

March 2022

Italian legislation regarding
foreign direct investment screening:
recent changes introduced
under Law Decree No. 21/2022

01. Introduction

On 22 March 2022, Law Decree No. 21/2022 entered into force providing *inter alia* several amendments to the Italian regulation regarding Foreign Direct Investment screening (Law Decree No. 21/2012; so-called “Golden power” or “FDI” Regulation), while additional amendments could be passed by Parliament during the process of converting the governmental Law Decree into a final law (process is to be completed within 20 May 2022).

Law Decree No. 21/2022 has established certain provisions (previously introduced on a temporary basis in the context of the Covid-19 emergency), and unified some existing practices. Furthermore, significant changes have been introduced to filing obligations related to 5G and cybersecurity.

02. Defence and National Security

Law Decree No. 21/2022 extends the scope of the defence and national security deals subject to the FDI screening by the Presidency of the Council of Ministries (“**Presidency**”); it is now provided that, in addition to deals currently subject to FDI screening (i.e., share deals), corporate resolutions resulting in a change of ownership, control and availability of strategic assets are also to be scrutinised by the Presidency, along with any assignments of strategic assets as a guarantee. The aim is to harmonise the asset deals subject to FDI screening to what is already provided in other sectors.

03. 5G and Cybersecurity

Article 1-*bis* of Law Decree No. 21/2012 has been completely replaced by new provisions under Law Decree No. 21/2022 with respect to mandatory filing of acquisitions of goods or services destined to certain assets / activities (up until now, 5G networks).

According to Law Decree No. 21/2022, not only the activities, goods, services and technology related to 5G are qualified as strategic (as was the case according to the current regime), but also those concerning cybersecurity and cloud, which must now meet the “strategic” test. These assets, which will be identified in detail by one or more decrees to be adopted, are equally to be considered strategic. However, until the adoption of such implementing decrees, the application of new rules to cybersecurity and cloud will not be applicable (although said sectors remain strategic for the purposes of share deals and asset deals under the general provision of Article 2 of Law Decree No. 21/2012).

As a significant change in the procedure, the mandatory filing no longer concerns the intention to enter into a specific agreement with an extra-EU vendor for the supply of goods or services related to 5G technology but, according to the new regime, it regards an annual plan concerning the intention to purchase throughout the whole year, from any supplier (irrespective of its nationality), goods or services related to the design, realisation, maintenance and management of 5G networks and other technology, as well as cybersecurity and cloud (once identified by the implementing decree). Such annual plan shall be notified before its implementation and can be updated on a quarterly basis.

The Presidency can authorise the implementation of the annual plan, with or without conditions/prescriptions. Up until now, all filings concerning supply agreements of goods or services related to 5G assets have been approved with the enforcement of detailed conditions; it is reasonable to assume that such an approach will continue also with reference to the annual plans. In case no condition is considered adequate to ensure the protection of the integrity and safety of the networks and data transmitted through them, the Presidency can

(i) approve only a part of the annual plan or (ii) approve it for a limited time or, as an *extrema ratio*, (iii) prohibit the implementation of the annual plan (so far, only one supply agreement for 5G has been prohibited).

In case of infringements of the new filing obligations, the Presidency is entitled to impose a fine up to 3% of the turnover of the entity subject to the notification obligation. Infringements can also imply criminal liability. Any agreement in breach of the prescriptions provided by the Presidency are null and void. Furthermore, the Presidency can impose an obligation to restore at its own expense the *status quo* prior to the infringement, also applying a fine (up to 1/12 of 3% of the turnover of the company) for each month of delay.

As a coordination measure, it is provided that the decrees already issued which enforce conditions relating to the acquisition of goods or services for 5G networks remain in force. Moreover, in the first annual plan, TLC operators are also required to provide the requested information concerning the agreements already authorised.

04. Energy, Transportation, Telecommunication and other sectors

Law Decree No. 21/2022 has transposed in the ordinary FDI regime, with some amendments, a set of provisional rules introduced in the context of the Covid-19 emergency under Law Decree No. 23/2020 (as already described in our previous newsletter of June 2020, [available here](#)).

