Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2024)29

Unclassified

English - Or. English

18 November 2024

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

The Use of Structural Presumptions in Antitrust – Note by Italy

4 December 2024

This document reproduces a written contribution from Italy submitted for Item 2 of the 140th meeting of Working Party 3 on 4 December 2024.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

JT03555661

Italy

1. Introduction

1. The Italian competition law framework does not provide for structural presumptions as *per se* rules, neither positive nor negative. Nevertheless, the Italian Competition Authority (the "Authority" or the "AGCM") uses structural indicators such as market shares as preliminary screens, in both merger and abuse of dominance cases. In merger review, structural presumptions are used in Phase I as important indicators to identify potentially harmful cases. However, the assessment of the actual effects of the transactions is based on a thorough economical and factual analysis in the course of the investigation. Similarly, market structure tools constitute key indices to infer market power in abuse of dominance cases, but are usually supported by additional case-specific elements that should be consistent with such structural presumptions.

2. The Authority's practice of using structural indices as rebuttable presumptions derives from EU competition policy and has been endorsed by the Italian Courts. The combined use of static market structure tools and alternative metrics seems appropriate to take account of market dynamics and to properly understand the competitive behaviour of the firms and its effects.

3. This contribution focuses on three recent developments in the Italian competition law system that relate to structural presumptions.

4. First, in the area of merger control, the AGCM updated its Notice on the notification of mergers in May 2024 to align with the EU guidelines. The Notice provides clarification as regards the identification of those relevant markets are likely to be affected by the merger, the so-called "affected markets" in terms of market shares, as well as competitors and other parameters. The revised Notice requires additional information beyond market shares and Herfindahl-Hirschman Index (HHI) changes, such as evidence from internal company documents on competitive constraints, entry barriers and efficiencies. These structural screening criteria assist the AGCM in the preliminary identification of problematic mergers, without constraining the Authority's capacity to challenge reportable mergers under the SIEC Test (introduced in Italy in 2022). In reviewing mergers involving oligopolies, the Authority has complemented the structural analysis with alternative screening tests, such as diversion ratios and price pressure tests, in order to gauge problematic mergers at an early stage.

5. Second, following an amendment to the Competition Act in 2022, the AGCM now has the power to request notifications of potentially problematic below-threshold transactions. These may include acquisitions of potential competitors or innovators if there is a "concrete risk for competition". In these cases, the strategic nature of the target company may be an equally or even more relevant factor than market shares or concentration screens, particularly when turnover figures are unavailable or insufficient to gauge the target's potential competitive impact in the future. Furthermore, the Guidance Notice published by the Authority introduced a detailed list of *safeguards*, specifying circumstances in which below-threshold concentrations are unlikely to be called in for review. Despite not being binding, these screening tools can be regarded as relative negative structural presumptions.

6. Third, in the area of unilateral conduct, the AGCM has occasionally recognised the concept of super dominance, particularly in the digital sector. In addition to high market

shares, other parameters – such as a substantial disparity in market shares in comparison to the nearest competitor or the fact that the undertaking was a key player in platform intermediation – were regarded as clear indications of the degree of the company's dominance and market power.

7. Notably, the Authority can also enforce the abuse of economic dependence legislation if there is a competitive impact. A legislative amendment in 2022 introduced a rebuttable presumption of economic dependence on digital platforms that play a "key role" in providing access to end users or suppliers. Early applications of this provision have offered insights into the practical utility of this presumption.

8. This contribution is organised as follows: Section 2 examines structural presumptive rules in merger control, with a particular focus on the Authority's new powers for below-threshold mergers, where negative presumptive rules may apply. Section 3 discusses the AGCM's application of structural presumptions in addressing abuses of dominance. Section 4 explores the interplay between structural presumptions and other competition policy tools, with a specific emphasis on economic dependency. Finally, Section 5 draws some conclusions.

2. The role of market shares and structural indices in merger review

9. In the context of Italy's merger control regime, a concentration may be prohibited when the substantive legal test, which is designed to prevent or remedy only those transactions that harm competition significantly, is met on the balance of probabilities. This is in accordance with the "more likely than not" standard. The Italian regime does not provide for *per se* structural presumptions as to whether the substantive test is met. Furthermore, it does not provide for a negative safe harbour, such as a general presumption that a concentration leading to a combined market share of the merging parties below a certain threshold does not meet the substantive test.

10. The Italian Competition Law (Law 287/1990) has been amended on several occasions, most recently by Laws No. 118/2022 and No. 214/2023. The amendments introduced a new substantive test and an expansion of the agency's remit to review non-notifiable transactions under certain circumstances. However, the role played by structural presumptions remains unchanged, as illustrated in the sub-sections below.

2.1. Notifiable mergers

11. Until 2022, the substantive test to determine whether a concentration had anticompetitive effects on the market was based on the creation or strengthening of a dominant position on the national market, which would result in the elimination or substantial reduction of competition on a lasting basis (Article 6.1 of the Italian Competition Act 287/1990). The 2022 reform modified the substantive merger test, requiring the Authority to consider whether a concentration would *"significantly impede effective competition in the national market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position"* (as provided by the amended Article 6.1 of the Competition Act 287/1990).

