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Antitrust Analysis in Mergers & Acquisitions: the Intesa/UBI case

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Anno Accademico 2021/2022

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Introduction

There are several ways through which one corporation can acquire control over another one, so why does M&A have this crucial role in our economy, and is it the most used method to acquire another enterprise?

In the first quarter of 2022, M&A is setting a new record of transactions every day[1]. This is not surprising, as a matter of fact, already in 2021 global M&As have shattered all time records. As an article published by Reuters reports;*"The value of M&A globally topped $5 trillion for the first time ever, with volumes rising 63% to $5.63 trillion by Dec. 16"*[2] (Sen et. al, 2021).

This unprecedented increase could be due to the fact that people regained confidence towards the end of 2021 and companies started to grow again. As Deloitte reports, consumer confidence has increased in 2021 with the global introduction of several COVID-19 vaccines, businesses started to be more optimistic and economic activities started to return to pre-pandemic levels[3].

Another reason that is leading to an excessive use of M&A, especially in the banking sector is the fact that the expansionary monetary policies imposed by the BCE have decreased the interest rates to 0%. As a matter of fact, profits in the banking sector have fallen down very rapidly.

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[1] *See* Kelly Teal. (2022, January 12). *2022 M&A is mind-boggling. what's fueling all the activity?* Channel Futures. Accessed January 18, 2022, from https://www.channelfutures.com/mergers-and-acquisitions/2022-ma-is-mind-boggling-whats-fueling-all-the-activity

[2] *See* Anirban Sen, Pamela Barbaglia, Kane Vu. (2021, December 20). *Global M&A activity smashes all-time records to top $5 trillion in 2021*. Reuters. Accessed January 18, 2022, from https://www.reuters.com/markets/europe/global-ma-activity-smashes-all-time-records-top-5-trillion-2021-2021-12-20/

[3] *See* Deloitte (2021, March 3). *2022 banking and Capital Markets M&A Outlook*. Deloitte United States. Accessed January 18, 2022, from https://www2.deloitte.com/us/en/pages/financial-services/articles/banking-securities-mergers-acquisitions-outlook.html

Furthermore, the digitalization, the introduction of new streams of payments and the entry of new competitors in this sector increased the need of consolidating the banks' position in their sector by means of relentless innovation and operations such as M&As[4].

The leading example of a merger and acquisition in the banking industry is the well-known operation which led Intesa to acquire UBI banca in 2020. Indeed, as it will be analyzed later on in this dissertation, this transaction was very useful in order to consolidate their position as leaders in the banking sector in a period of high uncertainty and fear.

Moreover, there are several reasons for which mergers are the most common and widely used way of acquisition. When corporations combine together the overall performance, the scale of operations and the resources tend to increase dramatically. Another reason that may lead corporations to merge together is the possibility to diversify the products and services offered by blending together the services already provided and the new ones that will be delivered once the merge is completed.

Additionally, another motivation to merge with another corporation might be to eliminate competition by consolidating the dominant position in a given market. That is the reason why, M&A transactions are heavily regulated by competition authorities.

The goal of this dissertation is to have a better understanding of the role played by antitrust in the M&A process, not only to protect the final consumer but also to protect competition in the market.

In view of the above, in the first chapter we will go through the history that led us to the establishment of the first competition law in Italy in 1990. The history is quite convoluted. In fact, Italy has introduced anti-competitive laws with a culpable delay with respect to the other industrialized countries in the world. As it will be addressed in detail later on, this is due not only to the heavy reliance on public investments in the most crucial and profitable markets in our country, but also to the main draft laws that from the '50s until 1990 have characterized the state of confusion inside our borders.

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[4] *See* Tommaso Grandoni (2021, March 28). *"M&A season" Nel settore bancario italiano?* Luiss Finance Club. Accessed January 18, 2022, from https://lfcfinanceclub.eu/ma-season-nel-settore-bancario-italiano/

Indeed, these draft laws showed the renewed interest of our Country in this matter but, rather than pushing toward the same direction, they created a sense of confusion due to the fact that these proposed decrees had opposing views and beliefs.

Moreover, together with the introduction of the first decree in 1990, Italy has also established its own Authority. That is why the second part of the first chapter investigates the powers, role, structure and functioning of this Authority in our economic framework. As a matter of fact, the Italian Competition Authority (hereinafter, "ICA") ICA not only has the power and the authority to regulate competition but also works toward consumer protection and as an advisor for the Government regarding some specific and relevant cases. It is also important to emphasize that the ICA is completely autonomous.

A peculiarity of ICA can be found in its structure, in fact, the President, not only must be *''a person of well known independence and that has already held high office, but must also be elected for a non renewable period of seven years"* (Law No.287/1990, Art.10(2)).

In chapter 2, it will be deeply analyzed merger control in Italy, firstly by analyzing which are the different types of mergers and what are the competitive concerns associated with each one of those.

For instance, vertical mergers are usually made in order to increase the overall efficiency since those are operations completed between firms operating at different levels in the value chain. Overall efficiency improves the customer utility but at the same time, this type of merger can also cause competitive concerns and must be closely regulated.

As a matter of fact, a vertical merger may increase the incentive of the vertically integrated firms to raise their rivals' costs by increasing the price or lowering the quality of inputs. In addition, the merged firm can also refuse to supply the rival with the inputs and this is the so-called ''input foreclosure''.

This is just an example of how mergers can be both beneficial or harmful in a competitive environment, in fact, the aim of this second chapter is not only to explain the benefits associated with this very common practice but also trying to understand how the ICA regulates mergers.

Indeed, the scrutiny of mergers usually starts from the analysis of the relevant market, market share and concentration level. These methods are all crucial to have a full overview of not only the competitive environment but also the possible implications that a given operation might have on our economic system. By the way, these methods must be used in conjunction because taken separately they are not enough to have a complete and precise overview of such a delicate matter.

Obviously, tons of mergers are completed every year and for a single Authority it will be impossible to review every single one. That is why, mergers are considered as 'notifiable' if they meet some thresholds. A peculiarity is that these thresholds are updated every single year by an amount equal to the increase of the GDP price deflator index. In Italy, the latest update was made in March 2022.

For what concerns the notification process, in our country, contrary to what has been laid out at the European level, there is no fixed time limit to notify a transaction and the only requirement is that the notification of an operation must be made before its implementation.

Furthermore, corporations have the possibility to submit an informal notification at least 15 days prior to the formal one in order to simplify the overall process, to have an informal dialogue and to receive advice directly from the ICA.

As for the process of evaluation of a notified operation, it is divided in two steps called Phase I and Phase II. In the first Phase the Authority must complete its initial investigation and if it discovers that the notification is incomplete, untrue or inaccurate the notifying parties are required to provide additional documents as required by the Law No. 217 of 1998 Article 5(3). When the additional information is received the Authority may decide if it is the case to start an in-depth investigation in those cases in which it is believed that the transaction should be prohibited and additional scrutiny is required.

When an in-depth investigation is required Phase II starts and a decision must be taken in 45 days whether to prohibit, clear or clear subject to remedies in order to remove competitive concerns. As we will see in depth in the final section of chapter 2 remedies can be both structural and behavioral.

Once the decision is taken, it must be published *''within 20 days in a special bulletin issued by the Prime Minister's office''* as amended by Law No. 287 1990 section 26.

In chapter 3, the merger between Intesa and UBI 'Banca' will be assessed with the aim of putting into practice the concepts developed especially in the second chapter.

In order to do so, the analysis starts from a general overview of the banking sector in the years of the merger in order to have a better understanding of the context in which the merger was actually completed.

Indeed, the Italian banking system was mainly in the hands of the public sector but with the introduction of the Law 'Amato' the initial composition was ripped apart, as a matter of fact, from this moment on every Bank had the possibility to choose its legal form and to merge.

Furthermore, as it will be articulated in the third chapter of this dissertation, the merger between Intesa and UBI raised several concerns especially regarding the post-merger entity due to the fact that the target and the bidder were two of the three main players in the Italian banking industry.

In this respect, it is crucial to first go through the history of both the parties involved, namely the bidder and the target in order to better grasp the rationale that led Intesa to acquire UBI.

As we may guess, the reason behind the offer was mainly related to a diversification of the services offered but also to increase and consolidate the dominant position already achieved in the domestic market. One of the main goals was to reach a dimension that could have given the possibility to Intesa to compete not only at a national level but also and especially outside our borders.

The final part of the third chapter is the one related to the antitrust role in this transaction that is the main focus of this section.

In fact, this dissertation addresses, as the antitrust Authority did, all the steps that the Authority undertook in order to complete an unbiased analysis of the case. Starting from the analysis of the context to the definition of the relevant markets and the consequent computation of both the concentration level and the market share.

This process was not an easy one, as a matter of fact, several were the markets affected by the operation, each of those with different characteristics and thus had to be analyzed in a completely different way. For instance, the market of deposits to households was analyzed taking into consideration a local market due to the limited mobility of the demand side, while, the market of loans to medium and big-sized firms was analyzed by taking into consideration regional markets.

At the end of this assessment, several critical areas were identified in which the concentration level overcomed the critical thresholds. In addition to that, the Authority focused also on the fact if UBI could have been considered as a maverick or in other words a bank that behaves in a disruptive way based on the other competitors. This was not the case but it is important to remark that everything has been properly assessed and nothing was left to chance.

As it will be assessed later on, at the end of the day the operation was cleared subject to remedies. Those remedies were imposed not only to reduce the post-merger concentration but also to give the possibility to another competitor to reach a scale similar to the pre-merger size of the bidder and thus restore as much as possible the competitive equilibrium of the banking industry in our country.

Finally, in chapter 4 the conclusion and personal remarks on the case have been laid out with the aim of trying to explain why, even if this merger was quite complex, it is crucial for our economy and in order to have a final assessment of the role of ICA in this operation.

1. The origins of Antitrust Law in Italy

Antitrust represents the set of legal standards that regulate free competition in a market with the aim of ensuring strong rivalry[5] among firms promoting not only innovation but also an efficient allocation of resources. The first real interest in this matter began to develop after the Second World War, as a result of a period characterized by strong political and economic instability.

By the way, Europe, and as a consequence also Italy, tackled this matter very late with respect to the US[6]. Truth to be told, the first sight of competition law in Europe was no earlier than October 1957 when the Treaty of Rome was signed and sealed. This date must be carefully remembered not only for the establishment of the EEC[7] but also and especially for the introduction of the first articles that restricted and regulated competition in the markets.

Indeed, the aim of the Treaty of Rome was; *''a) to bring together six countries (Belgium, Germany, Italy, France, Luxembourg and netherlands)*[8] *b) to create a common market between those countries based on the free movements of goods, services, people and capital''*[9] (Eur-Lex, 2017).

As a matter of fact, in the Treaty of Rome there are two articles that have laid down the foundations of competition law in Europe, for instance, as it will be analyzed in the next paragraph, the first draft law in Italy proposed by Guido Rossi in 1988 is based on an updated version of the articles published in this Treaty. Those articles are No. 85 and 86.

In fact article No. 85 reports that; *''all the agreements and concerted practices between undertakings which have as their objective the restriction and/or distortion of competition in a market are automatically null and void''*[10] (Treaty of Rome 1957, art.85).

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[5] Competition not only favors consumers because as a matter of fact it will reduce prices but also the economy as a whole because in order to achieve a competitive advantage firms will be more incentivated in making technological progress and differentiate their products.
[6] The US introduced its first Antitrust laws in 1890 with the Sherman Act.
[7] European Economic Commission
[8] *See* Eur-Lex, (14 Mar. 2017) *"Treaty of Rome (EEC)."* EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0023#:~:text=WHAT%20WAS%20THE%20AIM%20OF,and%20economic%20growth%2C%20through%20trade.
[9] Art 2 Treaty of Rome
[10] *See more European Economic Community (EEC) The treaty of Rome. 25 March 1957* Accessed January 16, 2022, from https://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf

The latter, on the other hand, is related to the abuse of dominant position, thus, *''any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States''* (Treaty of Rome 1957, art.86)[11].

The history that led us to the approval of the first antitrust law in 1990 is quite convoluted. In fact, it must be stated that before 1990 in Italy there has been more than some attempts of introducing some anti-competitive laws in order to restrict the possibility that firms could have put in place anticoncurrencial activities but those have been all casted aside. The first one was Giuseppe Togni who proposed to initiate a project of control on the corporations that were active in the market.

The proposal made by Giuseppe Togni was not accepted by the Italian parliamentarians and was thrown away. On top of that, in the '50s the debate regarding the introduction of antitrust laws was quite intense and different parliamentarian parties such as both the liberal and socialist parties required an immediate introduction[12] (Pera, 2010)

Furthermore, those parties believed that the establishment of the first competition laws was the only way to make an effective market restructuring and those could also be considered as an useful instrument in the process of deconcentration of economic power, that till that moment was in the hands of too few enterprises. Moreover, as Ernesto Rossi denounced, the concentration of economic power was considered to be the origin of deviant and sometimes abusive behavior. Additionally, it gave the possibility to exploit monopoly positions especially by those private firms operating in the public services industries such as the telecommunication one. The introduction of competition law was seen as an essential element in a strengthening strategy of public oversight on the markets: *''a sort of cleaning tool of a degraded environment''*[13] (Pera, 2010).

