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JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Italy --

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

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ITALY

1. Introduction

1. Notification thresholds are a key factor in determining how effectively and efficiently a merger review system works, as they help identifying transactions with a material nexus in the reviewing jurisdiction. However, the choice of appropriate notification thresholds may depend on several other factors which in combination will affect the assessment of whether a notification system is unduly burdensome or reasonably effective and efficient.

2. This contribution illustrates the Italian merger notification system with particular reference to the aspect of the jurisdictional nexus and the reform occurred in 2012, when the notification test was modified. The preliminary assessment of the impact of the new test carried out by the Italian Competition Authority (Authority or AGCM) and its proposals for further reform are also discussed.

2. Thresholds in the Italian Merger Notification Regime

2.1 *The current Notification System*

3. The Italian merger review regime uses notification thresholds to assess the jurisdictional nexus, determining whether a transaction is subject to merger review under the Italian Competition Law¹.

4. In particular, notification thresholds are based on turnover or sales, as they provide an objective measure of the potential impact of a transaction on the market and this information is readily available to companies². In addition, notification thresholds are based on the domestic turnover as the latter can be a good predictor of whether a sufficient local nexus exists.

5. Following a reform adopted in 2012, a transaction is subject to ex-ante notification when:

- the combined aggregate nation-wide turnover in Italy of all undertakings concerned was higher than 495€m (2015 value);
- and the aggregate nation-wide turnover in Italy of the acquired business was higher than 50€m (2015 value).

6. Notification thresholds relate to the parties' turnover in the previous financial year, i.e., the amount derived from the sale of products or the provision of services (excluding turnover taxes)³.

¹ Notification provisions are in Section 16 of the Italian Competition Law ([Law No. 287 of October 10, 1990](#)). Implementing regulations are in Section 5, [Presidential Decree No. 217 of April 30, 1998](#). Guidance regarding notifications (when to notify, how to calculate thresholds etc.) is provided in the [Guidance to Notification Form](#).

² Market share test applies only with respect to film distribution and operating movie theatres, in which case special notification rules exist.

³ Relevant turnover figures are calculated in a manner consistent with the principles set forth in the European Commission's [Consolidated Jurisdictional Notice](#). In particular, aggregate nation-wide

7. Notification thresholds are updated by the AGCM on a yearly basis to reflect the increase in the gross domestic product (GDP) deflator index. The resolution is published on the Authority's website after the increase in the index has been officially announced. The adjustment usually takes place between the end of April and the end of May.

2.2 *The 2012 Reform to the merger notification system*

8. In the merger notification system in place since the introduction of the merger review regime in Italy in 1990, a transaction was required to be notified even if only one of the two turnover thresholds was met (alternative thresholds).

9. In the Authority's experience, the old test based on the two alternative thresholds resulted in an elevated number of notified transactions, most of which with no significant competition effects. In fact a very limited percentage of the notified mergers required an in depth investigation (see Table 1).

Table 1 – Merger Notifications and Phase II Investigations under the old alternative test

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Notifications	492	570	603	529	521	549	696	843	817	480	478	514	451
Phase 2 investigations	4	4	6	2	1	3	5	6	2	1	-	5	6
% Phase 2 investigations over Notifications	0.8	0.7	1	0.4	0.2	0.5	0.7	0.7	0.2	0.2	-	1	1.3

Source: AGCM

10. Moreover the alternative test might capture international transactions having no material impact on the Italian territory. To partially remedy this issue, the Authority had introduced in its practice an exception for foreign-to-foreign transactions which were subject to notification whenever, by virtue of their sales in Italy only, any of the parties or the parties together satisfy the turnover thresholds, being the presence of assets or subsidiaries in Italy not a relevant factor. A similar exception applied to joint ventures⁴.

11. Two aspects of the Italian notification system were changed by the 2012 reform with effects from January 2013 : notification fees were abolished and the two thresholds became cumulative, resulting in the current system described in the previous section.

