

Newsalert

## Foreign Direct Investments Screening Italy expands its “golden powers” to new key sectors

### Summary

Responding to the market volatility linked to the Covid-19 outbreak, the Law Decree no. 23 dated 8 April 2020 widens the scope of application of the Italian Foreign Direct Investment Screening in order to protect security and public order (so called Golden Power regulation).

The main legislative changes include: i) the immediate and full application of the notification obligations to the economic sectors referred to in EU Regulation no. 452/2019, including finance, banking and insurance; ii) the introduction of new percentage thresholds triggering the notification obligations; iii) the partial application of the notification obligations also to European Union investors; iv) the introduction of new powers enforceable *ex officio* by the Presidency of the Council of Ministers in the event of breach of any notification duty.

In consideration of the widening of the scope of the prior government scrutiny, it becomes therefore pivotal for investors and businesses to carefully verify whether transactions, acts and resolutions are subject to the notification obligation and, if so, to fully explain the terms of the operation in order to obtain the approval of the Administration (within the ordinary 45-days term). Of course, the above does not imply that investments and transactions are banned or significantly obstructed. Up until now, measures and requirements have imposed only in ten per cent of the cases and only one transaction has been vetoed.

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## 1. A constantly evolving regulatory framework: European Regulation no. 452/2019 and Law Decree no. 105/2019

There is wide agreement that the prevailing market situation related to the ongoing serious Covid-19 emergency requires particular attention on preventing and mitigating possible adverse impacts for the economy and national strategic interests. The Italian Government response was not long in coming.

By means of the Law Decree No. 23 dated 8 April 2020 (the “**Law Decree**”), the Italian Government has responded to the extreme volatility of the stock markets by strengthening and expanding the special powers that can be exercised to protect the strategic assets of companies active in key sectors of the Italian economy. In particular, the Law Decree makes significant changes to the usual so-called Golden Powers regime referred to in Law Decree no. 21/2012, aimed at extending the current instruments for monitoring and combating speculative and predatory transactions or other deals jeopardising general vital interests.

The innovations introduced by the Law Decree, moreover, form part of a changing framework, both at national and supranational level, as a consequence of the progressive adjustment implemented by many Member States to the common control framework on foreign direct investments established by EU Regulation no. 452/2019. It should be noted that Italy has already partially complied with this adjustment process with the issuance, in September 2019, of Law Decree no. 105/2019, notwithstanding the continuing lack of the necessary implementing regulations to be adopted through specific Decrees of the President of the Council of Ministers.

In this regard, it should be noted that Spain recently approved the Royal Law Decree no. 8/2020, by means of which - as from 18 March 2020 - a suspension of the liberalisation regime, usually applicable to direct foreign investments in the Iberian territory, shall also apply towards non-EU investors. Without prejudice to the Spanish Government’s faculty to intervene when deemed appropriate in light of public security, public order or health needs, the sectors directly affected by the new restrictions are indeed those identified by the aforementioned European Regulation. The time limit for the governmental investigation is much longer than Italy: six months instead of 45 days.

Similarly, just a few days ago in France, the provisions introduced by Decree no. 1590/2019 entered into force, amending the legal regime concerning investments control by extending the relevant scope to new economic sectors, lowering the thresholds triggering supervisory powers as well as speeding up and simplifying the relevant procedures. Furthermore, Germany also announced last January a reform of the legal framework concerning foreign investments which, although still ongoing, seems to be moving toward the strengthening of the state controlling and intervention prerogatives.

Even outside the European Union, however, control mechanisms on foreign direct investments have been tightened up.

In the United States, by way of example, the powers entrusted to the Committee on Foreign Investments in the United States (“**CFIUS**”) have been further extended from 13 February 2020 in order to include, among others, non-controlling foreign investments (so-called “covered investments”) granting the investors with the ownership of certain information and/or rights concerning some “critical infrastructures”.

In Australia, the threshold triggering the government scrutiny has even been lowered to \$0.00: as a consequence, all foreign investments, regardless of the type of transaction or the nature of the purchaser, have been subject to prior government approval.

