ITALY MAY REVIEW ITS MERGER FILING THRESHOLD

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Consistent with its annual review of the merger filing thresholds, in March this year the Italian Competition Authority (the "**AGCM**") updated the turnover thresholds above which transactions must be notified to the AGCM prior to their implementation. In Italy, parties to a concentration must notify the AGCM of a transaction if the combined national turnover of the companies involved is above EUR 495 million (the "**Combined Turnover Threshold**") and if the national turnover of the target company exceeds EUR 50 million (the "**Individual Turnover Threshold**").

Coincidentally, two Italian senators have proposed substantial changes to Italy's merger rules. In particular, the changes will lower the Individual Turnover Threshold from EUR 50 million to EUR 30 million but leave unchanged the Combined Turnover Threshold at EUR 495 million.

The AGCM has also started investigating two financial institutions for failing to notify about a transaction before implementation. Under Italian merger control rules, the acquiring bank risk a fine of up to 1 per cent of the turnover in the preceding business year.

These developments suggest that the AGCM intends to reinvigorate its enforcement over transactions in Italy and raises the question of whether it is time to review the turnover thresholds.

BACKGROUND

On 24 March 2012, the law of conversion of Mr Monti's liberalization decree introduced substantial changes to the Italian merger control rules. From 1 January 2013 the bar above which mergers and acquisitions became reportable was raised, eliminating the obligation to notify to the AGCM smaller transactions. The reform also abolished merger filing fees for reportable transactions. In particular, the law substituted "OR" for "AND" in Article 16, paragraph 1 of the Italian Competition Act (law No. 287/1990), which sets forth Italy's merger filing requirements.

While on first reading this change appeared modest and presented as a part of a simplification process, upon closer consideration its impact has been significant, resulting in a dramatic drop in the number of filings each year. There were as many as 843 merger filings in 2007 before the start of the economic crisis in Europe. This fell to 451 in 2012, just before the reform, and fell further to 59 in 2013 when the reform came into force.

These changes were largely welcomed by the business and legal community since they corrected a longstanding anomaly that the AGCM was able to assert jurisdiction over a transaction that did not have an appreciable impact in Italy. This reduced red-tape and unnecessary administrative burdens. However, shortly thereafter the AGCM sought views on the impact of the reform on the Italian merger control regime. The AGCM itself acknowledged

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informally on a number of occasions the existence of an enforcement gap due to the high value at which turnover thresholds were set.

On 10 February 2014, the AGCM launched a public consultation and proposed to lower the Individual Turnover Threshold to either EUR 10 million or EUR 5 million to ensure that a significant number of potentially problematic transactions would not escape review.

The results of the public consultation did not clearly support a reduction of the Individual Turnover Threshold. The AGCM decided to further assess the impact of the legislative change on the merger control regime before recommending a formal legislative change to the Italian parliament.

However, two Italian senators have recently proposed changes to the text of the annual competition law (*Atto Senato n. 2085*), currently being discussed in the Senate. If those amendments are adopted by the Parliament, the Combined Turnover Threshold will remain unchanged and the Individual Turnover Threshold will be reduced to EUR 30 million. More importantly, the Individual Turnover Threshold will be applied not only to the turnover of the target company but to the turnover of any two of the undertakings concerned by the transaction.

As a result, should this proposal become law, transactions will have to be notified to the AGCM if:

1. The turnover of any two companies involved exceeds EUR 30 million each; and
2. All the parties' combined national turnover exceeds EUR 495 million.

IMPLICATIONS FOR COMPANIES

Although pending approval, the full ramifications of the proposal to lower the Italian merger thresholds are not yet clear. However, it appears that the current proposals will not significantly increase transaction costs or burdens on business. If approved, the (new) merger notification thresholds will remain sufficiently high to continue to screen out transactions that are unlikely to result in material competitive effects within Italy.

However, the AGCM is showing a reinvigorated appetite for merger control enforcement. Accordingly, it is advisable that companies carefully assess the reporting requirements of their transactions in Italy and take the necessary steps to fully comply with the relevant regulations.

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