

COVID-19: STRICTER RULES ON FDI SCREENING IN ITALY, IN THE WAKE OF THE HEALTH AND SANITARY EMERGENCY

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Following recent guidelines imparted by the European Commission, the “Liquidity Decree” (Law Decree no. 23 of 8 April 2020) includes specific provisions to amend and supplement the so-called “Golden Power” legislation, with a view to extending the government's powers of vetoing or imposing conditions on the disposal of equity interests or sensitive assets in Italian companies of a strategic nature.

The new legislation appears to be primarily aimed not only at protecting strategic assets in times in which they may be financially vulnerable, but also at safeguarding supplies of critical goods such as pharmaceuticals, medical devices, food or other essential supply chains.

The screening measures introduced with the Liquidity Decree may be well meant, in that they respond to a growing concern within the national and continental public opinions that local essential assets may be raided by unscrupulous foreign powers or speculators.

However, the regulatory scenario emerging from the new rules, raises several questions, not least as to its outright desirability in a macroeconomic contingency which, especially for a country whose economy was ailing before the outbreak of the epidemic, would require more than ever recourse to a sustained inflow of foreign capital.

Furthermore, interpretative uncertainties and the significant extension, at least temporarily, of the screening's scope to EU nationals (a move, so far, unparalleled in other Member States) pose a number of issues in the application of the new regime.

With Law Decree no. 23 of 8 April 2020 (the “Liquidity Decree”) the Italian government has enacted a series of measures to support companies' liquidity and business continuity, as well as their resilience against hostile foreign takeovers in strategic sectors.

In this latter connection - following recent guidelines imparted by the European Commission on 26 March 2020 (Communication no. 2020/C99/01) - the Liquidity Decree includes specific provisions (Arts. 15 to 17) to amend and supplement Law Decree no. 21/2012, as amended (the so-called, with a suggestive definition, “Golden Power” legislation), with a view to extending the government's powers of vetoing or imposing conditions on the disposal of equity interests or sensitive assets in Italian companies of a strategic nature.

Several European states¹ have enacted or have announced imminent enactment of domestic legislation, implementing the principles set out in the EU Regulation no. 2019/452 (the “FDI Screening Regulation”). Similarly,

in the US, the Committee on Foreign Investments in the United States (CFIUS) has powers of jurisdictional review over foreign investments involving domestic 'critical infrastructure.'

The new legislation appears to be primarily aimed not only at protecting strategic assets in times in which they may be financially vulnerable, but also at safeguarding supplies of critical goods such as pharmaceuticals, medical devices, food or other essential supply chains, as exemplified in art. 4.1 of the FDI Screening Regulation.

THE ITALIAN LEGAL FRAMEWORK FOR FDI SCREENING BEFORE THE LIQUIDITY DECREE

Prior to enactment of the Liquidity Decree, investments in Italian assets relating to the following sectors have been subject to prior scrutiny by the government under the “Golden Power” legislation: defense and national security,² 5G technologies,³ and energy, transport, communications.

In 2017, with the issuance of Law Decree no. 148/17, the government extended the “Golden Power” regime to certain categories of high-tech assets.

The law identifies by broad categories the industries falling within the review's scope, but the government has retained competence to determine periodically what specific assets within those industries would be relevant. While implementing specifications have been produced with respect to the other sectors, a punctual list of assets and activities included within the “high-tech” category is still missing.

Furthermore, assets and activities comprised within the sectors listed under art. 4.1 of the FDI Screening Regulation still need to be identified, by way of implementing legislative measures to be taken by the government.

Under the “Golden Power” rules, the government has a power (and a duty) to intervene in vetoing or imposing conditions on transactions, concerning the relevant sectors, that may constitute a threat of serious prejudice to fundamental interests of national defense or security, or more generally, as far as the sectors other than defense, national security and 5G are concerned, to the public interest relating to the safety and operation of the concerned infrastructure or assets.

Notice of any transactions falling within the above scope of application, needs to be given by the concerned parties to the Prime Minister's office (*Presidenza del Consiglio dei Ministri*) within 10 days of the passing of the relevant resolution or the entering into of an agreement relating thereto, and in any event prior to its implementation. The notice, to be given through ad hoc forms prepared by the government and to be filed through certified email, must include all relevant information, including a description of the proposed transaction, of the purchaser and its operational scope.

Upon receipt of the notice a standstill period of 45 days⁴ begins, during which the government carries out an assessment as to the existence of a threat to public interest, based on principles of proportionality and reasonability.

The powers that the government can exercise may be tailored on a case-by-case approach, but they substantially amount to the following: the power to oppose the transaction, the power to veto the adoption of certain resolutions, or the imposition of specific conditions and prescriptions to the transaction.

Until completion of the review by the government, voting rights attached to the potentially acquired interest are suspended.

Failure by the government to adopt any measures within the 45-day standstill period (as possibly extended, up to a maximum of 30 days,⁵ if additional information is needed) constitutes clearance of the proposed transaction for the subject purposes, which may therefore be lawfully carried out.

FDI SCREENING UNDER THE LIQUIDITY DECREE

Acting on the spur of the current health emergency and the protectionist sentiments voiced by some sectors of the public opinion, the Italian government has now (temporarily?) tightened the existing legislative framework, partly in compliance with the European Commission's guidelines, but also with a view to screening domestic ownership of strategic business assets, likely vulnerable to "predatory" initiatives by foreign investors.