12. Indeed, the shift to the cumulative test in 2013 was able to eliminate the filing obligation in a significant number of cases where turnover of the acquiring group in Italy was in excess of the first threshold, but the target itself only achieved limited sales in Italy. This was the case, for example,

turnover means the turnover from the sale of products and services during the previous financial year on the Italian market after deducting returned products and discounts, as well as taxes directly relating to the sale of products and the provision of services. Sales are allocated geographically by reference to the location of customers at the time the products were sold or the services were provided. Although there are no sector-specific thresholds, the Competition Law provides for special rules for the method of calculation of banks and insurance companies' turnover, as well as particular rules in the cinema sector.

⁴ Acquisition of sole control over foreign companies, which at the time of the acquisition and in the three preceding years, including the year the transaction takes place, did not have any turnover on the Italian market, have been exempted from notification unless it is expected that the acquired business will produce a turnover in Italy as a consequence of or in connection with the transaction. Similarly, joint ventures - in which one of the concerned companies is a foreign entity - do not have to be notified if the foreign entity had no turnover on the Italian market at the time of the acquisition and in the three preceding years, except where as a consequence of or in connection with the transaction the joint venture will produce a turnover in Italy. See Section 3 of *Part 1 A – Concentrations between undertakings* of the [Guidance Document](#).

with regard to small local purchases part of a larger international acquisition, the acquisition of negligible business branches (e.g., an outlet) by a large retailer, or the mere transfer of regulatory licenses or patent portfolios of limited value.

13. Thus, notification criteria have become less stringent as an effect of the 2012 reform: the rationale behind the new legislation was to release the AGCM's resources and staff from dealing with smaller concentrations and at the same time reduce unnecessary costs and burden for businesses, to align the Italian merger regime to the recommendations of international organisations like OECD and ICN, and to enable the Authority to focus more on serious antitrust infringements.

2.3 *The monitoring of the 2012 Reform*

14. The shift from an alternative to a cumulative test occurred without any modification of the turnover thresholds and this has raised the question as to whether the current levels of turnover thresholds were still adequate in the new scenario, that is, whether the new jurisdictional test could have excluded some potentially problematic transactions from merger review for failing to meet the second threshold. This could be an issue in certain sectors, e.g., commercial distribution, where relevant competitive effects could arise from subsequent operations below thresholds.

15. Mindful of this issue, the Authority began a monitoring exercise and carried out a retrospective analysis of the effects of the 2012 test over the period 2000-2012. The analysis has showed the risk of excluding some potentially problematic transactions from merger review. In particular, the AGCM found that:

- two thirds of the notifications filed under the pre-2012 reform system would have been excluded under the current system for failure to meet the target threshold;
- 80% of the “excluded” notifications above mentioned dealt with a target turnover of 10€m or less;
- 13 over 45 (30%) Phase 2 concentrations reviewed in the period 2000-2012 would have escaped the notification obligation with the 2012 reform: in all but one for failure to meet the threshold for the target company⁵.

16. In other words, the change in the notification threshold test highlighted another important issue in determining the local nexus: the level of turnover thresholds. Transactions once filed under the old disjunctive test - because they met the first threshold only - could include some potentially problematic concentrations which, under a conjunctive test, would escape the review because of a target threshold set “too high”.

17. In order to improve the mix of notifications, by increasing the number of problematic transactions subject to notification obligation, the AGCM has therefore studied a potential new threshold for the target, having regard to the specificity of the Italian contest, where nearly 95% of Italian firms have a turnover under 5 €m and only 5,000 firms (out of 1.2 million enterprises) meet the second threshold.

18. A simulation exercise was carried out to assess the impact of a conjunctive test with a target threshold of 5€m on the number of notifications filed with the old disjunctive test over the period 2010-2012. The exercise has showed that this hypothetical test would have generated additional notifications equal to 81 per year on average (see Table 2 below); in addition, the new level for the second threshold would have been able to capture 11 out of the 14 problematic transactions (measured

⁵ For instance, in 2011 the acquisition by Moby of the control over Toremar has been cleared subject to conditions (Case C11072-Moby/Toremar). This transaction would not have been notifiable under the new regime since the turnover of the target company, Toremar, amounted to Euro 39 million, below the second threshold of 48€m.

by Phase 2 operations) which were filed under the old disjunctive test (since they met the first threshold) but would have escaped the obligation under the 2012 conjunctive test (as unable to meet second threshold). The higher the level of the second threshold, the lower the number of problematic transactions potentially subject to mandatory filing.

