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Alessandra Tonazzi
Italian Competition Authority

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I. INTRODUCTION

In a general report issued at the beginning of October 2012, the Italian Competition Authority ("ICA") proposed to introduce some changes to the national competition rules in order to enhance their effectiveness. Some of the proposals aimed at aligning the national merger review rules to the European merger review system.

The differences addressed in the report concerned the substantive test for merger review and the assessment of joint ventures. In particular, the Authority proposed to align the current dominance test to the EU SIEC test and asked for a modification of the legal framework that would allow an assessment of joint ventures as mergers, irrespective of their concentrative or cooperative nature.

II. MERGER REVIEW

The Authority advocated that making the national regulatory framework for merger review more consistent with the rules adopted by the European Commission and the large majority of EU Member States would help, among other things, in avoiding inconsistencies in the assessment of multijurisdictional mergers.

The differences between the Italian and European merger review systems in these areas are not the only ones. One might cite several procedural differences, for example, as the acceptance of remedies in phase I, not possible under the national law, or the timeline to review the merger. Nor are these differences unique to Italy, given the coexistence of European and national regulations in this area of enforcement of the competition rules.

It might be interesting to notice, however, that the differences in merger review addressed in the report have—at least at the formal level—widened instead of diminished over time. Italy adopted its merger review system in 1990, with the coming into force of its competition law and the establishment of the competition authority. The drafting of the Italian law went in parallel with that of the EC Merger Regulation n. 4064/89 and the substance of the national merger review system, as well as the wording of some of the provisions, mirrored to a large extent those of the EC Regulation.

However, the Italian merger review rules were not modified afterwards (the only changes in the last few years regarding the filing fees or the thresholds for notification), while changes were introduced to the European rules, especially with the adoption of Regulation 139/2004. Hence the gap with respect to the two issues that was underlined in the Italian report.

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[1] Italian Competition Authority, Head of Unit, International Affairs. The views expressed in this article are those of the author and they should not be seen as reflecting in anyway those of the institution she belongs to.

One might ask, however, whether these differences are so wide as to imply a substantial divergence in approach.

III. THE TEST FOR ASSESSMENT

The substantive test for merger review is outlined in article 6 of the Italian law that asks to assess whether a merger "creates or strengthens a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis." The wording mirrors very closely the European provision of Regulation n. 4064/89 and reflects undoubtedly a structural approach.

The Italian Authority in its practice has adopted a notion of dominance in line with the European case law, close to the economic notion of market power. In that respect the assessment of mergers begins with the analysis of the market shares of the parties and it then includes other structural factors such as entry barriers.

The adoption of Regulation n. 139/2004 and the SIEC test has, therefore, opened a gap with the national law, at least at the formal level. However, this has not resulted, in practice, in a wide divergence in the decisions adopted at the national level.

First, there were not many national cases that could not be challenged using the current standard. In particular, the Authority has not dealt with cases concerning differentiated market oligopolies or complex vertical mergers, where the use of the SIEC test would have made a real difference. Hence, although the ICA still relies on structural analysis focused on single or collective dominance, the outcome of the assessment is not different from what it might have been using the new test.

Second, the Authority has interpreted the national substantive test in line with the evolution of the European approach, moving into a more effect-based approach, sometimes making direct reference to the EU horizontal mergers guidelines. This is consistent with the link between the Italian national competition law and the European law provided for in Section 1 (4) of Law n. 287/90 and requiring an interpretation of the competition rules "in accordance with the principles of the European Community competition law."

This has become more evident in very recent cases, where the analysis conducted by the Authority is much more focused on the assessment of the competitive effects of the merger than on assessing the creation or strengthening of a dominant position. For example, in a recent merger in the markets of newspapers and periodicals distribution[2] the Authority conducted an analysis of the horizontal and vertical effects of the merger and assessed the efficiency claims raised by the parties—the Authority concluded with a clearing decision.

Also, in recent cases more space is given to the use of non-traditional economic analysis, such as in the recent case of *Bolton Alimentari/Simmenthal*, where the Authority applied for the first time the Gross Upward Pricing Pressure Index ("GUPPI").

[2] C11824 - M-DIS DISTRIBUZIONE MEDIA-SERVIZI STAMPA LIGURIA-SOCIETÀ DI EDIZIONI E PUBBLICAZIONI/GE-DIS

IV. JOINT VENTURES

The divergence between the national and European system is probably wider with respect to joint ventures. In the current national legal framework they are treated as merger transactions and fall under merger control review only if their nature is clearly "concentrative." Pursuant to Art. 5, co. 3 of the Italian Competition Act, in fact, the joint venture must not have as its object or effect the coordination of the competitive behavior of independent firms (i.e., there must be no coordination between the parent companies relating to prices, markets, output, or innovation in the markets where the parent companies continue to operate autonomously).

The wording of the Law does not contain a clear definition of "concentrative" and "cooperative" joint ventures. In practice, the Italian Competition Authority applies the pre-March 1998 EU law definitions and relies on the relevant 1994 European Commission Notices. Therefore, since March 1998 there have been differences between Italian and EU law on the treatment of joint ventures.

The incorporation of a jointly controlled undertaking or the acquisition of joint control over a previously existing undertaking will give rise to a "concentrative" joint venture provided that (i) the joint venture is a full-function joint venture, and (ii) the joint venture's main object or effect is not the coordination of the competitive behavior of the parent companies.

With regard to the full-function condition, the ICA takes into account the availability of sufficient resources to operate independently in a market on a stable and long-lasting basis, without relying predominantly on trade relations with its parent companies. In practice this means that the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets—tangible and intangible—in order to conduct on a lasting basis its business activities within the area provided for in the joint-venture agreement.

If the "cooperative" nature prevails, then a full-function joint venture is treated and appraised under the rules on agreements between undertakings (and not under the merger control rules). In general the ICA considers that the risk of coordination of the behavior of the parent companies is high if, after the transaction, both parents will remain actual or potential competitors in the same geographical and product market as the joint venture, or in a market that is upstream or downstream or neighboring with respect to that of the joint venture's (if certain conditions are met).

However, the assessment of the coordinating effects of joint ventures is not always clear-cut and this might raise discrepancies and uncertainties in the treatment of these cases.

Although it might affect a relatively small number of cases, the different approach to the analysis of joint ventures might, in fact, cause some inefficiencies. First, it can interfere with the application of the referral system provided for in the EUMR. For example, it would be difficult for the ICA to ask for the referral of a cooperative joint venture notified to the European Commission and producing its main effects in Italy. Second, the different standard might create a disparity in terms of certainty of assessment between national and European joint ventures.

V. CONCLUSION

One might therefore conclude that while the differences between the Italian and European merger review system underlined in the ICA's report are not causing significant divergences, a realignment would bring an improvement in the consistency of merger review.