce the amount of the second threshold to EUR 10 million, leaving the first threshold unchanged; and ii) change the way to calculate the second threshold so that, similarly to the European rules, concentrations must be

\(^4\) ICA, Communication of 5 August 2013.
notified if the first threshold is exceeded and the turnover of at least two of the undertakings involved exceeds the second threshold.

These proposals, which testify to the ICA’s attention to the problems, must be welcomed, as they will resolve the interpretation issue and, at least in part, increase the number of concentrations subject to notification. This will prevent many operations that would potentially cause concerns from an antitrust standpoint escaping antitrust control.

In this regard, however, it seems appropriate to evaluate two additional changes.

First, it might be advisable to revise also the first turnover threshold. An analysis of the provisions of the main European countries shows that the thresholds concerning the sum of the turnovers of the undertakings involved are generally much lower than those in Italy and often refer to the worldwide, not national, turnover. Inspired by these examples, it might be useful to revisit not only the level of the second threshold, which regards only the target undertaking, but that of both thresholds. In this regard, the current level of the first threshold could be considered so high as to exclude even some large multinational companies from notification, which are leaders in some of the relevant markets where they are present.

Second, the inflation-linked indexation of thresholds could be reconsidered. No other European countries have a similar system, and Italy’s was introduced when inflation rates were at a high. Today, as is well known, Italian inflation rates are substantially equal to those of

---

5 The thresholds established in Germany, France, Spain, the United Kingdom and Poland are as follows: Germany: i) total worldwide sales in excess of EUR 500 million; ii) turnover of at least one undertaking in excess of EUR 35 million in Germany; and iii) total sales of another undertaking in excess of EUR 5 million in Germany. France: i) total worldwide sales in excess of EUR 150 million, and ii) individual turnover of at least two undertakings in excess of EUR 50 million in France. Spain: i) total sales in Spain in excess of EUR 240 million, and ii) individual turnover of at least two companies in excess of EUR 60 million in Spain, or iii) overall market share of the concerned undertakings in excess of 30% in Spain (or in a geographic market geographically defined in Spain); if the target undertaking has a turnover of less than EUR 10 million, the concentration must be notified only if the overall or individual market share exceeds 50%. Poland: i) total worldwide sales in excess of EUR 1 billion; and ii) national turnover of the acquired undertaking in excess of EUR 10 million, or i) total sales in Poland in excess of EUR 50 million; and ii) national turnover of the acquired undertaking in excess of EUR 10 million. In the United Kingdom, a concentration must be notified if: i) it creates (or makes stronger) an undertaking that holds more than 25% of the supply or purchase of certain goods or services (this is a different criterion from the market shares, allowing more flexibility); or ii) the turnover of the target exceeds GBP 70 million (when the concentration entails the incorporation of a new joint venture, the turnover of the larger concerned undertaking must be taken into consideration).

The analysis shows that not only turnover thresholds, but also market shares (or other data to measure the market power) are sometimes taken into consideration. These elements permit all critical concentrations to be submitted to notification, regardless of the annual turnover of the companies concerned. However, we should not forget that the aim of the thresholds is to allow a quick check of the notification requirements, while the market share analysis is definitely not immediate and often consuming. It therefore seems more appropriate to rely on the only turnover thresholds.

6 For example, the national turnover of Tod’s in 2014 was EUR 311 million, while its worldwide turnover was EUR 965 million.
other European countries, so the indexation system has lost its original reason and now only has the effect of progressively marginalising national jurisdiction in the field of merger control.

In any case, it should be considered that Italian undertakings seem to consider the issue of thresholds extremely delicate and urgent. In fact, if on the one hand it might be thought that undertakings are glad to avoid, insofar as possible, the control of the ICA, conversely they are often concerned that concentrations not subject to notification might create or strengthen a dominant position, which therefore raises the risk of them being fined for abuse of dominant position. As is known, in the Continental Can case, the European Court of Justice ruled that a merger could be caught by Article 102 TFUE; this case law was established in the absence of rules on merger control and, since Regulation 4064/1989 came into force, interest in it has largely been lost. However, it is conceivable that the relevance of this case law will return in relation to under-threshold concentrations, given the very high thresholds provided. An amendment to ensure that most of the potentially restrictive concentrations are examined in advance by the ICA is therefore necessary not only in terms of the public interest in maintaining a competitive economy, but also in terms of giving companies certainty as to the legality, from an antitrust standpoint, of the transactions they intend to carry out.

