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1. On December 3, 2008, the Italian competition authority (the “ICA”) authorized the merger between Compagnia Aerea Italiana (“CAI”), a new Italian company incorporated in order to acquire most of the passenger-related assets of Alitalia, and AirOne, the second largest Italian carrier. According to the decision, the transaction led to overlaps on 22 domestic and seven international routes where the combined entity would have a market share ranging from 50 to 100 percent. More importantly, the decision also outlined that the merged entity would be the only carrier to offer passenger air transport on numerous routes, including some of the most relevant routes in terms of traffic and revenue, whereas elsewhere the presence of competing operators, with a few exceptions, would be strongly reduced.²

Confronted with that analysis—which concluded that a transaction would impede effective competition by creating dominant positions on several markets—many, if not all, competition regulators in the world would have either prohibited the transaction or approved it further to significant structural remedies in order to ensure that the consumer would not be harmed. In fact, quite the contrary happened in this case!

Indeed, the ICA cleared the merger of the two most important Italian carriers following an expedited procedure and requested only minimal behavioral remedies from the parties. In short, for a period of three years the new airline is required to make ten percent of its tickets available at the price of the cheapest economy ticket found on Alitalia or AirOne flights to the same destination in the preceding IATA season on each flight. Also, the authority will determine by December 3, 2011 when a monopoly position resulting from the transaction must end. In addition, CAI will have to set up a toll free number and short message service, as well as allocate a specific section of its website to inform customers about the status of the flights and assist them in case of delays and cancellations. In case of cancellations or delays exceeding two hours, CAI will also have to guarantee the payment of compensation proportionate to the price paid by the customer for the ticket. ICA also said it would monitor services offered by airport

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² Provvedimento C9812 – Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane – AirOne, Bollettino n.46/2008.

operators who are also shareholders of CAI in order to prevent discriminatory practices towards competing airlines.³

Why did the national regulator grant approval contrary to the provisions of Italian competition law? The reason is simple: the ICA did not have a choice. It was forced to clear the transaction by a law passed by the Italian Parliament in August 2008 which was tailor-made for Alitalia to avoid bankruptcy (the “2008 Law”).⁴ In application of this law, the ICA is precluded from blocking a merger between companies deemed in “crisis” as the 2008 Law empowered the government to authorize restructuring plans for companies operating “essential public services.” In application of this unusual piece of legislation, any concentration resulting from such restructuring plan is to be exempted from receiving an authorization from the ICA. Concentrations falling into this category must still be notified to the regulator, but the only remedies that can be imposed are of a “behavioural” nature and aimed at avoiding higher prices and other contractual conditions that may be harmful to consumers. Structural remedies, such as the divestment of take-off and landing slots, cannot be imposed. This was illustrated in the present case by the ICA refusing structural commitments offered by the merging parties.

Indeed, during the ICA’s investigation, Meridiana, the third largest Italian carrier, as well as Easyjet, formally complained that the transaction would create or reinforce a dominant position on several routes, most notably on the Milan Linate/Roma Fiumicino route. In order to offset these concerns, Alitalia and AirOne offered a commitment to reposition 50 slots from the Milan Linate/Roma Fiumicino route. Nevertheless, the ICA refused to take this commitment into account as the ICA considered that it was outside the scope of the consumer protection objectives outlined by the 2008 Law.

This case is interesting in view of the current economic downturn and raises the question as to how far a country can or should go to protect its economy and its companies. The financial crisis has fundamentally shifted the balance of power between companies and governments. Companies and consumers are looking to governments to take the action that is necessary. But can state intervention really help solve the financial crisis? And which interests should prevail in these difficult financial times? Should governments lean in a direction which calls for more governmental intervention, with a risk that certain companies are kept artificially alive by public subsidies resulting in the national taxpayers facing the bill, as has been the case for Alitalia for the past years? Or,

³ A third party complained that, given that the Benetton Group is an investor of both CAI and of the company which owns and manages the Rome-Fiumicino and Rome-Ciampino airports, this could give Alitalia an unfair advantage in terms of slot allocation and services at the airports.

⁴ The law was initially approved as a Legislative Decree (n° 134, 28 August 2008 Disposizioni urgenti in materia di ristrutturazione delle grandi imprese in crisi) and converted by Parliament as Law 166, of 27 October 2008, Conversione in legge, con modificazioni, del decreto-legge 28 agosto 2008, n° 134, recante disposizioni urgenti in materia di ristrutturazione di grandi imprese in crisi, published in Gazzetta Ufficiale n° 252, 27 Ottobre 2008.

rather, should consumer interest prevail through sound economics and competition on the merits?

