The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving pharma and high-technology companies, we have added to this year's edition chapters focusing on the US and EU enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter discussing the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Greece, Portugal, Ukraine and the US). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun jumping' fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EU model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are to be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the Authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, in that the Authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include as a reportable situation the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EU and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multijurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the US and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or the US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
New York
July 2015

Chapter XX

ITALY

Rino Caiazzo and Francesca Costantini[1]

I INTRODUCTION

The Italian merger control regime was implemented with Law No. 287/1990 entitled 'Provisions for the protection of competition and the market' (Act). The Act was drafted on the basis of the 'reciprocal exclusivity' or 'single barrier' principles; thus, it applies only to concentrations that do not fall within the application of EC Merger Regulation No. 139/2004 (EC Merger Regulation), and that therefore do not have to be notified to the European Commission.

In July 1996, the Italian Competition and Market Authority (Authority) issued guidelines providing the general conditions of applicability of the merger control laws, as well as regulating certain procedural aspects (Guidelines).

Moreover, Decree of the President of the Republic No. 217/1998 (DPR 217/98) sets forth the procedural rules that must be complied with in carrying out investigations, which ensure the parties' rights of due process, including the right to be heard and to have access to the documents of the proceedings.

The Authority is an independent body that deals with relevant concentrations. For certain industries, the provisions of the Act are enforced by the Authority with the cooperation of different government bodies. Section 20 of the Act provides that in reviewing concentrations involving insurance companies, the Authority must consult with IVASS, the sector regulator (which, according to Law Decree No. 95 of 6 July 2012, replaced ISVAP, the previous sector regulator) prior to rendering its decision. Section 20 of the Act (as amended by Law No. 303, 29 December 2006) also provides that, with regard to banks, merger control is under the responsibility of the Authority, while the

1 Rino Caiazzo is a founding partner and Francesca Costantini is an associate at Caiazzo Donnini Pappalardo & Associati – CDP Studio Legale.

Bank of Italy is requested to carry on its assessment of sound and prudent management and issue its own authorisation (with reference to the same transaction).

In the case of a concentration resulting from a stock exchange takeover bid, the Authority must receive notification at the same time as the securities regulator, the National Commission for Companies and the Stock Exchange (CONSOB), prior to the launch of the offer.

On 1 January 2013, a new merger control regime providing for a cumulative turnover thresholds criteria for pre-merger notification was introduced by Section 5-bis of Law Decree No. 1/2012 (converted into Law No. 27/2012). Previously, the Act provided for alternative turnover thresholds.

The new regime prescribes that concentrations must be notified to the Authority when the aggregate gross turnover in Italy of the undertakings involved exceeds €492 million, and the gross turnover in Italy of the target exceeds €49 million.[2]

Notification thresholds are subject to an annual adjustment to reflect inflation. Filing fees are not required.

The Act defines 'concentrations' to include mergers, share or asset purchases resulting in the acquisition of control over another undertaking, and the creation of concentrative, as opposed to cooperative, joint ventures.

The Authority considers that a preliminary agreement is not sufficient to create a concentration for the purposes of the Act.

Section 7 of the Act adopts the definition of control set forth by the Italian Civil Code (CC) for the purposes of Italian corporate law generally. Section 2359 CC recognises both *de jure* control (i.e., when a majority of the voting rights are held), as well as certain cases of *de facto* control (i.e., when, by reason of either voting rights or contractual links, one company exercises a dominant influence over the other).

Section 7 expands the definition of *de facto* control by providing that such control may exist in a variety of circumstances giving rise to the right to exercise decisive influence over the productive activity of an undertaking. Such rights may, *inter alia*, concern the ability to use all or a portion of the assets of the undertaking or involve special rights in terms of the composition of the administrative bodies of a company. The definition of control in Section 7 may also cover persons who are indirect holders of such rights. In various cases, the Authority has considered that control over a company is created by means of shareholders' agreements, especially when a minority shareholder is given the right to appoint one or more members of the administration board, or when the by-laws require a certain voting quorum in the administration board that makes the participation and the vote of the director or directors appointed by the minority shareholder essential.