2. REVOCATION OF REMEDIES

Contrary to what is provided at European level, the ICA can impose conditional remedies, regardless of whether the undertakings concerned submit a proposal to allay antitrust concerns. In practice, however, there are no substantial differences between the two legal frameworks as, in most cases, the parties establish a dialogue with the ICA during the proceedings, in order to identify remedies which the parties propose and the ICA approves, although the remedies imposed by the ICA do not always perfectly coincide with those proposed by the parties. However, it can happen that remedies imposed in the past no longer suit the changed market conditions and, therefore, become an unnecessary burden on free enterprise. This thus hampers the ability of the undertakings involved to compete “on equal terms” against their competitors; at times, remedies even end up curbing competition rather than promoting it.

8 Lastly, see ICA Decision No. 25549 of 9 July 2015, C11982 - Enrico Preziosi-Artsana/Newco-Bimbo Store.
9 This happened, for example, in the Sky case (Commission Decision of 6 August 2010, M.2876 Newsco/L Telepiù). In its decision authorising the concentration which then led to the establishment of Sky, the Commission prohibited the post-merger entity from participating in any tender for the purchase of rights in digital terrestrial television frequencies. The

the remedies at the request of the parties concerned.

In the last few months, the number of revisions has increased significantly. This acceleration is probably due to the increased dynamism of the markets, which soon makes the remedies imposed obsolete.

This dynamism comes as a consequence of technological evolution (particularly the explosion of the Internet, which often reduces barriers to market entry and, consequently, weakens the incumbents) and of regulation changes to consolidate the single market within the EU, and it sometimes causes the relevant markets moving from national to continental in terms of geographical dimension.

However, the need to revise remedies comes not only from the evolution of markets, but also from the undertakings themselves, following reflection. Indeed, while it is true that in proposing remedies they should first carry out an analysis to evaluate their sustainability, often, in the limited time available in the course of the proceedings, they fail to fully evaluate the future consequences of the proposed remedies.

The ICA has recently shown its awareness of this issue, by not only revising previous remedies, but also by imposing remedies for a determined (often short) time in markets that seem more exposed to drastic changes.

That is what happened in the recent Feltrinelli case, which is the only concentration in 2014 for which the ICA opened an investigation. The concentration consisted of the establishment of a joint venture that would have merged the assets of two major publishing groups in the wholesale distribution of books. The operation was likely to produce anti-competitive effects from both a horizontal standpoint, since the two undertakings were the main businesses offering wholesale distribution services to non-integrated publishers and bookshops, and a vertical point standpoint, given the strong presence of the undertakings involved in the upstream and downstream markets. The concentration might thus have generated exclusionary effects, particularly on small-sized publishers that do not have their own distribution chain. To obtain authorisation, therefore, the undertakings involved agreed to maintain the

market subsequently evolved in such a way as to create a de facto duopoly in this sector. Consequently, if the remedy had not been changed, Sky would have been prevented from competing effectively against its two main competitors, resulting in a restriction of competition and the consolidation of a newly formed duopoly.

10 In 2014 three decisions to revise previous remedies were adopted (ICA Decision No. 25161 of 28 October 2014, C11524C - Unipol Gruppo Finanziario/Unipol Assicurazioni-Premafin Finanziaria Fondiaria-SAL-Milano Assicurazioni; ICA Decision No. 25088 of 9 September 2014, C8027D - Banca Intesa / Sanpaolo IMI; ICA decision No. 24768 of 19 January 2014, C3932B - Telecom Italy/Seat Pagine Gialle), and one in the first months of 2015 (ICA Decision No. 25511 of 4 June 2015, C8190B - Society for Banking Services - SSB/Interbank company for automation - Cediborsa). These numbers are high in view of the fact that the Authority had adopted only eight decisions to revise remedies in the previous 23 years since its establishment.

terms of contractual relationships with publishers unchanged and to ensure similar conditions to other small-sized publishers. The key element of the case is that these remedies have a very limited duration (until the end of 2016) because that evolutionary trends of the book sector will lead to an increase in the importance of online distribution channel and ebooks, which will soon be a valid alternative to physical distribution and paper books. The ICA thus made an effort to predict the evolution of the market, concluding that the operation would result in the exclusion of small-sized operators only in the very near future. If those remedies had been of an indefinite duration, they would have become obsolete in a short time and would have created a heavy and unnecessary burden on the undertakings involved.

