

## 1. Introduction

On April 8, 2020, the Italian government issued Law Decree No. 23/2020 (the Law Decree), which was published in the Official Journal and entered into force on April 9, 2020 in order to further mitigate the effects of the ongoing coronavirus disease 2019 (COVID-19) emergency on the national economy.

In addition to a wide range of measures covering a number of sectors, the Law Decree also extends regulations known as golden powers regulations aimed at safeguarding the ownership of national companies during this period of high uncertainty caused by the COVID-19 spread.

Golden powers regulations provide for state powers of intervention in the event of extraordinary transactions involving companies operating in certain defined strategic sectors.

Golden powers (also called "special powers") consisted in the state's right to (i) object to; (ii) put a veto on; and/or (iii) impose special conditions on extraordinary transactions involving strategic companies. The government had the power to exercise one or more of the aforementioned powers whenever an exceptional situation of threat and/or serious prejudice to the public interest relating to the security and operation of networks and infrastructures occurs.

On an EU level, on March 26, 2020, the European Commission, with its communication no. 2020/C 99 I/01<sup>1</sup>, published in the Official Journal of the European Union, issued a statement in favor of the protection of European companies. The communication underlines the necessity of preventing the adverse economic situation caused by the pervasive spreading of the COVID-19 in the whole of Europe, being used to allow predatory acquisitions, via foreign direct investments (FDIs), in strategic economic sectors, such as healthcare-related industries or research establishments.

In essence, the European Commission invited member states of the European Union (EU) to avail themselves of those control mechanisms they have to protect their industries from hostile FDIs in this period. In addition, the European Commission called on member states, where appropriate, to establish new control mechanisms, while making use of all options available if faced with the possibility that a potential acquisition or control of a particular undertaking, infrastructure or technology from foreign investor could pose a risk to security or public order in the EU.

## 2. Law Decree No. 23 Of April 8, 2020

Following the aforementioned guidelines of the European Commission, by the Law Decree, the Italian government has extended the scope of application of the reporting obligations set forth under the existing golden powers regulations, granting to the state more extensive control on relevant business transactions that may hide hostile predatory acquisitions by foreign investors.

Before the entry into force of the Law Decree, the reporting obligations concerned certain transactions in the defense and national security sectors and energy, transportation, communication and high-tech sectors.

Article 15 of the Law Decree extends, for a limited period of time, the reporting obligations to transactions, resolutions and actions adopted also by companies (Relevant Companies) owning assets or having business interests in the sectors of, for example:

- Health, communications, media, data processing or storage, financial infrastructure and sensitive facilities (including related land and real estate)
- Critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity and biotechnologies
- Supply of critical inputs including raw materials and food security
- Credit, insurance and financial<sup>2</sup>

In general, the Law Decree extends the reporting obligations to transactions concerning the acquisition of an equity participation in Relevant Companies.

In addition, up to December 31, 2020, all transactions, resolutions and actions a Relevant Company intends to adopt constitute a notifiable action, which must be approved by the competent office of the Presidency of Council of Ministers. In particular:

- a. Relevant Companies must notify the transactions, resolutions or acts that could determine a change of ownership or of control of their assets, as well as a change of the disposal or of the allocation of such relevant assets.

1 The communication is entitled "Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)".

2 The Law Decree refers to the sectors, including the credit, insurance and financial sectors, outlined by Article 4, paragraph 1, letters a), b), c), d) and e) of Regulation (EU) 2019/452.

- b. A foreign investor (even if located in another member state of the EU) must notify its intention to acquire an equity interest in a Relevant Company, when the purchaser could obtain control (pursuant to Article 2359 of the Italian Civil Code and the Consolidated Law on Finance of February 24, 1998 (TUF)) of such company.
- c. A foreign investor (not belonging to the EU) must notify its intention to acquire an equity interest in a Relevant Company (i) when the purchaser could obtain a share of voting rights or capital of at least 10%, taking into account the shares or quotas already directly or indirectly owned and whose investment has a value of €1 million or more; and (ii) also when the purchase leads to an increased shareholding of more than 15%, 20%, 25% or 50% of the aforementioned threshold.

In determining whether a foreign direct investment is likely to affect security or the public order, the Italian government may take into account the circumstance that the purchaser is an entity directly or indirectly controlled by a public administration (including state bodies or armed forces), including through ownership or substantial financing of a foreign country, even if it belongs to the EU.

The notification obligations as amended by the Law Decree also apply to relevant transactions, resolutions and actions adopted up to December 31, 2020, even if the notification to the competent office of the Presidency of the Council of Ministers has been omitted or submitted after December 31, 2020.

