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Latest amendments to the Italian golden powers: a significant set of new rules

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Italian Foreign Direct Investment legislation (known as “Golden Power” rules) has been recently amended by Law Decree No. 21 of March 21, 2022 (“**Decree 21/2022**”), which provided for significant changes to the applicable regime based, *inter alia*, on Law Decree No. 21/2012.

The provisions of Decree 21/2022 may be further modified during the parliamentary process of conversion into law (currently on going and to be completed within May 20, 2022). Furthermore, it is worth noting that some of the provisions of Decree 21/2022 are immediately applicable, some others – despite being theoretically applicable – need for implementing acts to be issued in order to become enforceable, some others will come into force starting from next year.

In particular, Decree 21/2022 introduced the (main) following changes:

(a) the “emergency” regime - born under the Covid-19 pandemic (and taking into account EU Regulation No. 452/2019, the “**FDI Regulation**”) and intended to elapse at the end of 2022 – will become (in greater part) permanent starting from January 1, 2023, thus implying a broadening of the scope application of the ‘ordinary’ Golden power screening mechanism;

(b) some adjustments in relation to certain sectors, and in particular, to the 5G and cybersecurity sector, have been provided;

(c) new procedural rules and coordination mechanisms among national authorities have been put in place.

In relation to the point under **(a)** above, it may be worthy to recall that the ‘temporary regime’ applicable to acquisitions of shares in the so-called “further strategic sectors” (i.e. those under Article 4 of the FDI Regulation, as specified at Italian national level) envisaged, on one side, **lower thresholds** of relevance for the triggering of the filing obligation, different from EU to non-EU investors, and, on the other side, the inclusion of intra-EU investments in the scope of the FDI mechanism (which was not the case before, except for the defence and national security sector).

According to the provisions of Decree 21/2022, starting from January 1, 2023, the above-mentioned temporary rules concerning the “further strategic sectors” will continue to apply to **share deals**, with some adjustments. Indeed, for **extra-EU** investors the **minority threshold** (10% of the share capital or voting rights in the target company) will be maintained in relation to **all the “further strategic sectors”** under Article 4 of the FDI Regulation (provided that the total investment value is of at least than one million euros), while **EU investors (and non-EU as well)** are subject to mandatory filing only for **acquisitions** implying the transfer of “**control**” of the target company and when this latter holds strategic assets in **certain sectors** under Article 4 of the FDI Regulation, such as the energy, transportation, communication, health, agricultural-food and finance (including banking and insurance).

As for other types of acts, resolutions or transactions resulting in a change of control, ownership, destination, availability of strategic assets of the target company (typically asset deals) in addition to being subject (as it was already the case) to filing when they involve all the “further sectors” referred to in Art. 4 of the FDI Regulation and when they are carried out in favor of non-EU parties, from 2023 they will also be subject to mandatory filing when carried out in favor of **EU parties** and with regard to **certain sectors** under Article 4 of the FDI Regulation, such as the energy, transportation, communication, health, agricultural-food and finance (including banking and insurance). In this respect, also the defence and national security sector provisions have been aligned.

In such context, Decree 21/2022 also pointed out that the notion of “**EU investors**” include “**any (natural or legal) person resident or established in Italy**”.

The scope of such specification is not so evident as it may seem and may imply an unreasonable extension of the scope of application of the FDI mechanism (also in view of the Treaty on the Functioning of the European Union provisions); moreover, it may lead operators, counsels and parties to adopt an even more “prudent” approach when evaluating the opportunity/obligation of the filing and to opt for “precautionary notifications” (a *modus operandi* which is already recurrent in the practice, due to the uncertainty of some profiles of the Golden Power rules). Such notion may also be interpreted taking into account the concept of **non-EU entity** (already envisaged under Article 2, par. 5-bis of Law Decree No. 21/2012), defined as being not only any legal person having its registered office, domicile or residence outside one of the EU Member states, but also any person who, despite formally having its registered office, domicile or residence in a member state, is directly or indirectly controlled by a natural person or a legal person outside the European Union or who has established its center of interests in the Union for the sole purpose of circumventing the legislation in question. Indeed, a certain **degree of analysis** will be more and more required, mainly in relation to the identification of the person “controlling” the “formal” investor (the so-called **ultimate beneficial owner**).