Hence, the debate came to the apex in that period but it has not reached the result that was hoped by those who proposed it. As a matter of fact, these consultations led to a

[11] *id* 10
[12] *See* Antonio Pera. (2010). *Vent'anni dopo: L'introduzione dell'Antitrust in Italia*. 1, 441–466. https://www.gop.it/doc_pubblicazioni/46_h9ghctahtv_ita.pdf
[13] *id* 12

nationalization of several corporations (i.e SADE, Edison, SME) that till that moment were private[14]. In addition, 'this school of thought' that saw the government as the central and the only possible force capable of governing powerful and key markets for the economic growth of our country was actually denying the scope of antitrust laws themselves that preach free and equal competition. Accordingly, neither the state nor private undertakings can benefit from any sort of competitive advantage over their main competitors[15]. (Pera, 2010).

Therefore, in a context where there was a strong preference for public enterprises, and where they enjoyed special privileges, competition law is seen as an essential prerequisite for a liberalization policy that is why private enterprises pushed towards an immediate change but at the same time the public was quite reluctant about the development of the first competition laws. Because of these different perspectives regarding this topic Italy remained behind the other countries that were already well ahead and were already exploiting laws that regulated the competition[16] (Pera, 2010).

By the way, there is another reason that led to a sort of legislative stagnation, in fact, as I have reported, during the years especially between 1950 and 1960 several initiatives took place, with different visions. For instance, the Parliament discussed in 1959 two legislative proposals made by two deputies known as Carcaterra and Foschini, just a few months later Giorgio Amendola proposed a decree related to the monopoly control and again a draft of 'protection of freedom of competition' proposed by the then Minister of Industry Colombo[17] (ICA, n.d.-a).

The various initiatives of those years were based on partly opposing views. As a matter of fact, some were openly aimed at imposing market controls, the others mainly proposed to protect the freedom of economic initiative from possible restrictions. These differences created confusion rather than pushing towards the same direction and can partly explain the failures of the proposals of the fifties and sixties[18] (ICA, n.d.-a).

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[14] Where competition could not have taken place due to a natural confifiguration or in those markets in which the accumulation of power was massive, such as, in the electricity and energetic sector the state should intervene to better govern it.
[15] *id* 12
[16] *id* 12
[17] *See* ICA. (n.d.-a). *La politica della concorrenza in Italia e il ruolo dell'Autorità Garante della Concorrenza e del Mercato.*Accessed January 15, 2022, from https://www.ICA.it/dotcmsDOC/relazioni-annuali/relaz_91.PDF
[18] *id* 17

In addition, *''after the stagnation of the 1960s and 1970s, the proposal for the launch of antitrust rules can be found again for the first time in the 'Statuto dell'Impresa', drawn up by Assonime and Guido Carli's Confindustria in 1978, and presented as the last bastion to reaffirm the reasons of Italian private enterprise. In this document, for the first time in twenty years, there was an official proposal concerning the establishment of antitrust laws similar to those that we have mentioned a few lines above when dealing with the Treaty of Rome"*[19] (Pera, 2010).

Starting in the 80s, especially after the crisis of the public sector, the need to create the conditions for the Italian economy to be comparable with that of other European countries came to light. In 1986, the newly elected Minister of Industry Valerio Zanone elected a commission headed by Franco Romani with the aim of studying which possible regulation could have been introduced to regulate competition. To this governmental initiative corresponded a rebirth of interest for the topic to parliamentarian level[20]. In this context, the opinions of world leaders were heard on the introduction of a law aimed at the protection of competition in Italy (Pera, 2010).

The hearings revealed a clear prevalence of favorable positions, albeit with different shades, to the adoption of legislation on competition[21]. Furthermore, the first draft law in 1988 was proposed by Guido Rossi, his proposal was inspired by the European decree that was already in effect but was renewed by the debate and the opinions that came to light in Italy from the fifties till 1988. Rossi's draft law was actually 'rejected' and was implemented later on by Adolfo Battaglia the then Ministry of Industry. Adolfo Battaglia's decree differs from the previous one with respect to the concentration, in fact, the decree stated that *''concentrations are prohibited if they configured a creation or strengthening of a dominant position such as to substantially reduce or restrict competition over a lasting period of time"* (Pera, 2010)[22]

[19] *id* 12
[20] *id* 12
[21] *id* 12
[22] *id* 12

This led to a process of flourishing regulatory production of mandates that led to the approval in 1990 of laws protecting competition in Italy for the first time. As we have understood Italy introduced antitrust laws relatively late with respect to other countries [23] .

Therefore, the Italian competition authority was set up on the 10th October 1990 a century later than the introduction of the Sherman act in the US. Competition Law in Italy bases its foundations on four main pillars that are: Restrictive agreements, Abuse of dominant position and the creation or reinforcement of a dominant position through the means of a merger and state aid[24]. With the abovementioned decree ICA wanted to protect the freedom of economic initiative[25] proscribing all those behaviors made by corporations competing in an industry that may relevantly affect or restrict competition[26] .

1.1 Law No. 287 of October 10th, 1990

After several years of complete stall, Italy finally introduced its own antitrust law on the 10th October 1990. This is by far one of the most important moments in the history of our country from the economic viewpoint. The introduction of the law n. 287/90, even though happening with delay regarding the evolution of the regulations in other industrial countries, has demonstrated the existence of a renewed interest to establish in the markets rules of conduct binding and especially equal for all types of enterprises[27].

From this moment on, Italy finally has the possibility to dispose of an independent authority that has the power to regulate competition inside its borders. The aim of this decree is obviously to increase competition in every industry in Italy thus, not only to protect the final consumer but also to favor the development and economic growth of the country itself.

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[23] France autorite de la concurrence was created on the 9th August 1953, Germany GWB entered into force on 1st January 1958, The monopolies and restrictive practices commission was set up on 1st January 1949 in the UK.

[24] *See* Siragusa, M., Beretta, M., & Bay, M.(n.d.-a) *Competition Law in Italy- The first 20 years of Law and Practices* (2nd edition). Cleary Gottlieb. https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/other-pdfs/competition-laws-outside-the-united-states.pdf

[25] Art 41 of the Italian Constitution

[26] *id* 8

[27] *See* ICA. (2000, April). 10 anni di Antitrust (No. 1). ICAhttps://www.ICA.it/dotcmsDOC/pubblicazioni/10_anni_Antitrust.pdf

It can easily be proven that competition favors the final consumers because they have the opportunity to buy products at their fair price and quality. At the same time gives the possibility to the undertakings to compete among themselves in order to achieve a competitive advantage by improving day in day out the services and products offered in the market. [28]

The need of having an independent authority that regulates such a complex matter started to rise due to the crisis of the public sector, that till that moment was dominant in almost every industry. In fact, as I have stated in the previous paragraph, the Italian economy was heavily reliant on public investments. Another reason behind the creation of this decree is the increasing need to implement the already existent article 41 of the Italian constitution that *''protects and guarantees the right of free enterprise''.*

This intention is clearly stated in the first article of the Law No.287 of October 10th , 1990: *''the provisions of this Act implementing Article 41 of the Constitution protecting and guaranteeing the right of free enterprise, apply to agreements, abuse of a dominant position and concentrations outside the scope of Articles 65 and/or 66 of the Treaty establishing the European Coal and Steel Community, Articles 85 and/or 86 of the Treaty establishing the European Economic Community (EEC), EEC Regulations or Community acts having an equivalent statutory effect''*[29] (ICA, 1990).

Another important implication has been laid out in section one and it is the relation between the regulations introduced at a national level and at the European one and also the application of European or national rules in different fields.

[28] Competitive advantage may be the result of a low cost strategy, differentiation strategy or focus strategy that can be achieved by increasing the quality or decreasing the price of products with respect to the main competitors. All these factors are necessary in an economy that wants to grow year by year that is why the role of the competition Authority is crucial.

[29] *See* ICA. (1990). *Legge 10 Ottobre 1990, No.287.* ICA. Accessed January 17, 2022, from https://www.agcm.it/chi-siamo/normativa/legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato

A decentralized economic approach which guarantees full freedom of economic initiatives allows the most efficient companies to emerge by responding more adequately to consumer needs. In addition, a competition regime implies that economic operators are also fully responsible for their own actions, ensuring that their behavior will be assessed transparently in order to protect consumers and to create a fair marketplace with equal opportunities for all members of society[30].

Furthermore, what is relevant to the extent of this dissertation are Sections 5-7 related to the topics of concentration and control that will be analyzed deeply in the following chapter. After having briefly analyzed the implication and the relevance of the first competition law introduced in our country, in the next section the dissertation proceeds by scrutinizing which are the main characteristics of the ICA.

1.2 The ICA

The ICA has been established with the Law No.287 October 10th in 1990 having the task of intervening to repress and prevent anticompetitive behavior by corporations that may restrict or affect competition for an extended period of time. Moreover, its headquarters are in Rome and the current president is Roberto Rustichelli who is in charge from the 6th May 2019 for a non-renewable period of seven years. ICA has several powers and, as reported in the Article 21, it has also the role to notify the Parliament and the Government of any distortions *''in order to contribute to a more effective protection of competition and the market''*[31] (Law No.287, 1990 Article 21).

Indeed, *''the Authority shall identify cases of particular relevance in which the provisions of law or regulations or general administrative provisions are creating distortions to competition or to the sound operation of the market which are not justified by the requirements of general interest''*[32] (Law No.287, 1990 Article 21).

[30] *id* 17
[31] Law No.287, 1990 Article 21
[32] *id* 29

Moreover, ICA works also as an 'advisor' for the Government as Law No.287 October 10th in 1990 article 22 reports: '*The Authority may express opinions on draft legislation or regulations and on problems relating to competition and the market whenever it deems this appropriate or whenever requested to do so by the government departments and agencies concerned*'[33] (ICA, 1990).

By the way ICA has also been established to protect the final consumer, in fact, ICA is called to repress any misleading advertising which is distributed by any communication channel: TV, newspapers and so on[34].

In 2007, this power was even extended to protect the consumers from all the unfair commercial activities and several punishments can be utilized by the authority to enforce the Law. For example, if a company tries to influence a consumer's economic decisions by deliberately ignoring relevant information, disseminating false information, or using undue influence, ICA can intervene and impose fines of up to 5 million euros[35] (ICA, n.d.-b).

Without making a detailed analysis it can be stated that there are two other functions that the ICA is responsible for. Even if these powers are not so relevant to the extent of this dissertation in my opinion it is important to state them.

Indeed, as reported by the Law 20 July, 2004 No.215 ICA in the exclusive interest of the general public has the authority and the power to make sure that the president and the ministers do not decide and manage situations where conflict of interest may arise.[36]

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[33] *See* id 31, art. 22
[34] *See* ICA. (n.d.-b.). *Tutela del Consumatore*. ICA. Accessed January 15, 2022, from https://www.ICA.it/competenze/tutela-del-consumatore/
[35] *id* 34
[36] *See* ICA. (n.d.-c). *Conflitto di Interesse*. ICA. Accessed January 15, 2022, from https://www.ICA.it/competenze/conflitto-di-interessi/

Finally, the last activity of ICA is related to the ratings of legality, it is a way to measure the legality of each corporation that requested it[37][38]. This recognition is assigned on a scale that goes from one to three stars and it can be increased over time the more requirements are satisfied[39].

In addition to what has been discussed in the paragraph above, it is crucial to understand the structure of ICA and its functioning.

Indeed, the Authority must operate in complete autonomy and rely on an efficient organizational chart. As a matter of fact, the president must be *''a person of well-know independence who has already held high office with broadly-based institutional responsibilities''*[40] (Law No.287 1990, art. 10).

Notably, the president must be *''appointed for a non-renewable period of seven years and during his appointment he cannot exercise any professional or consultancy activities or acquire directorships or be employee of public or private entities or hold public office of any kind whatsoever''*[41] as the Law No. 287 1990, art 10 section 3 declares (ICA, 1990).

Furthermore, ICA is also composed by other four members that as the President must be ''*a person of well-known independence, and chosen among judges serving on the Supreme Administrative Court ('Council of State'), the Court of Auditors, the Court of Cassation, full professors of Economics or Law or respected business executives of particularly high professional repute*''[42] as Law No. 287 1990, art 10 section 2 declares. (ICA, 1990)

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[37] *See more* at ICA. (n.d.-d). *Rating di legalità*. ICA. Accessed January 15, 2022, from https://www.ICA.it/competenze/rating-di-legalita/

[38] *id* 37 *''Credit rating may be requested by companies (both in individual and corporate form) that cumulatively meet the following requirements: headquarters in Italy; minimum turnover of EUR 2 million in the financial year ending the year preceding the year of demand; entry in the register of undertakings for at least two years at the date of application; compliance with the other substantive requirements of the Regulation''*(ICA, n.d.-d).

[39] *id* 37

[40] *See* Law No. 287 1990, art 10

[41] *id* 29

[42] *id* 29

In addition, Law No. 287 1990, art 11 states that the Authority may recruit at most 50 members to compose a staff and if needed it can also hire experts on a consultation basis on specific matters whenever it is necessary[43]. This feature shows all the requirements that must be respected to establish an organization chart of the authority and it is also evident a high adaptability of the structure to any given situation.

The decision taken by the members of the authority must be reported in a weekly bulletin published directly on their website and an annual report shall be submitted and sent each year before the 31st of March to the President of the Council who shall then forward it to the Parliament. It is always important to publish weekly and annual bulletins to show to those involved with absolute transparency which are the activities of the authority.

In addition, the ICA reinforces its independence thanks to the possibility to auto finance its operations with the funds derived from the grants paid directly by the corporations asking for the authorization from the ICA[44].

