NOTICE ON THE ENFORCEMENT OF ARTICLE 16(1-*BIS*) OF LAW 287 OF 10 OCTOBER 1990

AGCM Decision 31090 of 27 February 2024

turnover thresholds last updated by AGCM Decision 31495 of 18 March 2025

1. Preamble

With this Notice, the Authority lays down, in accordance with EU law, the procedural rules governing the enforcement of Article 16(1-*bis*) of Law 287 of 10 October 1990, introduced by Article 32 of Law 118 of 5 August 2022. It further provides clarification on its temporal scope and substantive reach.

Article 32(1)(b), point 1) of Law 118 of 5 August 2022 introduced several amendments to the rules governing the **control of concentrations** by the Authority.

Specifically, under said provision, Article 16 of Law 287 of 10 October 1990 (the "**Competition Act**") was amended to include the following paragraph 1-*bis*: "*The Authority may request the undertakings concerned to notify a concentration within thirty days even if only one of the two turnover thresholds referred to in paragraph 1 is exceeded, or if the combined aggregate worldwide turnover of all the undertakings concerned is more than 5 billion euro. Such a request can be made if there are concrete risks to competition in the national market or in a substantial part thereof. In making this assessment, the Authority shall also take into account any detrimental effects on the development and presence of small undertakings with innovative strategies. This power may be exercised only if no more than six months have elapsed since the concentration was completed. The Authority shall define the procedural rules for applying this Article in its own general measure, in compliance with the EU legal framework. The fines under Article 19(2) shall apply in case of failure to notify. The provisions in this paragraph do not apply to concentrations implemented before the date of its entry into force*".

2. Conditions for the enforcement of Article 16(1-*bis*) of the Competition Act

The cited provision grants the Authority the power to intervene limited to transactions in which **all** of the following conditions are met:

(a) no more than six months have elapsed since the transaction was completed;

(b) only one of the two turnover thresholds under Article 16(1)[1] of the Competition Act is met, or the combined aggregate worldwide turnover of all the undertakings concerned exceeds 5 billion euro; and
(c) based on the information at its disposal, the Authority finds that there are concrete risks to competition in the national market (or in a substantial part thereof), also considering the detrimental effects on the development and presence of small undertakings with innovative strategies.

To reduce legal uncertainty for undertakings participating in concentrations, it is particularly important to clearly define the scope of this new power. Therefore, before addressing procedural matters, the Authority shall provide preliminary clarifications on when the provision applies (temporal scope) and what it covers (substantive reach).

(i) Temporal scope of application

Article 16(1-*bis*) of the Competition Act clarifies that the provision does not apply to transactions completed before its entry into force. At the same time, however, the Authority may require notification only for transactions completed within the preceding six months. In this regard, reference can be made to the principles previously set out in the Authority's Notice of 14 November 2012, *New rules on the prior notification obligation for concentrations*. In that Notice, the Authority stated that a concentration is deemed to be completed when the acquisition of control takes effect. In light of this general criterion, where a concentration is implemented through a complex sequence of transactions, the Authority may require notification of the concentration no later than six months from the conclusion of the final contract (closing) or from the moment control is effectively transferred.

(ii) Existence of concrete risks to competition

The provision may apply to a wide range of transactions which, under certain conditions, may give rise to concrete risks to competition in the national market (or in a substantial part thereof). For instance, it may apply to the acquisition of an undertaking with limited or no turnover in the national market by a large undertaking operating at national and/or global level. The provision may also apply to transactions between small or medium-sized national undertakings.

[1] *[Ed.] The turnover thresholds requiring prior notification of a concentration are updated annually on the basis of the increase in GDP price deflator index. The relevant decision is published in the Authority's Bulletin after the increase in the index has been officially announced. As of 24 March 2025, the date on which the Authority's decision was published, the threshold for the combined aggregate nation-wide turnover of all the undertakings concerned is set at* ***582 million euro*** *and the threshold for the aggregate nation-wide turnover of each of at least two of the undertakings concerned is set at* ***35 million euro****.*

In general, the Authority shall assess the existence of concrete risks to competition by taking into account all relevant features of the undertakings concerned and of the markets in which they operate. Where available, it shall consider factors such as:

1. market structure;
2. the characteristics of the undertakings concerned;
3. the nature of the undertakings' business activities and their relevance for consumers and/or other undertakings;
4. the significance of the innovative activity;
5. the competitive pressure exerted by one or more undertakings beyond their market share.