12. The reformulation of the substantive test, despite a formal shift from the dominance test — where structural indicators, specifically market shares, were necessary but not sufficient to block a merger — to a *"significant impediment to effective competition"*, did not result in a significant alteration to the Authority's review process. Indeed, even under the dominance test, the Authority's approach in assessing a merger had been to conduct a

detailed analysis of not only market concentration and structure, but also the remaining competitive constraints and the other market features that affected the merged firm's ability to exercise market power and its potential impact on competition in the relevant market(s).

13. Notably, the Authority recently updated its "Merger Filing Notice" (May 2024)[1], which requests additional information beyond market shares and changes in HHI[2], including evidence from internal company documents on factors such as competitive constraints, ease of entry and efficiencies.[3]

14. The Notice provides clarifications as regards the identification of those relevant markets are likely to be affected by the merger, the so-called "affected markets" in terms of market shares, as well as competitors and other parameters. The Authority requires companies to specify the metrics, sources, and methodology used to calculate market shares. This reflect the need to accurately defined market shares for those metrics to be effectively informative to predict future competitive conditions.

15. These factors assist in inferring the informative value of firm-specific structural evidence and other transaction-specific elements, thereby supporting the Authority's review process.[4] While the main changes pertain to the definition of affected markets, these evidences reflect certain *a priori* presumptions about structural screening criteria to assist in the initial identification of problematic mergers, without constraining the Authority's capacity to challenge reportable mergers under the SIEC Test (see Box 1).

Box 1. Structural screens in the new Merger Filing Notice

The recently published Merger Filing Notice indicates that the market share thresholds for categorising a market as an affected market are now aligned with those set at the EU level, which allow to identify potentially non-problematic mergers according to certain a priori considerations in terms of structural parameters.

[1] The Merger Filing Notice is available only in the Italian version at the following link: https://www.agcm.it/dotcmsdoc/formulario/p31089_Comunicazione_operazioni_concentrazione.pdf.

[2] The HHI (Herfindahl–Hirschman) Index is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.

[3] See Case C12247 BDC Italia-Conad/Auchan, Auchan's internal pricing documentation provided reliable evidence supporting the Authority's analysis of close competitors. Internal documents prepared in the ordinary course of business are particularly valuable, as they often better reflect how the undertakings perceive market competitive dynamics. Similarly, such documents are highly relevant for conducting a forward-looking assessment. See also the Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645).

[4] Notably, under the 2022 reform, the Authority may also consider "*the economic and financial power*" of the undertakings active in the relevant market, along with "*the interests of intermediate and final consumers*," when determining if a concentration would substantially impede competition in the relevant market. The reform also expressly permits the Authority to balance the anticompetitive effects of a concentration against any merger-specific efficiencies (such as "*technical and economic progress*"), provided these efficiencies benefit consumers and do not restrict competition.

In the case of horizontal overlaps, the affected markets are identified in accordance with two criteria:

- if the post-merger market share is at least 20% and the increase in the Herfindahl-Hirschman Index (HHI) is above 150, or above 50% in other case; [5]
- if one of the merging parties holds a market share of at least 20%, and another party is a potential competitor. [6]

In the case of non-horizontal transactions (vertical and conglomerate mergers), the Notice establishes a single break point, whereby at least one of the merging parties must hold a market share of at least 30%. The same applies to mergers where a 30% market share triggers the identification of an affected market if any other participant holds key assets—such as raw materials, infrastructure, data, or intellectual property rights—that are essential for competitors in the same market or in closely related adjacent markets.

16. Under the new Filing Notice, although post-merger market shares below 20% do not lead to the identification of the affected markets, this does not imply a *safe harbour* for the scrutiny of such mergers (e.g., those at the lower end of the concentration spectrum). Similarly, a 50% post-merger market share is not regarded as a threshold for a legal structural presumption. In fact, due to the power to call in below-threshold mergers (see next section below), an affected market may be identified whenever an acquired or merged firm is a potential or nascent competitor, regardless of the market shares involved.[7] Furthermore, the Notice mandates that companies clarify the metrics, sources, and methodology employed to calculate market shares.[8]

17. The AGCM's practice indicates a positive correlation between the post-merger market shares of the merging parties and the probability of the Authority initiating an in-depth investigation (Phase II). In a similar manner, higher increases of concentration levels are associated with a higher percentage of mergers challenged.[9]

[5] Under the previous notification form, the market threshold was set at 15%.

[6] According to the 2024 revised Filing Form, an operator may be considered a potential competitor if it has either: planned to enter a market or actively pursued such a goal in the past three years, or entered the market within the past five years.

[7] The Notice specifies that a target is considered significant if it is an important innovator, has potentially valuable research activities, is a start-up, or is a new entrant with substantial competitive potential that has not yet developed or adopted a revenue-generating business model (or is in the early stages of implementing such a model).

[8] These requirements may be useful for the Authority, for instance, when it considers necessary to carry out a market reconstruction, as the informative value of market shares as an indicator of market power and as part of its competitive assessment may vary according to the industry and the nature of the competitive dynamics.

