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ITALY'S FDI RULES: A FURTHER EXTENSION OF THE "GOLDEN POWER" EMERGENCY REGIME

On December 30, 2021, due the persistence of the Covid pandemic, the **"emergency" provisions regarding the FDI Italian regime** (known as "Golden Power" rules), formerly intended to expire on 31 December 2021, have been further **extended until the end of 2022**, by virtue of Decree Law no. 228/2021. An overview of the FDI Italian regime, as amended and supplemented by said emergency provisions, is described in the note below edited by the Golden Power Team of LCA Studio Legale.

The Italian FDI (*Foreign Direct Investment*) regime ("**Golden Power Rules**") entrusts the Italian Government with **special powers** which can be exercised under certain conditions with the aim of (i) **safeguarding the ownership structures** of companies operating in Italy in specific **strategic sectors** of national interest and (ii) **monitoring** such operations, acts and activities.

The Golden Power Rules are based on Decree Law no. 21/2012, as subsequently amended, and on the relevant implementing decrees identifying, through a detailed but not exhaustive list, the activities, assets and legal relationships relevant to such rules ("**Implementing Decrees**").

On March 19, 2019, the European Parliament and the Council of the European Union adopted the **EU Regulation no. 2019/452**, providing for a **European framework** on FDIs (the "**FDI Regulation**")¹, which came into force in all EU member States on October 11, 2020. In particular, the FDI Regulation – in determining when a foreign direct investment is capable of affecting the security or public order of an EU member State – specifically considers the potential effects of such investment on the **sectors and assets** indicated under **Article 4, par. 1, let. from (a) to (e)** of the FDI Regulation (the "**Further Strategic Sectors**").

In April 2020, in connection with the Covid outbreak, the Italian Government introduced an **emergency regime** of the Golden Power Rules (the "**Emergency Regime**"), addressing, *inter alia*, the above-mentioned Further Strategic Sectors specified in the FDI Regulation. The Emergency Regime, initially meant to expire at the end of 2020, has been subsequently further extended two times and, most recently, until **December 31, 2022** by virtue of Decree Law no. 228/2021 of December 30, 2021 (*Decreto Milleproroghe*).

¹ See previous note of LCA in such regard, available on: <https://www.lcalex.it/en/regulation-ue-2019-452-on-foreign-direct-investment-comes-into-application/>



Please find below a brief summary of the main provisions of the Golden Powers Rules that have been affected by the Emergency Regime:

1. BROADENING THE SCOPE: NEW STRATEGIC SECTORS

Before the implementation of the Emergency Regime, the strategic sectors falling within the scope of the Golden Power Rules were limited to the following:

- defence and national security;
- cybersecurity and 5G;
- energy, transports and communications.

The Emergency Regime has widened the scope of application of the Golden Power Rules by making reference to the wide range of **Further Strategic Sectors** indicated in Article 4 of the FDI Regulation. This general reference includes, *inter alia*, the following sectors:

- **water**;
- **health**;
- **aerospace**;
- **dual use items**;²
- **electoral and financial infrastructures**;
- **artificial intelligence**, robotics, semiconductors, **cybersecurity**;
- energy storage, quantum and nuclear technologies, **nanotechnologies** and **biotechnologies**;
- **supply of critical inputs**, including energy or raw materials, **food security**;
- **media, data processing or storage** and access to **sensitive information**, including **personal data**, or the ability to control such information;
- freedom and **pluralism of the media**;
- **land and real estate** assets which are crucial for the use of certain **critical infrastructures** in the above sectors.

The Emergency Regime also envisaged the future adoption, by the Italian Government, of an *ad hoc* Implementing Decree aimed at identifying the specific assets and relationships to be included in the categories of the Further Strategic Sectors. Pending the adoption of said Implementing Decree and due to the uncertainty of the legislation (providing for a wide list of sectors without any detailed indication), a very large number of filings has been submitted to the Presidency of the Council of Ministries during 2020³.

² A *dual use* item is any item having a potential use in both civilian and military areas.

³ According to the Official Report of the Italian Government relating to the year 2020, 342 filings have been submitted during 2020.



Such Implementing Decree was then adopted on December 19, 2020 (Prime Minister Decree no. 179/2020, hereinafter “**Decree 179**”). In particular, it provides for a more detailed list of the **critical infrastructures/inputs/activities/information**⁴ falling within the scope of the Further Strategic Sectors at the Italian national level.

