

Bird & Bird

COVID-19 emergency
measures: the expansion of
'golden power' review on
foreign direct investments



COVID-19 emergency measures: the expansion of 'golden power' review on foreign direct investments

Law Decree No. 23 of 8 April 2020 - published in the Official Gazette on 8 April 2020 and entered into force on 9 April 2020 (the "**Decreto Liquidità**") - introduced, among other measures, a series of provisions that extend the scope of the so-called "golden powers". These special powers, which have taken the place of the so-called "golden share" since 2012, essentially consist of the power for the Government:

- to oppose or set particular conditions to the purchase by any entity other than the State, public entities or entities controlled by them of shareholdings in companies carrying out activities of strategic importance in the defense and national security sectors, as well as the purchase of shareholdings by a foreign entity (until now, only if non-EU based) in companies holding strategic assets in other specific sectors;
- to veto or impose specific requirements for the adoption of certain corporate resolutions or acts by such companies.

The extension of the sectors concerned by golden powers

By means of Law Decree no. 105 of 21 September 2019 (converted into law no. 133 of 18 November 2019), the area concerned by golden powers had already been significantly extended and was no longer limited to the sectors originally identified by Law Decree no. 21 of 15 March 2012, namely defence, security, energy¹, transport and

¹In the energy sector, the Presidential Decree no. 85 of 25 March 2014 identified the strategic assets as follows: *a)* the national network for natural gas transmission, including compressor stations and dispatching centers, as well as gas storage facilities;

telecommunications. Last autumn, the Government extended the sectors concerned by such powers so as to include those mentioned in Article 4, paragraph 1, of EU Regulation 2019/452 of the European Parliament and the European Council, which is soon to come into force². Pursuant to the above mentioned Law Decree, golden powers apply in the following areas:

- 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**;

b) the infrastructures for the supply of gas and electricity from other States, including both onshore and offshore LNG regasification terminals; *c)* the national network for electricity transmission, including control and dispatching facilities; *d)* management activities related to the use of networks and infrastructures provided under letters *a)*, *b)* and *c)*.

² EU Regulation 2019/452, which establishes a framework for the control of foreign direct investment in the European Union and, therefore, an EU framework for the regulation of special powers will enter into force from 11 October 2020.

d **access to sensitive information**, including personal data, or the ability to control such information; or

e freedom and pluralism of the **media**.

Full effectiveness of the extension, however, is subject to the adoption of one or more decrees by the President of the Council of Ministers, which shall identify - within these five sectors - which are, specifically, the "*assets and relationships of strategic importance for the national interest*"³, whose involvement in certain transactions triggers the obligation to notify the Presidency of the Council of Ministers. This decree has not yet been adopted: in fact, it is currently being finalised and must in any case be submitted to the relevant parliamentary committees.

Until its (possible) entry into force, with reference to the "new" sectors provided for by EU Regulation 2019/452, the transitional rules provided for by Article 4-*bis*, paragraph 3, of Legislative Decree no. 105/2019 shall apply. Therefore:

- before the entry into force of the Decreto Liquidità, the notification was mandatory only in the sectors provided for under the letters a) and b);
- **since 9 April 2020**, as a result of the amendments introduced by the Decreto Liquidità, **the notification is mandatory in all five sectors identified by Article 4, paragraph 1, of EU Regulation 2019/452** and, therefore, also those provided for by letters c), d) and e), with the clarification that, in the financial sector, the credit and insurance sectors must also be considered included.

In particular, the Presidency of the Council of Ministers must be notified of purchases by **non-EU based** of controlling interests in companies holding assets in one of these sectors.

³ In addition to those already identified by Presidential Decree no. 35 of 19 February 2014 ("*Regulation for the identification of procedures for the activation of special powers in the areas of defence and national security, pursuant to Article 1, paragraph 8, of Law Decree no. 21*") and Presidential Decree no. 85/2014 mentioned above ("*Regulation for the identification of assets of strategic importance in the energy, transport and communications sectors, pursuant to Article 2, paragraph 1, of Law Decree no. 21 of 15 March 2012*").

The temporary reinforcement of golden powers in the context of the COVID-19 emergency

In line with the initiatives taken by other (European and non-European⁴) countries and also following the indications provided by the European Commission⁵, the Italian Government decided to temporarily strengthen the so-called golden powers, in order to avoid that - in the midst of the emergency arising out of the COVID-19 pandemic - Italian companies carrying out activities in strategic sectors may be the target of speculative transactions or may be purchased indiscriminately (and at "discount" prices) by foreign operators.

The main innovation contained in the Decreto Liquidità is the fact that **for the first time, outside the sectors of defence and national security, acquisitions of shareholdings by EU entities** are also subject to the obligation to notify the Presidency of the Council of Ministers and, therefore, to the exercise of special powers. It must be recognised that this provision, although in some ways justifiable in the light of the historical moment that the Italy is undergoing, raises serious doubts regarding its compatibility with the rules laid down in the European Treaties and, in particular, with the free movement of capital, which can only be restricted for reasons of national security and public order⁶.

In this regard, the new text of Article 4-*bis*, paragraph 3-*bis*, of Legislative Decree no. 105/2019 provides that, until **31 December 2020**, the Presidency of the Council of Ministers must be notified:

⁴ The last in order of time was Spain with the *disposición final cuarta del Real decreto-ley* 17 March 2020, no. 8, which suspended the liberalisation of foreign investment in the five sectors provided for in Article 4(1) of EU Regulation 2019/452.