[9] See Noce, M. L., Bolasco, S., Allegra, E., Ruocco, V., & Capo, F. M. (2006). *Merger Control in Italy 1995–2003: A Statistical Study of the Enforcement Practice by Mining the Text of Authority Resolutions*. International Journal of the Economics of Business, 13(2), 307–334. The authors, in reviewing 6,920 merger decisions over the 1995-2003 period, found that the likelihood of opening of a Phase II investigation rose from 0.50% in the 0-40% range of post-merger market shares, to almost 11% in the 40-70% range, up to 25% in the highest rank (70-100%). When looking at changes in HHI levels, the likelihood of Authority intervention rises to 40% when the variation of the HHI index increases in value up to 1,000 (see tables 3-10).

18. Although useful in identifying mergers that may give rise to competitive concerns and necessitate further analysis, the AGCM's reliance on structural indicators as a presumption of dominance and market power has evolved over time under the dominance test in order to more accurately reflect market dynamics. In markets where structural metrics were insufficient to provide evidence of the actual competitive pressure exerted by the merging parties or to adequately predict the overall impact of mergers on competition, the so-called "gap cases", other factors were considered in the assessment.

19. The Table below illustrates the use of alternative metrics in several problematic mergers assessed subsequent to the implementation of the 2022 Merger Reform, which would have constituted "gap cases" under the pre-2022 merger regime. Those problematic acquisitions took place in markets in which shares were not substantial (in some cases slightly above 25%)[10] or were considered to be imperfect indicators of market power and the competitive constraints that the merger could eliminate, potentially enabling a greater exercise of market power. In such cases, to overcome the limitations of the traditional tools, the Authority has computed proximity proxies (such as diversion ratios[11]) as a screening tool, in order to complement the traditional structural analysis. In the Authority's practice, particular emphasis has been placed on analysing the degree of proximity between the merging parties and the availability of demand and supply-side alternatives, as in the more traditional product differentiation competition analysis.[12]

Table 1. "Gap cases" after the 2022 reform - SIEC

CASE	MARKET(s)	Structural metrics	Alternative metrics (proximity metrics / price pressure analysis)
C12410b-Cinven Capital Management-Fressnapf Beteiligungs/Agrifarma - Maxi Zoo Italia	wholesale and local markets for pet products	Mkt shares >40% Distance from the 2° market player> 10%	HHI>1000 and delta >250, and HHI >2000 and delta >150 DV>25% and GUPPI>5%; a case by case qualitative assessment on local markets was

[10] In the retail grocery market, the Authority has identified potentially critical mergers where, in certain local circumstances, market shares slightly exceeded 25%. For example, see case C12247B Conad-Auchan. Previously, the Authority conditionally cleared another merger (C12246 Fratelli Arena) where market shares were above 25% and the Diversion ratio (DR) exceeded 25%, complementing those results with a case-by-case qualitative assessment in some of the affected local markets.

[11] Diversion ratios measure the proportion of sales captured by different substitute products or services when the price of a product or service is increased.

[12] Even before introducing the SIEC test, the Authority employed proximity metrics beyond market shares, concentration screens (HHI), and price pressure analysis in two mergers in the consumer goods industry (C11799-Bolton Alimentari/Simmenthal and C11589-Bolton Group International/Luis Calvo Sanz). In case C11589, for instance, the acquirer's market share ranged from 30–35%, and the merging party was not the second-largest competitor in the relevant market. For both mergers, the Authority found that non-price qualitative factors, such as "*brand loyalty*" played a critical role in defining competitive constraints. Both mergers were conditionally approved in 2012, with structural remedies.

			conclusive[13]
C12488-Bubbles Bidco/Quattro	Personal care and household products	Mkt Share >40% Mkt shares >30% distance from the 2° market player >10% where Mks Share <30%	HHI>2500; DV>20%, GUPPI>10% HHI>1500, DV >10%, GUPPI>10% GUPPI>5%; a case by case qualitative assessment on local markets was conclusive
C12535-Ip Italiana Petroli/Esso Italiana	"off-network" wholesale and retail sales of petroleum products (highway fuel distribution sectors)	At the wholesale level Mkt shares >40% after an increase of at least 3% At the retail level Mkt shares >30%	GUPPI>5%
C12247b-Bdc Italia-Conad/Auchan	Retail grocery markets	Mkt shares >25%	GUPPI>5% and case by case qualitative assessment on local markets
C12615 - Alpacem Cementi Italia/Ramo Di Azienda Di Buzzi Unicem	Cement and concrete production and sales	Mkt share >30% *catchment area* of 250 km (broad mkt definition); and Mkt shares>35% in catchment area of 190 km (narrow mkt definition)	GUPPI>5%, DR >30% HHI > 2000 with a delta>250; in the smaller catchment area HHI > 2000 and delta > 500
C12625-Frozen Investments-Sammontana Finanziaria/Sammontana-Forno D'asolo	Frozen bakery products	Mkt shares >45%	delta HHI >1000[14], DR>20%, GUPPI>10%, SNIIP test and critical loss analysis

20. In the cases illustrated in the Table, the elimination of an independent competitor with sufficient competitive capacity would have resulted in non-negligible unilateral effects, irrespective of the mere structural effects. In such instances, the combined post-merger market shares would not have been sufficient to trigger a structural presumption in accordance with the EU Guidelines on the Assessment of Horizontal Mergers, had these shares constituted legal thresholds.[15] In the Authority's experience, market shares and structural presumptions have provided information on the likely effects of a merger, but only in combination with other relevant quantitative (price pressure analysis) and qualitative factors.[16] The Authority carried out a careful analysis in order to gather

[13] In the Authority's experience, to identify potential anti-competitive effects, the results of price pressure tests should be interpreted alongside other available quantitative and/or qualitative evidence.

