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Task Force Golden Power

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Foreign investment control in Italy: new timeframe and rules

1. Introduction

Last Wednesday (*i.e.* 13 November 2019), the Italian parliament approved the conversion into law of Law Decree 105/2019, which introduces significant changes to Italy's "Golden Power legislation". In Italy, the government's powers to screen investments in strategic sectors take the evocative name of "*Golden Power*".

Last July, our experts published an alert on Law Decree 64/2019, which introduced changes to the legislation governing foreign (but also domestic) investments in strategic sectors in Italy. That law decree was not converted into law and eventually lapsed in September, but not before the government applied it in five cases relating to 5G networks.

However**, the government included the same provisions in an amendment to Law Decree 105/2019, which establishes a national cybersecurity perimeter and was converted into law last Wednesday (*i.e.* 13 November 2019).**

The national cybersecurity perimeter is meant to tighten security standards for networks and IT systems used by Italian government bodies and by other entities of crucial importance to the State, the malfunction or breach of which can affect national security.

Implementing decrees to be adopted in the coming months will detail:

(a) the government bodies and the entities subject to the provisions;

(b) the criteria to identify relevant networks and IT systems;

(c) a procedure to monitor any incident involving the networks or IT systems; and

(d) the creation of the National Assessment and Certification Centre ("CVCN"). The CVCN will be responsible for assessing the security and vulnerabilities of relevant networks and IT systems through the imposition of and tests on hardware/software.

Authors
Massimo Merola
massimo.merola@belex.com
tel. +32 2 5520070

Filippo Caliento
filippo.caliento@belex.com
tel. +39 06 845511

Carlo Favaretto
carlo.favaretto@belex.com
tel. +32 2 55200 83

Beyond that, **the amendments to Law Decree 105/2019 impact the basic Golden Power legislation set out in Law Decree 21/2012**.

> It is expressly stated that **these amendments** apply immediately from the entry into force of the provisions (*i.e.* as of the day after the law's publication in the Official Journal), therefore they **apply also to filed notifications that have yet to receive clearance and whose screening timeframe has yet to elapse**.

2. Main updates

2.1. New screening timeframe

The government now has up to **45 business days** to issue a decision on a notified transaction (compared to the previous 15 business days).

If the notification is considered incomplete, the 45-day term runs from the date the notification is completed. If the government requests further information from the notifying parties, the 45-day term is delayed - only once - **up to 10 business days**, or less if the requested information is provided earlier. If the government requests information from a third party, the 45-day term is delayed - only once - **up to 20 business days**, or less if the requested information is provided earlier.

> The transaction is cleared if the government takes no action before the 45-day or extended term ends.

2.2. Adaptation to the timeframe set out in the new EU regulation on FDI screening

Application of the new Regulation (EU) 2019/452 on FDI screening is scheduled for 11 October 2020; however, well in advance of that date, Italy's Golden Power legislation already takes into account the possibility that EU Member States and the Commission will provide their comments or an opinion, respectively (under Art. 6 of the regulation).

As of 11 October 2020, if a Member State or the Commission notifies the Italian government of its intention to provide a comment or an opinion, the Italian government's screening timeframe is **suspended** until they are received.

Under Art. 6, other Member States must provide their comments **within 35 calendar days** from the date they are notified of an investment by the Member State involved, whereas the Commission has **up to 40 calendar**

days.
This means that, ***in exceptional circumstances, the timeframe for the Italian government's decision can exceed the 45-day term***, in order for it to take comments and opinions into account.

2.3. Special procedure for 5G networks

A special notification procedure is envisaged for transactions involving 5G networks.

The timeframe for the decision is shortened to **30 business days**, though it may be extended by **up to 20 business days** - and by **another 20 business days** on top of that - depending on the complexity of the case. If the notification is considered incomplete, the timeframe runs from the date the notification is completed.

If the government requests information from notifying parties or third parties, ordinary delays apply.

> Moreover, the government's powers are imposed only after the CVCN completes its assessment.

2.4. Strategic assets in technology-intensive sectors

As recently noted in the Italian press, Italy's Golden Power legislation was missing an implementing decree detailing the technology-intensive sectors to which the Golden Power legislation applies.

The new law now requires **an implementing decree that will identify these sectors within the critical infrastructure, technologies, inputs and information set out in Art. 4, para. 1, of the new EU regulation on FDI screening**. In the meantime, these sectors correspond to those included in Art. 4, para. 1, points (a) and (b), of the regulation.

2.5. Non-EU entities

A uniform, catch-all definition has been adopted for all sectors to which the Golden Power legislation applies in order to avoid circumvention of provisions specifically aimed at countering the additional risk associated with non-EU entities.

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All these **changes increase the administrative burden on investors seeking a Golden Power clearance**, though they introduce clearer provisions regarding the notification process and the possibility for the government to develop simplified procedures for cases presenting a lower degree of potential damage to national interests.

This hints at a possible future definition of a *de minimis* threshold. At the same time, **the harmonization of national procedures with the European coordination mechanism leads to growing interaction between national authorities and EU institutions also in this field**.

Task Force Golden Power's members

Angelino Alfano
International Law

Livia Cocca
Corporate

Massimo Merola
EU law and competition law

Luca Perfetti
Administrative

Mario Roli
Corporate

Alberto Saravalle
Corporate