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ANTITRUST AND COMPETITION

Significant Changes to the Italian Antitrust Regime

On 5 August 2022, the Italian Parliament adopted law no. 118, which entered into force on 27 August 2022 (2021 Italian Competition Law). The annual competition laws aim to update the Italian antitrust regime on a regular basis and remove regulatory constraints to fair competition. However, the annual competition law has been adopted only on two occasions (2009 and 2017) before the adoption of the 2021 Italian Competition Law.

The 2021 Italian Competition Law covers various areas of competition law, including concessions for public assets, local public services and transport, and distribution of natural gas and fiber optic networks. The 2021 Italian Competition Law also strengthens and widens the scope of the Italian Competition Authority's (ICA) investigative powers. The key changes are:

The ICA's Power to Review Transactions That do Not Meet the Merger Filing Thresholds

This change mirrors the new Commission's approach embodied in the referral mechanism under Art. 22 of the EU Merger Regulation (EUMR), which permits the Commission to review transactions that do not meet the EUMR and national merger filing thresholds but concern an emerging company in sectors such as pharmaceuticals and digital (so-called “killer acquisitions”). The ICA has now been empowered to review transactions that: (i) meet one of the turnover thresholds; (ii) raise competition concerns in the national market, or in a substantial part of it, also taking into account possible detrimental effects on the development of small companies with innovative strategies; and (iii) take place within six months from closing.

Change of the Substantive Test for Mergers Review

The 2021 Italian Competition Law marks the transition from the dominance test for merger control review to the significant-impediment-to-effective-competition test, in line with the Commission's approach.

Change of JV Review Rules

The ICA distinguished between concentrative and cooperative joint ventures (JV), where only the former was subject to a filing obligation if: (i) the JV was “full function”, i.e., JVs that perform, on a lasting basis, all the functions of an autonomous economic entity; and (ii) the relevant merger filing thresholds were met. The 2021 Italian Competition Law now simplifies the assessment of JV and mirrors the EUMR's approach to JVs.

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Request for Information Outside Investigations

Under the previous regime, the ICA could request information or documents only after the initiation of formal proceedings. With the 2021 Italian Competition Law, the ICA may request information at any time and can impose fines in case of missing or incomplete information.

Settlement Procedure

A settlement procedure is introduced for cases regarding restrictive agreements and abuse of dominance. In particular, the ICA can set a deadline by which the parties can express their interest in the settlement and submit settlement proposals. This new procedure seeks to enhance the companies' cooperation with the ICA by admitting the infringement and thus reducing the duration of proceedings in exchange of a substantial fine reduction.

Abuse of Economic Dependence in Digital Platforms

The abuse of economic dependence (i.e., a situation where one party that is in a position of relative strength to another, abuses such position) has been clarified by providing: (i) a presumption of economic dependence for customers of digital platforms having a key role in reaching end-users and suppliers; and (ii) a non-exhaustive list of practices amounting to abuse of economic dependence for digital platforms.

The 2021 Italian Competition Law brings related Italian procedures closer to the EU procedures and provides greater consistency in competition law enforcement. The new clarification of merger control rules, the settlement procedure, the expansion of the ICA's powers, and the refinement of the abuse of economic dependence are most welcome. However, companies are likely to face significant uncertainty for transactions that fall below the merger filing thresholds but meet the conditions for the ICA's ability to acquire jurisdiction over such transactions. This will be an important area for further monitoring and assessment.

DIGITAL AFFAIRS

Sustainable Designs for Mobile Phones and Tablets

On 31 August 2022, the Commission opened a feedback period on its draft regulation concerning rules for the eco-design of mobile phones, cordless phones, and tablets (Draft Regulation).

The Commission aims to reduce premature device replacement and insufficient product reuse and recyclability. The Draft Regulation will establish rules that promote the energy efficiency and durability of mobile phone and tablet designs.

The new rules would also allow consumers to easily repair and upgrade their electronic devices, and encourage the reuse and recyclability of devices. It includes proposals to make spare parts available to professional repairers from at least one month after the product is placed on the market until five years after the product ceases to be sold. These spare parts should also be available on a company's website and delivered to professional repairers within five working days.

Regarding product durability, companies should ensure for example that devices can survive 100 falls (without protective foils or covers), that the battery endurance in cycles achieves a certain minimum of full charge cycles, or that the device is dust tight and protected against water immersion up to one meter depth for a minimum of 30 minutes.

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The Commission will publish all contributions received to the Draft Regulation. Respondents can choose to have their details published or to remain anonymous. The feedback can be provided until 28 September 2022. The adoption of the Draft Regulation is currently planned for the fourth quarter of 2022.

ECONOMIC AND FINANCIAL AFFAIRS

European Parliament Set to Negotiate Basel Rules

As part of the Banking Package 2021, in October 2021 the Commission proposed two legislative proposals amending the Capital Requirements Directive (CRD) and the Capital Requirements Regulation (CRR). These legislative proposals are informally known as “Basel IV”.

Both files were referred in the ECON Committee which named Jonás Fernández (S&D, Spain) lead rapporteur for both acts. The European Parliament Drafts Reports were published in May 2022 and members of the European Parliament (MEPs) had until 15 July 2022 to present amendments. A total of 1,561 amendments were presented for the CRR and 582 amendments were proposed for the CRD.

The submitted amendments mainly target three key areas: output floor model, treatment of crypto-assets, and climate change.
With respect to the output floor (defined as the measure that sets a lower limit (floor) on the capital requirements (output) that banks calculate when using their internal models), many amendments are directed toward broadening the model proposed by the Commission. The Commission suggests using the output floor at a consolidated level for international banking groups, but not for subsidiaries. Some MEPs seem to disagree with that approach since many proposed amendments suggest to also include subsidiaries within the output floor scope. During recent ECON committee meetings, MEPs have argued that leaving subsidiaries out of scope can set a dangerous precedent for EU countries hosting banks from other EU member states, leading to undercapitalized subsidiaries.