Table 2 – Effect of different levels for the second threshold over the period 2010-2012

Revenue Threshold Target Company	No. of problematic transactions (over 2010-2012) potentially captured by the filing obligation		Incremental flow of notifications (annual average 2010-2012)
	n.	% of total 2010-2012 (14)	
above € 5 million	11	79	81
above € 10 million	8	57	50
above € 20 million	4	29	35
above € 25 million	4	29	28

Source: AGCM

3. Improving the merger notification system

3.1 *The public consultation*

19. The AGCM decided to share with the public its preliminary analysis of the effects of the new regime in its first year and in February 2014 it launched a public consultation with a view to possibly recommending to Parliament the amending of the thresholds of the merger control regime. The public consultation procedure was chosen to provide stakeholders the opportunity to contribute to the debate, by increasing transparency and inclusiveness with a view to build a wider support for a reform.

20. Following ICN guidance⁶, in its consultation document the Authority has presented the results of its monitoring and simulation exercises and has put forward proposals for future reform⁷. In the consultation document, the AGCM noted that one of the two objectives of the 2012 reform was not being met. Indeed, while a tangible effect of the reform was to limit the expenditure of public and private resources in connection with the notification and review of mergers that are unlikely to raise any competition concerns, it was questionable that the costs to society of mergers that have anti-competitive effects but escape review could be effectively minimized under the 2012 conjunctive test.

21. As a proposal for consultation, the AGCM suggested amending the jurisdictional test as follows:

- decreasing the second threshold concerning the target's Italian turnover from €49 million (the 2012 value) to €10 million; and
- clarifying that, for a deal to be reviewed by the Authority, this second threshold shall be met by at least two of the undertakings concerned, leaving unchanged the first threshold.

22. Indeed, an additional issue raised by the shift to a conjunctive test was the interpretation of the second threshold for transactions other than acquisitions, i.e., mergers and creation of joint

⁶ See: International Competition Network, [Setting Notification Threshold for Merger Review](#), April 2008.

⁷ The Consultation Document is available (in Italian only) on the [AGCM website](#).

ventures⁸. In the consultation document, the AGCM called for a wider formulation of the second threshold, removing the reference to the target company and extending the threshold to at least two of the parties to the transaction; this amendment would have improved the notification system overall and strengthened the local nexus.

23. Several stakeholders took part to the consultation, including law firms and business associations⁹. Law firms were more supportive of the AGCM proposals which in their view would have aligned the Italian merger control framework to the international best practices. In particular, it was pointed out that according to the ICN Recommended Practices, local nexus should be “measured by reference to the activities of at least two parties to the transaction in the local territory¹⁰”. Some commentators also called for a revision of the first notification threshold suggesting that the first threshold should make reference to worldwide turnover of the companies involved, and its level should be set in a way to close the gap of potentially problematic transactions that currently fall outside of both the Italian and EU merger control regimes.

24. From the business perspective, the proposals put forward by the Authority were perceived as a substantial change of the merger review regime, shortly after the 2012 reform, thus undermining legal certainty and business confidence. Furthermore, the business community considered that a lower target threshold would not encourage the consolidation of many fragmented industries and sectors in Italy, through M&A operations seeking efficiencies and scale economies.

25. Taking into account the contributions submitted during the consultation process, the AGCM eventually considered that more time was needed to accurately assess the longer-term effects of the revised notification test and decided to continue the monitoring of the 2012 reform.