The risks of bailing out or supporting industrial firms are severe and should not be underestimated. These include distorting competition, weakening healthier companies, and preserving outmoded methods of production. Also, the worry may not be that the state will become too powerful through its interventionism but, rather, that by applying such tailored legislation which circumvents ordinary laws; effective enforcement of national competition law is damaged. Such interventionism can weaken the country's overall economy. That said, support to industrial firms may sometimes be warranted. But the important questions are: what sort of aid; to which firms; and under what conditions? One form governmental action could take, at least in theory, is the provision of aid and other forms of support only to firms that are in trouble through no fault of their own and which have credible plans for recovery.

In Europe, Italy is not the only country to have adopted this kind of protective mechanism. Indeed, the provisions of French merger control, which were amended in March 2009, are very similar to the 2008 Law as they allow the French Minister of Economy to approve a transaction for general interest purposes that may compensate for the harm to competition resulting from the transaction. Likewise a recent amendment to the UK Enterprise Act allows potentially anticompetitive mergers to be cleared by the Secretary of State for Business, Enterprise & Regulatory Reform in the interests of the "stability of the UK financial system."⁵

However, the problem here is that, so far, Alitalia has failed to present a credible plan for recovery. It has been losing market share for years following the failure of various industrial initiatives and attempts to revive the company. Trying to avoid bankruptcy proceedings, the Italian authorities were forced to award a Euro 300 million loan to Alitalia in April 2008. Nevertheless, in September 2008 Alitalia was declared insolvent and subject to a special bankruptcy procedure (*amministrazione straordinaria*).⁶ The Italian commissioner appointed to oversee Alitalia's liquidation created a so-called "bad company" which took over most of the carrier's liabilities, leaving the passenger assets in a "good" company. The European Commission subsequently concluded in November 2008 that the loan constituted unlawful state aid incompatible with the common market.⁷

⁵ This provision was used in October 2008 to clear the Lloyds TSB, HBOS deal despite the competitive concerns it raised.

⁶ Given that the previous regulations governing the extraordinary administration procedure were unsuitable both in view of Alitalia's particular circumstances and for its subsequent acquisition by CAI, the Italian government introduced urgent amendments to the legislation governing the process, known as the Marzano Law, to allow the sale of Alitalia's assets to be concluded promptly.

⁷ At the time of this article, the Commission's decision in case n° 26/2008 is not yet published. The government funding was not transferred to CAI when it acquired the Alitalia assets. This liability lies with the "bad company" which

In these difficult economic times, the European Commission is demonstrating some flexibility in reviewing and assessing more rapidly the compatibility of the national measures adopted in the financial and industrial sectors. It is nevertheless committed to preventing Member States from taking the path to protectionism as the Commission firmly believes that it will take more than governmental funds to beat the crisis. European Commissioner for Competition Neelie Kroes believes that a strong enforcement of competition policy is part of the solution to current economic needs and that governmental intervention should be limited to where it is necessary. She recently illustrated this belief by indicating that:

“[competition policy] is like the oil that lubricates our economic engines. The engine might not be running smoothly right now, but take away competition policy and it could splutter to a stop.”

Therefore, rather than taking a lax approach in applying the competition rules, the European Commission is of the view that the economic crisis constitutes a further incentive for more active antitrust enforcement.

So is the Alitalia saga finally over? Not quite.

Alitalia's merger with AirOne is being challenged by various parties. Unsurprisingly, Meridiana appealed the ICA's authorization decision before the Italian Administrative Court arguing that the anticompetitive nature of the transaction has been made clear by the ICA, with the transaction leading to the creation of individual and joint dominant position on certain routes.⁸ While it is most likely that the Italian Administrative Court will not overturn the ICA's decision given its correct application of the 2008 Law overall, Meridiana is requesting that more extensive remedies are imposed on the merging airline. Incidentally to Meridiana's action, Alitalia is also appealing the authority's decision. While this challenge may seem surprising, Alitalia's appeal is not putting into question the (limited) competitive analysis developed by the ICA but rather the market definition adopted.⁹

Unquestionably, the Italian government's interventionism has prevented the collapse of Alitalia. However, is this the adequate road for recovery? Only time will tell.

remains under the commissioner's control. Consequently, it is not clear today how the Italian government will be able to recoup this sum from the company in liquidation; to the extent it is even possible.

⁸ Meridiana has also challenged the ICA's jurisdiction, arguing contrary to the Italian authority that CAI's shareholders exercise joint control over CAI and that, as a result of the combined turnover of the merged companies, the concentration had a community dimension and should have been notified to the European Commission.

⁹ The decision of the Italian Administrative Court is expected in the last days of May 2009.