⁵ In its Communication of 13 March 2020, the European Commission stated that "*Member States must be vigilant and use all available instruments at EU and national level to prevent the current crisis from leading to a loss of critical resources and technologies*", reiterating the concept in its Communication of 25 March 2020, where it called on "*Member States to make full use of the FDI monitoring mechanisms (FDI, No. d.r.) to take account of all risks to critical health infrastructure, critical inputs supply and other critical sectors, as provided for in the EU legal framework*".

⁶ Article 4 TUE ed Article 346 TFUE.

- of all acts or resolutions that are passed by companies operating in one of the five sectors identified in Article 4, paragraph 1, of EU Regulation 2019/452, including, in the financial sector, the credit and insurance sector, if they entail:
 - a change in the ownership, control or availability of strategic assets; or
 - the change of their destination.
- carried out by foreign entities, **not belonging to the EU**, attributing a share of voting rights or capital **of at least 10%**, taking into account the shares or quotas already directly or indirectly held, provided that the total value of the investment is equal to, or greater than, one million euros.

Acquisitions that exceed the thresholds of 15%, 20%, 25% and 50% are also subject to the same notification requirement.

Therefore, amongst others, the following resolutions must be notified:

- merger or demerger of the company;
- transfer abroad of the registered office;
- modification of the corporate purpose;
- dissolution of the company;
- transfer of the company or branches of the company including strategic assets; or
- assignment by way of guarantee of the company or branches of the company including strategic assets.

In both cases, the notification must be made – by the undertaking concerned or, in the case of acquisition of shares, by the purchaser – within ten days and the President of the Council of Ministers then has 45 days to veto the transaction or impose specific conditions. The rule of **silence – assent** applies: once the 45 day period has expired without the Government intervening, the golden powers are considered to not be exercised. Until that moment, however, the effects of the resolution or transaction are suspended and, when it comes to the purchase of shareholdings, the voting rights connected to them are suspended.

Under this perspective, it is important to point out that the obligation to notify does not depend on whether, for example, the transferee of the company is a person outside or inside the European Union. If the company concerned by the transaction includes strategic assets, the transaction must always be notified to the Presidency of the Council of Ministers, regardless of the nationality of the transferee and, therefore, even if the latter is EU or Italian. The same principle naturally also applies to all the other types of resolutions listed above:

In this regard, it should be noted that, pursuant to Article 103 of Decree Law no. 18 of 17 March 2020, as amended by Article 37 of the Liquidity Decree, all terms relating to the conduct of administrative proceedings, such as the one in question, are **suspended from 23 February to 15 May 2020**. Consequently, if a transaction falling within the scope of golden powers regulations is carried out and the relevant notification is made before 15 May 2020, the 45 day period will in any case start running from 16 May 2020.

- with reference to the energy, transport and communications sectors, as well as, more generally, to all the five sectors provided for in Article 4, paragraph 1, of EU Regulation 2019/452, including, in the financial sector, credit and insurance areas, purchases for any reason whatsoever of shareholdings:
 - made by foreign entities, **including the EU-based ones**, which result in the permanent establishment of the purchaser by reason of the acquisition of **control** in the company whose shareholding is purchased, pursuant to Article 2359 of the Italian Civil Code and Legislative Decree no. 58 of 24 February 1998;

The Government will intervene ex officio in the event of failure to notify

Also with a view to strengthening government control, Article 16 of the Decreto Liquidità has introduced a general discipline - which also applies to the defence and national security sectors, as well as electronic broadband telecommunications networks with 5G⁷ technology - aimed at regulating the exercise of golden powers, if the company under obligation to notify does not provide to do so.

⁷ This is the only provision of the Decreto Liquidità to affect these sectors, which otherwise remain governed by the rules laid down in Articles 1 and 1-bis of Legislative Decree no. 21/2012.

In such cases, the Presidency of the Council of Ministers shall **initiate** the procedure for the exercise of special powers *ex officio*. The term of 45 days shall start to run from the conclusion of the procedure for ascertaining the breach of the notification obligation.

This remedy is of course in addition to the sanction mechanisms already provided for by Legislative Decree no. 21/2012, for which - unless the fact constitutes a crime - **the violation of the notification obligation** entails the application of a **monetary administrative fine up to twice the value of the transaction and in any case not less than 1% of the cumulative turnover achieved by the companies involved** in the last financial year for which the financial statements have been approved⁸.

⁸ Even more significant sanctions are set out in Article 1-bis of Legislative Decree no. 21/2012 for violations in the field of electronic broadband telecommunications networks with 5G technology.

Contacts

Simone Cadeddu

Partner

simone.cadeddu
@twobirds.com



Edoardo Courir

Partner

edoardo.courir
@twobirds.com



Pierpaolo Mastromarini

Partner

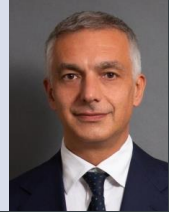
pierpaolo.mastromarini
@twobirds.com



Alberto Salvadè

Partner

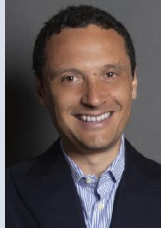
alberto.salvade
@twobirds.com



Stefano Silvestri

Partner

stefano.silvestri
@twobirds.com



Federico Valle

Partner

federico.valle
@twobirds.com



Andrea Angelillis

Senior Associate

andrea.angelillis
@twobirds.com



Jacopo Nardelli

Senior Associate

jacopo.nardelli
@twobirds.com



twobirds.com

Abu Dhabi & Amsterdam & Beijing & Berlin & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Dusseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & San Francisco & Shanghai & Singapore & Stockholm & Sydney & Warsaw

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.