

# New 2008 merger filing fee criteria set by the Italian Antitrust Authority

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## 1. Introduction

According to the Law No. 287/90 ("**Law**"), from 1 January 2006, the companies required to give notice of mergers and acquisitions to the Italian Antitrust Authority ("**Authority**") are required to pay a filing fee towards covering the costs incurred by the Authority in performing its control activities. According to the Law, the amount of the filing fee shall be calculated on the basis of the aggregate value of the notified transaction<sup>1</sup>.

In accordance with the Law, on 28 December 2005, the Authority adopted a decision concerning a series of criteria for setting the filing fee<sup>2</sup>. In particular, the Authority's decision provided for (i) filing fees equivalent to 1% of the value of notified mergers or acquisitions and (ii) minimum and maximum filing fees at EUR 3,000 and EUR 50,000, respectively.

In addition, the Authority approved some guidelines concerning the parties liable to payment of the fee, the payment of the filing fee in the case of notification of several concentrations using the same Form, the computation of the value of the transaction and the procedures for making the payment ("**Instructions**")<sup>3</sup>. With regard to the value of the transaction, it is worth noting that, according to the Instructions, the value coincides, as a general rule, with the valuable consideration agreed between the parties to the transaction.

## 2. New filing fee criteria introduced by the Authority

By way of a decision adopted on 27 December 2007 ("**Decision**")<sup>4</sup>, the Authority established new 2008 criteria for setting the filing fee payable by the companies subject to notification obligation under the Italian antitrust law.

The Decision, entered into force on 1 January 2008, introduced a number of significant changes to the criteria set by the Authority in its previous decision of 28 December 2005. Such changes are indicated below.

- (1) In 2008, the filing fee payable in compliance with the Law by the company giving notice of mergers or acquisitions shall be equal to **1.2%** of the value of the notified transaction (previously, as already said,

<sup>1</sup> On this point, it is noted that 2006 Italian Financial Act added the Section 10(7-bis) to the Law, which states that: "To cover the costs of merger review, each year the Antitrust Authority shall decide the filing fee payable by the companies which have a statutory obligation to notify mergers and acquisitions pursuant to section 16(1). To this end, the Authority shall adopt such criteria as to ensure that the fee is proportioned to/ in line with the overall costs incurred in reviewing mergers and acquisitions, taking account of the economic magnitude of the operation based on the value of the related transaction [...]".

<sup>2</sup> See Authority's Decision No. 14996 of 28 December 2005, published in the Authority's Bulletin No. 50/2005 of 2 January 2006.

<sup>3</sup> See "Instructions for the payment of filing fees, pursuant to Section 10(7-bis) of Law No. 287 of 10 October 1990, payable by those undertakings which give notice of an acquisition or merger", published in the Authority's Bulletin No. 50/2005 of 2 January 2006.

<sup>4</sup> See Authority's Decision No. 17711 of 27 December 2007, published in the Authority's Bulletin No. 47/2007 of 10 January 2008.

the filing fee was equal to 1% of the value of the transaction).

- (II) Changes also regard the minimum and maximum filing fees established by the Authority by way of decision dated 28 December 2005. On this point, it is worth noting that, compared to the previous system, the minimum filing fee of **EUR 3,000** has remained unchanged, while the maximum fee has increased from EUR 50,000 to **EUR 60,000**.
- (III) A significant change regards the method provided for setting the **value of the transaction**, calculated in accordance with the above-mentioned Instructions of the Authority.

In this respect, it is noted that the previous system had been criticized by several parties due to the fact that the amount of the filing fee was not adequate to the economic magnitude of the operation in Italy. In fact, prior to the Decision, in order to compute the value of the transaction, the Authority took into account the overall consideration agreed between the parties, without considering the turnover in Italy of the undertaking being acquired.

By adopting the Decision, the Authority has shown to take into consideration the above-mentioned criticisms and has amended the Instructions for setting the filing fee. Pursuant to the Decision, the value of the transaction, corresponding to the overall consideration agreed between the parties, shall be adjusted by applying the correction factor given by the ratio between the domestic and the worldwide turnover realized by the undertaking being acquired<sup>5</sup>.

- (IV) Finally, it is worth mentioning a formal amendment to Section IV "*Statutory filing fee: payment*" of Form B "*Concentration details*" of the Form for the notification of a concentration.

In particular, in relation to the correcting method described above in paragraph (III), a new sub-section B11 "*Correction factor*" has been included in the above-mentioned Section, where the notifying party has to indicate the nationwide and the worldwide turnover figures of the undertakings expected to be acquired, as well as the correction factor calculated as specified above (see the example below).

### 3. An example of the new method for calculating the filing fee

With reference to the above, we include a short example (published on the Authority's Website) clarifying the new method (valid as from 2008) for calculating the filing fee in the case of an acquisition of companies generating income outside the Italian territory.

*VT (Value of the Transaction) = 700,000,000*

*NT (Nationwide Turnover – last year – of the undertakings being acquired) = 5,000*

*WT (Worldwide Turnover – last year – of the undertakings being acquired) = 5,000,000*

*Correction Factor (the ratio between NT and WT) = 5,000/5,000,000 = 0.001*

*CVT (Correct Value of the Transaction) = VT\*Correction Factor = 700,000,000\*0.001=700,000*

*Filing fee = CVT\*1.2% = 8,400*

<sup>5</sup> See the Instructions, Part C - "*Computing the value of the transaction*" - where the following sixth paragraph substitutes the existing one: "*in the case of mergers and acquisitions entailing the acquisition of business or part of businesses operating (or realizing a turnover) in countries other than Italy, the value of the transaction coincides with the aggregate consideration agreed by the parties for all the activities involved in the operation, including those which generate income outside the Italian territory, and the value of the transaction shall be changed by applying the correction factor given by the ratio between the domestic and worldwide turnover realized by the undertaking which is to be acquired*".

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Therefore, according to the example, the filing fee for a transaction worth EUR 700 millions, the Italian turnover of which is absolutely minimal (one out of one thousand), would amount to EUR 8,400. According to the previous system, providing for a filing fee amounting to 1% of the value of the transaction, without any correction factor, the filing fee would have been of EUR 50,000 (i.e. the maximum amount of the fee in accordance with the Authority's decision of 28 December 2005).

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