

New Merger Thresholds for Italian Transactions

IN SHORT

The Background: On August 2, 2017, the Italian Parliament approved the Law on Market and Competition, which provided a new set of pre-merger filing thresholds. After publication of the law in the Official Gazette on August 14, 2017, the new thresholds entered into force on August 29, 2017.

The Issue: The amendment provides a twofold change in the second set of thresholds: the turnover required for filing obligation is now down to €30 million, and the threshold applies to at least two of the undertakings concerned.

The Outcome: The law is likely to increase the number of notifiable transactions in Italy.

The Existing Thresholds

According to previous legislation, a merger was reportable to the Italian Competition Authority ("ICA") if two cumulative thresholds were met:

- The combined Italian turnover of all the undertakings involved exceeded €499 million (approximately US\$552 million) in the previous fiscal year; and
- The Italian turnover of the undertaking being acquired (the target) exceeded €50 million (approx. US\$55 million) in the previous fiscal year.

Under the current legislation, the ICA annually amends these turnover thresholds based on the gross national product price deflator index. The last amendment entered into force in March 2017.

The current merger notification system is characterized by a strong local nexus, requiring filing only when transactions are likely to have a major impact on the Italian market. Therefore, straight acquisitions of Italian targets with significant turnover in Italy are likely to be reportable under Italian merger control rules (due to the "target threshold," irrespective of the Italian turnover of the buyer, if the target is a large company), whereas acquisitions of small or medium Italian companies by large buyers are likely to escape notification.

When reviewing joint ventures, the ICA takes into account the turnover of the company being jointly acquired (or the value of the assets transferred to a newly established joint venture) as the target turnover, with the consequence that the joint acquisition of a small target (or creation of joint ventures with limited transfer of assets) by large companies is likely to escape notification, as the second threshold is not met.



The new thresholds are meant to 'intercept' acquisitions of smaller targets, provided that the buyer has a presence on the Italian market and that the local nexus is significant.



The New Thresholds

The amended text of Article 16 (1) of Law No. 287/1990 provides the following cumulative thresholds for notification of a transaction:

- The combined Italian turnover of all the undertakings concerned exceeds €492 million (approximately US\$545 million); and
- The individual Italian turnover of each of at least two undertakings involved in the transaction exceeds €30 million (approximately US\$33.2 million).

As under the current legislation, the ICA can amend these turnover thresholds annually.

Consequences of the New Thresholds

Apart from the slight decrease of the first threshold (from €499 million to €492 million), there is a significant twofold change with respect to the second threshold, namely: (i) the threshold is lowered from €50 million to €30 million; and (ii) this threshold applies to at least two of the undertakings concerned (e.g., buyer and target).

The new thresholds are meant to "intercept" acquisitions of smaller targets (with a turnover exceeding €30 million), provided that the buyer has a presence on the Italian market (at least €30 million) and that the local nexus is significant (combined turnover of €492 million for all the parties involved). As for the joint acquisition of undertakings (or the creation of joint ventures), the new structure of the threshold will considerably extend the reportability of all those transactions where the parent companies meet the turnover thresholds, irrespective of the size of the joint venture.

Overall, as a result of this reform, the number of merger transactions reportable to the ICA are expected to grow. However, the reform is flawed in at least two respects:

- Because of the significant first threshold (€492 million), acquisitions of national champions—bearing in mind that Italy is dominated by small and medium enterprises—by foreign buyers may still escape merger control; and
- Due to the elimination of any reference to the target in the second threshold, some merger transactions lacking any local nexus with the Italian market now may become reportable (e.g., two large companies having a significant business in Italy setting up a joint venture in Asia).

Entry into Force and Effects on Pending Transactions

The new merger control entered into force on August 29, 2017 (15 days following the publication of the Law setting forth the new thresholds in the Italian Official Journal on August 14, 2017).

With regard to pending transactions, the relevant date to establish jurisdiction (and the thresholds to be applied) is to be considered the closing of a transaction, given the lack of standstill obligation under the Italian merger control system, and in accordance with the recent notice published by the ICA. Such choice is likely to create some confusion for deals signed under the old thresholds that will be closed under the new ones, given the decrease of the turnover thresholds (i.e., a deal that is not reportable under the rules applicable to the date of signing may become reportable at the time of closing, following the new thresholds).

THREE KEY TAKEAWAYS

1. The new thresholds will increase the overall number of notifiable transactions in Italy.
2. The reform may have some undesired side effects by causing some transactions lacking any local nexus with the Italian market to be reportable under the scope of the Italian merger control regime.
3. The effects of the new thresholds on pending transactions will depend on the approach followed by the ICA in determining the relevant date to establish jurisdiction.

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