[43] *See* Law No. 285, Art 11 Paragraph 4
[44] *See* ICA. (n.d.-e). *Opuscolo Antitrust e Consumatori*. ICA. Accessed January 15, 2022, from https://www.ICA.it/pubblicazioni/altrepubblicazioni

2. Introduction on merger control

The aim of this second chapter is to investigate the role and the importance that merger control plays in our economy trying to preserve the competition process in the markets by carefully analyzing all those mergers that may alter or restrict competition in a given industry.

In fact, mergers and acquisition can cause several structural changes to a market that can be both beneficial or harmful. As we may have understood, all those mergers that restrict competition need to be regulated by the competition authority. The control of concentration is enforced by the ICA pursuant to law No. 287/1990 which has also the power to declare the merger null and void when it is required[45].

As it is reported, *''the goal of competition law is to protect and promote competition. This goal is implemented in two ways: first, by preventing the development of anti-competitive market structures through ex-ante (structural) interventions; and second, by detecting and punishing any ex-post restrictions on competition or market abuse''*[46](Padilla, 2001).

By the way, every year tons of mergers are completed and it would be impossible for the competition authorities around the world to analyze every single one. That is why, the ICA analyzes only those mergers that are considered as 'notifiable' with respect to certain thresholds that are updated and increased every year by an amount equal to the GDP price deflator index.

Moreover, *''mergers are most commonly done to gain market share, reduce costs of operations, expand to new territories and increase profits—all of which should benefit the*

[45] *See* Marasà, E. Giuliano, D. Picciano, I. (n.d.-a). *Merger control 2022: Laws and regulations: Italy: ICLG*. International Comparative Legal Guides International Business Reports. Accessed January 24, 2022, from https://iclg.com/practice-areas/merger-control-laws-and-regulations/italy

[46] *See* Padilla, A. J. (2001, June). *The role of Supply side substitution in the definition of the relevant market in merger control* European Commission. Accessed January 24, 2022, from file:///Users/andreamazzei/Downloads/supply-side_substitution_2682.pdf

firms' shareholders''[47](Hargrave, 2021). In fact, since this is a very common practice there are several types of M&A. The most common ones are vertical, horizontal and the so-called 'conglomerate'.

Vertical mergers are usually completed in order to improve the satisfaction of the final consumer, in fact, this is an operation made by two corporations with different supply chains that join forces for a better production of final goods or services. Most often, the merger is effected to *''increase synergies, gain more control of the supply chain processes that is the reason why not only costs will be lowered but the efficiency and the overall productivity will, as a consequence, increase''*[48] (Kenton, 2021).

In some circumstances, vertical mergers may result in lowering competition by allowing the merged firm to use the control of a key input to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the downstream market or by raising its rivals' costs by increasing the price or lowering the quality of the input[49]. In addition, the merged firm can also refuse to supply rivals with the inputs needed and this is called 'foreclosure'.

Moreover, horizontal mergers are also widely used by corporations and are operations used by undertakings that are direct rivals and compete in the same relevant market. Also this type of merger can cause a restriction to the competition in a market by creating or strengthening a dominant position by the means of a unilateral or coordinated effect.

Unilateral effects occur when, as a result of a merger, competition between the merging firms' products is constrained or completely eradicated, allowing the merged entity to

[47] *See* Hargrave, M. (2021, December 30). *Learn how mergers happen and why*. Investopedia. Accessed January 24, 2022, from https://www.investopedia.com/terms/m/merger.asp#:~:text=Mergers%20are%20most%20commonly%20done,should%20 benefit%20the%20firms'%20 shareholders.

[48] *See* Kenton, W. (2021, September 21). *Vertical merger*. Investopedia. Accessed January 24, 2022, from https://www.investopedia.com/terms/v/verticalmerger.asp

[49] A famous example of a vertical merger is 'Luxottica/Barberini' of 2019.

''unilaterally exercise market power by, for example, raising product prices''[50] (Eur-Lex, 2004).

On the other hand, coordinated effects arise when firms that; ''*previously were not coordinating their behavior are now significantly more likely to do so and raise prices or otherwise harm effective competition. A merger may also allow coordination to be easier, more stable or more effective for firms which were coordinating prior to the merger*''[51] (Eur-Lex, 2004).

Furthermore, a conglomerate, that is an operation between two firms operating not in the same market but in markets that are adjacent and where firms offer complementary services and products, may also cause a restriction to competition in a given market. In addition, a conglomerate may be a pro competitive strategy in some cases due to the ability to combine complementary skills and assets, improving cooperation, and facilitating innovation.

However, there may be some concerns about competition as a result of these mergers. Bundling and tying possibilities, reduced innovation incentives, and coordinated effects are among them[52](OECD, n.d.-a).

Due to the possible implications limiting competition it is important to have an independent authority that regulates these situations in order to preserve competition in the market. That is why the ICA authority carefully scrutinizes mergers that could possibly restrict competition in a market and clear or allow those mergers under certain conditions.

Having said that, we can state that merger control is required to preserve a healthy

[50]*See EUR-Lex*. (2004, February 5). *Guidelines on the assessment of horizontal mergers under the council Regulation on the control of concentrations between undertakings.* EUR-Lex. Accessed April 25, 2022, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0205%2802%29
[51] *id* 50
[52] *See* OECD. (n.d.-a.). *Conglomerate effects of mergers*. OECD. Accessed January 24, 2022, from https://www.oecd.org/competition/conglomerate-effects-of-mergers.htm

competitive process that is the key for markets to deliver lower prices, better quality, variety and innovation in the ultimate interest of consumers.

2.1 The notion of relevant market

The notion of the relevant market is crucial to assess the aftermath of M&A on competition. Indeed, most often the analysis of antitrust cases starts directly from the definition of a relevant market.

Even if it is not explicitly requested by the ICA to find the relevant market it is a useful tool in order to identify which are the boundaries of competition between firms, the applicability of the law[53] but also to identify the ability of an agreement to alter the competition for an extended period of time[54]. Usually, a relevant market can be divided in two different sections, the so-called product and geographic market.

In addition, firms operating in the same relevant market are affected by three competitive constraints: the demand and supply substitutability and the potential competition.

It goes without saying that the product relevant market takes into account both the demand substitutability and the supply-side substitutability. In fact, the demand substitutability represents a set of products that consumers consider as a substitute for the main one. This means that if the price of one good in this product market goes up, customers will switch consumption to the products that have maintained their initial price.

It is crucial to state whether customers have the possibility to move to promptly available substitutes and suppliers located elsewhere*''in order to react to a hypothetical small (ranging from 5% to 10%) but constant relative price increase in the goods and areas under consideration. If the substitution is sufficient to make the price increase unprofitable because*

[53] The law does not apply to cases that are restrictive as their effects outside the national territory nor to those of minor importance related to negligible geographical areas

[54] *See* Bruzzone, G. (n.d.-a). *L'individuazione del Mercato Rilevante nella tutela della concorrenza*. ICA. Accessed January 24, 2022, from https://www.agcm.it/dotcmsDOC/temi-e-problemi/tp001.pdf

of the resulting loss of sales, additional substitutes and areas are included in the relevant market''[55](Eur-Lex, n.d.-a).

Moreover, a quantitative approach to the product relevant market can be found in the Hypothetical Monopolist Test (HMT). Under this approach, *''a relevant product market is defined as the smallest group of products in which a sole profit-maximizing seller (a hypothetical monopolist) would impose and maintain a small but significant and non-transitory price increase (SSNIP) above competitive levels''*[56] (Thomson Reuters Practical Law, n.d.-a).

Furthermore, *''it is important to note that whilst the "Hypothetical Monopolist Test" provides a precise, rigorous and clear-cut theoretical standard to guide a market definition exercise, its exact implementation is typically very difficult''*[57] (Eur-Lex, n.d.-a).

If demand substitutability means that customers can easily switch from one good to another, then supply substitutability means the same thing. In fact, the question in this case is whether other suppliers can quickly switch production to the relevant products and sell them on the relevant market. We want to know if suppliers can switch production to the relevant products not only quickly but also without incurring high switching costs in the supply substitutability category[58] (Eur-Lex, 2021).

To be honest, when defining a relevant market, the third competitive force, referred to as potential competition, is ignored. In fact, as the *Commission notice on the definition of relevant market for the purposes of Community competition law* reports, if this analysis is needed, it is done later and, in general, after the position of the enterprises involved in the relevant market has been determined and when that position raises competitive issues. It is

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[55] *See* Eur-Lex. (n.d.-a). *Commission notice on the definition of relevant market for the purposes of Community competition law*. Eur-Lex. Accessed January 25, 2022, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997Y1209%2801%2

[56] *See* Thomson Reuters Practical Law. (n.d.-a). *Hypothetical Monopolist Test*. Thomson Reuters Practical Law. Accessed January 24, 2022, from https://uk.practicallaw.thomsonreuters.com/7-594-3746?transitionType=Default&contextData=(sc.Default)&firstPage=true#:~:text=The%20hypothetical%20monopolist%20test%20is,define%20a%20relevant%20product%20market.&text=In%20determining%20whether%20a%20SSNIP,See%20Commissioner%20of%20Competition%20v.

[57] *id* 55

[58] *See* Eur-Lex. (2021, October 26). *Summaries of EU legislation*. Eur-Lex. Accessed January 25, 2022, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al26073

usually overlooked when examining a relevant market because the conditions under which potential competition will actually act as a competitive constraint are dependent on the analysis of specific factors and circumstances related to entry conditions[59] (Eur-Lex, n.d.-a).

Furthermore, the relevant geographic market is related to the area within which the firm(s)'s strategy concerning a given product is determined by the competitive interaction with the other players in the market itself, and for which prices and other conditions are significantly independent from those prevailing in other geographic areas.

Generally, a geographic relevant market is defined based on the analysis of the consumer traveling times and it is useful to define local and global markets in which firms compete. For instance, supermarkets compete in a local market so, neither the consumers nor the supermarkets themselves will be affected, if a merger between two shops is completed in another area of the country.

Moreover, '*the objective of defining the relevant market in both its product and geographic dimension is to identify the actual competitors of the undertakings involved and preventing them from behaving in a way which can negatively affect competition*'[60] (Eur-Lex, n.d.-a).

It is also crucial to give a brief analysis of what is the process used by the competition authorities in order to gather evidence and information related to a given relevant market. Usually, both the consumers and the firms are requested to share their views on the boundaries of the product and of the geographical market.

This process is necessary in order to understand what could be the possible reaction of all the agents involved in an industry following an operation of concentration or an increase in prices of goods and to share views and opinions related to the boundaries. For the product market, analyzing just the characteristics of a given product is not enough to show that two products are deemed as substitutes.

[59] *id* 55
[60] *id* 55

That is why evidence of substitutability has always been considered as the degree of quality. As a matter of fact, if the price of one good increases and everything else remains constant consumers will shift consumption to those products that offer the highest quality level at the lowest price[61].

To wrap up, as I said at the beginning of this chapter, the notion of relevant market is the first stage in assessing the potential effect of an M&A operation on competition. By the way, this analysis alone is not enough.

As a matter of fact, when we have defined the relevant market it is also very important to compute the market share and the concentration levels in order to have a full overview not only of the market structure but also of the competitive importance of the parties involved in the operation.

2.2 Market share and concentration levels

In the previous section I underlined the crucial role that a relevant market plays in our economy. By the way, it is not enough to compute it alone. That is why, in order to correctly analyze the competition environment, it is also crucial to estimate not only the market share but also the concentration levels of the merging firms.

It is quite easy to compute the market share and, in case of a merger, the post merger combined market share of the two merging firms is computed based on the assumption that it will be the result of the sum of each pre-merger market share.

High market shares of 50% or more can indicate the existence of a dominant position. Due to other factors such as the number of competitors, their power, the existence of capacity constraints, or the extent to which the merging parties' products are close substitutes, a consolidation involving firms whose post-merger market share will remain below 50% may raise competition concerns[62] (Eur-Lex, 2004).

[61] *id* 58
[62] *id* 50

Thus*, the Commission has considered that concentrations that result in companies with market shares of 40 percent to 50 percent, and in some cases even less than 40 percent, may result in the creation or strengthening of a dominant position*[63](Eur-Lex, 2004).

On the other hand, computing the concentration level in a market provides relevant information with respect to the competition level of a given industry.

To measure the degree of concentration, the Commission often uses the Herfindahl-Hirschman Index (HHI). *''The HHI is computed by summing the squares of the individual market shares of all firms in the market. Moreover, the index gives proportionally more weight to the market shares of the larger firms that is the reason why it is not crucial to introduce also smaller firms since they do not affect in a relevant way the index itself''*[64] (Eur-lex, 2004).

The HHI index is important for determining market concentration levels; an HHI of less than 1,500 indicates a competitive market, 1,500 to 2,500 indicates a moderately concentrated market, and 2,500 or greater indicates a highly concentrated market[65] (Hayes, 2022).

To sum up, both the market share and the concentration level are necessary and crucial measures to have a first indication of the market structure, competition and all the economic agents involved.

2.3 Transactions covered and exceptions

The Law No. 287 of 1990 sets out the merger control rules for our country and especially the articles 5 and 7 are very important in order to understand which are the transactions covered and the exceptions laid out by our national regulation.

It goes without saying that all the operations reviewed by the national authority are those transactions that have met some thresholds that I will explain in detail in the next section of this second chapter.

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[63] *id* 50
[64] *id* 50
[65] *See* Hayes, A. (2022, January 21). *Herfindahl-Hirschman Index (HHI)*. Investopedia. Accessed January 25, 2022, from https://www.investopedia.com/terms/h/hhi.asp

As a matter of fact, article 5(1) states all the different situations in which a concentration is deemed to arise such as when:

a) two or more undertakings merge;

b) one or more persons controlling at least one undertaking or one or more undertakings, acquire the direct or indirect control of the whole or parts of one or more undertakings, whether through the acquisition of shares or assets, or by contract or by any other means;

c) two or more undertakings create a joint venture by setting up a new company[66].