In light of the above, it can be said that Italian government has crystalized the “temporary regime” into the ordinary one, especially broadening the scope of the Golden Power rules in relation to the “subjective” requirement (definitely putting the intra-UE investments in the lens of the Italian FDI mechanism). However, such enlargement has been “limited” to only certain assets, excluding areas such as personal data, dual-use items, water, electoral infrastructure, media, aerospace, steel.

Significant changes have also been provided for in relation to the **5G and cybersecurity sector** (regulated by Article 1-bis of Law Decree no. 21/2012).

In such respect, activities, assets and relationships concerning **cybersecurity and cloud** have been included in the scope of application of such sector, provided that they are considered “strategic”. The detailed identification of such assets for the purposes of Article 1-bis (referred to above) will be executed by way of implementing decrees to be issued in the following months.

The **content of the mandatory filing** in this sector, which already differed from the one relating to the other strategic sectors due to the high specificity of the matter, has been totally reinterpreted. Pursuant to the new provisions, the Italian operators active in this field will have to submit to the Italian Presidency an annual plan describing their intention to acquire products or services with regard to the design, implementation, maintenance and management of 5G networks and other critical components of high technological intensity functional to such realization, before starting the relevant implementation. Such annual plan, whose relevant **information** may be further defined according to **future implementing decrees**, is to be filed irrespectively of the nationality of the suppliers of such services and/or products and could be updated by the parties on a quarterly basis; for these recurrent monitoring activities, the Italian government will avail itself of the support of *ad hoc* and specialized committees which were established in the context of the national cybersecurity.

Considering the impact of such changes, a coordination mechanism between the (previous) mandatory filing concerning the entering of supply agreements with extra-UE investors and the new rules has been envisaged; in any case, any proceeding already in place before the Italian Golden Power office in such respect is to be deemed “extinguished” and the relevant assessment will be conducted in the context of the annual plan evaluation. However, such new rules - which immediately entered into force – depend on many implementing decrees to be issued, so that they are not applicable on their entirety.

In addition to the above, further procedural profiles have been reviewed, in a general way, by Decree 21/2022, also taking into account what was already frequently put in place in the practice. Such provisions include the following:

- A **joint filing** of the transaction with the target company shall be made by the investor, where possible. In case such joint filing is not possible, the notifying party shall simultaneously send to the target company a notice reporting the information of the transaction and of the filing that has been done; the target company is then entitled to submit comments and documents to the Presidency within 15 days from receipt of the notice.
- **Prescriptions and fines** may be imposed by the Italian Presidency not only on the acquiring company, but also on the **target company**.
- **Simplification measures** (as per deadline, investigation steps) will be introduced, in particular in the view of allowing a lighter screening process in those cases in which, from a first review of the filing by the Group of coordination within the Italian Presidency Office, a unanimous and unconditional clearance is to be adopted.
- A **pre-notification mechanism** aimed at obtaining a preliminary assessment on the applicability of the Golden Power rules to the transaction at stake and on the need of a mandatory filing will be soon set up by the Italian Government.
- A **collaboration mechanism with other national authorities**, namely the Italian finance police (i.e., *Guardia di Finanza*), has been encouraged. This will help to avoid circumvention of the applicable FDI regime.

On this last point, it may be interesting to report that the Italian Government has, for the first time, annulled and declared ineffective an entire transaction occurred in 2018 concerning the aerospace sector and involving extra-UE investors (in addition to have imposed significant pecuniary fines). The transaction in issue was not notified at all at the time of its execution; however, such investment captured the attention of the Italian Presidency (also) in reason of some recent investigations conducted by the Italian finance police over the involved parties.

As a mere conclusive remark, it shall be noted that the Official Report concerning 2021 notifications will be issued within the very next months by the Italian Government. Such Report has proved to be a quite useful reading key for FDI trends and will constitute an interesting starting point for discussion on the current Golden Power regime.