### 3. Historical Background

In the past, the Italian government controlled strategic companies by means of special shareholder rights referred to as “golden shares”, which may be considered as the precursor of current golden powers. Following the privatization process that took place primarily in the 1990s, former Italian public companies were transformed into joint stock companies, and their shares were listed on the stock exchange with large-scale public share offerings. At that time, regulations allowed the residual state shareholdings in such companies to be vested with special powers that allowed the exercise of prerogatives capable of affecting the decisions of the companies concerned, even if the state held a minority shareholding interest.

The relevant legislation<sup>3</sup> defined the criteria for the exercise of these special powers, which included, *inter alia*, the right to (i) object to the acquisition of significant shareholdings; (ii) appoint members of management bodies; and (iii) veto certain corporate resolutions, such as those concerning the dissolution, transfer, merger or demerger of the company, proposals to transfer its registered office abroad or modify its corporate object.

Nevertheless, the Italian legislation on golden shares was held to be in contrast with EU legislative principles regarding the free circulation of capital. In fact, the European Court of Justice ruled that the Italian golden shares provisions had the effect of dissuading other member states from investing in the relevant companies<sup>4</sup>. Moreover, initially the European Commission and subsequently the European Court of Justice held that the criteria for the exercise of powers deriving from golden shares were “vague and indeterminate in scope” giving to national authorities “wide discretionary powers in judging the risks to the vital interests of the state”.

In light of the above, the European Court of Justice ruled that Italy was in violation of the EU law and hence requested it to introduce more certain rules allowing an *ex ante* assessment of the possible limits to business operations and transactions concerning strategic companies.

For these reasons and with the aim of rationalizing and defining a more precise scope and criteria for exercising the powers of the state, Italy adopted Law Decree No. 21, dated March 15, 2012.

### 4. What Law Decree No. 21/2012 Provides

Law Decree No. 21 of March 15, 2012, as subsequently amended, applies to all companies carrying out business in strategic sectors.

Strategic companies must provide the competent office of the Presidency of the Council of Ministers full information on certain resolutions or acts they intend to adopt and on certain proposed transactions. Following a notification, the competent office of the Presidency of the Council of Ministers has a period of 45 days within which the President of the Council of Ministers may, if it so determines, impose its veto or conditions on the proposed transaction. In the event that further information is required, the 45-day term is suspended, which may occur once only, until receipt of the requested information. In this case, the company under scrutiny must provide the additional information within 10 days from the request. If it is deemed necessary to request further information from third parties, the aforementioned 45-day term is suspended, which may also occur once only, until receipt of all such information, which must be provided within a period of 20 days from the request. Further information requests, both to the company and to third parties, do not suspend the 45-day term. Moreover, in case of incomplete information provided initially by the company, the 45-day term commences from the date of complete provision of the relevant information. Once the government has been provided with the relevant information, it must then evaluate whether to exercise its special powers and notify its decision to the company concerned.

In the event of breach of the procedure and/or of any conditions imposed, the golden powers legislation provides for specific penalties, ranging from the suspension of voting rights, to the invalidity of the actions carried out, to the application of administrative penalties.

<sup>3</sup> Law Decree no. 332 of May 31, 1994, Article 2, converted into Law no. 474 of July 30, 1994 and amended by Law no. 350/2003, as well as Decree of the President of the Council of Ministers of June 10, 2004.

<sup>4</sup> In its ruling C-326/07 of March 26, 2009, the Court of Justice of the European Union stated that the special powers held by the Italian State in Telecom Italia, Eni, Enel and Finmeccanica were incompatible with EU law, accepting the conclusions of the European Commission, which in June 2006 referred Italy to the Luxembourg Court for infringement of Articles 56 and 43 of the EC Treaty.

As indicated above, golden powers legislation aims at specifying the industries and sectors having a national interest and the need to be protected from predatory acquisitions by foreign investors<sup>5</sup>.

The types of transactions that may be reviewed by the government are various in nature. For instance, they can include stock or asset purchases, mergers, joint ventures in which a foreign partner is investing in an Italian company, as well as transactions or corporate actions that may have the effect of changing the target company's ownership structure or purpose, or winding up the target company's business.

It should be considered that Regulation (EU) 2019/452 of the European Parliament and of the Council dated March 19, 2019, the FDI Screening Regulation, will apply from October 11, 2020. In fact, the aforementioned regulation establishes a framework for the screening of foreign direct investments into the EU, allowing member states to maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order. Therefore, Article 4 outlines some "factors that may be taken into consideration by member states or the Commission" in determining whether a foreign direct investment is likely to affect security or public order<sup>6</sup>.