That is why a merger between two independent corporations falls in the cluster of transactions that must be reviewed by the Italian Competition Authority (ICA). Furthermore, a merger can occur when one business *''is absorbed by another, with the latter retaining its legal identity while the former ceases to exist''*[67] (Siragusa, et.al, n.d.-a).

Furthermore, acquisition of control represents the most common type of transactions reviewed by the Italian Competition Authority. It is very important to understand the notion of control. In fact, control means that one corporation or more than one corporation has the power to influence the decision making process of other undertakings.

The ICA sets forth the notion of control of Law No.287/1990 article 7 completely in accordance with the definition laid out also at European Level in Article 3 of merger regulation.

Indeed, article 7 states that ''*control is acquired in the cases provided by Article 2359 of the Civil Code, and by the holding of rights, contracts or other legal relations which, separately or in combination, and having regard for the considerations of fact and law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by*:

[66] Law 287 1990, art. 5(1)
[67] *id* 24

a) the ownership or right of use over all or part of the assets of an undertaking;

b) rights, contracts or other legal relations which confer a decisive influence over the composition, resolutions or decisions of the board of an undertaking.

Control is acquired by persons or undertakings or groups of persons or undertakings which:

a) are holders of the rights or beneficiaries under the contracts or are parties to the other legal relations;

b) while not being holders of the rights or beneficiaries under the contracts or parties to such legal relations, have the power to exercise the rights deriving therefrom"[68] (Law No.287 1990, art. 7).

In fact, this section states that control may have different shapes, in the first part it states that control is acquired when an agent has the capacity to influence the decision taken by an undertaking through the means of a right of ownership or also by having the right to influence the decision to be taken by the board of a corporation.

As we have understood the notion of control is quite convoluted since it takes into account a broad range of activities. This is the reason why control is one of the most common types of concentration scrutinized by the ICA.

The third operation that may be classified as a concentration is the so called concentrative joint venture. Usually a joint venture is an agreement between two or more companies to put together all their resources both tangible and intangible in order to accomplish a specific goal. There are several reasons for which businesses use joint ventures quite extensively, for instance this operation may lead to a cost reduction, leverage resources and, as I have said a few lines above , to combine resources and expertise.

[68] Law 287 1990, art. 7

On top of that a joint venture will be reviewed by the authority and is considered as a concentration when the following three criteria are all met:

a) It is jointly controlled by two or more parent companies, which can block any proposed strategic decision;

b) It is full-function, that is, it performs all the functions of an autonomous economic entity on a long-term basis, and has all economic, financial and personnel capabilities necessary to act as an independent entity in the market;

c) Its main object or effect is not the coordination of the behavior of its parent companies (for example, if the parent companies are not active in the market of the joint venture or transfer to the joint venture all their activities in this market or if only one parent company remains active in the joint venture's market)[69](Valentino, et al, 2021).

The above mentioned are all those types of operations that may qualify as concentration if some specific thresholds are met but there are also some exceptions that need to be considered.

The exceptions are clearly stated in the Law No.287 1990 art. 5(2) and (3) as follows: ‘’*acquisition of shares by credit or other financial institutions, solely for resale, in companies undergoing incorporation; or, when the share capital of a company is increased on condition that the acquiring institutions do not exercise any voting rights tied to the shares acquired, and dispose of them within 24 months*’’ (Valentino, et al, 2021)[70].

This is the first exception of operations that do not fall under the requirements of merger control but another special case is reported in art. 5(3) and is the following: ‘’*operations which have as their main object or effect the coordination of the actions of independent undertakings*’’.

[69] *See* Valentino, S., & Ciccioli, G. (2021, February 1). *Merger control in Italy: Overview | practical law*. Thomson Reuters Practical Law. Accessed January 25, 2022, from https://uk.practicallaw.thomsonreuters.com/w-023-1862?contextData=%28sc.Default%29

[70] *id* 69

If a joint venture is said to be cooperative in nature, meaning that there is a coordination between the companies, then the transaction must be evaluated in accordance with Article 101 of the TFEU (Treaty on the Functioning of the European Union) or the analogous Italian Law provision, namely article 2 of competition Act[71] (Valentino, et al, 2021).

The aim of this section was just to report the type of transactions that are regulated by the ICA. As I have said, those operations need to meet certain thresholds in order to be deemed as concentration, that is the reason why, in the next section of this chapter I will dig into those thresholds in order to have a complete overview of the characteristics that an operation must have in order to be subject to the control of the competition Authority.

2.4 Thresholds in Merger control

As I have mentioned in the previous paragraph, in order to fall in the subject of merger control the operation must meet certain thresholds that are described in Law No.287 1990 art. 16(1).

It is important to underline that these thresholds are adjusted and fixed each year in line with the evolution of the markets and taking into account the GDP price deflator index.

The latest update has been made in March 2022 and affirms that when the following conditions are fulfilled prior notification of all mergers is mandatory. The above mentioned conditions are: *‘’aggregate turnover in Italy of all undertakings concerned above € 517 million and individual aggregate turnover in Italy of at least two of the parties of the transaction above € 31 million’’*[72] (Campagnano, 2022).

The so-called "undertakings concerned" are all those enterprises whose final turnover is being merged as a direct outcome of the concentration. They include the entity acquiring control and the target. Since control can be exercised jointly, the acquiring side may have more than one undertaking involved.

[71] *id* 69
[72] *See* Campagnano, M. (21 March 2022). ‘ *’New turnover thresholds for merger control in Italy”.* Dentons. https://www.dentons.com/en/insights/alerts/2022/march/25/new-turnover-thresholds-for-merger-control-in-italy

In addition, the aggregate turnover represents the overall value of the sum of the firms involved in the operation, it is not computed for each firm alone and it includes the overall revenue accomplished in our country throughout the financial year before the filing.

As Law No.287 1990 art. 16(2) reports, the threshold for the financial institutions shall be equal to *''one-tenth of their total assets with the exclusion of memorandum accounts and, in the case of insurance companies, to the value of premiums collected''*.

2.5 Notification and Procedure

When an operation meets the above mentioned thresholds then it must be notified to ICA and there are no exceptions to this rule. Even though, in contrast with EU competition law, there is no fixed time limit to notify a transaction, there are strict procedures that must be carefully respected.

However, a notification must be filed before the concentration is implemented, namely, *''before the buyer acquires the ability to exercise substantial influence on the behavior of the target''*[73] (Valentino, et al, 2021).

In this respect, the ICA clarifies the following: *''in case of a merger, the notification must be filed before the merger contract is executed; in case of an acquisition of control of a company by means of purchase of equities or shares in a company, the requirement of prior notification is fulfilled if implementation of the contract is made conditional upon the ICA's advance approval; in case of a JV, the notification must be filed before registering its articles of association in the Company Register''*[74] (Valentino, et al, 2021).

On top of that, it is also crucial to state that, before the formal notification, corporation may benefit from a service, granting them the possibility to submit *''an informal communication to the ICA at least 15 days before the formal notification''*[75] (Law

[73] *id* 69
[74] *id* 69
[75] *See* ICA. (n.d.-f). Notice on certain procedural aspects regarding mergers/acquisitions pursuant to law No. 287 of 10 October 1990. ICA. Accessed January 25, 2022, from https://en.agcm.it/dotcmsDOC/competition/NoticeMA_27122010_.pdf

No.287/1990 art. 16(6)). This is a way to create an informal dialogue with the Authority with the aim of receiving advice and simplifying the proceedings before the formal notification[76].

Furthermore, as I have already stated in the first chapter, when analyzing the ICA, one of the powers that the Italian Competition Authority has is the possibility to work closely with the Prime minister. That is why, even if we are dealing with the notification procedure, in art 16(3) it is stated that immediately after[77] having received the notification of a concentration the ICA must notify not only the Prime Minister but also the Minister of Trade and Industry.

This shows that, even if the ICA is completely independent, it also has the capacity, when needed, to join forces with other persons of high responsibility in order to better govern these critical issues.

As for the procedure of evaluation, the Italian Competition Authority has some strict deadlines to evaluate the notified concentration that can be differentiated in a two step process.

The first part of this process is known as "Phase I'' and represents the first deadline that the ICA encounters when it is notified of a given concentration. In the first 30 days after having received the notice *''the Authority must complete its initial investigation and if it discovers that the notification is incomplete, untrue or inaccurate the notifying parties are required to provide additional documents"* as required by the Law No. 217 of 1998 Article 5(3)[78] .

Since the 30 days starts when the additional information is received, this power is often used by the Authority in order to have more time to scrutinize those cases that are more complex and require tons of information.

A peculiarity is that this additional information can be provided by both the merging firms but also from third parties such as customers or even competitors.

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[76] *id* 75 *''When a corporation submits this informal notification it should preferably provide the following information: the identity of the parties to the acquisition or merger; a short description of the acquisition or merger procedures; an indication of the relevant markets; the shares of the parties on these markets; whether or not the operation must be notified to the authorities in any other country"* (ICA. n.d.-f).
[77] At most 5 days later
[78] *id* 69

Then, at the end of Phase I, the ICA shall take a decision whether to clear the proposed transaction in those cases in which the Authority finds that it does not raise any competitive concern. On the other hand, ICA may also decide to open an in-depth investigation in those cases in which it is believed that the transaction should be prohibited and additional scrutiny is required.

If the ICA decides to adopt an in-depth analysis the so-called Phase II commences and a final decision must be taken within 45 days. *''The period can be extended by an additional 30 days whenever the parties fail to supply information and data that are requested. When opening an in-depth investigation, the Competition Authority may simultaneously order the undertakings concerned not to proceed with the concentration until the investigation is concluded"*[79] (Siragusa, et.al, n.d.-a)

An important difference between Phase I and Phase II can be found in the protection that the parties receive. In fact, the parties have the right to: *''(i) be heard by the competent Competition Authority's officials within the time limit indicated in the decision to open a Phase II investigation; (ii) obtain a final oral hearing before the Competition Authority's Board shortly before the end of the investigation; (iii) submit documents and memoranda; and (iv) access the Competition Authority's file"*[8081] (Siragusa, et.al, n.d.-a).

At the end of Phase II, the ICA shall take a decision with respect to what has been laid out in article 18 of competition law. The ICA can either prohibit the transaction if it falls within the scope of article 6[82] or can also unconditionally clear the transaction if the undertakings are able to demonstrate that *" any aspects of the concentration deemed likely to distort competition as originally planned have since been removed"* (Law No.287 1990, art.18 (1)).

[79] *id* 24
[80] *id* 24
[81] Competition Law Section 14(1)
[82] Law No.287 1990, art. 18 (1)

Furthermore, Law No.287/1990 art.18 (3) states that: *''if the concentration has already taken place, the Authority may require measures to be taken in order to restore conditions of effective competition, and remove any effects that distort it''*[83].

Once the decision is taken, it must be published within 20 days in a special bulletin issued by the Prime Minister's office as amended by Law No. 287/1990 art. 26.

2.6 Substantive Test and Counterfactual analysis

The ICA utilizes two tests in order to assess the possible effects of a given operation on the competitiveness of a market. The first one is the so-called substantive test and is widely used at a European level, while the second one is known as Counterfactual analysis and it is mainly used at a national level.

As Law No.287/1990 article 6(1) underlines, *''concentrations should be cleared unless the investigation proves that the concentration creates or strengthen a domestic position on the domestic market with the effect of eliminating or restricting competition on a lasting basis''*[84].

The main concept that must be understood is the notion of dominance that is usually defined as the power to behave independently of competitors, suppliers or customers. The Competition Authority attempts to predict *''the likelihood that a given concentration will translate into higher prices or diminished output to the detriment of consumers, or to the detriment of competitors, when determining whether a transaction will create or strengthen a dominant position.competitors''*[85] (Siragusa, et.al, n.d.-a).

The second test that the ICA applies to assess the impact of a merger on competition is the counterfactual analysis. This test compares the conditions of competition that would have gained ground in the case in which the notified merger would have taken place with the conditions that might have prevailed in the absence of the merger itself.

[83] *id* 82, art. 18 (3)
[84] *id* 82, art.6 (1)
[85] *id* 24

In any case, it may be necessary to consider future market changes that can be predicted in certain circumstances. If the merger does not go through, the analysis may need to factor in the likelihood of firms entering and exiting the market[86].

2.7 Remedies, Penalties and Appeal

In some cases the Competition Authority has the possibility to clear a transaction subject to remedies or commitments in order to remove the competition concerns.

In addition, it must also be noted that the ICA has the power to impose such remedies without the need to receive the consent from the notifying parties.

Furthermore, for the competition Authority it is also crucial to assess whether a remedy will restore effective competition by taking into account the scale, type and the scope of the remedy proposed to the merging parties. Moreover, there are two different types of remedies that can be imposed and can be structural or behavioral.

Structural remedies are the most effective because they represent tangible operations such as the sale of assets of a business or part of it or placing a cap on the number of businesses that can be owned by the corporation.

On the other hand, behavioral remedies are least effective because they are just related to a change in behavior of the merging parties. Since they are only related to imposed ‘’limitations’’, it is difficult to assess the likelihood of success of these measures. By the way, examples of behavioral remedies can be: an obligation to grant competitors access to infrastructure, limiting voting rights and termination of exclusive distribution[87](Valentino, et al., 2021).