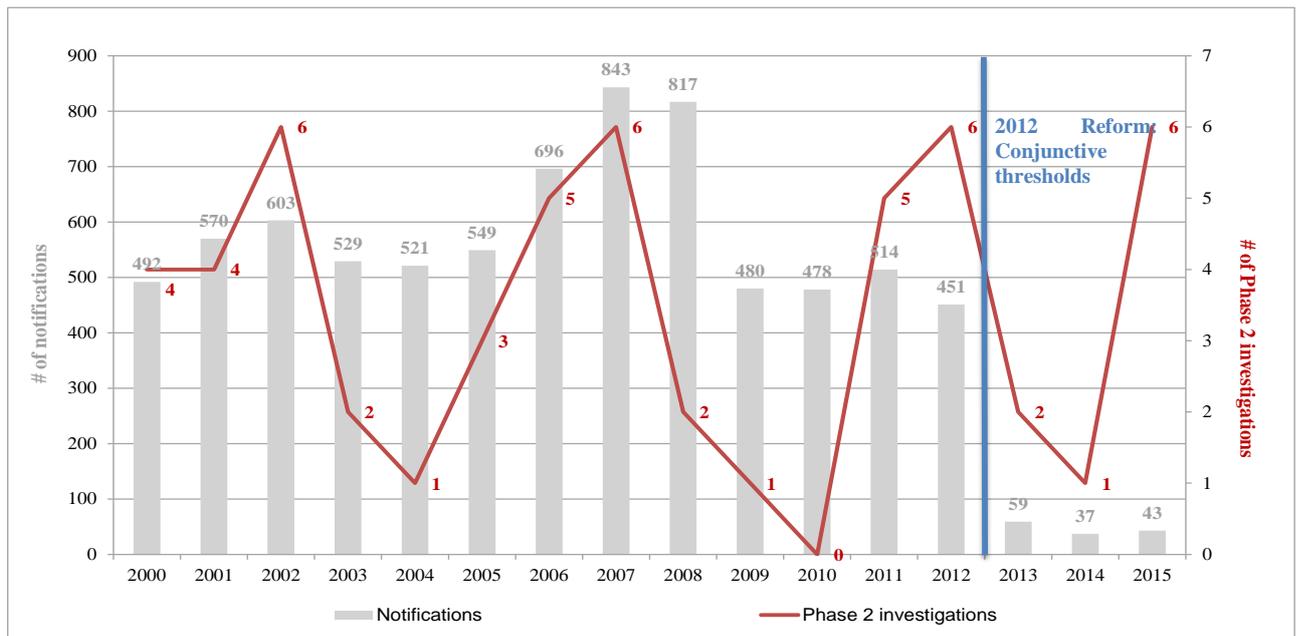
3.2 *Recent trends*

26. As expected, the drop in the merger notifications experienced in 2013 has been confirmed in the subsequent two years, thus showing a structural change compared to the period prior to 2012 reform (see Chart 1 below). What appears unchanged is the trend in the number of Phase 2 investigations: in 2015, the AGCM opened five in-depth investigations, a number registered also in the period prior to the reform. However, the number of Phase II investigations is determined by a number of factors influencing each other, not least the increased availability of resources released by the new notification system.

⁸ In mid-2013 the Authority issued a [Notice on the interpretation of the second threshold](#) to clarify that, in the case of formation of a new joint venture, in the computation of the turnover for the purpose of the second threshold, the Authority will consider the turnover generated by any contributions conferred to joint venture by the undertakings which acquire joint control, and will deduct this amount from the turnover of the undertakings forming the joint venture. In the case of a merger, the Authority will distinguish two situations. When the merger consists of two or more companies combining together to form a new firm altogether, the Authority will take into account the turnover attributable to businesses the consolidating companies confer to the new consolidated entity (which coincide with the turnover of the “all undertakings concerned” for the purpose of the first threshold). When the merger consists of absorption of a company into another, the Authority will take into account the turnover of the company that is consolidated.

⁹ Submissions are available on the [AGCM website](#).

¹⁰ [ICN Recommended Practices](#), Recommended Practice I.C.

Chart 1 –Number of notifications and Phase 2 investigations at the AGCM in 2000-2015

Source: AGCM

4. Conclusion

27. The Italian Competition Authority's experience confirms that it is not easy to achieve the optimal mix between effectiveness of a merger review system and avoidance of unnecessary burdens and costs on merging parties.

28. The revised notification test introduced by the 2012 reform has significantly reduced the number of notifications of non-problematic transactions reviewed by the Authority. However, the experience with the new system so far has shown that an adjustment in the level of thresholds is desirable in order to minimize the risks that some potentially problematic transactions may escape the merger review. This might become even more relevant in view of the new "merger wave" that seems to accompany the first signs of economic recovery.

29. Despite the large number of phase-2 merger reviews undertaken in 2015, the experience with the current notification system suggests that amendments in the notification thresholds would make merger review in Italy more effective.