THE MERGER CONTROL REVIEW

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Editor
Ilene Knable Gotts

THE LAWREVIEWS

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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, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. 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.

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. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-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. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

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 a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency in 2018. 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 has amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). 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, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. 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., in Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before 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 competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

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 provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. 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, Indonesia 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., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). 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 Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

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 EC model than the United States 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 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 processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC 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 must 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 EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), 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 antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States 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, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC 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 competition authority, 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 European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

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 EC 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 United Kingdom 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 stand-alone 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. Multi-jurisdictional 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 United States 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 enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. 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 EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping 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* and 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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Part II

Jurisdictions

Chapter 20

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. Therefore, it applied only to agreements, abuses of dominant position and concentrations that did not fall within the application of the Treaties establishing the European Communities, EC Regulations or other Acts of the EC having equivalent legal effect. Italian Legislative Decree No. 3/2017 implementing Directive 2014/104/EU on antitrust damages actions has introduced some changes. Section 1(1) of the Act now provides that the provisions of the Act apply to 'any agreements, abuses of dominant position and concentrations', while Section 1(2) specifies that the Italian Competition and Market Authority (Authority) may also apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and Sections 2 and 3 of the Act concerning agreements restricting competition and abuses of dominant position to the same cases, even in parallel. With specific reference to concentrations, even if the current version of Section 1 of the Act does not provide such a specification, we may conclude that the Act still applies to concentrations (exceeding the statutory thresholds set forth in the Act as described below) that fall outside the scope of EU Merger Regulation No. 139/2004 (the EU Merger Regulation), and that therefore do not have to be notified to the European Commission. In this respect, reference is made to the combined effect of Section 1(4) of the Act, which specifies that its provisions shall be interpreted in accordance with the principles of European Community competition law, and the provision of Considerandum 18 of the EU Merger Regulation, which specifies that Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension.

In July 1996, the 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

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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 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, prior to the launch of the offer.

On 1 January 2013, a new merger control regime providing for 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 €504 million and the gross turnover in Italy of at least two of the participants exceeds €31 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 for the purposes of Italian corporate law generally. Section 2359 of the Civil Code 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 2020.

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

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).

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 EU 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 EU 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.

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

No. 11775 of 6 March 2003, *Nuova Maa Assicurazioni/Mediolanum Assicurazioni* and Decision No. 1852 of 16 March 1994, *Ticino Assicurazioni/Sis*; in these cases, the contractual relationships of the companies were considered to be business divisions.

4 Decision No. 4516 of 19 December 1996, *Agip 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*.

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 EU 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 EU 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. Note that the Authority has refused an application by analogy of Section 5(2) of the EU 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 to

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.

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 made during the past year were two proceedings concerning mergers authorised subject to the adoption of corrective measures. On 20 May 2019, the Authority issued its decision regarding the acquisition by Sky Italian Holding SpA (Sky) of certain assets of the digital terrestrial pay-TV business owned by Mediaset Premium SpA (MP).[6] The acquisition involved the sale of R2 Srl (R2) to Sky. R2 operates the terrestrial digital broadcasting technical platform of MP, Sky's main pay-TV competitor in Italy. The Authority, having expressed concern about the impact of the acquisition on the market, opened a Phase II investigation. At the end of the investigation, the Authority found that the transaction – that had been implemented prior to obtaining the clearance – strengthened the dominant position of Sky in the pay-TV retail service market, as well as in the wholesale market of pay-TV terrestrial digital broadcasting platform access services, thereby eliminating or substantially reducing competition in those markets and in related markets such as digital broadcasting, pay-TV content and pay-TV channels. In this respect, the Authority asserted that although the transaction related only to the technology platform owned by MP to distribute its programmes, the sale of such assets to Sky necessarily resulted in an exit of MP from the pay-TV market, which in fact occurred in April 2019. These effects are irreversible and the competitive conditions that existed prior to the merger were not restored following the return, implemented by the parties to the transaction, of part of R2 to Mediaset Group. For this reason, the Authority decided to impose, for a period of three years, remedies to restore competition in the pay-TV market and the above-mentioned related markets; in particular it: (1) prohibited Sky from entering into exclusive rights for audiovisual content and linear channels for internet platforms in Italy, so that content would be available for other operators that provide their services through the internet, and (2) ordered Sky to grant competitors access to any newly developed platform that is compatible with R2's assets, under fair, reasonable and non-discriminatory conditions.

