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NEW 2013 ITALIAN ANTITRUST AND COMPETITION LAW RULES

Italian Prime Minister Mario Monti's governmental decree on liberalization has recently become law, introducing a number of changes to the Italian antitrust and competition rules that had been originally laid down by the office of the Italian Antitrust Authority *(Autorità Garante della Concorrenza e del Mercato*, or "AGCM") at the time when Antonio Catricalà, today Vice-Secretary of the Council of Ministers, was the acting Chairman of the AGCM.

These enhancements, supported by the new AGCM Chair, Giovanni Pitruzzella, are mostly welcome, but in our view, they are not adequate enough to equip the country with a sound and effective competition policy with enforcement sufficient to operate within an increasingly globalized framework.

THE COMPETITION MERGER CONTROL RULES

Premerger Filing Thresholds Drastically Changed. Until the end of 2012, a mandatory premerger filing in Italy is due whenever a concentration, not subject to the one-stop EU notification before the Commission, shows either (i) a combined aggregate turnover in Italy of all undertakings involved (e.g., buyer group plus target) exceeding €468 million *or* (ii) an aggregate Italian turnover of the target exceeding €47 million. The notification thresholds are adjusted every year by an amount equivalent to the increase in the GDP price deflator index.

Starting in 2013, these two turnover thresholds applicable to the notification of mergers, which are currently "alternative" conditions triggering the notification obligation, will become "cumulative" conditions. This apparently minimal modification to the text of the Italian Antitrust Law (No. 287/1990) has, in fact, drastic consequences, partially positive but in part disagreeable.

The very good news, especially for non-Italian enterprises, is that a large number of less-significant transactions that currently fall under the mandatory premerger notification regime will no longer

be scrutinized. This is the case, for example, with regard to small local purchases that are part of a larger international acquisition, the sale of negligible business branches in the context of outsourcing deals, or the mere transfer of regulatory licenses or patent portfolios of limited value.

The new mechanism will place Italy among the Member States with the highest thresholds for merger review in Europe. The bad news is that this alteration will cause significant transactions that realistically may affect the national markets not to be subject to any kind of review or investigation by either the AGCM or the EC Commission.

Indeed, if the intention of the AGCM was to reduce the number of unimportant transactions falling under the AGCM net, this purpose could have been achieved more effectively by introducing a "de minimis" exception or, alternatively, the new rules could have otherwise included the option for the AGCM to investigate a national merger case not meeting *both* thresholds but only one of the two, whenever the AGCM receives a complaint and discretionally deems the matter worth the opening of an assessment procedure.

From Filing Fee Abolition to the Pre-Merger Regime Tax. Beginning in 2013, the filing fees for the notification of mergers will be abolished.

What could initially be seen as more good news, however, also brings a novel system of funding the AGCM activity, which should instead be viewed as a "tax" applied on companies.

Indeed, once in place, any Italian corporation with total revenues exceeding €50 million will be charged an annual "fee" amounting to 0.08 per thousand of its sales as shown in the latest approved annual report, with a minimum fee by each company of €4,000, up to a maximum amount of €400,000.

The filing fee system introduced in 2006 provided that the maximum filing fee would be €60,000. This is a significant amount, but it would be paid by a subject that had a direct interest in obtaining antitrust clearance of its acquisition, and such party would factor in this fee as part of the overall transaction costs.

Instead, the new burden will be imposed on large groups of enterprises with a multiplying effect that could well exceed €400,000 per year, with no direct relevance to the merger activity of such group, even if the group of companies had made no purchase or sale subject to a pre-merger notification obligation in Italy for a given year.

The outcome appears to be paradoxical, particularly because it will likely give rise to ineffective efforts to avoid such tax while gathering an excess of funding available to the authority and, at the same, reducing the authority's powers and activity in the pre-merger area under the new legislation.

PRIVATE ENFORCEMENT AND COMPETITION LITIGATION

Creation of "Enterprises" Courts. Another welcome aspect of this reform is the abolition of a historic bifurcation of the jurisdiction relating to competition matters. In the past, such matters were determined before one of two ordinary Civil Courts: (i) the Court of Appeal, which ruled, as the first and only level of jurisdiction, on follow-on actions for private damages deriving from the violation of antitrust rules, as ascertained by an AGCM decision; and (ii) the Specialized Sections on IP of the Civil Courts of First Instance, which applied to any decision on the direct infringement of EU competition law occurring in Italy.

