



•ALERT•

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Regulation UE 2019/452 On Foreign Direct Investment Comes Into Application

As of yesterday, 11 October 2020, the EU Regulation 2019/452 of 19 March 2019 ("Regulation") on the control of foreign direct investment is directly applicable in Italy. The aim of the Regulation is to establish a common system among Member States of the European Union in order to monitor foreign investment. With this Regulation, the European Union provides itself with ad hoc screening mechanisms for operations with a potential impact on security and public order in the territory of the Union and an additional instrument to protect strategic activities.

This legislation is the result of a geopolitical framework marked by the desire to exercise greater control over economic activities within member countries, in the light of certain economic changes. Even more recently, concerns have been raised by multiple parties concerning activities carried out by non-EU actors - including governments of foreign countries - who could have taken advantage of the economic shock resulting from the pandemic to acquire critical businesses and activities in the EU for small amounts, given the EU's current economic vulnerability.

In its Communication of 13 March 2020, the Commission stated that "*Member States must be vigilant and use all available instruments at EU and national level to prevent the current crisis from leading to a loss of critical resources and technologies*". Among them, the Commission included, in a note of 26 March 2020, in particular (but not exclusively) those related to the health care supply chain.

According to Article 4 of the Regulation, among the factors to be considered in determining whether a foreign direct investment may affect security or public order, their potential effects may be taken into account on the following sectors:



- critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- critical technologies including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- supply of critical inputs, including energy or raw materials, as well as food security;
- access to sensitive information, including personal data, or the ability to control such information;
- the freedom and pluralism of the media

In any case, the Regulation sets the responsibility for the final assessment over foreign direct investments in charge of the Member States, providing, however, for a coordination mechanism under the European Commission and for obligations of cooperation between Member States, ensuring appropriate management of ongoing procedures and confidential information. Therefore, the coming into application of the Regulation will have direct consequences on the internal regulations of the single Member States, providing for a lengthening of the decision-making procedures, especially in the context of transnational operations subject to more than one jurisdiction.

With reference to Italy, the Regulation will have an impact on the so-called Golden Power legislation (d.l. 21/2012, as converted into Law no. 56/2012 and subsequent amendments), which has long endowed the Italian Government

with **special powers** to control foreign investments in **Italian companies holding assets or having legal relations considered of strategic importance for national interests in certain sectors** (defense and national security, cyber security and 5G, energy, transport and communications, as well as the sectors referred to in Art. 4 of the Regulation, as specified below).

Specifically, such legislation imposes **an obligation** on the investor or transferor party, as the case may be, **to notify** the Presidency of the Council of Ministers of any acts, resolutions or corporate transactions that have as their object or effect the change of ownership or availability of the above-mentioned assets or relations, with different thresholds of relevance depending on whether they are intra-EU investors (in such case, acquisition of control) or extra-EU investors (in such other case, also concerning acquisitions of minority interests).

The notifying party shall provide full information in order to enable the Government to (i) **veto** the relevant act or transaction, (ii) **impose particular requirements or conditions** on the execution of the relevant act or transaction, (iii) **refrain from exercising such powers**.

In this respect, due to its content, the Regulation will require the Government to:

- **conform to the factors of evaluation** while assessing the effects of a foreign direct investment (Art. 4 of the Regulation);
- **notify the European Commission** of the communications received regarding relevant transactions;
- **comply with the time limits necessary to obtain the opinion of the European Commission** on the transaction.

For the sake of completeness, it should be noted that the Italian emergency legislation related to the diffusion of Covid-19 has anticipated the effects of the Regulation with regard to some of these aspects. See, in this regard, the previous in-depth analysis [available here](#).

The **Liquidity Decree** (Law Decree no. 23/2020), in fact, by providing for some temporary changes to the Golden Power legislation, made **express reference to the sectors and assets of strategic importance** indicated in article 4 of the Regulation, with the consequence that it was in fact implemented in Italy well before its formal application. The Golden Power legislation, however, identifies the relevant sectors in a general manner and, given that, **further governmental decrees** need to be adopted to identify the specific assets and relationships that fall within the scope of application of such legislation. This identification, to date, can be considered complete only with reference to certain sectors such as, for example, defence and national security. Pending the complete adoption of the detailed regulations, therefore, the Regulation has become the reference legal text for the interpretation of the Golden Power legislation. Therefore, it is highly recommended, in the light of increasingly pregnant measures aimed at controlling foreign direct investments, to address to professionals with specific expertise in the sector who can offer a preliminary assessment of the strategic importance of the transaction in accordance with the Golden Power regulation, as supplemented by the mentioned Regulation.

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