Accordingly, by way of mere example, pursuant to the provisions of Decree 179:

- **financial sector** is meant to include, *inter alia*, the banking and insurance sector, especially in connection with the use of artificial intelligence, blockchain technologies and digital platforms (e.g. *insurtech*).
- **health** sector⁵ is meant to include any critical technologies whose objective is the analysis of data and the application of biological know-how to health and diagnostics, prognostics, therapy and related follow-ups, as well as bio-engineering critical infrastructures and critical nanotechnologies applied in the pharmaceutical sector and in the sectors of medical devices, diagnostics, prognostics, therapy, as well as in the chemical and agri-food sectors;
- **artificial intelligence** infrastructures and technologies are meant to include robotics, machine learning, machine-to-machine communication systems, semiconductors, microprocessors, advanced manufacturing and industrial automation, blockchain, big data & analytics technologies;
- **dual use related activities** are meant to include those relating to the items specified by the EU Dual Use Regulation⁶, provided that they are carried out by companies generating a significant turnover (currently at least Euro 300 million).

As a result, according to the provisions of the Emergency Regime, **both the factors** referred to in Article 4 **of the FDI Regulation** and **the sectors referred to in Decree 179** shall **apply** in Italy, until the Emergency Regime is in place.

Therefore, **the scope** of the Golden Power Rules – as far as the nature and type of the assets is concerned – **remains** currently **very broad** and its enforcement still quite uncertain. Accordingly, in relation to the Further Strategic Sectors, many operators have taken a precautionary and extensive approach.

On December 23, 2020, also the Prime Minister Decree no. 180/2020 (“**Decree 180**”) was issued. In particular, Decree 180 updated the list of strategic assets and relationships falling within **the energy, transport** and **communication sectors** (as originally identified by an Implementing Decree of 2014 based on Decree Law no. 21/2012). This updated list of assets is generally consistent with the

⁴ A “critical” asset is defined as the one which is essential for the safeguard of the vital functions of the society, of the health, of security, of the economic and social welfare of the people, including, depending on the case, for the technological development.

⁵ The importance of the health sector for investment screening purposes and in the context of the FDI Regulation has been highlighted by the EU Commission in its Communication of March 26, 2020 (2020/C 99 I/01).

⁶ EU Regulation no. 2021/821, which replaced EU Regulation No. 428/2009.



previous one, except for the addition of the reference to **any real estate assets** functional to the use of the strategic infrastructures in the abovementioned sectors – which are now expressly included within the scope of the Golden Power Rules – and for a few specifications on transports' infrastructures.⁷

2. RELEVANT TRANSACTIONS AND PARTIES SUBJECT TO FILING OBLIGATIONS - UPDATES

The **ordinary regime** of the Golden Power Rules considers as relevant **many types of transactions**, which differ depending on the sector concerned.

In this regard, both (i) the **acquisition, at any tile, of interests in companies holding strategic assets** and (ii) the adoption of any **act, resolution or transaction, by the company(ies) holding strategic assets** resulting in a change of the ownership, control or availability of such strategic assets, fall within the scope of the Golden Power Rules. As for the obligation of the Golden Power filing in relation to acquisitions (referred to under point (i) above), different thresholds apply for each sector.

In the **defence** and **national security sector** – that has not been affected by the Emergency Regime – the Golden Power Rules apply when “*the level of shareholding with voting rights are capable of compromising the interests of national defense and security*”, and, in particular, notifications are required when the thresholds of, respectively, 5%, 10%, 15, 20%, 25%, 50% are exceeded (except for listed companies when the minimum threshold is set at 3%). As for the **energy, communication and transport sectors**, the relevant Emergency Regime thresholds apply, as outlined below in this Section 2.

Furthermore, with specific reference to the **cybersecurity and 5G sector**, the Golden Power Rules - under the ordinary regime - especially consider **additional types of acts and transactions** as relevant for the FDI screening, such as the execution of license and supply agreements, including know-know and technology transfer agreements, with **non-UE entities**. In particular, for the purposes of the cybersecurity and 5G sector, both (i) the **execution of contracts** or agreements having as their object the **acquisition, at any tile, of goods or services** relating to the design, implementation, maintenance and **management of networks** for broadband electronic communication **services based on 5G technology**, and (ii) **the acquisition or the licensing at any title of technology-intensive components** which are functional to the implementation or management of broadband electronic communication services based on 5G technology, fall within the scope of application of the ordinary regime of Golden Power Rules.

⁷ National airports, interports of national importance and road and highway networks of national interest have also been specifically included.



Indeed, according to past practice (as resulting from the Official Reports concerning the application of the Golden Power Rules released by the Italian Government during the last years), the Golden Power Rules and the relevant proceedings have been applied to transactions with different features, such as industrial or services joint-ventures, know how licenses, supply agreements, and also some financial transactions (e.g., securization transactions).

The **Emergency Regime** left unaltered the types of transactions and operations falling within the scope of the Golden Power Rules. However, while the previous Golden Power Rules limited the screening of intra-UE transactions to the defence and national security sector, the **Emergency Regime** also includes the **screening of intra-UE investors** and transactions in the **energy, communication and transport sectors** and in the **Further Strategic Sectors**.