[14] In this specific case, for the purpose of calculating the HHI index, the market shares of marginal competitors (amounting to approximately 5–10%) were excluded as a precautionary measure for the parties. Including these shares would have resulted in a higher HHI index.

[15] The EU Guidelines on the Assessment of Horizontal Mergers indicate that mergers resulting in a concentration exceeding a 50% market share for one undertaking may, in themselves, suggest an existing dominant position. Conversely, mergers where the post-merger market share does not exceed 25% of the relevant market may be presumed compatible with the Common Market (see Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31/5, 5.2.2004).

[16] The price pressure tests provide *prima facie* evidence of the likelihood of unilateral effects in mergers, especially in differentiated product markets. However, they differ in their underlying assumptions and functional forms. When used for merger control purposes, they may lead to

sufficient compelling evidence of direct competitive constraints between the merging parties and to identify possible unilateral effects.

21. The application of the concept of closeness of competition has proven invaluable in the identification of merger-specific competitive concerns, even in instances where the precise boundaries of the relevant market were not clearly delineated. In order to achieve this objective, the Authority also commissioned surveys of customers or distributors with the aim of calculating diversion ratios and measures of substitutability, among other indicators of competitive proximity.[17]

22. In general, this type of analysis is particularly useful in the context of local competition, as observed in retail markets. Examples of such markets include food and drug stores, banks, perfume stores, pet shops, and petrol stations. In the context of retail markets, non-price parameters play a pivotal role in defining the competitive landscape and delineating the boundaries of relevant markets. In the Authority's experience, in specific sectors such as retail distribution, pet products, personal care and household products or selective distribution of cosmetics and perfumes, competitive variables may include distance, brand reputation or brand loyalty, product quality and packaging, shopping experience and sales services.[18] In food retailing (grocery distribution) in addition to

different results. The Authority's approach at the screening stage is to use those metrics as complement tools in combination with other relevant structural screens,

[17] Recently, in the C12625-Frozen Investments-Sammontana Finanziaria/Sammontana-Forno D'Asolo merger case, a survey was conducted to assess the degree of substitutability between the merging parties and calculate DR through targeted questions to customers and suppliers. Similar surveys were also conducted in other merger cases such as C12410B (wholesale and retail markets for pet products), C12488 (retail markets of personal care and household products), C12535 (local fuel markets), and C12625 (frozen breakfast bakery products). The Administrative Court of first instance has emphasized that the analysis of demand-side substitutability must be based on actual, not theoretical, substitution possibilities to accurately identify competitive pressures. Although this ruling was issued in an abuse of dominance case, the court's interpretation provides essential guidance for the methodology the Authority should follow in its assessments. Relevant judgments include TAR Lazio, I, 4 June 2019, No. 7175, A487 - Compagnia Italiana di Navigazione; TAR Lazio, Rome, Section I, No. 12168/2014; and the Court of Justice judgment of 23 January 2018, No. 179.

[18] For example, in case C12488 Bubbles-Quattro, a merger in the retail distribution sector for personal care and household products, the Authority found that the transaction could reduce competition by creating or strengthening a dominant position in nine out of thirty-five local markets and by eliminating a key competitive constraint in the remaining markets, leading to unilateral post-merger effects. Close competition analyses were also conducted in other merger cases. In case C12410b-Cinven Capital Management-Fressnapf Beteiligungs/Agrifarma - Maxi Zoo Italia, according to the Authority's analysis online retailers were considered to exert sufficient constraints on the merging parties, unlike large-scale retail distributors (such as supermarkets), due to differences in the quantity and quality of their assortments and the types of clients they serve. Post-merger, market shares exceeded 40% across approximately 524 retail stores. In the past, the Authority has conducted such type of analysis in a case retail distribution of cosmetic products and luxury fragrances. The transaction envisaged the concentration of the first and second market operator in the relevant markets and, according to the Authority, would have raised unilateral effects concerns in several local markets (C12109-Douglas-LaGardenia). All of these merger cases were conditionally cleared with structural divestitures.

distance, key competitive parameters would include the minimum size of the outlet, the product range, the quality and the layout of the outlet/shop.[19]

23. Even in mergers within traditional homogeneous product markets, non-price factors, such as the distance between points of sale, may exert an influence on competitive dynamics without providing clear support for either a narrow or broad market definition.