Additionally, the ICA can also impose penalties for a failure to intentionally or negligently notify a concentration. Penalties may be up to 1% of the total value of the undertaking worldwide in the preceding fiscal year[88].

[86] *id* 50
[87] *id* 69
[88] *id* 69

Penalties in the same way as the final decision must be published in the public bulletin in compliance with the approval of the merging parties.

Moreover, failure to comply with the measures imposed by the ICA may result in fines and penalties, as a matter of fact, failing to comply with the measures established by the competition Authority may result in fines ranging from 1 to 10% of the total turnover realized by the parties in the relevant market[89] (Valentino, et al, 2021).

Corporations are also granted the right of appeal if they believe that the remedies or penalties imposed by the competition Authority are too harsh. In fact, the right of appeal is always granted in case of *a) a decision prohibiting a concentration, b) in a decision authorizing a concentration but subject to certain remedies or, c) for all those decisions imposing fines*[90] (Valentino, et al, 2021).

By the way, there is a specific procedure for exercising the right of appeal; for example, an appeal for the annulment of the ICA's decision must be filed within 60 days of notification, and the appeal decision must be made before the Regional Administrative Tribunal for Lazio in Rome. Third parties can also use the right of appeal if they can demonstrate that they are directly affected by an ICA decision[91](Valentino, et al, 2021).

[89] *id* 69
[90] *id* 69
[91] *id* 69

3. Overview of the Italian banking sector

In the previous chapters, I have analyzed the history of Antitrust and the role of merger control in our economy while in this chapter I will deal with one of the biggest and more relevant mergers that have recently occurred inside our borders. By the way, before going ahead with the analysis of the case itself, it is important to understand the composition of the banking sector in Italy in order to better underline the reasons why this merger is considered crucial and raises concerns.

As I have already stated in the first chapter of this dissertation, the banking industry at the beginning was mainly in the hands of the public sector but a revolution occurred with the introduction of decree No. 218/1990 also known as Law 'Amato' in honor of Giuliano Amato that was its promoter[92].

This decree led to a privatization of the banking sector that until that moment was composed by the Public Law credit institutions[93] and banks that were under public control. Truth to be told, this decree was introduced mainly to keep pace with what was happening at the European level. As a matter of fact, Italy was accumulating a delay with respect to the other main countries in Europe. This is something that we have already seen when dealing with the introduction of the first Antitrust regulations which have been introduced in Italy with culpable delay.

The abovementioned decree is crucial, in fact, it gave the possibility to the banks to choose their legal forms and the most widely used was the Joint Stock Company. This not only led to a remodeling of the banking sector but also gave the possibility to the banks to start the first M&A operations.

[92] *See* Pacifici, Clarissa. (11 Feb. 2021). *"Il Processo Di Privatizzazione Del Sistema Bancario Italiano e La Nascita Delle Fondazioni Bancarie."* Filodritto, https://www.filodiritto.com/il-processo-di-privatizzazione-del-sistema-bancario-italiano-e-la-nascita-delle-fondazioni-bancarie.

[93] i.e Bank of Naples, Bank of Sicily and the National Bank of labor.

An example of this new trend can be found in the process of concentration that led to the creation of Unicredit in 1998 which was finalized in 2007 with the merger between Unicredit and Capitalia[94].

In addition, as the article published by the Bocconi's students reports, *''the Italian banking sector, at the beginning of 2000, was characterized by a large number of small and highly skilled banks. In fact, the consolidation process, which began at the end of the 1990s, affected almost half of the Italian banking system leading to a big reduction in the number of operating banks. In the time frame between 1993 and 2014, indeed, the number of operating banks noted a reduction of 35% starting from 1037 and getting to 672''*[95] (Bsmac, 2020).

Furthermore, the Italian banking sector is undergoing restructuring and consolidation, which is influenced *''by the changing regulatory environment and the digital revolution''*[96](Saravia, 2020). The number of active players in the banking industry was 110 at the end of 2020, continuing the trend highlighted a few lines above[97] (Amici, 2021).

Due to the economic crisis and the willingness to create banks able to compete at the European level, several operations of consolidations occurred in the past decade. The merger between Intesa and UBI is just the icing on the cake but there have been several others such as the abovementioned merger between Unicredit and Capitalia or also the one between Monte dei paschi di Siena and Banca Toscana.

Indeed, today the key players and the biggest banks in Italy are Intesa Sanpaolo, Unicredit, Banco BPM, BPER and Monte dei Paschi di Siena[98] that are all banks that

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[94] *See more Zotti, Johnny.* (31 July 2020) *"UniCredit: Storia, Nascita e Sviluppo Del Gruppo Bancario." Investire.biz, Investire.biz, https://investire.biz/articoli/analisi-previsioni-ricerche/azioni/unicredit-storia-nascita-e-sviluppo-del-gruppo-bancario.*

[95] *See* Bsmac.(27 Oct. 2020), "*Intesa Finds Agreement to Acquire UBI to Create the Largest Italian Banking Group."* Bocconi Students M&A Circle, https://bsmac.org/2020/10/27/intesa-finds-agreement-to-acquire-ubi-to-create-the-largest-italian-banking-group/.

[96] *See* Saravia, Francisco.(31 Dec. 2020), "*Banking in Europe: EBF Facts & Figures 2020*." European Banking Federation, EBF, https://www.ebf.eu/wp-content/uploads/2020/11/EBF_043537-Banking-in-Europe-EBF-Facts-and-Figures-2020.pdf.

[97] *See* Amici, Alessandra. (13 Dec. 2021), "*Italy's Banking sector: Facts & Figures*.", EBF, https://www.ebf.eu/italy/.

[98] *See* Tuttitalia. (17 Jan. 2022). "*Tutte Le Banche in Italia per Numero Di Succursali."* Tuttitalia.it, https://www.tuttitalia.it/banche/classifica/.

underwent operations of consolidations. By the way, the banking industry is very dynamic and this composition may change in the next few years, as a matter of fact, in these days it was possible to read in the newspapers that Unicredit made an offer in order to acquire Banco BPM.

The aim of this section was just to give an overview of the context in which the Intesa Sanpaolo merger has been completed in order to better understand the economic rationale behind the offer made by Intesa. I would like to start the analysis of the case by deepening our knowledge of the main parties involved. This is the reason why in the next section I will analyze the convoluted and fascinating history of the Offeror.

3.1 The bidder: Intesa Sanpaolo

The history that led to the creation of Intesa Sanpaolo is quite convoluted and is based on several Mergers and acquisitions, as a matter of fact, the creation was on the 1st January 2007 thanks to the union of Banca Intesa and Sanpaolo IMI. By the way, this is only the last stage that led to the final creation of the bank but it is important to take a step back and underline the history of both Banca Intesa and Sanpaolo IMI.

Figure 1: The history of Intesa Sanpaolo

Source: Intesa Sanpaolo Official website.

As the graph reports, Banca Intesa was founded in 1988 after the union of 'Banco Ambrosiano Veneto' and 'Cariplo' and the following introduction of 'Banca Commerciale

Italiana' a few years later. Following the merger of Comit and Banca Intesa in May 2001, the Group was renamed Intesabci.

The shareholders' meeting in December 2002 decided to change the company's name to Banca Intesa, effective January 1, 2003[99] (Intesa Sanpaolo, 2021). On the other hand, Sanpaolo IMI was founded in 1998 thanks to the merger of Istituto Bancario San Paolo di Torino and IMI ("Istituto Mobiliare Italiano''). (Intesa Sanpaolo, 2021).

Finally, on the 28th December 2006, Banca Intesa and Gruppo Sanpaolo IMI merged together with consequent legal effects from 1st January 2007.

Truth to be told, the bank continued to grow in the following years by completing the acquisitions of other banks all over the country and the major acquisitions were the 'Banca di Napoli', 'Banca dell Adriatico and 'Banche Venete' and many others. These acquisitions gave the possibility to have a homogeneous distribution all over Italy, to increase the customer base, and especially to differentiate its business.

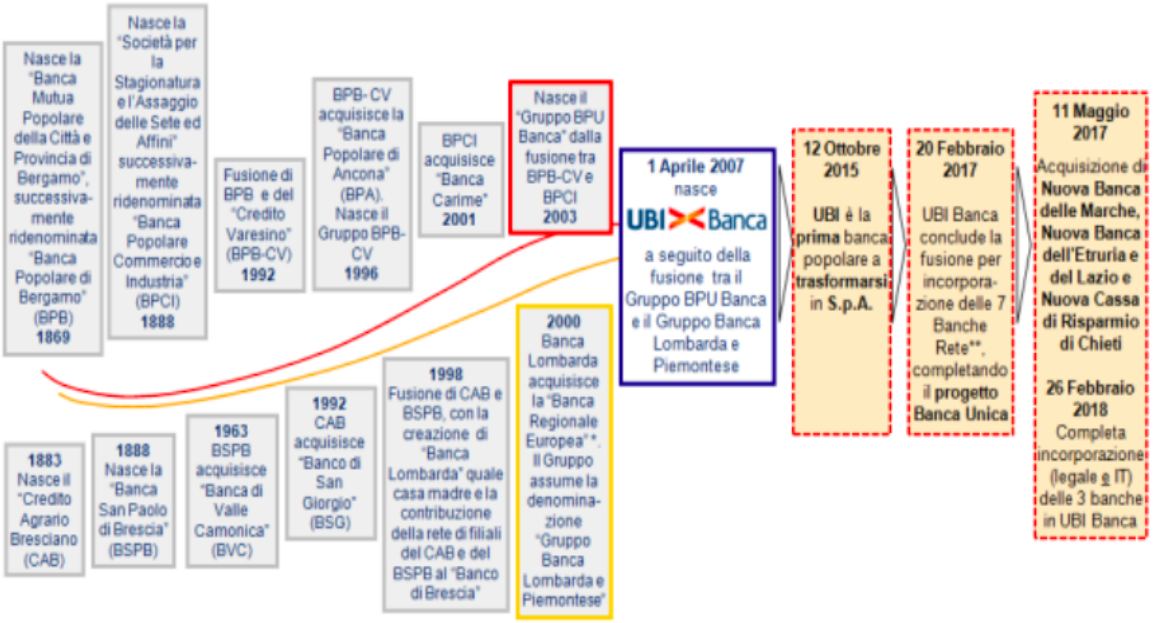
3.2 The target: 'UBI Banca'

The name UBI is quite fascinating, in fact, it stems from the Latin meaning 'everywhere' but at the same time it also means 'Unione di Banche Italiane'. As we can see from figure 2, retrieved directly from the official site of Intesa Sanpaolo, the bank was officially founded on the 1st April 2007 from the merger between 'BPU Banca' and the 'Gruppo Banca Lombarda e Piemontese'.

Also, the history of 'UBI Banca is quite complex and derives from several acquisitions made through the years starting with the creation in 1869 of the so-called 'Banca Popolare di Bergamo' and a few years later in 1883 with the establishment of 'Credito Agrario Bresciano' as the following chart reports.

[99] *See* Intesa Sanpaolo.(3 Dec. 2021), "Storia." *Intesa Sanpaolo Group*, https://group.intesasanpaolo.com/it/chi-siamo/storia.

Figure 2: The history of 'UBI Banca'



Source: Intesa Sanpaolo official website

Besides all the different acquisitions made throughout the years, it is important to remark that on the 12th of October 2015 UBI became the first Joint Stock Company in Italy and it is also included in the FTSE MIB index.

The fact that Intesa was distributed all over the country, the history of both banks and the fact that UBI was already a Joint Stock Company make the merger between those two corporations quite delicate and that is why starting from the next section I will carefully analyze each step of this merger.

3.3 Reasons for the offer

The deal completed by Intesa for more than 4 billion makes it one of the European biggest banking mergers in a decade[100](Za, et.al, 2020). Several were the aims that led to these offers from Intesa such as the possibility to increase by more or less 3 million its customer base, increasing in profit but also and especially enlarging its capillarity in our country.

[100] *See* Za, Valentina, and Gianluca Semeraro. (*28 July 2020*). "*Intesa Secures Full Control in Takeover Battle for Ubi.*" Reuters, https://www.reuters.com/article/us-ubi-m-a-intesa-sanpaolo-idUKKCN24T0PI.

In fact, the interest of the offeror was to reach a dimension enabling it to compete independently and to play a proactive role in the European banking scenario. In addition, the Offeror also believes that the achievement of the dimensional growth should take place through a transaction entailing the aggregation with another operator that has, as far as possible, similarities to the Offeror itself, so as to minimize execution risks and generate value for all the stakeholders, which is the ultimate purpose of a major player in the sector[101] (Intesa Sanpaolo, 2020).

Furthermore, as the official report made by intesa reports, Intesa believed and granted to UBI that by accepting the offer they could have the possibility to exploit the capabilities of both groups by creating a reality capable of:

a) strengthening the stakeholders of the two groups, including the Italian component, on the European banking scene

b) creating value for the shareholders through the distribution of dividend flows that are sustainable over time also by means of the synergies deriving from the aggregation and estimated fully operational in approximately Euro 730 million before tax per year

c) enhancing the value of the Issuer's corporate representatives so as to provide reputation and prestige

d) integrating the Issuer's top management into the first lines of management of a leading company in Italy and of European dimensions

e) offering the Issuer's corporate resources the opportunity to grow professionally in the new group

f) generating consolidated profits higher than Euro 6 million from 2022[102]

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[101] *See* Intesa Sanpaolo,(17 Feb. 2020),*"Voluntary Public Exchange Offer launched by Intesa Sanpaolo S.P.A on all of the ordinary shares of Unione di Banche Italiane S.P.A.*." Intesa Sanpaolo, https://morrowsodali-transactions.com/attachments/1587984588-Notice%20pursuant%20to%20Article%20102%20IFA.pdfAccessed 8 Feb. 2022.