## **2. The European Commission Communication dated 26 March 2020**

The regulatory changes adopted in Italy and summarized in this Newsalert directly follow the invitation made by the European Commission, which, in its Communication dated 26 March 2020, urged Member States *“to make full use, as of now, of the control mechanisms for foreign direct investments”*, to guard against the risk of attempts to acquire strategic businesses and assets with the consequent *“loss of critical resources and technologies”*.

The Commission's guidelines therefore aim at preventing that the adverse economic situation, linked to the ongoing Covid-19 health emergency, allows predatory acquisitions in strategic European sectors (primarily, but not limited to, the health sector).

To this end, the European Commission has gone so far as to express a hope that, where deemed appropriate, new and comprehensive control mechanisms will be promptly adopted, while at the same time preserving all the options available to manage the cases in which the acquisition or control of a particular business, infrastructure or technology implies a risk to security or public order in the EU context, also taking into account the interdependencies existing in an integrated market such as the European one.

In the Commission's opinion, the restrictive measures are, therefore, legitimate to protect national security and public order as they are necessary to ensure security of supply, of essential public services and/or financial stability in the context of the current health emergency, neutralising the risk of European industrial and commercial players, including small and medium-sized enterprises, being sold off at low prices.

## **3. The main regulatory changes provided for by the Law Decree**

The Law Decree no. 23/2020 covers each of the key aspects of Golden Power regulation: the scope of the regulation on special powers, the conditions triggering the notification obligations, the related powers granted to the Italian Government in the event of threat to national interests and the controlling structure.

In summary, as wished for by the European Commission, the regulatory changes have developed two parallel areas: on the one hand, they strengthen the current mechanisms, ensuring full operativity of the innovations introduced by Law Decree no. 105/2019 and providing for the application of the Golden Power regulation also to investors from other EU Member States until 31 December 2020; on the other hand, they introduce new powers that complete the mechanisms already outlined by Law Decree no. 21/2012, filling in certain procedural and organisational gaps in those.

### **3.1. The extension of the scope of application**

Already in September 2019, Law Decree no. 105/2019 had expanded the scope of the Golden Power regulation, extending Italian government scrutiny to companies holding assets or strategic relationships to sectors beyond the usual areas of security, defence, energy, transport, communications or 5G networks, through a direct reference to the list introduced by EU Regulation no. 452/2019.

However, the effectiveness of such extension had been hampered by the failure to specifically identify the relevant strategic assets in those newly-introduced sectors, which were left to be defined in subsequent decrees of the President of the Council of Ministers which, at the date hereof, have not yet been adopted. In this context, the transitional rules laid down by Law Decree

105/2019, and including, pending the adoption of the implementing rules, the notification obligation, had remained substantially inapplicable.

Conversely, the provisions provided under Article 15 of the new Law Decree clarify (e.g. with express reference to the financial, banking and insurance sectors) and strengthen the immediate enforceability of the control power granted to the Italian Government in respect of investment transactions and the consequent acts and resolutions concerning various strategic sectors of the economy, making fully effective the extension of the scope of the Golden Power regulation already carried out by the Law Decree no. 105/2019 in line with the European Regulation.

From now on, therefore, a large number of transactions, acts and resolutions in various critical sectors of the Italian economy potentially falls within the scope of Golden Powers regulation and the related obligations at least until the Prime Minister's Decrees, punctually identifying each strategic assets, will be adopted.

In particular, the scope of application of the notification obligations set forth under Law Decree no. 21/2012 now also apply, with immediate effect, to the following sectors:

- (i) **critical infrastructures**, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructures, and sensitive facilities (*strutture sensibili*), as well as investments in land and buildings essential for the use of such infrastructures. The financial sector – as already pointed out – pursuant to Article 15, paragraph 1, which amended Article 4-bis, paragraph 3, of the Law Decree no. 105/2019, also expressly includes the credit and insurance sectors;
- (ii) **critical technologies and dual use products** as defined in Article 2, no. 1, of Council Regulation (EC) No. 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies;
- (iii) **security of supply of critical inputs (*fattori produttivi*)**, including energy and raw materials, as well as food security;
- (iv) **access to sensitive information**, including personal data, or the ability to control such information;
- (v) **media freedom and pluralism.**

Until **31 December 2020**, regardless of whether the implementing decrees are issued or not, companies holding assets or with relationships relating to the aforementioned sectors are required to **notify** to the Presidency of the Council of Ministers any resolution, act or transaction which implies any change in the ownership, control or free availability of strategic assets or modification of their allocation. At the same time, whoever intends to acquire shares in the companies identified above is also required to comply with the notification obligations referred to above if the transfer of the shareholding causes various thresholds indicated below to be exceeded.