The Authority also considers the acquisition of a business division that may be deemed to constitute a going concern in itself as a concentration.[3] However, the Authority

2 These figures apply for 2015.

3 The acquisition of intangible assets such as goodwill or trademarks could lead to a concentration. See the Authority's Annual Report of 1994, pp. 135, 136; in particular for the insurance sector, see Decision No. 11775 of 6 March 2003, *Nuova Maa Assicurazioni/Mediolanum Assicurazioni* and Decision No. 1852 of 16 March 1994, *Ticino Assicurazioni/Sis*;

considers that no concentration takes place when the target company does not conduct (nor has conducted or has plans to conduct) any economic activity, even if it owns some assets. However, should the non-active target company be granted authorisations or licences that are necessary to enter a given market, its acquisition is considered to be a concentration.[4]

With specific regard to joint ventures, the Authority distinguishes cooperative joint ventures from concentrative ones. Ventures with the principal object of coordinating the behaviour of otherwise independent undertakings are dealt with as 'restrictive agreements' rather than as 'concentrations' under the Act. Full functionality of the venture must be verified to establish that the venture is concentrative in nature. In this respect, to ascertain whether a joint venture is a full function venture, the Authority relies upon the criteria set forth in Communication 2008/C 95/01 of the European Commission (i.e., the carrying on of a stable basis of all the functions of an autonomous economic entity).

Note that, pursuant to Law No. 153/1994, concentrations that result in the direct or indirect holding (even if in only one major Italian city) of more than 25 per cent of the turnover for cinematographic distribution and, contemporaneously, of the number of cinemas active in the relevant geographic area, must be notified to the Authority.

The Act prohibits concentrations whose effect is to create or strengthen a dominant position in such a way as to eliminate or reduce competition in a substantial and lasting manner.

Unlike the EC Merger Regulation, the Act contains no general presumption that a concentration affecting less than a given market share (25 per cent, as established in paragraph 32 to the preamble of the EC Merger Regulation in the current version) is compatible with the maintenance of competition on the relevant market. Nevertheless, the Authority has clarified through the Guidelines that for product and geographic markets that exceed certain thresholds, certain information must be given in addition to that required under the synthetic notification form.

The Authority considers six specific factors in determining whether a concentration would create or strengthen a dominant position in the market in such a way as to eliminate or reduce competition in a significant or lasting manner, as stated in Section 6 of the Act. These are:

a the range of choice available to suppliers and consumers;

b the market shares of the parties involved in the concentration and their access to sources of supply or market outlets;

c the structure of the relevant markets;

d the competitive situation of the national industry;

e barriers to entry into the relevant market; and

f the trends in supply and demand for the products or services in question.

in these cases, the contractual relationships of the companies were considered to be business divisions.

4 Decision No. 4516 of 19 December 1996, *Agio Petroli/Varie società* and Decision No. 9529 of 17 May 2001, *Benetton Group/Vari*. However, the licences must be released at the time of the transactions: see Decision No. 15464 of 10 May 2006, *Enel Trade/Nuove Energie*.

To date, the Authority's decisions show that it considers market shares, entry barriers and the degree of competitiveness in the relevant market to be the most relevant criteria in evaluating concentrations. The Authority also focuses on the opportunity for the parties to the concentration to preserve the market share that they would hold after the transaction as a factor to be taken into consideration in evaluating the competitive impact of a concentration. Such opportunity depends not only on the degree of competitiveness on the market and on the barriers to entry in the same, but also on other factors, such as the degree of evolution of the market or the retention of technological leadership, a vertical integration or important trademarks by the dominant operators. In cases where the market share in question is substantial, the Authority tends to look first at the competitive structure of the market, including the number of competitors and barriers to entry. In determining the scope of its examination, the Authority looks at the relevant product and geographic markets that it considers to represent, respectively, the smallest group of products and geographic area for which it is possible, having regard to the existing possibility for substitution, to create or strengthen a dominant position.

The Act also provides some exceptions to the general rule.

According to Section 5(2) of the Act, equity positions held by credit institutions, including insurance companies that participate in the underwriting of shares on the occasion of the incorporation of a company or the launching of a capital increase, are excluded from the definition of concentration, provided that the shares in question are sold within two years and the voting rights are not exercised during the period of ownership. This exemption is more restrictive than that available under Community law. In fact, Section 3(5)(a) of the EC Merger Regulation refers in general to a temporary purchase of securities with a view to reselling them. The Act also requires that the bank or financial institution in question abstain from exercising the voting rights attached to its shares, whereas the EC Merger Regulation allows such rights to be exercised as long as they do not result in any influence over the competitive behaviour of the target, in particular in certain circumstances, such as to prepare the disposal of the shares. It must be noted that the Authority has refused an application by analogy of Section 5(2) of the EC Merger Regulation in cases in which the temporary acquisition is made by an entity other than banks or financial institutions.