[102] *id* 101

In my opinion, it is not only important to analyze the reason for the offer, as they have been directly published by Intesa Sanpaolo, but it is crucial to understand the reason why the offeror decided to target 'UBI Banca. As I have reported in the first part of this chapter, in Italy and Europe a trend of consolidation was in effect but several key players were still present in the market. So, why have Intesa targeted UBI?

The main reasons for this acquisition are rooted in the fact that UBI Banca shares many of the same characteristics as the offeror. Indeed, the business model, market positioning, and territorial coverage of both companies are very similar, as is the set of values shared by the management, the strong commitment to supporting the Italian economy and achieving sustainable and inclusive growth, and the significant presence of Italian stakeholders[103] (Intesa Sanpaolo, 2020).

In addition, in the opinion of the offeror, even if UBI Banca was the third main operator in the Italian banking system it was not capable of operating in a context that is changing and evolving frequently, and especially UBI alone was not able to compete at an international level.

Furthermore, the acceptance of the offer from the target will result in the creation of value not only for the shareholders but also for all the stakeholders' groups involved by achieving both industrial and financial goals.

Indeed, the main industrial aspect is related to *''an increase in critical mass and the simultaneous achievement of geographical markets that previously were less served in order to achieve significant cost synergies thanks to the economy of scale and the ability to operate efficiently''*[104] (Intesa Sanpaolo, 2020).

This goal is what actually has also raised concerns. As a matter of fact, the post-merger distribution was all over Italy increasing the discussion whether this operation may lead to a restriction of competition.

[103] *id* 101
[104] *id* 101

Figure 3: Post-merger distribution of Intesa Sanpaolo

Source: ICA Press release 14th July 2020

As the figure above reports, the consolidation gave the possibility to have a homogeneous distribution of about 50% of all the municipalities with banks[105].

On the other hand, the financial goals were related to the so-called revenue synergies that, based on the analysis made by the parties, could have led to a profit of around 220 million euros stemming from an increase per customer productivity and the efficiency gained by the melting of both product factories in different business segments.

In these two sections, I have analyzed the main reasons that have incentivized Intesa to complete and proceed with the acquisition of UBI not only from the financial point of view but also by considering the shared values of the two firms and also the industrial effects that may result by the end of the merger.

Now we are ready to proceed with the analysis of the offer itself.

3.4 Key elements of the offer

Before the analysis of the key details of the offer, it is crucial to understand the type of offer we are dealing with. As a matter of fact, Intesa proposed the so-called voluntary public exchange offer on all the shares of 'UBI Banca *''launched pursuant to articles 102 and 106,*

[105] *See* ICA decision, para. 51

paragraph 4, of the Italian Consolidated Financial Act and the relevant implementing provisions set forth in the Issuers' Regulation"[106] (ICA decision, Paragraph. 9).

Indeed, it is relevant to state that there are some differences between two very similar practices such as the so-called voluntary public exchange offer and the voluntary public acquisition offer.

The first one concerns the exchange of shares so that the acquisition is not completed through the means of capital but rather with the acquisition of a certain number of shares.

On the other hand, when we are dealing with a voluntary public acquisition offer, it is important to bear in mind that the acquisition will be made solely through the capital.

That is the reason why the offer concerns; *''no. 1,143,425,545 ordinary shares of the issuer listed on the 'Mercato Telematico Azionario' organized and managed by Borsa Italiana S.p.A"*[107]. (Intesa Sanpaolo, 2020).

This amount of shares represented the whole amount of shares held by the target at the date of the transaction and *it must be freely transferred to the Offeror free from restrictions and encumbrances of any kind and nature*[108]. (Intesa Sanpaolo, 2020).

If the previous conditions are satisfied, then the Offeror will pay each share of the Issuer at a premium *''based on the official price per ordinary shares at the date of the transaction"* as reported by the following figure:

[106] *See* ICA decision, para. 9
[107] *id* 101
[108] *id* 101

Figure 4: Consideration of the offer

Reference Date	Weighted average price per Issuer's Share	Premium
14 February 2020	3.333	+27.6%
1 month prior to 14 February 2020 (included)	2.968	+35.7%
3 months prior to 14 February 2020 (included)	2.939	+36.0%
6 months prior to 14 February 2020 (included)	2.743	+38.6%

Source: Official Intesa Sanpaolo press release 17th February 2020

As the official press release of Intesa reports; *''based on the official price of the Offeror ordinary shares recorded at the closure of the last open market trading day, i.e. 14 February 2020 (equal to Euro 2.502), the maximum aggregate amount of the offer, in case of total acceptance of the same, will be equal to Euro 4,864,132,268.43, such amount being equal to the evaluation "in cash" of the consideration (i.e. Euro 4.254 per Share)"* (Intesa Sanpaolo, 2020)[109].

Since UBI was not aware of the interest by Intesa Sanpaolo, at the beginning they rejected the bid claiming that it could have been harmful to the shareholders.

In addition, the chairman of UBI also believed that the transaction was too complex especially in a period of high uncertainty such as the early stages of the pandemic. These were the reasons why the bid was considered 'hostile' at a first glance.

On 6 March 2020, ISP filed with CONSOB the document containing the offer in which 1.7 shares must be issued for each share of UBI Banca[110]. The acceptance by CONSOB arrived with delay due to the spike of the pandemic in Italy.

[109] *id* 101
[110] *See ICA. (14 July 2020). "C12287 - Intesa Sanpaolo/Ubi-Unione Di Banche Italiane." ICA, https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/FC2C77E58EDE066BC12585AB004E7900/$File/p28289.pdf*

Due to the delay of the acceptance and the reluctance shown by UBI, Intesa decided to hold an extraordinary meeting in which they agreed to increase the capital in order to complete the merger with 'UBI Banca'. The new offer was considered to be an exchange of both shares and capital (OPAS) in which each share of the target was valued at 0,57 Euros and the premium was increased to 44,7%.

In addition, as the ICA reports, the offer was subject to certain conditions such as[111]:

a) obtaining unconditional authorization from the Authority;

(b) the acquisition by ISP of a share of at least 50% plus one share of the share capital of UBI;

(c) the non-adoption by the organs of UBI of acts from which significant variations in the capital or economic situation of UBI;

d) the abstention of UBI from completion of acts or operations that may conflict with the objectives OPS;

(e) the absence of extraordinary circumstances or occurrences involving significant negative changes in the political and financial situation, which are economic or market-related and have an adverse effect on OPS[112].

At that moment it was irrational to reject this offer and this is the reason why UBI decided to accept the bid and the deal was cleared subject to remedies as we will see more in detail in the next section.

In this section, I have analyzed the composition of the offer made by ISP starting from the type of operations by claiming its peculiarity but also by going through the evaluation that has been made by both parties when the offer was presented. In the next section, I will dig

[111] *See* ICA decision, para. 10
[112] *id* 110

into the main findings and into the role of the Italian Competition Authority in such a complex and delicate merger.

3.5 Preliminary findings of the antitrust Authority

During this dissertation, I went through the analysis of the role of the Competition Authority explaining the different proceedings that it utilizes to fully and correctly evaluate a given merger.

It's time to put those theoretical notions into practice and see what the role played by the Italian Competition Authority in the evaluation of what was probably one of the most complex mergers of the last decade was.

In fact, as we have understood, the first step in assessing a merger is to start by identifying the relevant markets in which a merger may directly affect competition, restricting it and thus harming the final consumer. That is why to better identify those relevant markets the ICA started by analyzing generally what was at the time the banking system in Italy as I did at the beginning of this chapter.

This is an important analysis to understand what the scale of the operation is. In fact, Intesa was the leader in terms of capitalization at around 41 billion euros, followed by Unicredit with 21 billion euros and then UBI with 3,3 billion euros[113].

Chances are that since the merger involves two of the three main players in the banking industry it may result in a restriction of competition that is why ICA carefully analyzed this merger.

The biggest concerns were related to the fact that these operations could have strengthened the already dominant position of ISP in the banking industry but also raised competition concerns due to the elimination of a bank that was considered as a substitute of Intesa inside our borders.

[113] *See* ICA decision, para. 30

As a matter of fact, the post-merger entity would have been of around 4900 branches dislocated homogeneously all over Italy, namely 21% of the overall branches present in our country and in about 50% of all the municipalities with banks[114].

From the preliminary findings, the Authority found out that there were also several markets that will be affected by the operation in a way in which the competition may be altered for a lasting period of time. Hence, the main ones were the market for bank deposits, loans, savings, and insurance.

What has popped out from the analysis made by the ICA is that for the bank deposit markets there were some concerns related to the post-merger entity. This was especially related to the fact that the demand-side in this markets is not very ‘’elastic’’[115] and thus it is crucial to analyze carefully the territorial presence after the merger[116].

As a matter of fact, by taking into consideration both the concentration level and the HHI index, it has come out that the market share after the merger could have been around 20% in the whole country with some peaks ranging from 40 to 50% in some specific areas[117]. This was pretty impressive.

After this preliminary analysis, 639 critical areas were identified based on the following criteria:

a) *a combined market share of 35% or more*

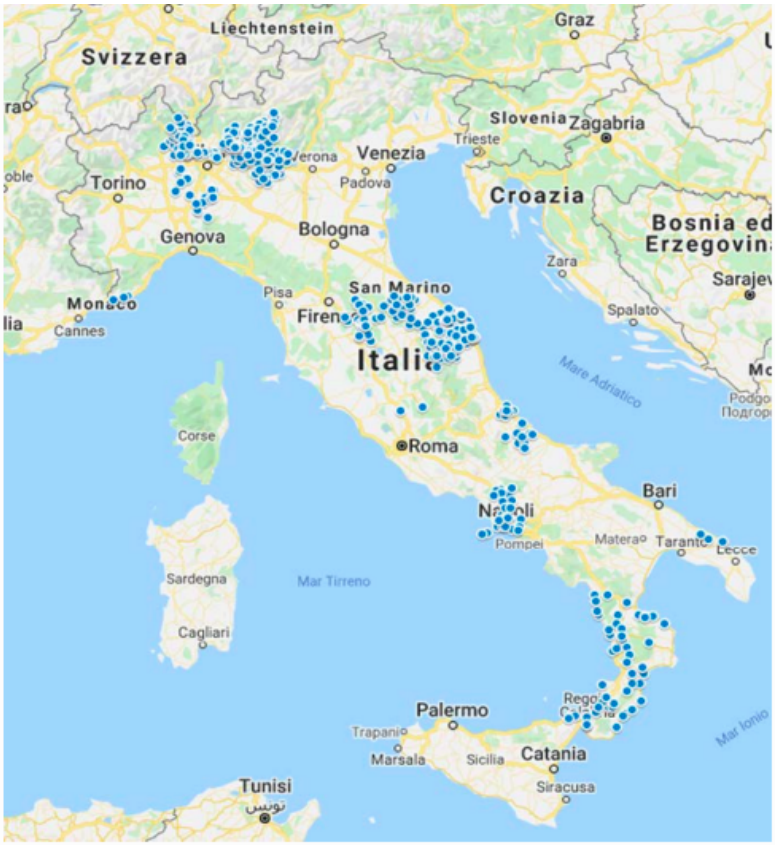
b) *an HHI index ranging from 1000 to 2000*

c) *a distancing from the second-largest operator of no less than 10%*[118]

[114] *See* ICA decision, para. 49
[115] The so-called Catchment areas has been computed based on a maximum journey of 30 minutes by car.
[116] *See*, ICA decision, para. 57
[117] Such as Reggio Calabria, Rieti, Varese, Bergamo, Macerata and Ancona
[118] *See* ICA decision, para. 64

Indeed, as reported by the following figure those critical areas were positioned homogeneously all over our country and this could have resulted in a restriction of competition on those territories.

Figure 5: Map of critical areas in the deposit market



Source: ICA press release 14th July 2020

As reported by the above figure most of the critical zones are located in the area of 'Bergamo' with 120 critical areas, 'Brescia' with 122 and 'Varese' with 73 [119].

It is crucial to remark on the fact that the Authority found out that the post-merger entity would have been superior than 50% in 171 of the critical areas examination and in between 40% and 50% in 288.

Let's remember that the critical thresholds for the creation of a dominant position are between 40% and 50% and in some specific cases also below 40%. That is the reason why

[119] See ICA decision, para. 66

the Authority has evaluated that there could be concurrencial problems in 639 critical areas as reported before[120].

The situation was pretty similar also in the loan market, even if the analysis is a bit more convoluted. As a matter of fact, there are several types of loans that can be offered by the bank itself.

This is the reason why each sub-market must be analyzed as a standalone one. The main ones are the loan to households, small, medium and large sized enterprises and also the market of loans to the public authorities[121].

As for the first one, the post-merger market share seemed to be quite consistent, in fact, in several areas the concentration level was above 40% with some peaks of even 60%.

These shares seem to lead to a dominant position in this market that is why the Authority in this case found more than 700 homogenously dislocated over our territory with some peaks in specific areas as reported by Figure 6.

Figure 6: Map of critical areas in the loan market

Source: ICA press release 14th July 2020

[120] *See* ICA decision, para. 67
[121] *See* ICA decision, para. 69

Even if in this market the critical areas individuated are more than what we have seen in the previous market what it is important to analyze in my opinion is the fact that those areas of concerns are more or less distributed in the same location as the ones identified for the previous market.

