



NEW RULES ON THE ITALIAN GOVERNMENT'S REVIEW OF INVESTMENTS IN STRATEGIC INDUSTRIES AT THE TIME OF COVID-19

1. Italian investments review in a snapshot

Historically, Italy has always welcomed foreign investments, which have been subject to a very limited scope of Government's review. In particular, Law Decree no. 21/2012 (the Golden Powers Law or "GPL") has (i) confined the review of foreign investments to specific strategic sectors (defense and national security; energy, transport and communications) and (ii) limited the exercise of the Government special powers, i.e. veto rights or request of prescriptions/conditions, only to cases of threat of serious prejudice to the national interest, as detailed by law and subject to judicial scrutiny.

Under the increasing wave of requests of strategic assets' protection – due to the incredibly fast technological innovation of the last years, the consequent cybersecurity needs, the enactment of EU foreign investments screening coordination rules – the GPL has been progressively amended, in particular by extending the scope of the strategic assets falling under the governmental review (G5 technology infrastructure and other high-technology assets now fall under such scrutiny).

2. COVID-19 outbreak impact on the FDI Screening Regulation: the EU Approach

While the EU was still announcing the first coordination measure adopted in the screening of foreign investments with the enactment of the "FDI Screening Regulation" (Regulation (EU) 2019/452), the COVID-19 outbreak irrupted in the EU single market.

Thus, the European Commission, in its communication on foreign direct investments ("FDI") dated March 25, 2020, requested Member States to make full use of the national screening mechanisms in order to conduct their impairment test, taking in full account *"the risk to critical health infrastructure, supply of critical inputs, and other critical sectors as envisaged in the EU legal framework"*.

3. Amendments to the GPL rules and new strategic assets under protection

On April 8, 2020 the Italian Government enacted Law Decree No. 23 (the "Decree"), setting forth several provisions impacting the GPL and in general the FDI screening mechanisms.

A. GOLDEN POWERS REQUIREMENTS IN THE HIGH TECH SECTORS

The Decree has introduced the obligation to communicate to the Government **any acquisition (share deal), by any EU or extra-EU entity, of shareholdings** in companies operating assets falling in the so-called **high tech sectors** (as described below, including the assets of **financial, banking and insurance sector**).

The assets included in the high tech sector are all those listed in Article 4(1), letters a), b), c), d), e) of the FDI Screening Regulation (concerning *"screening of foreign direct investments into the Union"*), namely:

- (a) **critical infrastructure**, whether physical or virtual, including energy, transportation, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;



- (b) **critical technologies** and dual use items as defined according to European regulation, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- (c) **supply of critical inputs**, including energy or raw materials, as well as food security;
- (d) **access to sensitive information**, including personal data, or the ability to control such information;
- (e) the freedom and pluralism of the **media**.

The Decree clarifies that the activities falling within the scope of the FDI Screening Regulation include also those concerning the **financial, banking and insurance sectors**.

The provisional regime introduced by the Decree will be applicable until the adoption of an implementing decree that will identify more specifically the strategic assets included in the high tech sectors.

B. PROVISIONAL REGIME FOR COVID-19 EMERGENCY

The Decree has provisionally extended the scope of the existing filing requirements for transactions concerning sectors of energy, transportation, communications and high tech. In particular, **until 31 December 2020**, the following transactions are subject to a foreign investment filing:

- **any resolution and transaction** adopted by any **EU or extra-EU entity** holding strategic assets in the sectors of **energy, transportation and communications, as well as high tech** (including, when applicable, assets falling in the financial, banking or insurance sectors) resulting in **change of control, ownership, or destination of use** of assets above (asset deals);
- **any acquisition of shareholdings** (share deals), by any **EU or extra-EU entity**, in companies holding strategic assets in the sectors of **energy, transportation and communications, as well as high tech** (including, when applicable, assets falling in the financial, banking or insurance sectors), resulting in a **change of control** of the target company;
- **any acquisition of shareholdings**(share deals), by any **extra-EU entity**, in companies holding strategic assets in the sectors of **energy, transportation and communications, as well as high tech** (including, when applicable, assets falling in the financial, banking or insurance sectors), resulting in the **acquisition of at least 10% of share capital or voting rights** (taking into account also shares and rights already directly or indirectly held), provided that the **total investment value is equal to or higher than Euro one million**. Such acquisitions will be also subject to communication whenever **the holding thresholds of 15%, 20%, 25% and 50% are exceeded**.

