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Italy's Liquidity Decree Extends Foreign Investment Regulation in Response to COVID-19

The Italian government extends its Golden Power to veto or impose conditions on corporate transactions involving foreign investment.

On April 8, 2020, the Italian Government issued Law Decree 23/2020 providing a contingency package of extraordinary measures to safeguard and strengthen the national economy and support Italian companies during the COVID-19 emergency (the Liquidity Decree).

As recommended by the European Commission in its March 25, 2020 guidelines, the Liquidity Decree includes significant measures to prevent the exploitation of the COVID-19 emergency by foreign entities to acquire critical and strategic assets. Such measures amend the existing regulatory framework governing foreign investments in Italy, as originally provided under Law Decree 21/2012, as converted into Law, amended and implemented, among others, through specific Presidential Decrees (the Italian Foreign Investment Regulation).

Pursuant to the Italian Foreign Investment Regulation, the Italian Government has, among others, the power (the Golden Power) to:

- Veto corporate resolutions (such as extraordinary transactions, changes to the corporate purpose, and voluntary winding-up) entailing structural changes of, or M&A transactions involving, entities holding assets which are deemed to be of strategic importance
- Impose conditions on any such transactions or corporate resolutions in relation to the security of supplies and information, the transfer of technologies and export controls.

The Golden Power can be exercised only if the relevant corporate resolutions or transactions could result in a threat to national defence and security or other public interests.

The scope of the Golden Power was originally limited to specific assets in the defense and national security, energy, transport, and communications sectors. Such scope has been subsequently extended to 5G broadband communication systems and, pending the adoption of the implementing decrees that will identify the specific assets, to the sectors referred to in Article 4, Paragraph 1, letters a) and b) of EU Regulation 2019/452 (*i.e.*, critical infrastructure including energy, transports, water, health,

communications, media, data processing and storage, aerospace, defense, electoral and financial infrastructures, dual use items and critical technologies, such as artificial intelligence, robotics, semiconductors, cybersecurity, quantum and nuclear technologies, nanotechnologies and biotechnologies).

The Golden Power gives the government a broad reach over transactions involving strategic assets in the defense and national security sector, irrespective of the nationality of the investor (it does not apply only in case of acquisitions made by the Italian State or by an Italian State-controlled entity) and with respect to investments resulting in the acquisition of any shareholding higher than 3% and, subsequently, 5%, 10%, 15%, 20%, 25%, and 50% in the company holding the relevant asset. As to the energy, transport, communications, and any other relevant sectors, until the Liquidity Decree, only acquisitions made by non-EU entities, resulting in such entities acquiring control of the company owning the relevant asset, could be vetoed or conditioned by the Italian government.

Resolutions and transactions falling within the scope of the Italian Foreign Investment Regulation are subject to scrutiny by the Italian government and, to such purpose, companies and potential buyers have to make a specific filing, providing all information necessary for the Italian Government to analyze the relevant corporate resolution or transaction. Upon receipt of the filing, a 45 days waiting period begins (which can be extended twice and for an aggregate period of up to 30 days, if additional information is deemed necessary by the Italian government on top of those already provided — the Waiting Period)¹, during which the Italian government analyses the resolution or transaction and resolves as to whether to exercise or not the relevant Golden Power.

In the event that the Italian government does not exercise its Golden Power before the expiry of the Waiting Period, the resolution or transaction is deemed to be cleared. In case of non-compliance with the decision issued by the Italian government, the relevant resolution or transaction is null and void and the notifying entity could be subject to administrative fines up to two times the deal value and not less than 1% of the aggregate turnover of the involved entities².

The Liquidity Decree extends the scope of the Italian Foreign Investment Regulation and the relevant Golden Power. In particular, pending the adoption of the implementing Presidential Decrees that will identify the specific assets, pursuant to the Liquidity Decree, the Golden Power will apply to all the sectors referred to in Article 4, Paragraph 1, letters a) to e) of EU Regulation 2019/452, including the insurance, financial and credit sectors. Therefore, the extension of the Golden Power covers the assets pertaining to the sectors listed below:

- Critical infrastructure, whether physical or virtual, including energy, transports, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure (letter a) of Article 4, Paragraph 1, of EU Regulation 2019/452)
- Critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies (letter b) of Article 4, Paragraph 1, of EU Regulation 2019/452)
- Supply of critical inputs, including energy or raw materials, as well as food security (letter c) of Article 4, Paragraph 1, of EU Regulation 2019/452)
- Access to sensitive information, including personal data, or the ability to control such information (letter d) of Article 4, Paragraph 1, of EU Regulation 2019/452)

- The freedom and pluralism of the media (letter e) of Article 4, Paragraph 1, of EU Regulation 2019/452)
- Insurance, financial, and credit.