Moreover, undertakings that operate a legal monopoly (e.g., before the 1999 liberalisation, ENEL for electric energy distribution and, before the 1998 liberalisation, Telecom Italia for various telecommunications services) or under a special statutory mandate (or concession) are exempted from the provisions of the Act. However, this is true solely in respect of matters strictly connected to the performance of the tasks for which an undertaking has been granted its concession. In particular, Section 8 of the Act now provides that those undertakings shall operate through separate companies if they intend to trade on markets other than those on which they trade under monopoly. In addition, the incorporation of undertakings and the acquisition of controlling interests in undertakings trading on different markets require prior notification to the Authority. To guarantee equal business opportunities, when the undertakings supply their subsidiaries or controlled companies on different markets with goods or services (including information services) over which they have exclusive rights by virtue of the activities they perform, they shall make these same goods and services available to their direct competitors on equivalent terms and conditions.[5] Moreover, Section 25(1) allows the government to provide the Authority with guidelines in order to authorise potentially restrictive concentrations that would be in the general interest of the national economy within the framework of European integration (although this provision has never been used).

II YEAR IN REVIEW

Among the most significant decisions during the past year were two proceedings: one concerning an alleged failure to observe the structural remedies imposed by the Authority at the time that a concentration was authorised; and the other concerning a merger authorised subject to the adoption of corrective measures.

In the first case, on 19 February 2014, the Authority started proceedings against Unipol for violation of the structural remedies imposed by the Authority at the time of Unipol's acquisition of the insurance group Premafin.[6] At the time of analysing the concentration (June 2012), the Authority found that it could lead to the post-merger entity holding a dominant position in the national and regional markets of damages insurance, with particular reference to the market of RC Auto (drivers' liability). Such dominant position would permit the company to adopt price strategies independently from its competitors and to impose these prices on its clients. For such reason, the Authority authorised the concentration subject to the adoption of some structural remedies, *inter alia*, the divestiture by Unipol of some of its business to reduce its market share to a percentage not higher than 30 per cent of the Italian damages insurance market. The Authority established that such divestiture should occur by 19 December 2013. Despite such obligation, because Unipol did not perform the divestiture of the relevant business by that deadline, the Authority resolved to start proceedings to determine what sanction to impose on the company. During the proceedings, however, Unipol informed the Authority that on 15 March 2014 it had entered into an agreement with Allianz for the divestiture of some assets, which reduced its market shares in the national and regional markets of damages insurance to a percentage below 30 per cent. Unipol also informed the Authority that the delay in the performance of the divestiture occurred due to factors beyond the control of the company, namely the failure of the negotiations with the companies originally interested in the acquisition of the business. The Authority, having taken into account such circumstance and also the short delay of the dismissal,

5 The Authority had interpreted this exemption narrowly. For example, in a decision involving an abuse of dominant position, the monopoly granted to the then state-owned telecommunications concern, SIP (now Telecom Italia), was interpreted by the Authority as not extending to non-reserved neighbouring markets (payment of voice-telephone services by credit cards), exclusivity clauses in the franchise agreements of SIP concerning the distribution of mobile terminals and the new pan-European digital mobile telecommunications services.

6 Decision No. 24805 of 19 February 2014, *Unipol Gruppo Finanziario/Unipol Assicurazioni–Premafin Finanziaria–Fondiaria SAI–Milano Assicurazioni*.

resolved that Unipol did not violate the remedies imposed at the time the concentration was authorised and, thus, determined not to inflict any fine on the company.[7]

In the second case, by Decision No. 25205 of 4 December 2014,[8] the Authority authorised the creation of a joint venture controlled by Messaggerie and Feltrinelli, leading companies in the market of the distribution of books to bookshops and retail distributors (with a combined market share of approximately 50 to 60 per cent). The Authority found that the new entity could produce restrictive effects on small to medium-sized publishers who, due to the reduction of competition in the market, could be affected by a worsening of the economic and contractual conditions of distribution. As a result, the Authority resolved to authorise the concentration subject to the adoption of the following remedies (valid until 31 December 2016) in favour of small to medium-sized publishers (with a turnover not higher of €300,000):

a the joint venture should not terminate, or should extend until 31 December 2016, the distribution agreements entered into with small to medium-sized publishers at the time of the concentration, and should not apply worse conditions than those currently in force; and

b if requested to do so and subject to the recurring of some objective requisites, the joint venture should enter into distribution agreements with small to medium-sized publishers that do not have such agreements in place yet. Such agreements should provide the same conditions as those applied to publishers that already have a distribution contract in place and similar to those requesting (having regard to turnover, average book cover prices, percentage of returned goods).