By Decision No. 27842 of 17 July 2019, the Authority authorised with conditions the acquisition by BPER Banca SpA of exclusive control of Unipol Banca SpA.[7] The Authority took the view that the proposed merger might restrain competition in many banking markets in the region of Sardinia where BPER already had a leading position, owning about 55 per cent of the bank branches in the region and having a substantive competitive advantage over its competitors (Intesa Sanpaolo and Unicredit). For these reasons, the Authority opened a Phase II investigation, focusing in particular on the economic effects of the merger in the following problematic markets: (1) deposit-taking, (2) lending to families, family businesses and small and medium-sized enterprises, and (3) distribution of investment funds and provision of wealth management services. On the contrary, the Authority was not concerned about the competitive impact of the merger in the markets for lending to large firms or public entities due to the low shares held by the parties in the above markets. The Authority finally decided that the transaction may be authorised based on agreed measures

6 Decision No. 27784 of 20 May 2019, *Sky Italia/R2*.

7 Decision No. 27842 of 17 July 2019, *BPER Banca/Unipol Banca*.

resolving the identified competitive weaknesses and restoring the competition structure of the relevant markets to pre-merger levels. The measures imposed relate to the disposal of an undisclosed number of branches of Unipol Banca SpA, in problematic geographical areas, to an independent third party capable of being an actual or potential competitor in the market. The purchaser has to be approved by the Authority.

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 I), 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 II), 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 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.

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.[8] 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]

8 Section 6(4) of DPR 217/98.

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.

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;
- 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, 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 of 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 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.

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

IV OTHER STRATEGIC CONSIDERATIONS

Under Section 1 of the Act as recently amended, the Authority is no longer required to suspend its own proceedings in cases where the European Commission has already commenced an investigation. Such an obligation was, in fact, provided by Section 1(3) of the Act, which has been repealed. We deem that such an amendment specifically refers just to the proceedings concerning cartels and abuses of dominant position (in relation to which the Act now provides the application, even in parallel, of Articles 101 and 102 of the TFEU and Articles 2 and 3 of the Act). With specific regard to concentrations, and considering the combined effect of Section 1(4) of the Act and Considerandum 18 of the EU Merger Regulation, we may conclude that the old regime still applies. In other words, the Authority's jurisdiction is still limited to concentrations that fall outside the scope of the EU Merger Regulation.

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, the concentration must be notified. The approach taken by the Authority is in line with the EU 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 EU 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

In February 2020, the Authority, along with the Italian Electronic Communications Authority and the Data Protection Authority, published the results of the joint sector inquiry on big data that they launched in 2007 to develop a deep understanding of the impact of big data on the protection of personal data, market regulation, consumer protection and antitrust law. As a result, guidelines and recommendations of policies for big data have been issued to improve the effectiveness of the authorities' intervention. Merger regulation is also being considered. Specifically, the authorities recommend the reform of the rules on merger analysis to provide for examination of those concentrations that do not meet the prior notification thresholds but are capable of reducing potential competition, with particular reference to 'killing acquisitions' (i.e., the acquisitions by major digital firms of innovative start-ups).

The above authorities also recommend the amendment of Article 6(1) of Law No. 287/90 to introduce an evaluation standard grounded on the significant impediment of effective competition criteria, which may be more suitable in challenges involving the digital economy.

Appendix 1

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