With the introduction of Articles 15 and 16 of the Liquidity Decree, application of the "Golden Power" regime has been extended so as to require prior notice in respect of a larger number of transactions, and give the government autonomous powers to investigate on and, if appropriate, object to prospective transactions even if not notified by the parties.

More to the point, the redefined boundaries of the "Golden Power" prerogatives, are the following:

1. The requirement for the government's prior review has been extended to the strategic sectors identified by art. 4.1 of the FDI Screening Regulation, namely:

- 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 and dual use items, 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; and
 - freedom and pluralism of the media;
- the Liquidity Decree has expressly specified that reference to "financial infrastructure" is meant to include the banking, financial and insurance sectors.

2. While the language and drafting technique of the decree clearly suffer from a certain haste commanded by the emergency context, and, as such, give rise to interpretative uncertainties that will need to be tested upon concrete application, it is safe to say that, at least until 31 December 2020, any and all resolutions and transactions involving acquisition, change in ownership or availability of any of the assets pertaining to the above sectors, will require prior notice to the government pursuant to the "Golden Power" regime.

More specifically, acquisitions of interests in companies holding strategic assets will be subject to the prior notice requirement when carried out by:

- *EU nationals*,⁶ if the transaction involves acquisition of *control* in the target company
- *non-EU nationals*, if the transaction involves acquisition of interests the target's capital in excess of:

- 10%, if the transaction's value is higher than Euro 1 million; or
- 15%, 20%, 25% or 50%, it being provided that upon excess of each of the said thresholds a new notice will need to be given.

The extension of screening limitations to EU nationals, appears to be justified on grounds of public order and public security, pursuant to art. 65, paragraph 1, letter b), of the Treaty on the Functioning of the European Union.

3. Furthermore, while the parties to the transaction still have a duty to notify, the government will now be entitled to investigate autonomously suspect transactions, with the support of economic intelligence tools, also in the absence of the parties' notice.

4. Beyond the measures tightening the "Golden Power" rules, the Liquidity Decree has also introduced new rules aimed at protecting public companies. Namely, art. 17 of the Liquidity Decree amends art. 120 of Legislative Decree no. 58/98 (the so-called "Finance Law" or "*Testo unico della finanza*") in the matter of disclosure requirements for significant stakes, in that: (a) CONSOB (the Italian stock exchange regulator) is given ampler powers to determine, temporarily, thresholds lower than 3% and 5% even irrespective of the condition of "high current market value," hence extending the requirement also to unlisted small and medium-sized companies with "particularly widespread shareholding";⁷ and (b) a new 5% threshold is introduced, beyond which the purchaser is required to disclose the objectives that it intends to pursue over the following six months.

POTENTIAL IMPACT OF THE NEW EMERGENCY LEGISLATION

The screening measures introduced with the Liquidity Decree may be well meant, in that they respond to a growing concern within the national and continental public opinions that local essential assets may be raided by unscrupulous foreign powers or speculators.

Yet, the regulatory scenario emerging from the new rules, raises several questions, not least as to its outright desirability in a macroeconomic contingency which, especially for a country whose economy was ailing before the outbreak of the epidemic, would require more than ever recourse to a sustained inflow of foreign capital.

Furthermore, the new regulatory framework's interpretative uncertainties will likely determine an overload of notices to the Prime Minister's office, and the significant extension, at least temporarily, of the screening's scope to EU nationals (a move, so far, unparalleled in other Member States) raises doubts of compatibility with the principles underlying the foundation of EU law.

In conclusion, concrete application of the new framework will require careful attention by investors, local companies and their legal counsels, on the one hand, as well as by the competent governmental departments, on the other, with a view to striking the right balance between competing interests to protection and economic stimulus.

FOOTNOTES

¹ In Spain, Royal Law Decree no. 8/2020 has introduced several limitations to FDIs, in sectors identified by the FDI Screening Regulation; similarly, in France, decree no. 1590/2019 has extended the number of economic sectors and lowered the investment's size threshold triggering governmental review; in Germany, according to

press reports, the government is considering introducing a “clearance certificate” system to transactions concerning critical infrastructure and presenting a risk of “hazard” within the meaning of the FDI Screening Regulation.

² Including activities falling under the realm of the Ministry of Defence and the Ministry of Interior, such as research, design, development and production of a variety (as better specified in the Prime Minister's Decree no. 108 of 6 June 2014) military and public security systems, infrastructure and devices.

³ The Golden Power tool was applied to condition and supervise relations of domestic telecommunications operators Linkem, Tim, Wind Tre and Fastweb with the Chinese Huawei and Zte.

⁴ It should be noted that the Liquidity Decree has extended the suspension of administrative terms up to 15 May 2020. In the circumstances, the 45-day term for any notices now filed under the “Golden Power” will start running on 16 May 2020.

⁵ With specific respect to 5G technologies, the 45-day term can be suspended for additional 45 days (extendable only once to 90 days) if a deeper analysis is required to assess vulnerability factors.

⁶ Which expression is deemed to include entities belonging to the European Economic Area (EEA).

⁷ With resolutions nos. 21326 and 21327 of 9 April 2020 (effective until 11 July 2020), CONSOB has temporarily lowered disclosure thresholds to 1% for companies with market capitalization in excess of €500 million, and to 3% for companies with smaller market capitalization. Companies subject to formal control (i.e. by virtue of ownership in excess of 50% of their capital) are exempted from the above reduced thresholds.

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