

NEW ITALIAN RULES ON THE REVIEW OF FOREIGN INVESTMENTS IN ITALY: DAWN OF AN ERA OF GREATER CERTAINTY FOR FOREIGN INVESTORS? A FOCUS ON THE ENERGY SECTOR

13 January 2021 | Italy
Legal Briefings

Article 10-ter of Law of 18 December 2020, no. 176, extended the temporary regime introduced with the Liquidity Decree until 30 June 2021. Following the extension of the Governmental Powers on FDI carried out with Law Decree of 8 April 2020, No. 23 (the “**Liquidity Decree**”), on 18 and 23 December 2020 the President of the Council of Ministers enacted Decrees no. 179 and no. 180 , clarifying the scope of the Government Powers (the “**New GP Decrees**”) in respect of foreign direct investments. The New GP Decrees, that will enter into force on 14 January 2021, will set out which specific assets, activities and relationships, are deemed “strategic”. These assets are in addition to those already identified as strategic by applicable laws (ie Law Decree no. 21 of 15 March 2012, Decree of the President of the Council of Ministers no. 85 of 25 March 2014, Decree of the President of the Council of Ministers no. 108 of 6 June 2014).

Foreign investments in certain Italian strategic sectors are subject to the regime set out by Law Decree No. 21 of 15 March 2012, as subsequently amended in 2017 and 2019 (the “**Golden Power Decree**”). In particular, under the Golden Power Decree, certain transactions and corporate resolutions in the defence and national security sectors, as well as on networks, plants, assets and contractual relationships deemed strategic for the national interest in other sectors (*ie* communications, energy, transport and high-tech sectors) (collectively, the “**Strategic Sectors**”) must be notified to the Italian Government. The Italian Government can then request information, impose specific rules or conditions or, under certain circumstances, exercise a veto in relation to the relevant transaction or corporate resolution (the “**Government Powers**”).

In order to face the impact on the Italian economy of the COVID-19 pandemic, under the Liquidity Decree the Government powers of intervention in respect of foreign investments have been extended to certain strategic sectors (which include, *inter alia*: financial services, infrastructures and critical technologies, energy, transport, water and health, food security, access to sensitive information and personal data, artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnology and biotechnology, collectively, the “**New Strategic Sectors**”).

Further amendments introduced by the Liquidity Decree include:

extension to EU persons of the duty to notify to the Government any acquisition of a controlling interest in any company holding assets in a Strategic Sector or in the New Strategic Sector;

introduction of a duty to notify to the Government also acquisitions, by any non-EU person, of interests representing more than 10% of the shareholding in any companies owning assets in a Strategic Sector or in a New Strategic Sector if the acquisition value exceeds Euro 1 million, or acquisitions leading to a surpassing of each 15%, 20%, 25% and 50% thresholds;

extension of the duty of notification to Consob (the Italian Financial Markets Authority) to all companies having a broad shareholder base, regardless of the relevant marked capitalisation, in case of ‘major holdings’ acquisition. In addition, Consob may introduce a duty of notification also in case of acquisition of an interest equal or above the current 5% threshold.

In case of breach of the obligation of prior notification, the Government can exercise its powers under the Golden Power Decree *ex officio*.

With respect to the energy sector, by virtue of the general reference to Article 4(1), letters a) and c) of the EU Regulation 2019/452, the Liquidity Decree seemed, *prima facie*, to extend the foreign direct investments regime to all energy infrastructures, real estate assets essential for the use of these infrastructures, and energy supply (generation, wholesale supply, etc.). As a consequence, the Italian Government's power of intervention was, at least in theory, extended to all stages of the supply chain. Due to the width of the definitions and the absence of further guidance, investors had to assess carefully whether a transaction would have fallen within the scope of the Italian FDI regime and how to contractually address the relevant timing and risks.

The New GP Decrees clarify the scope of the Government Powers, by restricting it only to certain assets and activities within the New Strategic Sectors.

Notably, as regards the energy sector, the foreign investment regime applies to the following energy networks of national interest, and in related contractual relationships under Article 3 of Decree of the President of the Council of Ministers of 18 December 2020, no. 179:

“critical” infrastructures (ie those essential to the health, safety and economic and social well-being of the population) in which fuels, nuclear materials or radioactive waste are stored, as well as the technologies and infrastructures for the processing, management and transport of those fuels, nuclear materials or radioactive waste;

buildings essential for the use of the above critical infrastructures;

coastal deposits of crude oil and oil products with a capacity of one hundred thousand or more cubic meters used for the domestic market, LNG storage capacity infrastructures equal to or greater than 10 thousand cubic metres, import pipelines and oil pipelines for intercontinental airports' supply;

“critical” technologies (ie those essential the health, safety and economic and social well-being of the population), including platforms, for the management of natural gas wholesale markets and electricity; and

economic activities of strategic importance carried out in the energy sector by undertakings with an annual net turnover of no less than Euro three hundred million and an average annual number of employees of at least two hundred and fifty.

The assets mentioned above are in addition to the following ones, which are already listed under Ministerial Decree No. 85 of 25 March 2014, now replaced by Article 1 of President of the Council of Ministers of 23 December 2020, no. 180:

national natural gas transmission network, related compression stations and dispatching centres, as well as gas storage facilities;

infrastructures for the supply of electricity and natural gas from other States, including onshore and offshore LNG regasification facilities;

national electricity transmission grid and relevant control and dispatching facilities; and

management activities related to the use of the networks and above mentioned infrastructures.

Besides, the New GP Decree clarifies that Governmental Powers are excluded (but notification has, nonetheless, to be carried out):

- a. if the safeguard of security and public order, including protection of the essential interests of the State in safeguarding the security and operation of networks and installations and of the continuity of supplies, is adequately guaranteed by specific sector regulations, including those stemming from a concession; and
- b. for the following intra-group transactions: mergers, demergers, acquisitions or transfers of shares, transfer of the company's headquarters in a country not belonging to the European Union, change of the company's purpose, winding up of the Company, amendments to the by-laws clauses adopted under Article 2351, paragraph 3 of the Italian Civil Code (ie providing for a limit of the voting rights in relation to the number of shares held by the same person) or pursuant to Article 3 paragraph 1 of Law Decree 332/1994 (pursuant to which companies operating in defence, transport, telecommunications, energy, and other public services and banks and the insurance undertakings, directly or indirectly controlled by the State, or by public authorities, including local and regional and economic authorities, may introduce a limit to the share ownership), creation or transfer of property rights or intangible assets, adoption of restrictions affecting the use, including by reason of its subjection of the company to

insolvency proceedings.

These exclusions do not apply if the relevant transaction may lead to a prejudice to the continuity of supply or a danger to security and public order. However, the practical implementation of this exclusion may be problematic due to an unclear and somehow contradictory provisions.

In addition, the other measures introduced by the Liquidity Decree have been extended, by virtue of Article 10-ter of Law of 18 December 2020, no. 176, until 30 June 2021. In particular, until that date, acquisitions of controlling interests by EU investors and acquisition by any non-EU entity of an interest equal or higher than 10% of the voting rights, as well as any subsequent acquisition exceeding 15%, 20%, 25% and 50% (provided that the investment value exceeds Euro 1 million) will be subject to notification duties.

The uncertainty stemming from the width of sectors involved has now been significantly reduced by virtue of these recent measures. However the text of the New GP Decrees still leaves a certain degree of uncertainty: in this respect, only the future application practice will provide guidance.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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