III THE MERGER CONTROL REGIME

Notification of a concentration must be filed prior to the execution of the deed of merger, the acquisition or the joint venture's creation. Within 30 days of receipt of notification (Phase 1), the Authority shall either authorise the transaction or open a formal investigation. This 30-day period is reduced to 15 days in cases of a domestic takeover bid, except for public bids on a foreign stock exchange, in which case the normal period applies.

If a formal investigation is commenced (Phase 2), Section 16(8) of the Act provides that the Authority must inform the parties of its final decision within a maximum of 45 days, which period may be extended for a maximum of 30 days in the event that the parties have failed to provide any information available to them that has been requested by the Authority. Otherwise, the Authority may order suspension of the proceedings. The final decision prohibiting the concentration, clearing the concentration in its entirety or clearing the concentration with the imposition of remedies must be adopted within the above statutory time limit, but it may be communicated to the parties thereafter.

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7 Decision No. 25160 of 28 October 2014, *Unipol Gruppo Finanziario/Unipol Assicurazioni–Premafin Finanziaria–Fondiaria SAI–Milano Assicurazioni*.

8 Decision No. 25205 of 4 December 2014, *Emmelibri–Effe 2005 Gruppo Feltrinelli/NewCo*.

The undertakings may accelerate the proceedings by contacting the Authority prior to the formal notification of the transaction and filing an informal document providing information on the same. That procedure anticipates the request for information at a preliminary phase, thereby avoiding delays during the formal proceedings.

The Authority may be made aware of a concentration by interested third parties, which may file a claim against a companies' failure to notify. In such case, the opening of the investigation must also be communicated to the interested third parties (Sections 6(4) of DPR 217/98). In general, the Authority may also request hearings with third parties, which have the right to access the documents of the proceedings with the exception of those documents providing confidential data.

Third parties who feel aggrieved by a decision of the Authority to permit a merger have the right to initiate an appeal against that decision before the Lazio Court. In this respect, the administrative courts have recognised that competing companies have a qualified interest to oppose the decisions of the Authority, as such decisions may directly produce effects on their activity. Therefore, if the Authority authorises a merger that violates competitors' rights, the competitors may appeal the decision before the administrative judge.[9]

The Authority may also impose conditions upon the authorisation of the proposed merger. These conditions can be directly imposed by the Authority or as a result of negotiations. The Act does not provide for the Authority to enter into any such negotiations with the parties, although in practice this may well happen.

In general, should the Authority consider that a concentration is forbidden under the Act, an authorisation may be granted provided that the parties undertake to fulfil some specific undertakings that can be divided into structural and behavioural remedies. Considering the cases that have been dealt with by the Authority, the following remedies can be envisaged:

a structural remedies:

- divestiture of business or branches: this may be imposed to reduce the market share created by the concentration or more narrowly with regard to some geographical areas where the overlaps arising out of the concentration are deemed to be incompatible with the Act. In general, the Authority requires that divestiture be made to an undertaking with no structural, financial or personal links to the parties, and with financial resources and expertise in the involved market. The re-acquisition of the divested business may be forbidden indefinitely or for a limited time period. The Authority may also provide for a temporary moratorium on any further acquisition of third parties operating on the relevant market;

9 As indicated by the Italian Supreme Administrative Court in Decision No. 280 of 3 February 2005, parties that are not directly involved in an antitrust procedure can also legitimately appeal a decision of the Authority if they have a different and qualified interest in the procedure, and if they can prove that the same interest has been damaged by a decision. In this respect, see also Regional Administrative Court of Lazio, Decision No. 10757 of 20 October 2006 and Supreme Administrative Court, Judgment No. 1113 of 21 March 2005.

- undertaking to reduce production capacity: the Authority may ask the parties to divest production capacity and related assets and personnel necessary to operate in a given market. The same objective can also be attained by means of a 'conduct' remedy, consisting of an undertaking by the parties to reduce production capacity for a given period;
- reduction of the scale of the business acquisition;
- undertaking by the parties not to commercialise products under a certain trademark; and
- transfer of brands and other intellectual property rights; and

b behavioural remedies:

- grant competitors access to essential facilities and know-how; and
- create an internal committee responsible for the future compliance of the interested company with the competition law.

The Authority may expressly reserve the right to revoke its decision to clear the concentration and to impose fines for any failure to observe the prescribed undertakings.

Finally, as stated above, the Authority must prohibit a concentration that creates or strengthens a dominant position in such a way as to eliminate or reduce competition in a substantial and lasting manner. If the Authority has not issued a suspension order and finds that a merger violates the provisions of the Act, it may issue an order to restore competition in the market. Such order may require divestiture of a company, business or assets that have been acquired.