(a) Market shares and concentration levels

Market shares and concentration levels – measured, for example, by the Herfindahl-Hirschman Index ("HHI") – provide useful first indications of the market power and the competitive importance of both the parties to the concentration and their competitors.

For example, the Authority is unlikely to require notification of a horizontal concentration where the undertakings' combined market share post-merger is below 25%[2]. Furthermore, in the context of a horizontal concentration, the Authority is unlikely to find a concrete risk to competition:

1. in a market where the post-merger HHI is below 1,000;
2. where the post-merger HHI falls between 1,000 and 2,000 and the delta is less than 250;
3. where the post-merger HHI exceeds 2,000 and the delta is less than 150 – except in particular circumstances.

By way of example, the Authority is also unlikely to require notification of a non-horizontal concentration where the new entity's market share post-merger in each affected market is below 30% and the HHI is below 2,000[3].

(b) Additional factors the Authority may consider

In any case – especially where **turnover does not adequately reflect the competitive pressure** that a company exerts, or may exert in the future, in the national market or in a substantial part thereof – the Authority may also consider additional factors, such as whether an undertaking:

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[2] See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5) ("*Horizontal Merger Guidelines*").

[3] See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008).

1. is a start-up or a recent entrant with significant competitive potential that has yet to develop or implement a business model generating substantial revenue (or is still in the initial phase of implementing such model);
2. is an important innovator or is conducting potentially important research;
3. is an actual or potential important competitive force;
4. has access to competitively significant assets (such as raw materials, infrastructure, data or intellectual property rights); and/or
5. provides products or services that are key inputs/components for other industries.

The Authority may also look at whether the consideration paid to the seller is particularly high relative to the current turnover of the acquired undertaking.

As noted above, however, Article 16(1-*bis*) of the Competition Act provides that the Authority may require notification of a concentration only where there are concrete risks to competition "*in the national market or in a substantial part thereof*".

Where the undertakings concerned generate turnover in Italy, it is reasonable to presume that the concentration's effects may arise in the national market, or in a substantial part thereof.

(c) Criteria applicable to undertakings with no turnover in Italy

Where none of the parties to the concentration generates turnover in Italy, the Authority shall assess, based on the specific features of the transaction and of the undertakings concerned, whether the concentration nonetheless appears likely to affect competition in the national market, or in a substantial part thereof, by considering, for example:

a) the presence in Italy among users/consumers of the services provided by the undertakings concerned, including services provided free of charge; in the digital sector, for instance, reference can be made to the number of users of such digital services in Italy on a daily or monthly basis, or the number of times individual users residing in Italy access a specific website;
b) the presence in Italy of the undertaking's corporate headquarters, production plants, and/or research or testing facilities;
c) the conduct of R&D that is potentially relevant to the national market. For example, relevant factors may include the marketability of research results in Italy, ownership of a particular patent, or the initiation of the approval process for a drug to be distributed in Italy;
d) the existence of a plan to enter the Italian market. Relevant indicators may include plans to open production plants, the recruitment of personnel, whether completed or imminent, ongoing procedures to obtain authorisations to trade, or the expected conclusion of sales contracts, all of which in Italy;

e) any other significant link with the national market – or a substantial part thereof – as evidenced by the specific features of the transaction.

3. Procedural Aspects

To determine whether a concentration falls under Article 16(1-*bis*) of the Competition Act, and to define its scope, the Authority may exercise its investigative powers under Article 16-*bis*(1) of the Competition Act. In the event of non-compliance, the fines set out in paragraph 2 of the same provision shall apply.