24. In this regard, a case study was conducted on the wholesale and retail distribution of petrol. In order to ascertain the competitive constraints and magnitude of substitution resulting from the aforementioned merger, the Authority computed proximity statistics. This enabled the definition of a plurality of affected local markets. Furthermore, the Authority noted that the structural analysis would not have yielded significantly different results had the HHI (in line with the EU concentration thresholds) been used instead of market shares. The latter were calculated in terms of (i) the number of petrol stations and (ii) the volumes supplied. In both cases, the metric was found to be greater than or equal to 30% in the vast majority of local markets. Furthermore, the Authority determined that the merged entity would enhance its network in terms of both size and volume. In terms of size, the merged entity would control approximately 29% of the stations, compared to 18% for the second largest operator in the market. In terms of volume, the merged entity would control a share of almost 25%.[20]

25. An additional case study concerns a merger in the cement and concrete markets. In this instance, the calculation of market shares was complemented by an HHI analysis based on two different catchment areas. The results indicated that, in the broader catchment area, the post-merger HHI would have exceeded 2000 with a delta greater than 250. In the narrower catchment area, the HHI would have been above 2000 with a delta exceeding 500.[21]

2.2. Below-threshold mergers

26. In 2022, the Authority was granted the power to review certain below-threshold acquisitions (new Art. 16,1-bis of the Italian Competition Act) with the objective of preventing the deterioration of competitive market structures and enabling the Authority to address so-called killer acquisitions.[22]

27. The *call in* option serves two main objectives:

- to scrutinize transactions with a domestic link or nexus that do not meet the applicable turnover thresholds under the national merger control regime, but raise competition concerns based on the size and nature of the undertakings;

[19] For instance, see case C12247B Conad-Auchan. Similar techniques have been applied in assessing other mergers in the past, such as C12246 Fratelli Arena and C12279 Diperdì/Company Branches.

[20] See case C12535 API-Esso. Following an extensive investigation, which included analyzing approximately 4,000 local markets for on-network fuel distribution, 200 local markets for off-network fuel distribution, and surveying over 2,000 consumers, the Authority identified significant competitive effects resulting from the transaction. These effects included the strengthening of a dominant position and a reduction in competition across various on-network and off-network markets. The merger was conditionally cleared in Phase II.

[21] See C12615 - Alpacem Cementi Italia/Ramo di Azienda di Buzzi Unicem.

[22] See Article 32 of Law n. 118/2022 amending Article 16 of the Competition Act 287/90.

- and to prevent harmful effects on the growth and development of small-sized companies characterized by innovative strategies (e.g. nascent or innovative competitors).

28. Consequently, the reform enables the Authority to address mergers that may result in the elimination of a close or potential competitor, which could ultimately lead to concrete risk for competition by reducing innovation.

29. In particular, the Authority may request notification of a deal that meets the specified turnover size requirements (a combined worldwide turnover of EUR 5 billion or meet one of the specified national turnover thresholds) and is likely to result in a concrete risk to competition in the national market or a significant part of it, based on several factors.

30. In order to clarify the circumstances under which a case may be deemed eligible for a "call in" the Authority issued a Guidance Notice subsequent to a period of public consultation in 2023.[23] In accordance with the Notice, even in the event that none of the undertakings involved in the concentration generates turnover in Italy, the assessment of market structure and the characteristics of the undertakings is contextualised by consideration of other factors, such as the nature of the undertakings' activities, their importance to consumers and/or other businesses, and the competitive constraints exerted by one or more companies in the relevant market in the future.[24]

31. In addition to market share and concentration screens, the nature of the target company is a crucial factor, particularly in instances where turnover figures are unavailable or insufficient to gauge the target's potential competitive impact in the future.[25] Specifically, the acquisition of nascent or potential competitors in vertically adjacent or complementary product markets may be presumed to pose a significant restriction of competition, particularly in sectors where innovation is a pivotal competitive factor. This presumption may provide grounds for challenging the proposed transaction. Furthermore,

[23] The Authority consulted stakeholders to gather and incorporate the views of the legal and business community on the application of this new regime, Article 16 (1-bis) of Law No. 287/90, in accordance with the EU principles. The Notice aims to provide clarifications on the temporal and substantive scope of the provision's application. The Notice is available only in the Italian version, at the following link: https://www.agcm.it/dotcmsdoc/normativa/concorrenza/P31090_Comunicazione_operazioni_sotto-soglia.pdf.

[24] The following elements are considered: diffusion in Italy of the activities concerned, this includes the extent to which users or consumers in Italy utilize the services of the undertakings involved (as an example in the digital sector, reference may be made to the daily or monthly number of users of such services residing in Italy or the number of accesses by individual users in Italy to a given website); location in the national territory, this refers to the presence of the company's headquarters, production facilities, and/or research or experimentation laboratories in Italy; performance of R&D activities relevant to the national market, this could involve factors such as the marketability of research results in Italy, ownership of a particular patent, or having started the approval process for a drug intended for distribution in Italy; plans to enter the national market, this includes considerations such as the prospect of opening manufacturing plants, the occurrence or imminent hiring of personnel, the process of obtaining marketing authorizations, or the expectation of concluding sales contracts in Italy. Other significant links with the domestic market. Any relevant connection that arises from the characteristics of the transaction and ties to the national market or a significant part of it.

[25] This applies when the target company: i) is a start-up with significant competitive potential, ii) is an important innovator, iii) has access to competitively significant assets, or iv) provides products or services that are key inputs or components for other industries.

the Authority may supplement structural indicators with transaction-level metrics, such as the acquisition value, in particular when this is markedly higher than the target's current turnover.