Another crucial market is the one related to the loans granted to medium and large sized enterprises. In this case it is important to state one crucial difference with the previous markets. In order to evaluate the critical areas the Authority has considered a broader area due to the higher mobility of the demand side. That is why, in this case we will find a regional analysis rather than a provincial one[122].

What has popped out from this analysis is the fact that the post-merger market share will be, as reported by the Authority, *'meaningful'* in several regions such as: Piemonte with a post-merger market share between 50% and 55% and Marche, Sardegna, Umbria and Calabria with a post-merger share between 35 and 40%[123].

Obviously, there are also other markets involved in the analysis made by the ICA but what caught my attention was the insurance market and the following approval of the IVASS. Actually, due to the fact that these operations had the basis to raise concerns also in the market of insurance the clearance of the IVASS was needed.

For instance, in the life insurance market, Intesa Sanpaolo was operating via 'Intesa Sanpaolo vita' and 'Fideuram vita' and also via UBI's subsidiary known as 'Bancassurance Popolari SPA', 'AVIVA vita' and 'Lombardi vita'.

The authority found out that in three branches, the one related to the human life insurance, investment funds and pension funds relevant post merger concentration levels were relevated. As for the first one a post merger concentration level of 15-20%, then 20-25% in the second one and finally in the third one of 30-35%[124].

[122] *See* ICA decision, para. 80
[123] *See* ICA decision, para. 88
[124] *See* ICA decision, para. 131

What it is important in this market is not just the concentration levels but the preventive authorization made by the IVASS regarding the indirect acquisition of 'Bancassurance popolari SPA' and also of qualified shareholdings in both 'Aviva vita' of 20% of the social capital and 'Lombardi vita' with 40% of the social capital.

In this regard, based on the outcome of the investigation, the operation was authorized pursuant the legislative decree No. 209 of 7 September 2005, art 68[125].

That is why, on the 10th July 2020 Intesa received the authorization from the IVASS because the operation was not able to *' alter in a lasting way the concurrencial equilibrium of both the life and casualty insurance markets'*[126].

3.6 Evaluation of the operation

In order to correctly evaluate the operation it is crucial to start from the possible effects of it on each and every market in our nation. This operation has a massive importance due to the fact that this transaction may result in *'having a systemic impact on the broader national scale because of the size of the operators involved and their potential, considering the characteristics of the same'* [127].

In addition, as the ICA reports, some corporations *have a greater influence on the competitive process than their market share and similar measurements will suggest*. This is the reason why this merger must be assessed carefully because it may result in changing drastically the concurrencial dynamics of a given industry especially when the market is already concentrated[128].

[125] *See IVASS. (2020, June 6). Bollettino di Vigilanza - IVASS. Accessed March 8, 2022, from https://www.ivass.it/pubblicazioni-e-statistiche/pubblicazioni/bollettino-vigilanza/2020/06-giu20/Boll_giugno_2020.pdf*
[126] *See* ICA decision, para. 172
[127] *See* ICA decision, para. 190
[128] *See* ICA decision, para. 191

In fact, the merger involves two key players in the banking industry in Italy and, as I have underlined in the first part of this chapter, Intesa Sanpaolo, who at that moment was the leader in the industry, decided to acquire the third biggest bank in Italy.

This operation has radically changed the shape of our domestic market by further strengthening the dominant position already achieved by Intesa and by depriving the market of a medium-sized bank.

Another concept that has been carefully analyzed during the final evaluation of the transaction is whether UBI Banca could have been considered as a *maverick* operator in our country. Before going ahead it is crucial to analyze the concept of maverick in order to have a complete understanding of the operation.

A maverick firm is crucial for every market, as a matter of fact, it is considered to be a corporation that behaves in a disruptive way with respect to the norm of a given industry. Furthermore, UBI Banca should have been considered as such in the case in which it possessed an intrinsic capacity of acting in a very innovative and different way with respect to the leader.

The concept of maverick is relevant in the merger regulation both in Europe and in the US and *'they are perceived to present a barrier to tacit collusion and for that reason competition authorities can seek to prevent mergers that might result in their removal from a market*[129] (Bromfield, 2016).

Even though it is rare to see mergers involving maverick operators, especially in the banking industry, that I would say that it is pretty standardized, anyway it is important to state and analyze this concept because it could have represented another implication on this already complex merger.

By the way, in the course of this dissertation I have analyzed in several instances UBI Banca from its strategy to its distribution all over the country and now that we have a full

[129] *See* Bromfield, J. *(2016, August). Maverick firms and merger policy (No. 1). Aston Business School.* https://research.aston.ac.uk/en/studentTheses/maverick-firms-and-merger-policy

overview on this operator we can state that it does not represent an innovative bank or at least it is not different from Intesa.

In fact, I have stated that one of the reasons that led to the proposal of acquisition from Intesa to UBI is the fact that these banks were similar for the services provided, the distribution, the core values and so on. For this reasons, UBI cannot be considered as a maverick for the above-mentioned concepts and they considered themselves as a 'traditional' operator[130].

What is important to underline is that UBI can also not be considered as a maverick but it represents the only player in the Italian banking industry capable of reaching the dominant position held by Intesa and Unicredit that at that moment were the biggest banks and thus to compete with them.

The ICA sustained that from the analysis has not popped out any tangible data showing that UBI could have represented the third player in the banking industry. Indeed, there were just some preliminary projects in which UBI would have acquired other operators becoming a player comparable to Intesa and Unicredit.

Based on the evidence given in the previous lines the ICA sustained that since UBI cannot be classified either as a maverick nor as a key player the operation is not entitled to alter the normal concurrencial dynamics of the banking industry whatsoever[131].

This also due to the fact that based on the opinion and on the analysis made by the ICA and the following remedies imposed on Intesa there were other players able to put competitive pressure on the biggest banks in Italy and thus the competitiveness would not have been altered and the customers were not harmed by no means.

Moreover, the evaluation is also focused on the effects of the operation on every single market and what has been analyzed is that the transaction is in fact able to modify and alter in a relevant way the concurrencial dynamics in some specific geographical and commodity-related markets.

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[130] *See* ICA decision, para. 195
[131] *See* ICA decision, para. 198

As already stated in the previous sections due to the relevance of this operation several markets have been closely analyzed by the competition Authority.

Especially for those related to the loans to small enterprises and households and also for the deposit market the Authority has at a first glance analyzed the market shares at a provincial level and then in order to have a better and more precise overview of the operation the ICA made the same analysis also at a catchment level area.

Before going ahead it is important to define the concept of catchment area, as a matter of fact, this notion identifies the ‘’*usual area of origin of the bulk of an outlet's customers, is primarily commercial and has no legal existence. It is nevertheless very useful for assessing the impact of this type of operation*[132]’’ (Genevaz, et.al, 2016).

Sometimes, it may result difficult to identify the real market share and concentration level especially in the local markets this is the reason why the Authority decided to tackle this problem by localizing and evaluating the territorial presence of the bank in every municipality. This is considered by the Authority as the most powerful tool in order to have an unbiased scrutiny of the real market power of the bank in the local markets.

From the preliminary screening, it has been found that ISP would have achieved some relevant market shares in both the market for loans but also for the deposits in several provinces.

Truth to be told, in the market for deposit ISP would have reached a post-merger entity between 35% and 40% in several provinces such as Napoli, Caserta, Vibo Valentia, Brescia, Brindisi, Arezzo, Pesaro and Urbino, Imperia, Catanzaro, Padova and Monza-Brianza. Concentration level of 40% was relevated in the provinces of Ancona, Rieti, Reggio Calabria, Cosenza, Prato, Novara and Chieti. Even greater than 50% in the provinces of Varese,Verbano-Cusio-Ossola, Macerata, Pavia and Bergamo[133].

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[132] *See* Genevaz, S., Jalabert-Doury, N., & Déchamps, P. (2016, July 5).*”Catchment areas in merger control”.* Concurrences. *Accessed March 1, 2022, from* *https://www.concurrences.com/en/conferences/catchment-areas-in-merger-control*

[133] *See* ICA decision, para. 60

The concentration level in this market has been analyzed locally taking into consideration the presence of the bank subsidiaries in the different areas. In fact the customers in this market are highly reliant on the physical presence of the bank branches that is why the analysis took into consideration the concentration level in each province.

On the other hand, based on the same criteria, the loan market to private households is important to note that the operation would have led to a post merger market share between 35% and 40% in the provinces of Monza-Brianza, Viterbo, Teramo, Cosenza, Como, Taranto, Campobasso, Terni, Aosta, Avellino, Perugia, Alessandria, Imperia, Arezzo, Vibo Valentia, Napoli, Potenza, Savona and Matera.

Then, between 40% and 50% in the areas of Macerata, Isernia, Ancona, Chieti, Reggio Calabria, Barletta-Andria-Trani, Novara, Prato, Brindisi, Pavia, Ascoli Piceno, Fermo, Cagliari, Caserta, Lecco, Foggia, Brescia and Bari.

Finally, a post-merger market share greater than 50% in the provinces of Varese, Rieti and Bergamo and even greater than 60% in Pesaro,Urbino and Verbano-Cusio-Ossola's provinces[134].

Moreover, for the market of loans to small sized enterprises a similar investigation has been conducted leading to similar results. As a matter of fact, the post merger entity would be between 35% and 40% in the provinces of Urbino, Brindisi, Ancona, Perugia, Chieti, Barletta-Andria-Trani, Foggia, Napoli and Pesaro. Even greater than 40% in the provinces of Isernia, Ascoli Piceno, Macerata, Cagliari, Pavia, Caserta, Bergamo, Reggio Calabria, Novara, Prato, Rieti and Fermo. Finally, greater than 50% in Varese and Verbano-Cusio-Ossola[135].

This preliminary screening led to some already massive results that, as a matter of fact, several are the provinces in which the post-merger market share is well over the critical thresholds.

[134] *See* ICA decision, para. 72
[135] *See* ICA decision, para. 73

Indeed, the ICA proceeded with a more in-depth analysis taking into account the above-mentioned catchment areas but the situation was not getting any better. In fact, the Authority found out that the post merger entity would have overcome the critical thresholds in 639[136] areas in the deposit market, 782 in the loan market to households[137] and 218 in the market of loans to the small sized enterprises[138] as reported by the decision of the ICA paragraph 74.

These findings are all very important, by the way, especially the scrutiny made in the deposit market is relevant because this market has the capacity to alter the competition effect also in the adjacent industries.

It is crucial to remark for the market of deposits that not only the banks can participate but also Poste Italiane and to some extent also the online services, by the way, the ICA stated that it does not consider these other services as substitutes of the traditional system offered by the banks themselves.

Based on these considerations the ICA stated that ISP had the characteristics to increase the competitive advantage already possessed in the markets for the deposits and loan compromising even more the concurrencial pressure that could have been put in place by the main competitors of ISP.

Moreover, with respect to the loan market to medium and large-sized firms the situation seems to be pretty the same. As a matter of fact, the Authority found out that the operation could alter significantly the concurrencial equilibrium of the market in several regions with a post-merger entity of 50% to 55% in Piemonte. While in Marche, Umbria, Calabria and Sardegna with 35-40%[139].

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[136] In the provinces of Ancona, Arezzo, Bergamo, Brescia, Brindisi, Caserta, Chieti, Cosenza, Catanzaro, Imperia, Monza-Brianza, Macerata, Napoli, Novara, Pesaro e Urbino, Pavia, Reggio Calabria, Rieti, Varese, Verbania Cusio Ossola and Vibo Valentia- ICA decision, para. 68

[137] In the provinces of Alessandria, Ancona, Ascoli Piceno, Arezzo, Avellino, Bari, Bergamo, Brescia, Barletta-Andria-Trani, Brindisi, Caserta, Chieti, Como, Cosenza, Campobasso, Foggia, Fermo, Imperia, Isernia, Lecco, Monza-Brianza, Macerata, Matera, Napoli, Novara, Perugia, Pesaro e Urbino, Pavia, Potenza, Reggio Calabria, Rieti, Savona, Taranto, Teramo, Terni, Varese, Verbano Cusio Ossola, Vibo Valentia and Viterbo;-ICA decision, para. 75

[138] In the provinces of Ancona, Ascoli Piceno, Bergamo, Brindisi, Caserta, Chieti, Fermo, Isernia, Macerata, Napoli, Novara, Pavia, Perugia, Pesaro e Urbino, Reggio Calabria, Rieti, Varese and Verbano Cusio Ossola-ICA decision para. 75

[139] *See* ICA decision, para. 88

What it is important to underline is how the Authority has worked, indeed, for the previous market the ICA made an analysis starting from the provinces because those markets were considered to be mainly local and the mobility of the consumers was therefore limited.

On the contrary, for the market of loans to the medium and large sized enterprises, the Authority was considering a regional rather than a local market, in my opinion, it is important to remark these peculiarities in order to show how the work is highly adaptable to any kind of situation based on the different needs.

What's more, another important finding was the fact that in the regions of Marche, Calabria and Umbria the post merger entity would have given an uncontested leadership in the provinces of those regions with an increase in the market share due to the acquisition of UBI of 15-20% in Marche, 10-15% in Calabria and finally of 5-10% in Umbria[140].

As for the region of Sardinia that, as mentioned before reached the critical threshold of 35%, it can be noted that the increase is due to the overlapping of the parties' shares, largely below the percentage point, which is 0-1%[141]. Therefore, since the marginal increase is less than one percentage point the transaction does not appear to be capable of altering the pre-existing competitive dynamics. Furthermore, in Piemonte the post-merger entity overcomed the 50% threshold meaning that ISP would have been the by far the most influential firm in that area.