Both the imposition of short-term remedies and the high number of decisions to revise remedies shows that the ICA is very sensitive to the issue, but to date it has been addressed only in practice; there remains a clear legal vacuum concerning the criteria and the procedure to be used to decide whether a commitment can be revoked or amended, contrary to what takes place at European level. Indeed, the Commission’s notice on remedies\(^{12}\) expressly provides for the possibility to revise remedies, providing that they should generally include a revision clause, whereby the Commission - in exceptional circumstances and following a reasoned request from the parties - may revoke, modify or replace remedies. However, even in the absence of such a clause, the Commission may take into consideration requests to revise remedies if the revisions can improve the effectiveness of the remedies. The Commission also believes that revocation and revision of remedies should be granted very rarely for structural remedies consisting of the obligation to sell assets, because those sales could be completed in a short period during which it is unlikely that exceptional circumstances - which are required to justify a revision - may arise. At most, in these cases the prohibition on re-purchasing the assets sold, generally for ten years, is lifted.\(^{13}\)

Similar provisions are completely absent in the Italian legal system and this causes great uncertainty. However, an analysis of previous decisions reveals some interesting elements, especially concerning the substantive conditions that may lead to a revocation or revision of remedies.

The ICA has granted revocation when the reasons that had led to their adoption no longer exist.\(^{14}\) But in cases where the circumstances considered at the time of the authorisation were later found to have changed significantly (but not enough to justify a revocation), the ICA granted a revision and...


\(^{13}\) See Commission Notice op. cit., para. 43.

\(^{14}\) See, for example, ICA Decision No. 24555 of 29 January 2014, C3932B - Telecom Italia/Seat Pagine Gialle; ICA Decision No. 25511 of 4 June 2015, C8190B - Società per i Servizi Bancari – SSB/Società Interbancaria per l’automazione – Cediborsa.
imposed other remedies.\(^{15}\) Moreover, the ICA has also agreed to a revision in cases in which the market conditions had not changed, but the undertaking had proposed alternative remedies equally able to remove competition concerns. These concerned cases where the revision was not substantial\(^{16}\) or the remedies allow activities of particular benefit to the economy.\(^{17}\) Contrary to European provisions, the ICA has also amended structural remedies not yet implemented when their implementation was excessively onerous or complex, or even impossible.\(^{18}\)

In contrast, many uncertainties still remain regarding the procedural aspect. It is still not clear whether: \(i\) proceedings must be opened following a request, \(ii\) the request can be followed by a dialogue with the ICA to identify alternative remedies, \(iii\) a report on the findings of the preliminary enquiry must be issued, or \(iv\) the request must be discussed in separate proceedings or within the original ones.\(^{19}\) In one case, new concentration proceedings followed a request to revise previous remedies, which ended with no investigation being opened, instead of the request being approved or rejected, as usually happens.\(^{20}\)

Therefore, given the increasing number of requests to revise remedies, it would be desirable to clarify the procedure to be followed and, as happens under the European legal framework, include a revision clause in the decisions to conditionally authorise concentrations. Moreover, it should be considered that the Bank of Italy, when it was still responsible in the assessment of antitrust banking concentration, did include such a clause.\(^{21}\)

### 3. Conclusions

The Italian system of antitrust control over concentrations was subject to wide debate and reflection in the course of 2014. Revisions of remedies and analyses of the new legislation on

\(^{15}\) See ICA Decision No. 25161 of 28 October 2014, C11524 - Unipol Gruppo Finanziario/Unipol Assicurazioni-Premafin Finanziaria-Fondiaria SAI-Milano Assicurazioni.

\(^{16}\) See ICA Decision No. 6030 of 28 May 1998, C2910 - Agip/Tmf-Energon.

\(^{17}\) See ICA Decision No. 9928 of 13 September 2001, C3818 - Edizione Holding/Autostrade-Concessioni e Costruzioni Autostrade.


\(^{19}\) See, for example, C2910 - Agip/Tmf-Energon cit. and C2741 - Italcalcestruzzi/Calcestruzzi cit.

\(^{20}\) See ICA Decision No. 24679 of 10 December 2013, C4793B - R.T.I.-Rete Televisive Italiane/Ramo di azienda di Europa TV.

\(^{21}\) See, for example, Bank of Italy Decision No. B151 of 2 November 1998, C3219B - Credito Italiano/Unicredito; Bank of Italy Decision No. B207 of 2 December 1999, C3597B - Banca Intesa/Banca Commerciale Italiana; Bank of Italy Decision No. B270 of 19 January 2001, C4190B - San Paolo-Imi/Banco di Napoli.
turnover thresholds have been carried out, thus counterbalancing the scarcity of concentrations notified and investigated. These initiatives allowed the ICA to identify certain problems, but they have yet to be fully resolved. The ICA has been extremely receptive and open to the opinions and suggestions of all stakeholders, and I am confident that following the necessary study and reflection, it will adopt practical measures to further improve our system of antitrust control of concentrations.