When the Authority becomes aware of a concentration which, based on a *prima facie* assessment, meets the criteria outlined in point 2 of this Notice, it may, by a reasoned request, require each of the undertakings concerned to notify the transaction. This request is made pursuant to Article 16(1-*bis*) and Article 16-*bis*(1) of the Competition Act.

For the notion of "undertaking concerned", reference is made to the Commission Consolidated Jurisdictional Notice on jurisdictional issues under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (paragraphs 129-153).

The notification must be made within thirty days of receiving the relevant request. However, the Authority may – upon receiving a reasoned request from the undertakings concerned, submitted well in advance of the deadline – grant an extension of this time limit, including to allow a pre-notification phase[4]. In cases of acquisition of control, if the recipient of the Authority's request is not the undertaking acquiring control, the transaction may also be notified by the latter undertaking.

The notification must be made in accordance with the procedures set out in Article 5 of Presidential Decree 217 of 30 April 1998. If the notification is not submitted within the time limit set in the Authority's request, the recipient shall be subject to the fines under Article 19(2) of the Competition Act. If, upon notifying a concentration, the undertakings fail, in whole or in part, to provide the requested information or documents, or if they provide false information or documents, the fines under Article 16-*bis*(2) of the Competition Act shall apply.

If the Authority determines that a notified concentration is liable to be prohibited pursuant to Article 6 of the Competition Act, it shall open investigation proceedings within thirty days of receiving a complete notification.

Concentrations notified pursuant to Article 16(1-*bis*) of the Competition Act are subject to the applicable provisions of the Competition Act governing the control of concentrations, as well as the relevant provisions of Presidential Decree 217 of 30 April 1998.

[4] See Notice concerning certain procedural aspects relating to concentrations under Law 287 of 10 October 1990 published in Bulletin 22 of 20 June 2005 (as amended by decision of the Authority of 27 December 2010).

The formulation of a request pursuant to Article 16(1-*bis*) of the Competition Act does not preclude the exercise of the referral power under Article 22 of Council Regulation (EC) 139/2004, provided the necessary conditions are met.
The Authority shall publish an announcement on its website (www.agcm.it) indicating that a notification has been filed pursuant to Article 16(1-*bis*) of the Competition Act. To this end, the undertakings concerned must provide their prior consent to the publication of the announcement, at the time of filing the formal notification.

4. Voluntary notification of concentrations under Article 16(1-*bis*) of the Competition Act

Where the undertakings concerned consider that a transaction which is not subject to notification to either the European Commission or the Authority nevertheless falls within the scope of Article 16(1-*bis*) of the Competition Act, they may voluntarily inform the Authority.
The concentration should be notified prior to its implementation, provided that the parties have already agreed on the essential elements of the transaction, so as to allow the Authority to conduct a comprehensive assessment. In any case, the notification must be submitted to the Authority no later than two months following the conclusion of the transaction.
In case of voluntary notification, the undertakings may submit to the Authority a document containing at least the following information:

- details of the parties to the transaction;
- a brief description of how the transaction will be implemented, including the date on which the transfer of control has taken (or will take) place;
- an indication that one of the two turnover thresholds set out in Article 16(1) of the Competition Act is met and/or that the combined aggregate worldwide turnover of all the undertakings concerned is more than 5 billion euro;
- a brief description of the markets affected by the transaction;
- the position of the parties in those markets;
- the reasons why the transaction could affect competition in the national market or in a substantial part thereof (for this purpose, account should be taken of: (i) whether the market shares or concentration thresholds referred to in point (ii)(a) are met; (ii) the presence of one or more of the elements listed in point (ii)(b); and (iii) the fulfilment of one or more of the criteria referred to in point (ii)(c));
- whether the transaction has been or must be notified to foreign competent authorities.

Having assessed the information provided, within sixty days of receiving a **complete** voluntary notification, the Authority shall inform the undertakings whether or not it intends to require formal notification of the transaction pursuant to Article 16(1-*bis*) of the Competition Act.
Where the voluntary notification is incomplete, the sixty-day term runs from the date on which the supplementary information is received.

The Authority reserves the right to amend or supplement this Notice, based on insights gained from its practical enforcement.