Finally, the Law Decree itself includes two clarifications which are worth mentioning for a fuller understanding of the changes it brings about.

First of all, without prejudice to the notification obligations, the special powers in relation to those sectors only now brought within the ambit of Golden Powers can be exercised only should "*the protection of the essential interests of the State, i.e. the protection of security and public order, ...*

*not be already adequately guaranteed by the existence of a specific regulation of the relevant sector".* This is clearly a caveat arising out of the need to take into proper account certain important regulations, such as those covering banking, finance and insurance or utilities and radio and television.

secondly, with regard to the temporary nature of the provisions in force until 31 December 2020, the Law Decree specifies that the relevant provisions will apply to all cases in respect of which the notification obligation arises during the period at hand producing, in any case, stable effects over time also once the sunset rule application term expires.

### **3.2. The introduction of new thresholds**

The changes to Golden Power regulation provided for by the Law Decree on are not limited to the extension of the ordinary regulation to new sectors, but also affect the conditions for the triggering of the notification obligations under Article 2 of Law Decree no. 21/2012.

In this regard, new thresholds for the Golden Power notification obligation for the purchase of equity investments in companies operating in the critical infrastructure and technology sectors, as well as in the procurement of critical production factors, access to sensitive information and media (as described above) have been introduced.

For these cases, the Law Decree adds to the existing criterion, linked to the acquisition of a controlling position, a stricter regime directly inspired by the European Regulation which asks that also non-controlling investments be evaluated. The introduction of the thresholds, however, refers to only to acquisitions of shareholdings made by foreign non-European entities.

Specifically, the non-European purchaser entity is required to notify the Presidency of the Council of Ministers also acquisitions "*which grant voting rights or a portion of the corporate capital of at least 10 per cent, taking into account shares or quotas already directly or indirectly held and [whose] overall investment value is equal to or higher than Euro 1 Million*", or those resulting "*in the exceeding of 15 per cent, 20 per cent, 25 per cent and 50 per cent thresholds*".

It should be noted that the mechanism described above is also subject to a time limited application, namely until 31 December 2020.

### **3.3. The partial removal of the distinction between intra-EU and extra-EU investments**

Another important innovation concerns the partial removal of the distinction between the more flexible regime applicable to intra-European investors - except for the provisions of Article 1 of Law Decree no. 21/2012 - and the more restrictive regulation for non-EU entities under Article 2 of Law Decree no. 21/2012.

The Law Decree, first of all, introduces a single regime in force until 31 December 2020 applicable to acquisitions of controlling shareholdings carried out by entities generally belonging to a foreign State (without prejudice to the thresholds described above applicable for the assessment of non-controlling investments carried out by non-European entities).

Therefore, for so long as the Golden Power regulation introduced to contain and counter the Covid-19 outbreak remains in force, it is irrelevant for the purposes of notification obligations whether the relevant acquisition of controlling shareholdings implying the stable settlement of the purchaser in a company, falling within the scope of Article 2 of Law Decree 21/2012, is carried out in favour of an entity belonging to the European Union, or external to it.

In both cases, the notification obligations and the related state control are the same. In relation to the latter, however, one of the criteria used to assess whether a foreign investment may affect security or public order is expressly extended, namely that relating to the question of whether the purchaser is directly or indirectly controlled by a public administration (now also extended to include public administrations of EU member states).

Furthermore, the assimilation of intra-EU and extra-EU investments shall also apply with specific reference to the new sectors of infrastructures and critical technologies, as well as of the procurement of critical inputs (*fattori produttivi*), access to sensitive information and media: by virtue of the regulation provided by the Law Decree, companies holding significant assets and relationships in these sectors, indeed, are now required to also notify all acts, resolutions and transactions involving a transfer of ownership, control or, in any case, of availability of strategic assets, without limitations related to the extraneousness to the European Union of the beneficiary.