## 5. Further Impact of COVID-19 Emergency Rules on Golden Powers Regulations

In this context, on March 17, 2020, CONSOB (the supervisory authority for the Italian financial products market) adopted two measures aimed, on the one hand, at containing the volatility of the financial markets and, on the other hand, at strengthening the transparency of the holdings in Italian companies listed on the Italian stock exchange. Although not specifically related to golden powers regulations, these measures may be relevant in the context of companies affected by the golden powers regulations.

- a. Starting from the negotiation session of March 18, 2020, CONSOB, by its Resolution no. 21303 of March 17, 2020, introduced a prohibition on taking net short positions (short selling and other bearish operations) pursuant to Article 20 of EU Regulation 236/2012, according to the positive opinion of the European Securities and Markets Authority (ESMA). For the first time, the ban applies to all traded shares on the Italian regulated market.

Following the ban, all forms of bearish speculative operation are prohibited, even if carried out through derivatives or other financial instruments. Bearish intra-day trades are also prohibited. According to the provisions, the restrictions will apply from the start of the trading day of March 18, 2020, until the end of the trading day of June 18, 2020. The restrictions could be lifted before June 18, 2020, according to market conditions.

The prohibition applies to shares included in a list attached to the resolution<sup>7</sup>, as well as to related instruments included in the calculation of net short positions, like saving/preferred shares, derivatives, depositary receipts, and index-related instruments.

- b. On March 17, 2020, by resolution no. 21304, CONSOB also introduced a temporary regime of enhanced transparency on the shares held by investors in Italian companies with the largest capitalization and widespread shareholdings, listed on the Italian Stock Exchange. The provisions, adopted pursuant to Article 120 paragraph 2-*bis* of the Consolidated Law on Finance of February 24, 1998, (TUF), lower – without prejudice to the thresholds already provided for by current legislation – the minimum thresholds beyond which it is required to communicate a shareholding participation in a listed company.

The new threshold is set at 1% for non-SME companies and 3% for SMEs<sup>8</sup>.

---

5 In particular, the Italian government has the right to review certain transactions that:

In the defence and national security sectors, may harm or constitute a material threat to the essential interests in the national defence and national security

In the energy, transportation, communication and high-tech sectors, may harm or constitute a material threat to the national fundamental interests relating to the security and operation of networks and systems, to the continuity of supplies and to the preservation of high-tech know-how (see the Decree of the President of the Italian Republic No. 85 dated March 25, 2014; Legislative Decree No. 148/2017; and Legislative Decree No. 22/2019)

6 Article 4 of the Regulation (EU) 2019/452 of the European Parliament and of the Council dated March 19, 2019, provides that: "1. In determining whether a foreign direct investment is likely to affect security or public order, member states and the Commission may consider its potential effects on, inter alia: (a) 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; (b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies; (c) supply of critical inputs, including energy or raw materials, as well as food security; (d) access to sensitive information, including personal data, or the ability to control such information; or (e) the freedom and pluralism of the media. 2. In determining whether a foreign direct investment is likely to affect security or public order, member states and the Commission may also take into account, in particular: (a) whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; (b) whether the foreign investor has already been involved in activities affecting security or public order in a member state; or (c) whether there is a serious risk that the foreign investor engages in illegal or criminal activities".

7 <http://www.consob.it/web/area-pubblica/bollettino/documenti/bollettino2020/d21303.htm>

8 Small and medium enterprises (SMEs), defined by the European Commission Recommendation as those enterprises having not more than 250 employees and falling under one of the following requirements: (i) annual revenues not exceeding €50 million; or (ii) assets not exceeding €43 million.

The aforementioned resolution affects 48 companies listed on the electronic stock market of the Italian stock exchange, indicated in a list attached to the CONSOB resolution and identified according to a grid of criteria that refers to a capitalization of more than €500 million and to companies with a broad shareholder base<sup>9</sup>.

This resolution entered into force on March 17, 2020, and will be valid, unless revoked, for three months.

## Contacts

### **Galileo Pozzoli**

Partner, International Dispute Resolution  
T +39 02 1241 27710  
E galileo.pozzoli@squirepb.com

### **Daniela Sabelli**

Partner, Energy & Natural Resources  
T +39 02 1241 27703  
E daniela.sabelli@squirepb.com

### **Ian Tully**

Partner, Corporate  
T +39 02 1241 27702  
E ian.tully@squirepb.com

### **Fabrizio Vismara**

Partner, Litigation  
T +39 02 1241 27707  
E fabrizio.vismara@squirepb.com

---

9 <http://www.consob.it/web/area-pubblica/bollettino/documenti/bollettino2020/d21304.htm>