32. The Notice introduced a detailed list of *safeguards*, specifying circumstances in which below-threshold concentrations are unlikely to be called in for review. These include cases in which certain market share levels, HHI levels, or HHI deltas—set in line with EU law—are not met, e.g. when post-merger market shares are below 25%. Additional criteria include the level of the HHI and its changes. For horizontal mergers: if the HHI is below 1,000; or the HHI is between 1,000 and 2,000, with a delta below 250; or the HHI is above 2,000, but the delta is below 150. For vertical mergers: post-merger of the new entity is below 30%, and the HHI is below 2,000.[26] Even though, these structural parameters are not binding, they function as a screening tool for merging parties and the Authority to identify likely unproblematic below-threshold mergers, serving as a relative negative structural presumption. This approach enables the Authority to prioritize its investigative efforts on cases that warrant more detailed scrutiny.

33. Furthermore, the Notice permits the undertakings concerned to submit a voluntary merger filing below the established threshold. A pre-notification phase may, indeed, be an opportunity for the undertakings to elucidate the reasons why they consider that the transaction is unlikely to give rise to concrete risks to competition at the national level or in a relevant part of it. Furthermore, it allows them to obtain legal certainty that the Authority will not call in the transaction.

34. In the first ten months of 2024, two out of four Phase II merger investigations stemmed from the exercise of the *call-in* power of the Authority, confirming the importance of this tool.[27] These two transactions affected traditional sectors and related to cases in which concentration would have had a significant impact on local markets due to horizontal overlaps and vertical relationships.

3. The role of market shares and other structural indices in antitrust cases

35. In accordance with established EU and national jurisprudence, dominance in antitrust cases typically arises from a combination of several factors, including structural factors primarily identified by market shares. [28] Although the concept of dominance is not

[26] These criteria align with the EU Horizontal Merger Guidelines (OJ C 31, 5.2.2004) and the Non-Horizontal Merger Guidelines (OJ C 265, 18.10.2008).

[27] See C12586 Ignazio Messina & C./Terminal San Giorgio and C12615 Alpacem Cementi Italia/Ramo Di Azienda Di Buzzi Unicem. Both mergers were conditionally authorized.

[28] According to the Council of State in line with the Commission Notice on exclusionary "*conduct by dominant undertakings (Feb. 9, 2009), the structural factors of dominance are essentially identified in the size of the market share, all the more so if significant and persistent over time, and of barriers to entry for new entrants."* (July 18, 2014, No. 3849, A422 - Sky Italia/Auditel in which the Court). Beside market shares, other factors indicative of dominance may be retrieved from the qualitative analysis of the supply-side and brand notoriety (see Administrative Court Tar Lazio, 2019, n.7175, A487). The Council of State further clarified that dominance is defined by "*the ability of the undertaking in such a position, by virtue of its superiority and the market power which it derives from it, to significantly influence competition in the market*" and to operate to a considerable extent independently of competitors, customers, and ultimately, consumers (Council of State, VI, 2014, No. 1673, A437 - Coop Estense).

absolute[29], market shares exceeding 50 percentage points may, in and of themselves, serve as evidence of the absence of an effective competitive constraint[30] and, therefore, a dominant position, except in exceptional circumstances. [31] Indeed, the case law indicates that substantial market shares should *"inevitably"* be regarded as a strong indication of potential dominance and the accompanying special responsibility by prominent firms.[32]

36. Conversely, it is not precluded that a company may be found to have dominant position if its market share is below 50 percentage points.[33] A review of case law on dominance reveals that the presumption and the level of the metrics have evolved over time.

37. In line with established European Commission precedents, the Authority has on occasion recognised the concept of super-dominance and varying degrees of dominance, particularly in the context of the digital environment. This emerged in a case where a company exploited its dominant position in the market for marketplace intermediation services in a manner that was detrimental to competitors in the related e-commerce logistics market.[34] In order to evaluate the extent of the company's dominance, the Authority employed a methodology that involved the calculation of market shares based on a range of economic evidence. This evidence was selected to reflect the distinctive characteristics of the e-commerce platform business model and its two-sided nature.[35] Furthermore, in

[29] According to national case law, a dominant position does not necessarily imply a monopoly or near-monopoly situation; it may also be inherent in the characteristics of the market and its competitive dynamics; see among others Council of State, VI, 2014, No. 1673, A437 - Coop Estense.

[30] See Administrative Court Tar Lazio, July 26, 2017 No. 8945, A480 – Aspen.

[31] In Council of State, 2021, No. 2727, A487 - Compagnia Italiana di Navigazione-Trasporto Marittimo delle Merci da/per la Sardegna, the court established that very large market shares are, save in exceptional circumstances, evidence of the existence of a dominant position. In the same case, the Administrative First Court Tar Lazio (2019, n.7175) acknowledged that "*a vast majority share of the relevant market, well above the 50% mark, (is) identified, albeit in a tendency, by the relevant Community guidelines as symptomatic of dominance"* as well as the permanent consistency of that percentage of the market referable to the undertakings.

