

## Italian cross-border banking mergers: A case for Article 21 of the Merger Regulation?

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On 29 March 2005 the Commission received the notification of the proposed acquisition by the Spanish bank Banco Bilbao Vizcaya Argentaria ('BBVA') of the Italian bank Banca Nazionale del Lavoro ('BNL') by way of public bid. The following day, the Dutch bank ABN AMRO ('ABN') filed a notification for the acquisition of the Italian bank Banca Antoniana Popolare Veneta ('Antonveneta') also by way of public bid. The two bids were also notified to the Bank of Italy, which under Italian law has to authorise takeover bids after verifying their compatibility with prudential rules. The Bank of Italy also has to authorise the increase of a participation in an Italian bank rising above certain thresholds.

Both operations did not raise any competition concerns and therefore were treated under the simplified procedure. They were authorised by the Commission on 27 April 2005 by way of simplified decisions.

After the clearance decisions by the Commission, BBVA and ABN claimed that the Bank of Italy created obstacles to their respective bids which constituted an infringement of *inter alia*, Article 21 of the EC Merger Regulation ('ECMR'). Article 21(4) ECMR states that the Commission has exclusive competence for concentrations with a Community dimension but that Member States may nevertheless take measures to protect legitimate interests other than those taken into consideration by the ECMR and compatible with Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests. Any other public interest must be communicated to the Commission and shall be recognised by the latter after an assessment of its compatibility with Community law.

ABN claimed that the Bank of Italy violated Article 21 ECMR because, by favouring a counter-bid by Banca Popolare Italiana ('BPI'), it applied a discriminatory treatment to ABN that created serious obstacles to its bid. According to ABN such a discriminatory treatment could not be justified under prudential rules. The Commission carefully examined ABN's arguments and sent requests for information both to the Bank of Italy and to BPI

to enquire about the alleged infringement. In the light of the replies to these requests and the available information, the Commission decided not to formally intervene under Article 21 (4), *inter alia*, because a direct link could not be established between the alleged discriminatory treatment and the failure of ABN's bid. ABN also lodged complaints for violations of national law before the Italian Stock Market Authority ('CONSOB'), the Bank of Italy and national courts. It now appears that ABN will finally be able to acquire Antonveneta through a share purchase agreement with BPI and a subsequent public bid.

BBVA also claimed that the Bank of Italy had violated Article 21(4) ECMR since the approval of its bid was conditional upon the acquisition of a shareholding above 50% in BNL. According to BBVA this condition was not justified under the prudential rules and could constitute an obstacle to an acquisition of control (i.e. control over BNL could have been acquired with a shareholding below 50%). The Commission's services indicated to the Bank of Italy that such a conditioned approval could, indeed, constitute a violation of Article 21(4). Following the Commission's intervention, the Bank of Italy stated that it did not condition its authorisation but it indicated that in case BBVA acquired a shareholding below 50% in BNL it would need to verify if, after the bidding process, BBVA would be able to exercise effective control over BNL. After the offering period, however, BBVA decided to abandon the bid given its limited success. The low adherence derived from the appearance of a mandatory counter-bid at a higher price, triggered by the conclusion of an agreement between other BNL's shareholders and the Italian insurance company Unipol.

The Commission continues to monitor the outcome of the national proceedings and it is not excluded that further steps could be taken under the ECMR in the light of new elements emerging. By instantly taking up these complaints the Commission has shown its willingness to act with regard to any possible infringement of European competition law related to cross-border consolidation.