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Italy Changes Its Merger Control Rules and Raises the Bar for Merger Notification Requirements

The law of conversion of Mr. Monti's liberalization decree (a package of measures adopted by the Italian government to boost competitiveness, infrastructure and promote competition) has introduced welcome changes to the Italian merger control rules. Effective as of January 1, 2013: (i) the bar above which mergers and acquisitions become reportable has been raised, eliminating the need for smaller transactions to be notified; and (ii) merger filing fees for reportable transactions will be abolished.

On March 24, 2012 the law of conversion of Mr. Monti's liberalization decree (law No. 27 of March 24, 2012 or the "Law") was published in the Official Journal of the Italian Republic. In addition to measures designed to remove obstacles to market liberalization, the Law also provides for improvements to the Italian merger control rules that will affect reportability of transactions in Italy. This publication briefly addresses the main implications of these changes, which will be of interest to corporations, private equity funds and institutional investors doing, or planning to do, business in Italy.

As of January 1, 2013 Only Major Transactions Will Be Subject to Merger Notification in Italy

Currently, transactions must be filed with the Italian Antitrust Authority ("IAA") prior to their implementation if: (i) the parties' combined turnover in Italy exceeds EUR 468 million (approx. USD 620.4 million); or (ii) the target's turnover in Italy exceeds EUR 47 million (approx. USD 62.3 million). As of January 1, 2013 transactions will only be reportable if they meet both of these thresholds. The Law substituted "OR" for "AND" in Art. 16, paragraph 1 of the Italian Competition Act (law No. 287/1990), which sets forth Italy's reportability requirements. While on first reading this change appears minor, upon closer consideration its impact is in fact significant. First, it corrects a longstanding anomaly of the IAA being able to assert jurisdiction over a transaction that did not have an appreciable impact in Italy. From January 1, 2013 the IAA may only assert jurisdiction over transactions that have a material nexus with Italy based upon the merging parties' activity in Italy. Secondly and as a corollary to the above, the changes increase the hurdle above which mergers and acquisitions become reportable and therefore far fewer transactions will fall within the scope of Italian merger review. In fact, the change will leave Italy with one of the highest thresholds for merger review in Europe alongside France and the Netherlands. For corporations, private equity funds and institutional investors this is a welcome change as in many cases the merger filing was merely an administrative burden, expanding resources to notify transactions that do not raise any competition concerns, for instance in the case of a large company acquiring a foreign company with negligible Italian turnover. Whether the change is sufficient to minimize the costs related to mergers that do have anti-competitive effects but escape merger review is, at present, difficult to gauge. Unless the legislator intervenes again, the Law will result in a substantial drop of notifications with the IAA, coupled with a decrease in red tape and unnecessary costs for companies.

Merger Filing Fees Abolished as of January 1, 2013

Currently, reportable transactions in Italy are subject to merger filing fees which must be paid by the notifying party(ies) at the time of submission. Filing fees amount to 1.2 per cent of the value of the transaction and are capped between a minimum of EUR 3,000 and a maximum of EUR 60,000. However, their final determination is also contingent upon the application by the IAA of a 'corrector factor', which takes into account the ratio between the domestic and worldwide turnover of the target company. As a result, the corrector factor provides for substantial reductions of the filing fees (although never below the minimum of EUR 3,000) in circumstances where the target company has limited sales in Italy. As from January 1, 2013 the merger filing fees will no longer apply. The revenue lost by the IAA will be recovered by the application of a new tax equal to 0.08 per thousand Euros of Italian turnover in the last financial year of companies doing business in Italy with a minimum annual turnover of EUR 50 million. The IAA is expected to publish guidelines concerning the implementation of this new tax before the end of October 2012.

Conclusion

The changes to the Italian merger notification system are welcome. Italy currently stands as one of the few European countries with low turnover thresholds for notifications of mergers and acquisitions. This has imposed an unnecessary administrative burden on both Italian and foreign companies with limited sales in Italy. The revisions should alleviate this burden for smaller transactions. Although pending publication of the IAA guidelines, the full ramifications of the new tax regime are not yet clear. However, abolition of the merger filing fees should be welcomed by merging parties if, as a matter of fact, they lower overall transaction costs.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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