[32] The Court observes that according to the Authority enforcement proactive "*any wise economic operator must be aware that the holding of substantial market shares, while not necessarily and in any case the sole determinant indication of the existence of a dominant position, nevertheless has in this regard a considerable importance which must inevitably be taken into account with regard to his potential conduct in the market*," see Council of State VI, 13 2020, nn. 310, 315, A435 - Comune di Prato-Estra Reti Gas.

[33] According to the Court in line with the Community orientation, the notion of '*dominant position*' cannot be interpreted in the sense of an uncontested *market position*; therefore, variations in market share in a negative sense may well be compatible with the existence of a dominant position, just as, more generally, the existence of competition, even lively competition, on a given market does not exclude that an undertaking may be dominant on the same market. See Council of State, VI, April 1, 2021, No. 2727, A487 - Compagnia Italiana Di Navigazione-Transporto Marittimo Delle Merci Da/Per La Sardegna.

[34] See A528 - FBA AMAZON case.

[35] See A528 - FBA AMAZON case. In its assessment, the Authority relied on various indicators to determine Amazon's market shares and market power, including revenues from basic intermediation services, retailers' sales (Gross Merchandise Volume and Value), number of retailers, number of products available, and consumer visits. This variety of metrics allowed for a comprehensive measurement of the marketplace's size, its ability to generate revenue from intermediation, and its 'attractiveness' from both a consumer perspective (number of active consumers, average annual

order to supplement the analysis and in accordance with established case law, a substantial disparity in market shares in comparison to the nearest competitor (exceeding 60 percentage points) was regarded as a clear indication of the strength of the company's dominance and market power.[36] In another case, the structural analysis was complemented by consideration of the fact that the undertaking was a key player in platform intermediation.[37]

38. Similarly, on one occasion, the Authority determined, based on a comprehensive structural analysis of the relevant market (out-of-home sales outlets in Italy for industrial ice cream), that the undertaking held a position of absolute predominance, with a market share exceeding 60%, approximately four times that of each of its closest competitors.[38] This case has a significant practical impact on the treatment of exclusivity under the EU prohibition on abuse of dominance. The Italian Council of State, in accordance with the principles established by the EU Court, has confirmed that the significant market coverage criterion constitutes a sufficient legal test for presuming the exclusionary effects of single-branding exclusivities and other commercial restrictions, while allowing for rebuttable evidence.[39]

4. Relationship between structural presumptions and other competition policy instruments

39. The Authority is empowered to prohibit practices that constitute an abuse of economic dependence (Art. 9, Law No. 192/1998). This is in situations "*in which the Authority itself finds that an abuse of economic dependence has relevance to the protection of competition and the market*" (Art. 9, 3-bis of Law 192/1998). Subsequently, the Authority has interpreted this type of presumption to focus exclusively on those restricted instances where the abuse of economic dependence is capable of precluding a competitor from the market, whether through the arbitrary termination of contractual relations or the imposition of unfair contractual terms.

40. The introduction of Law no. 118/2021 saw the implementation of more stringent regulations targeting digital platforms, with the objective of enhancing the Authority's

spending, frequency of purchases) and a seller's standpoint. Amazon's dominance was assessed based on its overall power and influence, which included factors such as reputation, loyalty programs, and a wide range of services. These elements contributed to the creation of an ecosystem characterized by indirect network effects and an unmatched pool of personal data.

[36] In the A528 - FBA Amazon case, there was a significant difference between the market share of the undertaking, which was in the range of 70-80%, and that of its closest competitor, which was between 10-15%.

[37] The Authority computed Google's market share, on the quantity and popularity of apps available on Google Play, on the automatic app update features, and on the fact that app stores for operating systems that are not licensed, and among them in particular Apple's iOS, do not exert sufficient competitive pressure to weaken Google's autonomy of behaviour, as well as relaying on the notion of gatekeeper as an element for defining Google's dominance. The Court endorses the Authority approach; see Tar Lazio, I, 18 luglio 2022, n. 10147, A/529 – Google/ Enel X.

[38] See A484 - Unilever/Distribuzione Gelati, where dominance was assessed based on market shares calculated from both volume and value sales, as well as the product range. The product range was used as an indicator of the type of competitive constraint each competitor could effectively exert, in terms of competition in (within outlets where fridge exclusivities applied) and for the market.

[39] As for the metric of market coverage, the Authority assessed that Unilever's exclusivities impacted between 50-70% of the market.

capacity to intervene in response to their market power.[40] In order to achieve this, the scope of the rule prohibiting the abuse of economic dependence was broadened. The most significant innovation introduced by the revised legislation is the rebuttable presumption of economic dependence on digital platforms offering intermediation services, particularly when these platforms serve as pivotal gateways for both end users and suppliers. In essence, the legislation stipulates that, *"in the absence of evidence to the contrary, economic dependence is presumed in instances where an undertaking utilises the intermediation services of a digital platform that plays a pivotal role in providing access to end users or suppliers, including in light of network effects or data availability"*.[41] The second noteworthy aspect of the legislation is the provision of a non-exhaustive list of abusive practices conducted by digital platforms.[42]

41. The application the presumption of economic dependence was recently challenged by the Court, which overturned an *interim measure* order issued by the Authority.[43] Although the ruling does not address the main competition proceedings, it offers insights into the probative value of such presumption.[44] The judgment specifically emphasized that "*the presumption in question is not absolute but expressly rebuttable*", thereby confirming the relative nature of structural presumptions in the national case law. Furthermore, the Court overruled the Authority's decisions on various grounds, including the claims that it had not been reasonably demonstrated that Meta performs had an "*intermediary*" function

[40] See Law 118/2022 Art. 33 *Strengthening the fight against the abuse of economic dependence*.