In addition, another industry involved is the public authorities market, even if in this market the critical thresholds have not been overcomed it is worth mentioning because in this case the relevant market has been defined in a different way. Since the public bodies operate all over the country the relevant market can only be a national one.

Additionally, another key market is the insurance one, that we have briefly analyzed in the previous section when dealing with the role of the IVASS in this merger. What we still need to address is if also in this market the operation raised concerns related to its post merger entity.

[140] *See* ICA decision, para. 88
[141] *See* ICA decision, para. 216

As reported briefly before, the authority found out that in three branches, the one related to the human life insurance, investment funds and pension funds relevant post-merger concentration levels were relevated. As for the first one a post-merger concentration level of 15-20%, then 20-25% in the second one and finally in the third one of 30-35%[142].

By the way, we need to dig deeper in this market because the insurance market can be divided in two parts, the upstream or management sector and the so-called retail, downstream or distribution part.

Truth to be told, in the distribution area of life insurance services ISP has a concentration level that exceeds 25% in several provinces such as Imperia, Verbano-Cusio-Ossola, Novara, Prato, Padova and Rovigo. While UBI detaines a concentration of 25% in the provinces of Bergamo, Brescia and Macerata and of 15% in Pavia, Varese, Pesaro and Urbino[143].

Hence, the post-merger entity exceeds the 35% threshold in the provinces of Rovigo[144], Varese, Pavia, Imperia and Macerata while the 40% is overcomed in Bergamo and Brescia[145]. These shares were susceptible to altering the competitive equilibrium of the industry. So, also in this market, we can see how some critical areas have been identified.

A peculiarity can be highlighted in the province of Rovigo in which, even if the post-merger entity exceeds the 35% threshold, this is not due to the effects of the operation. In fact, there were no UBI subsidiaries in that area and so the transaction had no effects in that local market[146].

This was the only 'niche' market in the insurance industry that could have potentially raised concerns based on the analysis made by the ICA. As a matter of fact, in the pension fund branch, it is true that ISP detained a market share between 30-35% but this was not

[142] *See* ICA decision, para. 131
[143] *See* ICA decision, para. 132
[144] This is the only area in which the concentration level has not increased due to the merger because UBI was not present in this area.
[145] *See* ICA decision, para. 133
[146] *See* ICA decision, para. 222

increased by the operation and in addition, it also remained the third player in this industry in Italy. Thus the concurrencial equilibrium remained untouched[147].

Besides, there are two markets that are still to be addressed and I am referring to the market for administered savings and the asset management. The market for administered savings is related to the case in which an investor assigns its deposits to an intermediary. That is why the concurrencial effects of this market have been evaluated on a local basis following and using as *'proxy'* the direct deposit market.

In fact, also in this case, the Authority has evaluated the scarce mobility from the demand side and the high reliance on the bank subsidiaries in order to have access to the desired services.

The latter, related to the assets and mutual funds management market, is composed by different services that can be provided to the final consumer. The first one is related to the mutual funds which is when savings are collected and then again reinvested in stocks, bonds and every type of security available. ISP has a market share in between 15-20% while UBI is between 1-5% that is why the post-merger entity would be around 25% thus below the critical 30% threshold[148].

Then, another service provided in this market is the portfolio management also known as GPM and GPF. This service is usually related to the management of the investments made by different clients.

Going a little bit more in detail we can see that ISP operates in this market through its subsidiaries Eurizon Capital SGR S.p.A. and Fideuram – Intesa Sanpaolo Private Banking S.p.A with a cumulative market share in between 15-20% while UBI of just 1-5%. That is why also in this case the post merger entity would be around 25%[149].

Finally, the third service provided is the pension funds management but also in this case the cumulative post- merger entity will be well below the 25%.

[147] *See* ICA decision, para. 131
[148] *See* ICA decision, para. 116
[149] *See* ICA decision, para. 119

Based on the services provided the Authority used as proxy the loans and deposits markets. What can be said is that this market is more complex than what it seems at a first glance. As a matter of fact, this market is composed of both upstream and downstream sectors thus several markets are affected by these services.

The upstream services are related to the management and can be analyzed at a national level, while the downstream ones are more related to the relation of the final consumer and thus have been analyzed locally[150].

It is important to remark that in this market 70% of the commission is earned by the assets management companies while for the retail market the banking industry has the 100% of the market both with the subsidiaries or through consultancy services. In this context, the Authority raised concerns both related to the territorial presence (retail) of the bank and its dominant position in the upstream services of asset management due to the diversity of services offered by ISP[151].

That is why the Authority concluded that due to the vast post-merger territorial presence ISP had the capacity to increase its dominant position also in this market by catalyzing the attention of all the most influential Asset managers and thus altering the concurrencial equilibrium[152].

In light of all the above-mentioned considerations and analysis, the operations appear to be capable of producing the establishment and/or creation of a dominant position of ISP in different markets pursuant Law No.287/90 article 6 paragraphs 1 and 2. The markets involved are the loans market to the households, small, medium and large sized corporations, insurance services, the market for deposits, asset and mutual funds management[153].

That is why the Authority sustained that the operation was capable of altering *'in a substantial and durable manner the competition'* in the abovementioned markets and thus

[150] *See* ICA decision, para. 104
[151] *See* ICA decision, para. 111
[152] *See* ICA decision, para. 112
[153] *See* ICA decision, para. 223

harming the final consumer. That is why in the following section I will analyze the remedies imposed by the Authority to clear the merger[154].

3.7 Remedies and conclusion of the case

After the analysis made by the Authority on this complex merger it resulted that the transaction appeared to be capable of altering the competition in the banking industry and establishing the already dominant position of ISP pursuant Law No.287/90 article 6 paragraphs 1 and 2. This is the reason why this merger could have been cleared only subject to remedies.

In fact, the goal of this final section is to evaluate which were the remedies imposed and what is the rationale behind this decision.

The remedies proposed at the beginning were related to the disinvestment of over 500 branches to BPER. This operation aimed to reduce the post-merger entity in the markets for: ‘’*a) lending market of medium to large enterprises b) administrative savings market c) distribution of asset management product d) distribution of life insurance products”*[155].

Especially in the lending market of medium to large enterprises after the disinvestment, the post-merger entity will be below the 35% threshold in the regions of Marche, Umbria and Calabria. These regions as I have analyzed in the previous section had a concentration level that was between 50% and 55% so this disinvestment would have led to a big reduction in these areas[156].

In addition, this will also reduce to the order of 1% the increment of the quota in Piemonte where ISP is already above that threshold.

[154] *id* 153
[155] *See* ICA decision, para. 227
[156] *id* 155

By the way, the aim of this disinvestment was not just to reduce the post-merger entity in some markets but also to solve all the criticality in the catchment areas in the market for deposits and lending market to households and small enterprises.

Let's remark that the critical areas have been identified based on the following three main criteria:

a) a combined market share of 35% or more

b) an HHI index ranging from 1000 to 2000 with an attention delta of no less than 250 or an HHI index of more than 2000 with a delta of not less than 150

c) a distancing from the second-largest operator of no less than 10%.[157]

In addition, in my opinion, it is also important to state that these disinvestments give also the possibility to BPER to reach a bigger scale in order not only to compete with ISP on the national market but also to gain a market share similar to the one achieved by UBI Banca before the merger occurred. Thus, thanks to these remedies, a new competitor would have emerged in the market re-establishing the competitive equilibrium present in the industry before this operation occurred.

Let's also remark that the buyer of those branches, in this case BPER, must be independent, not a shareholder of the new bank entity that is created at the conclusion of the operation and it must not only possess the approval of the Authority but it must also possess the necessary capabilities and financial resources in order to manage the acquisition.

The Authority also remarked that, since the disinvestment is related to all the activities operated by the bank, this will create a domino effect by decreasing the post merger entity not only in the directly interested markets but also in all those markets that are strictly related and dependant on the previous ones[158].

As a matter of fact, the disinvestment will affect all those markets that are related and dependent on the bank branches. The post-merger entity will be reduced in the market for

[157] *See* ICA decision, para. 229
[158] *See* ICA decision, para. 231

administered savings, and asset management in which the evaluation works as a proxy for the positioning of the parties in the markets of direct and indirect deposits.

Finally, the Authority remarked that in the case in which ISP was not able to disinvest all the branches they would have imposed sanctions equivalent to the withdrawal of the branches to BPER[159]. As a matter of fact, this would have resulted in an operation of concentration pursuant the Law No. 287, 1990 article 6, paragraph 1.

In conclusion, the investigation found out that *'the operation was inclined to the strengthening or creation of a dominant position by reducing or altering the competition for a lasting period of time in the previously underlined markets. The remedies result suitable to respond to the competitive issues analyzed above"*.

In the view of the above, *'the notified concentration may be authorized pursuant the Law No. 287 of 10th October 1990 article 6 paragraph 2 of the sale of branches as identified by ISP"*[160].

[159] *See* ICA decision, para. 233
[160] *See* ICA decision, para. 235

4. Conclusion and personal remarks on the case

In the previous chapters the important merger between Intesa and UBI and all the actions taken by the ICA in order to assess this case correctly has been analyzed. In fact, the way in which the ICA dealt with this operation seemed to be consistent with all the steps and procedures mentioned in the second chapter.

For instance, several times has been pointed out how it is important to start from a broad picture and then zoom in in order to see more closely how each and every market could possibly be affected by the operation. This is a key step in order to firstly understand the general context and then see what happens in each market.

In this case the ICA appears to be very consistent because they firstly analyzed the banking industry in order to understand the position and the relevance of the parties involved and after that they analyzed the effects on each market.

Furthermore, in section 3.6 when dealing with all the critical areas that have been relevated by the Authority it is worth mentioning that they applied the same framework previously analyzed in section 2.2 by taking into account not only the relative market share but also the HHI framework. This is another example that demonstrates that the analysis was consistent but especially unbiased.

An additional remark is that, while assessing the modus operandi of the ICA, their capacity to adjust and modify their strategy with respect to the circumstances and the specific needs emerged.

For example, the market of deposits to households have been analyzed by taking into account a local market due to the limited mobility from the demand side and also the reliance and the need of having a direct relation with the bank itself.

On the other hand, the market of loans to medium and large enterprises was analyzed on a regional basis thanks to a greater mobility but also because businesses of bigger firms are

inter-regional and as a consequence the bank needs to have its own regional and even national network of branches.

In addition to that, it seems that nothing was left to chance. In fact, the authority not only analyzed every single market affected, but also some other potential scenarios such as the case in which UBI could have been considered as a maverick player.

At the end of the day this was not the case but it is really important to analyze every possible scenario when assessing a massive operation such as this one.

As a matter of fact the assessment made by the ICA was crucial not only to see what could have been the possible repercussions on the markets but also to make sure that everyone was aware of the effects of the operation. That is why this analysis has been crucial for both parties in order to decide if it was the case or not to go ahead with the merger.

Moreover, another crucial part of the case was whether UBI was or not the third main player in the banking industry in Italy and especially regarding the fact if it was capable or not to merge with other small and medium sized banks to consolidate its position and reach a size that would have enabled them to compete against Intesa and Unicredit on a national and international level.

In fact, the main concerns were related to the fact that this merger could have consolidated the already dominant position on the market of Intesa and at the same time depriving the industry of a medium sized bank.

The ICA stated that there were no ‘proofs’ that UBI could have been considered as a bank capable of merging with others but truth to be told, this is not fully shareable.

Indeed, based on the analysis of the ranking of the Italian banks based on capitalization, UBI was behind Intesa and Unicredit but they still had a capitalization of more than 3 billion euros. Hence, the Authority’s position that UBI was not able to merge with a bank of the likes of MPS and BPER due to the fact that those banks had similar sizes and capitalization is acceptable.

However, it may be pointed out that UBI was a medium bank and they might have had the capacity to aggregate with some smaller banks becoming in the very long run a main competitor of Intesa or Unicredit.

By the way, the ICA considered that since at the time of the merger UBI did not plan to acquire any corporation it cannot be fully sustained that UBI represents a bank with the capacity and the intention of aggregating with other smaller banks.

Nonetheless, ruling out the purchasing power capabilities of a bank solely based on their current business plan is not 100% effective.

What was sure is that after this merger the market was deprived of a medium sized bank and the transaction appeared to be capable of altering the competition in the banking industry. This is the reason why the operation was cleared subject to remedies which seem to be fully reasonable.

Accordingly, the remedies imposed had the aim of recreating a player with a size similar to the one possessed by UBI before the merger took place. Indeed, the final decision was related to the divestiture of more than 500 branches of UBI to be sold to 'BPER Banca'.

As anticipated, in this case the remedies imposed are enough in order to maintain intact the equilibrium in the banking industry due to the fact that these divestitures are the end result of a very peculiar analysis made on each market affected by the operation trying to eliminate all those critical areas that have been identified during the evaluation.

In addition to that, as the ICA reported, the divestiture of some branches will create a sort of domino effects on all the other markets involved. That is why it is believed that the final remedies imposed are absolutely consistent with the analysis made.

What demonstrates that the remedies are enough to restore or to maintain intact the equilibrium is not only the quantity but also the fact that those branches were sold to an entity that was fully independent and not involved in the merger whatsoever.

Let’s bear in mind that the overall number of the critical areas was well above 500 but several of those critical areas have been ‘double counted’ because they represented a concern in several markets.

To sum up, based on the analysis carried out while writing this dissertation, it can be stated that the Italian Competition Authority supervised in the most effective way this very complex and delicate merger.

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