It should be noted that this obligation to notify shall also apply to transfers in favour of Italian entities, as it was already provided for strategic assets in the communications, energy and transport sectors, pursuant to Article 2, paragraph 1, of Law Decree no. 21/2012.

Finally, it should be pointed out that the objective scope of the equal treatment introduced by the Law Decree concerns only the notifications made pursuant to Article 2 of Law Decree 21/2012 as described above, with the exclusion of the sectors of national security and defence and broadband electronic communications services based on 5G technology, to which the regime in force to date continues to apply.

### **3.4. Failure to notify and subsequent intervention of the Italian Government**

As outlined above, the framework of the Law Decree involves also permanent changes, aimed at completing the existing mechanisms of public scrutiny of direct foreign investments by means of the amendments to Law Decree no. 21/2012 introduced by Article 16 of Law Decree 23/2020.

The powers of intervention granted to the Italian Government are thus extended by providing the possibility to commence *ex officio* proceedings for the exercise of Golden Powers in the event that any notification obligations provided under Article 1 and 2 of Law Decree 21/2012 is breached. In such instances, the term for completion of the proceeding runs not from the closing of the transaction, but from the end of the investigation activities aimed at assessing whether there has been a breach of the notification obligation.

The new *ex officio* power supplements the ordinary sanctioning mechanisms in the event of non-compliance with the obligations arising from the Golden Power regulation, therefore ensuring a more effective protection of national interests.

### **3.5. Structures supporting the Presidency of the Council of Ministers**

In order to gather data and information useful for assessments relating to the exercise of the special powers, Article 16, paragraph 1, letter e) of the Law Decree gives the interministerial Group for coordination power to request public administrations, public or private entities, businesses and any other third party to provide information and submit documents.

Similarly, the Law Decree envisages that agreements or memoranda of understanding with research institutes or entities may be entered into, to establish forms of regular cooperation and strengthen existing intelligence tools with a view to an effective exercise of Golden Powers. Unlike recently established in France, however, no explicit provision setting forth the faculty of companies

and investors to ask for information and clarifications to the competent authorities has been introduced.

#### **4. The operational implications for strategic investors and businesses**

It is clear that the new rules on Golden Powers are intended to expand the number and types of transactions, resolutions and acts subject to notification requirements. Hence, there is a need to find a new balance between the competing needs of protecting strategic interests and of the economic system to attract foreign investment. However, this does not mean that investments are *per se* automatically halted or prohibited. On the contrary, the flow of investment can continue, to the satisfaction of all stakeholders, if the investors and strategic businesses succeed in positioning themselves positively in the dialogue with the competent administrative authorities.

The experience gained over these years, supported by the reports published by the Presidency of the Council of Ministers, unequivocally shows that special powers have only been exercised with great caution and carefulness in around 10% of cases and that only one transaction has been vetoed in six years of practical application.

In this new legal framework, caused by the health and social-economic emergency, obviously the ability to efficiently illustrate development and investment plans and to commence a productive dialogue with the offices of the Presidency of the Council entrusted with the relevant monitoring oversight, will become even more pivotal.

Moreover, given that the Golden Power rules are now immediately applicable to investment transactions in new and broad sectors of the Italian economy, it follows that there is a need for an immediate and practical analysis of every kind of business in order to determine whether a company and its relevant transactions are subject (even partially) to the special power regulation.

It will also be advisable for companies to give full and transparent disclosure to the markets of the outcome of such analysis, and of whether the Golden Power regulation is applicable to them or not.

The foregoing seems particularly relevant, given that the application of the special power regulation does not derive from the inclusion of businesses in an *ad hoc* list, which is clear and can be checked in advance, but instead requires a sensitive prospective assessment which then needs to be double-checked in light of the technical and discretionary evaluations to be carried out by the Italian Government.

In conclusion, it is first and foremost a responsibility of investors and businesses to carry out an in-depth assessment of the scope of application of the Golden Power regulation, which is thus bound to affect the terms and timing of many share deals.

Chiomenti, thanks to its in-depth experience in the notifications and procedures related to the exercise of special powers, is well placed to provide investors and businesses with clarifications and in-depth analysis in this area, as well as dedicated and expert advice.

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*For further information, please reach out to your usual Chiomenti contacts, as well as the following:*

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