[41] As a result, the burden of proving the absence of economic dependence now lies on the digital platforms (those may include a wide range of entities such as transactional platforms, marketplaces, search engines, etc). By contrast, the previous regime remains in force and applies to relations involving traditional operators as well as digital platforms not meeting the specific requirement of playing a "*a decisive role*" in reaching end users or suppliers.

[42] The non-exhaustive list of abusive practices conducted by digital platforms, includes: a) providing insufficient information or data on the scope or quality of the service provided and b) requesting undue unilateral services not justified by the nature or content of the activity performed, or c) adopting practices that inhibit or hinder the use of different providers for the same service, including through the application of unilateral conditions or additional costs not provided for in the contractual agreements or existing licenses. Notably, b) and c) provisions mirror conducts included into the notion of abuse of dominant position (respectively, tying contracts and exclusionary clauses to the detriment of competitors).

[43] See Judgment July 2024 No. 5827 by the Council of State - the Italian Administrative Court of Second Instance - overturning the Italian Administrative Court of First Instance ("TAR Lazio"). The latter had upheld the Authority's decision to impose *interim measures* on Meta Platforms Inc. ("Meta") for the alleged abuse of economic dependence in its negotiations with Italy's main Collective Management Organisation, SIAE. The Authority had required Meta to resume negotiations with SIAE in good faith and to immediately restore the availability of musical works intermediated by SIAE on Meta's platforms. Meta had removed SIAE's repertoire from its platforms because SIAE had demanded a significantly higher fee than what Meta was willing to offer.

[44] Article 9 provisions may be entrusted, in a private action, to civil Courts, which can grant interim measures and damages. Legal presumptions are governed by Article 2727 of the Italian Civil Code. Here, a "known fact" serves as the basis of the presumption, and a decision is made based on the "presumed fact" (i.e., indirectly proven by law once the known fact has been established). The presumed fact, in turn, can be challenged with contrary evidence by the concerned party. The known fact itself must be proven unless it constitutes a "notion of common experience" as defined in Article 115 of the Code of Civil Procedure. For further details, refer among others to Orizzonti del Diritto Commerciale, 28 Fascicolo 1/2023, ISSN 2282-667X.

in the relevant field, as required by law, and thus the presumption of "*economic dependence*" did not apply.

42. In the light of the above, the assessment of economic dependence may require a careful analysis of the relevant market(s) and viable alternatives, similar to the approach taken in more traditional cases of non-horizontal dominance case.

5. Final remarks

43. The Italian competition regime is not supported by the use of structural presumptions as a basis for the review of competition cases. In accordance with the fundamental tenets of EU law, structural presumptions and safe harbours with regard to market shares serve as preliminary indicators, without necessarily resulting in an immediate legal conclusion. In accordance with the standard burden of proof, which encompasses the presumption of innocence and the right to a defence, such presumptions are not binding for the Authority and can be rebutted. It is the responsibility of the Authority to conduct a comprehensive market analysis and economic assessment of the potential harm to competition in both merger and antitrust cases.

44. In its enforcement practice, the Authority may rely on evidentiary or factual presumptions, such as those related to market share thresholds, to analyse the likely impact on market structure and competition and decide, on a case-by-case basis, whether an in-depth investigation is required. Nevertheless, the effectiveness of market share thresholds, along with other concentration screens, depends on the features of the market in question. In certain instances, these measures may prove inadequate for gauging potential market power, particularly when there are no established precedents or when non-price parameters assume a pivotal role.

45. In order to address these challenges, the Italian Competition Authority frequently integrates an assessment of market shares with an examination of supplementary factors that can either corroborate or disconfirm the undertaking's actual capacity to influence competitive dynamics or generate outcomes within the market. This approach has been consistently endorsed by the Italian Administrative Courts.

46. Moreover, the Authority has augmented its toolkit with the objective of addressing market power in rapidly evolving markets, exemplified by the below threshold call-in option. The Authority's Guidance Notice clarified its principal concerns with regard to the acquisition of nascent or potential competitors who are likely to become independent competitors and exert an effective competitive constraint. The information required to notify such mergers now includes additional relevant parameters, such as the nature of the target and its activities or the value of the transaction. These extend beyond the more traditional structural factors that have previously been considered.

47. The Authority's enforcement actions have been enhanced by a balanced application of rebuttable structural presumptions in conjunction with qualitative and quantitative evidence. When appropriate, this has been complemented by detailed economic analysis, including econometric studies to estimate price effects and other outcomes. This approach enables the Authority to respond to developments in the markets and in the economic theory. The opportunity for experience sharing and joint reflection among competition authorities on complex topics, such as structural presumptions, is of significant value and is strongly encouraged.