Decisions of the Authority may be appealed within 60 days from their adoption before the Regional Administrative Court of Lazio, which also has exclusive appeal jurisdiction over administrative fines for infringements of the Act.

Appeals of the Authority's decision may be made either by the parties to the merger in the case of an adverse decision or, as mentioned above, by third parties, including competitors, affected by a decision to permit a merger.

The Lazio Court may review the merits of the decision, but it may only uphold or overturn it; it may not amend or alter the Authority's decision. In fact, the Lazio Court, like all other regional administrative tribunals of its kind in Italy, is able to undertake judicial review only with respect to the legitimacy of the administrative decision referred to it (i.e., determining whether the Authority has correctly applied the Act in each particular case). Decisions of the Court must take the form of either an approval of the decision of first instance or an order quashing such decision. While it may not alter or amend the decision, Law No. 205/2000 has afforded the Regional Administrative Court of Lazio the power to impose on the Authority a duty of compensation for the damage suffered by the affected parties.

Appeals from the judgments of the Regional Administrative Court of Lazio may be filed with the State Council.

IV OTHER STRATEGIC CONSIDERATIONS

The Authority is required to inform the European Commission of a concentration that it believes to be subject to Community regulation (Section 1(2) of the Act). In cases where the European Commission has already commenced an investigation, the Authority must suspend its own proceedings, save in respect of aspects that are of 'exclusive domestic relevance' (Section 1(3) of the Act). In such way, it is ensured that the Act does not apply when the European Commission actually exercises its jurisdiction.

Moreover, the Act has been interpreted as having extraterritorial application. Insofar as concentrations involve companies without a permanent establishment in Italy, but that have sales in Italy exceeding the statutory thresholds either at the time of the transaction or during the previous three years, the concentration must be notified. The approach taken by the Authority is in line with the EC competition rules and the approach of both the European Commission and the European Court of Justice, which have adopted the 'effects test' regardless of where companies are based. Where the companies involved in the concentrations have subsidiaries in Italy, the Authority adopts the 'business unit' approach taken at the Community level, whereby the subsidiary's behaviour is deemed to be decided by the parent company.

A more difficult question is that of the effective extraterritorial application of the various monetary sanctions set forth in the Act for failure to notify or for providing false or incomplete information. The Authority has fined foreign companies in some cases for failure to notify a concentration.

V OUTLOOK AND CONCLUSIONS

On 10 February 2014, the Authority published a proposal to amend the merger control regime by reducing the notification threshold concerning targets from €48 million to €10 million. Such proposal aims to make those concentrations that are exempt from notification under the regime currently in force (e.g., those involving the acquisition of a company (with a turnover that is lower than the current threshold) operated by large corporate groups, which may impact on the level of competition on the market (especially where the relevant market is local)) subject to the analysis of the Authority. From its analysis of the Italian market, the Authority has observed that the market is highly fragmented and characterised by the presence of small to medium-sized companies in which only few enterprises would reach the current notification threshold. Moreover, such proposed amendment is in line with the European practice (e.g., the regimes in force in Germany and Poland).

A second proposal aims to solve some issues concerning the calculation of turnover of the target company in the case of a merger or joint venture. In this respect, following the amendment of the merger control regime in 2013 and the application of a cumulative threshold, the Authority published a notice detailing the criteria for the calculation of the turnover of the target company in the case of a joint venture and merger. In the notice, the Authority provided that in the case of a joint venture, the transfer of a business and the related turnover by the incorporating companies to the joint venture should be kept out of the calculation of the turnover of the incorporating companies. In the case of a merger, the calculation of turnover should refer to both the undertakings concerned. Such criteria shall be overcome by the new proposal, which aims to simplify the procedure. In this respect, the amendment provides that concentrations shall be notified to the Authority when the turnover of at least two of the undertakings involved in the concentration exceeds €10 million, with the understanding that the aggregate turnover of all the undertakings involved is higher than €489 million. This proposal is also in line with the European practice (e.g., with the regimes in force in Germany, France, Spain, Portugal, Denmark and Greece).

In this respect, companies participating in the public consultation have underlined that a reduction of just the threshold concerning targets may result in a burdening of the filing procedures, and also proposed that the Authority should modify the threshold concerning the overall turnover of the companies involved in the acquisition. Such a proposal aims to submit to the procedure of authorisation also those mergers concerning small to medium-sized enterprises that could nevertheless produce restrictive effects in regional and local markets. The Authority, having taken into account such proposals, resolved to continue the monitoring of the current merger regime at least until the end of 2014. No final resolution has yet been adopted in such respect.

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