The transactions which require mandatory filing are summarised as follows:

(i) Share deals

- (a) acquisition of control: until 31 December 2022 the temporary regime remains applicable (thus, mandatory filing is required by non-Italian entities of companies holding strategic assets); while, from 1 January 2023 mandatory filing will be required for acquisitions by:
1. any extra-EU and EU entity (including Italian) for the acquisition of control in companies holding strategic assets in the energy, transportation, communication, health, agricultural-food and finance (including banking and insurance) sectors;
 2. any extra-EU entity for the acquisition of control in companies holding strategic assets also in sectors other than those mentioned in point 1. above (i.e. water; personal data; electoral infrastructure; high tech; aerospace; steel sector; dual-use products; media);
- (b) acquisition of at least 10% of the share capital or voting rights: in any case, mandatory filing is required for transactions carried out by extra-EU entities with respect to any deal in companies holding strategic assets, resulting in the acquisition of at least 10% of share capital or voting rights (even if not resulting in acquisition of control), provided that the total investment value is equal to or higher than one million Euro. Such acquisitions will also be subject to filing whenever the thresholds of 15%, 20%, 25% and 50% are exceeded (this provision was already provided for under the temporary Covid-19 regime and has only been confirmed);

(ii) Asset deals

Mandatory filing is triggered:

- (a) for any resolution or transaction resulting in a change of control, ownership, destination, availability of strategic assets in the sectors listed by Presidential Decree No. 179/2020 (including, *inter alia*, energy; agriculture-food; finance; water; personal data; electoral infrastructure; high tech; aerospace; steel sector; dual-use products; media) only if such change benefits an extra-EU company;

- (b) for any resolution or transaction resulting in a change of control, ownership, destination, availability of any strategic asset in the energy, transportation, communication, health, agricultural-food and finance (including banking and insurance) sectors, if such change benefits an extra-EU or EU company (including Italian).

05. FDI Screening procedure

Law Decree No. 21/2022 also streamlines the FDI screening procedure.

With regard to share deals, while as a general rule the mandatory notifying party remains the acquiring entity, Law Decree No. 21/2022 has provided, where possible, the joint filing of the transaction with the target company (as already widely applied in the practice). In the event such joint filing is not possible, at the date of the filing to the Presidency, the notifying party shall send an information notice concerning the transaction and the filing to the target company, which has the right to submit pleadings and documents with the Presidency within 15 days from receipt of the notice.

Furthermore, the Presidency may impose prescriptions and fines not only on the acquiring company (as established up until now), but also on the target company.

In addition, further procedural measures will be identified in order to:

- (i) simplify the notification procedure (also with respect to the deadlines, the investigation process); and
- (ii) introduce a pre-notification mechanism (as already in force in other EU countries) aimed at providing a preliminary assessment on the applicability of the FDI regulation and the need of a mandatory authorisation of the transaction to the parties.

Finally, in order to support the enforcement of the FDI regime, the competent department within the Presidency has been expanded, also for the purpose of more effective monitoring. In this respect, the Presidency is also authorised to avail itself of the collaboration of the Italian finance police (i.e., *Guardia di Finanza*); this suggests a stricter approach to monitoring of transactions subject to FDI filing.

The Corporate Finance, Administrative Law, EU, Antitrust and Regulation and Telecommunication, Media & Technology Department 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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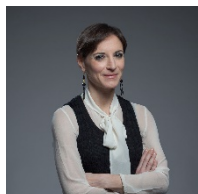
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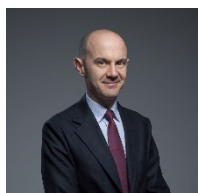
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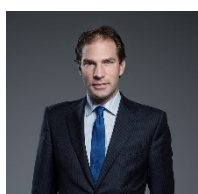
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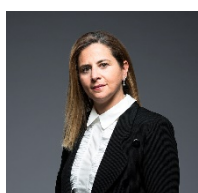
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