In addition, until December 31, 2020, the Italian Foreign Investment Regulation will apply also to:

- Acquisitions made by any EU entities that would result in their control of a company holding strategic assets in the sectors referred to above and in the energy, transport, and communications sectors
- Acquisitions made by any non-EU entities that would result in such non-EU entities acquiring at least 10% (provided that the aggregate value of the relevant investment is at least equal to one million Euro) of the share capital or the voting rights in a company holding strategic assets in the sectors referred to above and in the energy, transport, and communications sectors, as well as any further acquisitions by non-EU entities that would result in such non-EU-entities exceeding the 15%, 20%, 25%, and 50% thresholds of the share capital or the voting rights in the companies mentioned above.

The new provisions of law enacted with the Liquidity Decree will apply to all relevant resolutions and transactions carried out until December 31, 2020; the Italian government will retain the ability to exercise its Golden Power after the above date. In any case, any order issued by the Italian government pursuant to the Liquidity Decree will remain effective also after the end of this term.

Furthermore, pursuant to the provisions of the Liquidity Decree, the Italian government is now entitled to exercise its Golden Power also if a relevant transaction or corporate resolution is not communicated to the Italian government, and the government becomes aware of it through public or private sources. This additional power can be exercised in all sectors that are subject to the Italian Foreign Investment Regulation. In such event, the relevant Waiting Period will begin from the date on which the Italian government ascertains the abovementioned breach.

Along with the above measures, the Liquidity Decree (Article 17) strengthens CONSOB's powers to impose stricter reporting obligations of relevant shareholdings in Italian-listed issuers (Article 120 of Legislative Decree 58/1998). CONSOB³ is now entitled to temporarily lower the beginning 3% threshold (5% for small and medium-sized companies) triggering the shareholding reporting obligation (Article 120, Paragraph 2 of Legislative Decree 58/1998) with reference to all Italian-listed companies having a particularly widespread shareholding base and irrespective of their actual high capitalization which is difficult to determine due to the current volatility of the markets. Exercising the powers granted by the Liquidity Decree, CONSOB⁴ has lowered the entry threshold of relevant shareholding to be reported:

- From 3% to 1% for no. [39 major companies listed on the MTA](#)
- From 5% to 3% for no. [65 small/medium enterprises listed on the MTA](#)

Such reduced thresholds will be in force until July 11, 2020 unless early revoked.

Moreover, the Liquidity Decree strengthens CONSOB's power to lower to 5% the threshold for the purpose of the six-months strategic plans and takeover intention reporting obligation to the public imposed (in addition to the disclosure of the relevant shareholding) to anyone acquiring a stake in an Italian-listed issuer (Article 120, Paragraph 4 bis of Legislative Decree 58/1998). CONSOB⁵ has added a lower 5% entry reporting threshold which will apply to the 104 listed companies above for which it has

also lowered the general reporting of relevant shareholding obligation. This measure will be in force until July, 11 2020, unless revoked earlier.

For additional information on this topic please see our *White Paper* “Managing Italian Companies With Listed Securities During the COVID-19 Outbreak” and blog post [Italy Adopts Liquidity Decree to Support Italian Companies](#).

The new provisions introduced by the Liquidity Decree entered into force on April 9, 2020, and need to be confirmed (with potential amendments) by the Italian Parliament within 60 days.

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Endnotes

¹ It is worth noting that Law Decree 18/2020, adopted on March 17, 2020 to face the COVID-19 emergency, provided that all terms relating to the Golden Power notification procedures pending as of February 23, 2020 or commenced after that date, are suspended until April 15, 2020. Pursuant to the Liquidity Decree, the suspension period mentioned above has been extended until May 15, 2020. Therefore, the period between February 23, 2020 and May 16, 2020 shall not be taken into account for the purposes of the relevant time elapsing.

² Different amount of sanctions (*i.e.*, up to 150% and no less than 25% of the deal value) apply in case of breaches related to the broadband communication systems based on 5G technologies sector.

³ The Italian Companies and Exchange Commission (Commissione Nazionale per le Società e la Borsa) is the authority responsible for the regulation of the Italian securities market.

⁴ See CONSOB Resolution No. 21326 of April 10, 2020.

⁵ See CONSOB Resolution No. 21327 of April 10, 2020.