As to companies holding assets in the high tech sectors (including, when applicable, assets falling in the financial, banking and insurance sectors), the Government is entitled to exercise its special powers (i.e. veto or imposition of prescriptions/conditions to the transaction) to the extent that the protection of the essential State interests, as well as of security and public order, may not be properly ensured through **sectorial regulations**.

C. PROCEDURAL AMENDMENTS

For all sectors falling within the scope of the Golden Power regulation, in case of failure to report a transaction, **the Government is entitled to commence *ex officio* the procedure to assess the exercise of the special powers** (i.e. veto or imposition of prescriptions/conditions to the transaction).



In such cases, the term for the exercise of the special powers by the Government (45 days, or 30 days only for 5G technology assets) starts from the date the violation of the notification obligations is ascertained.

For transactions/acts subject to the regime under A) and B) above:

- a filing is requested for any transaction for which the notification obligation arises before 31 December 2020, even if the filing is made after that date or in case of failure of notification;
- any act or measure deriving from the exercise of the special powers of the Government remains fully valid and effective even after 31 December 2020.

D. AMENDMENTS TO ANTI-RAID RULES¹

The Decree also provides new powers for CONSOB (*i.e.*, the Italian Stock Exchange Authority) aimed at protecting market transparency and the general interest of the stakeholders against creeping takeovers of listed companies, in order to strengthen the so-called “anti-raid” rules.

In particular, as concerns the filing requirements concerning holdings in listed companies (under Article 120 of the Consolidated Financial Act, *i.e.* Legislative Decree 58/1998), CONSOB, for a limited period of time, shall be entitled to set lower holding thresholds triggering filing requirements with respect to small caps.

Moreover, CONSOB shall be entitled to temporarily set a 5% holding threshold (triggering filing requirements) in case of acquisition of stakes in non-listed companies with widely held shares.

4. Conclusive remarks

In light of the new set of rules enacted by the Decree, the scope of the transactions subject to Golden Powers filing (and, potentially Government’s special powers) is significantly increased, both in terms of new sectors added within the scope of the GPL (*e.g.* financial, banking and insurance sectors, as well as of the media pluralism, food security and access to sensitive information), and type of transactions requiring a communication to the Government (*e.g.* also the acquisition of non-controlling stakes may trigger the obligation of communication).

Thus, the enhanced Golden Powers requirements should be taken into account in future transactions involving assets subject to the GPL. In addition, the notification itself should be carefully drafted in order to reduce as much as possible the risk of intervention of the Government for the purposes of protecting essential interests of the State, as well as of security or public order.

In case of lack of notification, in addition to other sanctions (*e.g.* invalidity of concerned resolutions), the Government can impose a fine up to the double of the value of the transaction and not lower than 1% of the turnover of the interested companies.

Amendments to the Decree may not be excluded. In fact the Decree is subject to the Parliament which will have to approve its conversion into law within 60 days.

Due to the recent enactment of the Decree and the further regulations adopted and to be adopted by the Government, this note does not provide an exhaustive analysis of the aforementioned rules.

¹ Whilst this newsletter was being finalized, CONSOB issued the implementing resolutions no. 21326 and 21327 dated 9 April 2020 that apply from 11 April 2020 until 11 July 2020 (except in case of early revocation thereof).

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The Corporate Finance, Administrative Law, EU, Antitrust and Regulation and Telecommunication, Media & Technology Departments of Legance are available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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