In particular, according to the Emergency Regime, different criteria apply depending on the parties involved in the relevant filing. Specifically, the Golden Power filing is mandatory and applies to:

- a) entities **belonging to the European Union**, in the event of acquisitions of **controlling interests** in businesses and/or companies active in Italy in the **energy, communication and transport sectors** and in **Further Strategic Sectors**, regardless of the value of the transaction;
- b) entities **not belonging to the European Union**⁸, in the event of acquisition of (also) **non-controlling interests** in business and/or companies active in Italy in the in the **energy, communication and transport sectors** and the **Further Strategic Sectors**, when:
 - the acquisition of the interest is equal of at **least 10%** of the share capital or voting rights of the relevant company (also considering any shareholding already held by the investor in the latter), provided that the **aggregate value of the investment is at least equal to Euro 1 million**;
 - the subsequent acquisition of the interests exceeds the threshold of 15%, 20%, 25% or 50% of the capital, regardless of the value of the transaction;
- c) **entities (irrespective of their nationality) holding critical assets** in the **energy, communication and transport sectors** and in **Further Strategic Sectors** in Italy, in the event of adoption of any act, resolution or transaction, resulting in a **change of the ownership, control or availability of such critical assets**.

The above-mentioned thresholds may be triggered also by the execution of any shareholders' agreement or similar arrangements granting the investor with specific powers (e.g., powers of management over the company), capable of enabling it to exercise a certain influence over the target company. Thus, any subsequent act or agreement executed by the investor having similar effects, even after closing of the transaction, should be submitted to the attention of the Italian Government.

⁸ Decree no. 105/2019 integrated Decree Law no. 21/2012 by redefining the concept of "non-UE entity".



The recent Implementing Decrees, like the previous ones, clarified that **intra-group reorganizations** and **transactions** carried out by and between Italian companies holding strategic assets in any of the sectors covered by the Golden Power Rules **are subject to filing obligations**, but the application of the special powers by the Italian Government is in principle excluded in relation to such transactions (except in cases of “serious threat for the national interest”).

3. SPECIAL POWERS GRANTED TO THE GOVERNMENT AND RECENT REVIEW TRENDS

According to Golden Power Rules, in case the Italian Government detects a risk or a threat for the national interests in relation to the envisaged investment in the Italian companies/businesses, it may take the following measures:

- a) **veto** the adoption of certain corporate resolutions, acts and transactions and **oppose** the acquisition of shareholdings or assets (or the creation of rights in rem over them), as well as the execution of contracts and agreements modifying the ownership, availability and control over strategic assets, or
- b) **impose specific conditions or requirements** on the acquisition of shareholdings or assets, as well as on the execution of contracts and agreements modifying the ownership, availability and control over strategic assets; or
- c) **refrain from exercising** its powers of intervention by issuing the relevant **clearance**.

Under scenario sub c), the Italian Government may also issue “recommendations”, a quite atypical measure which is not expressly provided for by the Golden Power Rules, with the aim of having a smoother approach and, at the same time, continuing to monitor the relevant investment and business.

In addition, under the Emergency Regime, the Italian Government has also been granted with the right to trigger its special powers *ex officio* both for **non-compliance with the notification requirements** and for the **lack of notification**.

According to the Official Report of the Italian Government, during 2020 the special powers summarized above have been **exercised in a minority of cases** (around 12%) and, in most cases, the measures only consisted in the **imposition of specific requirements or conditions to the M&A transaction**.

In such regard, the **awareness** of the ongoing **technological evolution** and its impact on society, institutions and the economy, as well as the evolving nature of security threats, draw the attention of the Italian Government specifically on such sectors. Indeed, during 2020, all 18 **notifications relating to 5G technology were subject to the exercise of powers** with conditions and prescriptions and in one case the relevant transaction was vetoed.



In the case of **relevant transactions**, as identified, there is an obligation to notify the Presidency of the Council of Ministers, **to be carried out within a limited period** – *i.e.* **10 business days** – from the relevant act, resolution or transaction, following a specific procedure. The notification differs in content depending on whether it is to be made by the buyer/investor or by the seller/target, but must, in any case, contain **adequate information** to enable the Government **to assess any prejudice** that the transaction, deed or contract may entail for national interests.

As a final remark, it shall be noted that Golden Power Rules grant the Italian Government the powers to fine significant **pecuniary sanction of administrative nature** in case of non-compliance with the filing obligations/requirements. Also, the transaction subject to a filing obligation or under review cannot generally be executed before conclusion of the relevant proceeding and, in any case, any act put in place as a result of the relevant transaction, when non-compliant with the prescriptions of the Italian Government, is null and void.

LCA has developed a specific expertise in the field of Golden Power, providing advice to multinational companies and global investment fund, headquartered in EU and non-EU, operating in the telecommunications, defense and national security, energy and infrastructure, assisting in the **screening assessment**, in the examination procedure and in the **preparation and submission of the Golden Power notification to the Government for the exercise of special powers**. The LCA Golden Power team assists its customers in a 360° perspective, in all relevant sectors, supported by professionals who provide daily advice in these areas.

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