As for the treatment of crypto-assets, some MEPs proposed to apply higher risk-weighting to banks who meet a certain threshold of crypto-assets holdings. In this sense, higher risk weighing would prohibit banks from being exposed to risky crypto-assets if such assets would equal more than 1% of their capital.

Regarding climate change, some MEPs proposed to apply higher risk-weighting to banks financing new fossil-fuel exploration as of 2022. This proposal is likely to lead to controversial negotiations as other MEPs have suggested deleting climate-related provisions from the proposals.

The vote on the amendments and both reports in the ECON committee is currently scheduled for 5 December 2022. After the adoption of both reports by the ECON committee, they will have to undergo a plenary vote, after which the European Parliament negotiating position on the file will be adopted. Once the Council of the EU adopts its position (it has not yet as of September 2022) on both proposals, trilogue negotiations will start, most likely in 2023.

Czech Presidency Considering Using the Enhanced Cooperation Mechanism for Pillar 2 if No Deal Is Reached Soon

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The Pillar 2 Model Rules (Pillar 2) were published in December 2021 as part of the two-pillar solution to address tax challenges of the digitalization of the economy, within the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting. Pillar 2 aims to ensure that large multinational enterprises pay a minimum level of tax on the income arising in each jurisdiction where they operate.

With the aim to implement Pillar 2 in the European Union, the Commission published a proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union in December 2021 (Pillar 2 Directive).

EU Finance Ministers have failed to reach a political agreement on the Commission's proposal since the start of their negotiations in the first quarter of 2022. The Council of the EU is the sole legislator in regards to EU tax law and draft laws being adopted by unanimity, meaning that all 27 EU member states must greenlight the proposed legislation. At the beginning of the negotiations, more than one EU member state was reluctant to approve the Pillar 2 Directive (e.g., Poland, Hungary). However, it now appears that only Hungary is blocking the adoption of the legal text.

Towards the end of the French Presidency of the Council (January–June 2022), the possibility of using the enhanced cooperation mechanism was put on the table by the presidency and the Commission. The enhanced cooperation mechanism allows EU member states to adopt legally binding legal texts amongst those who would opt-in to the mechanism. The minimum number of participants to use the enhanced cooperation mechanism is nine. The adopted legal text would not bind nonparticipating EU member states, who at the same time would be allowed to join the enhanced cooperation mechanism framework at any time in the future. However, the enhanced cooperation mechanism must only be used as a last resort, when unanimous agreement is impossible to reach. The enhanced cooperation mechanism also has been used by a group of EU member states to advance the proposed EU Financial Transaction Tax.

The Czech Presidency of the Council (July–December 2022) is tasked to find a solution to the impasse. The topic was last discussed at the informal meeting of economic and financial affairs (ECOFIN) ministers on 10 September 2022. The Czech Minister of Finance and President of the ECOFIN Council, Zbyněk Stanjura, appears determined to prioritize a European solution, i.e., compromise and consensus, before the next ECOFIN meeting on 4 October, where the subject will be discussed in-depth. If no agreement is reached by October, the use of the enhanced cooperation mechanism could become reality in the coming months.

FOREIGN DIRECT INVESTMENT (FDI)

Second Annual FDI Report

The Commission published its second Annual Report on the application of the EU (FDI) Screening Regulation (Regulation) on 1 September 2022 (Report). The Report covers the year 2021 and highlights developments in national screening mechanisms and the utilization of the FDI cooperation mechanism.

In October 2020, the Regulation entered into force. The pandemic-induced FDI slow-down of 2020 was followed by a surge in global FDI flows the following year. In 2021, the European Union's inbound FDI amounted to €117 billion, or 8% of global FDI. The recent growth of inbound FDI flows is due to strong equity markets and a recovery of business confidence, which in turn led to more merger & acquisition deals and greenfield investments. These transactions increased from their 2020 levels by 32% and 12%, respectively. While the 2021 business

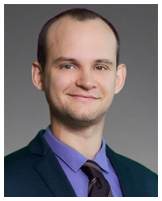
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activities subject to FDI screening are positive, it is likely that the uncertainty caused by the Russia-Ukraine conflict will create an unreliable business climate that stifles FDI growth. Insofar as target sectors go, information and communications technology and manufacturing are leading the recovery of foreign transactions in the European Union.

EU member states are not required to adopt national screening mechanisms; however, the Regulation has nonetheless triggered a wave of screening mechanism adoption and implementation. In 2021, most of the EU's member states experienced major FDI legislative developments. Seven EU member states had existing FDI screening mechanisms (Austria, Finland, Malta, Poland, Portugal, Slovenia, Spain), six amended an existing mechanism (France, Germany, Hungary, Italy, Latvia, Lithuania), two had a consultative or legislative process expected to result in updates to an existing mechanism (the Netherlands, Romania), and three adopted a new national FDI screening mechanism (Czech Republic, Denmark, Slovakia). Seven EU member states had a consultative or legislative process expected to result in the adoption of a new mechanism (Belgium, Croatia, Estonia, Greece, Ireland, Luxembourg and Sweden). Only two EU member states—Bulgaria and Cyprus—do not have publicly reported initiatives underway.

The findings of the Report, along with a related study on the FDI cooperation mechanism, will contribute to the Commission's potential revision of the EU FDI Screening Regulation in 2023.

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