Under the new system, all private enforcement cases will be brought before the newly established (but yet to be put into service) Enterprises Courts of First Instance, with the subsequent possibility of filing recourse to the Court of Appeal, thus correcting the Italian system with the inclusion of two levels of jurisdiction for any private antitrust litigation.

The Enterprises Courts will be set up to hear cases in the capital of each region.

The only concerning issue in this judicial restructuring is that the Enterprises Courts, in addition to deciding on private antitrust and unfair competition matters, will also address more general corporate litigation and will still have control

over cases regarding intellectual property law (presently assigned to the Specialized Sections on IP). Moreover, the Enterprises Courts will have jurisdiction over disputes relating to corporate relationships; liability actions; creditors' oppositions; shareholders' agreements; and control, direction, and coordination of group of companies, as well those connected to public work contracts, public supply bids, and public service contracts of European relevance.

According to various sources, this liberalization package creates a new venue for more efficient and rapid resolution of business disputes. However, under the current economic climate and scarcity of financial means, it may end up being less effective than hoped, maintaining, if not increasing, the problems of the former civil judicial system (sluggish and long-winded procedures conducted by overloaded judges in poorly equipped court rooms), which led to the coining of the phrase "Italian torpedoes"—a request for judgment in a slow court to prevent other courts from hearing a case.

Ideally, the Enterprises Courts will not be simply formed of the same judges shifting from the Specialized Sections on IP and with augmented competences to be dealt with using the same or less resources.

Class Actions Expansion. The "baby" Italian class action, as governed by Article 140-*bis* of the Consumer Protection Code, will be amended to be applicable not only to "identical" situations and rights of the stakeholders involved, but also to "homogenous" situations. It will also include the protection of so-called "collective interests." Still, the system is based on individuals' opt-in rights, and it does not provide for an opt-out by a generality of damaged parties called to redress.

THE CONSUMERS' PROTECTION REGIME

Unfair Commercial Practices. The AGCM, which already has jurisdiction to decide cases relating to the protection of consumers from unfair commercial practices perpetrated by "professionals" (as defined by the Consumer Protection Code), beginning in 2013 will also review consumers' cases involving so-called "micro-businesses." According to the liberalization decree (and in accordance with the EC Commission Recommendation 2003/361), these are defined as those companies having less than 10 employees and revenues not exceeding €2 million.

Micro-businesses, therefore, will be protected as if they were "consumers," with the effect of further widening the number of claims the AGCM will have to resolve.

Mortgage Loan Agreements. Some banks and financial institutions require that customers purchase an insurance policy or open a bank account with the financial institution or bank in order to close a mortgage loan agreement. The liberalization decree modifies the Consumer Protection Code by adding this practice to the list of unfair commercial practices to be argued before the AGCM.

Unfair Terms and Conditions. The so-called "*clausole vessatorie*," or restrictive covenants, are currently a matter of civil law and can be voided if found abusive by a Civil Court. Under the new decree, they will come under the administrative authority of the AGCM whenever unfair terms and conditions are contained in standard agreements between business entities and consumers.

The AGCM may impose sanctions on companies that fail to provide requested information or provide false information or fail in any way to amend their contractual forms. The authority's decision is made public, and fines may reach up to €50,000.

The new procedure allows companies to consult the AGCM in advance concerning the unfair nature of their contracts with consumers, although this further activity will likely drain the AGCM with an additional workload. The authority shall decide within 120 days from the request for relief, and those terms and conditions deemed fair by the AGCM cannot be subject to subsequent sanctions by the authority.

The ordinary Administrative Court has jurisdiction over any appeal against the AGCM decision, while the Civil Courts will continue to have jurisdiction over the validity of the unfair terms and conditions and on any request for damages.

AGCM AMPLIFICATION OF POWERS

Counseling Assigned to the AGCM. The AGCM is now granted with several new advisory and warning powers in a diverse variety of matters that are not included in this discussion, since they are unrelated to antitrust enforcement but instead apply to the oversight of public administration matters.

Rating the Companies' Legality Level. The AGCM in the future shall propose to the Parliament legislative bills aimed at promoting ethical conduct in business dealings and will implement a system of rating the "legality level" of companies in Italy whenever public funding is granted or credit is being sought from banks.

Marketing of Agricultural and Farming Products. Certain provisions regulate the AGCM's scrutiny of the trade of food farming and agricultural products, particularly as they relate to the nature and content of contracts among stakeholders in the food chain.

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