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## FDI Screening in Italy - Implementing Decrees Of Golden Power Rules

### 1. Introduction

The Italian Government recently issued the Decrees of the President of the Council of Ministers No. 179 of 18 December 2020 ("**Decree No. 179/2020**") and No. 180 of 23 December 2020 ("**Decree No. 180/2020**"), published in the Official Gazette on 30 December 2020. The two decrees complete the Italian regulatory framework on foreign direct investment (FDI) screening, commonly known as Golden Power legislation<sup>1</sup>. In particular, the decrees identify assets of strategic importance in (i) the energy, transport, and communications sectors, and (ii) the other relevant sectors referred to in Article 4 of EU Regulation No. 452/2019 of the Parliament and of the Council of 19 March 2019 which establishes a framework for monitoring foreign direct investment in the European Union ("**EU Regulation No. 452/2019**")<sup>2</sup>. The decrees become effective on **14 January 2021**. The key principles of the new implementing decrees are set out below.

### 2. Energy, transport and communications sectors

Decree No. 180/2020 identifies assets of strategic importance for the energy, transport and communications sectors, in accordance with Article 2, paragraph 1 of the Golden Power Decree. The new rules replace the previous rules in force since 2014 pursuant to Presidential Decree No. 85 of 25 March 2014 ("**DPR 85/2014**"). The main changes concern the following:

- for the **energy** sector: the new rules also consider as strategic assets the key properties related to the use of networks and infrastructures for the transport of natural gas, the supply of energy and gas from other States and the national electricity transmission grid. This extension is in line with Article 4, letter (a), last paragraph, of EU Regulation No 452/2019. Moreover, Decree no. 179/2020 further extends the scope of strategic assets in the energy sector (see further below).

<sup>1</sup> See Article 2, paragraphs 1 and 1-ter of Decree-Law No. 21 of 15 March 2012, converted with amendments by Law No. 56 of 11 May 2012 ("**Golden Power Decree**").

<sup>2</sup> Article 4 of EU Regulation No. 452/2019 provides that, "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 investments in land and buildings critical to the use of such infrastructure; (b) Critical technologies and dual-use items as defined in Article 2(1) of Council Regulation (EC) No. 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnology and biotechnology; (c) security of supply of critical inputs, including energy and raw materials, as well as food security; (d) access to, or the ability to control, sensitive information, including personal data; or (e) media freedom and pluralism."

- In the **transport** sector, in addition to ports, airports and railway sections which are relevant to trans-European networks, also national spaceports, freight villages of national importance and road and motorway networks are considered assets of national interest. The new rule expressly confirms the interpretation that road and motorway networks could already be considered as strategically relevant pursuant to Article 2, paragraph 1, Presidential Decree 85/2014. Also the inclusion of spaceports (even if currently this provision only applies to the spaceport at the Taranto-Grottaglie airport, already identified as strategic infrastructure under Ministerial Decree of the Ministry of Transport No. 250/2018) is new.
- Finally, with regard to the **communication** sector, the new implementing decrees do not contain any new elements and/or additions compared to the previous Presidential Decree 85/2014.

### 3. “Other sectors”

Decree No. 179/2020 identifies assets and relationships of strategic importance under the so-called “other sectors” referred to in Article 2, paragraph 1-ter of the Golden Power Decree. These sectors cover all the sectors set out under Article 4 of EU Regulation no. 452/2019 and include water (Article 4), energy infrastructure (Article 3), health (Article 5), electoral information system (Article 7), food supply (Article 11), and also the data processing and storage (Article 6) and finance (Article 8). In particular, the decree considers as strategic assets in these sectors critical infrastructures, critical technologies and information, critical inputs and economic activities of strategic importance, i.e. those assets considered essential for maintaining the vital functions of society, security, and the economic and social well-being of the population.

- In particular, in the **water** sector, the decree includes: (i) infrastructures needed to ensure the continuity of services related to the supply of drinking water intended for human consumption and water intended for irrigation, sewerage and purification; (ii) technologies used in the management of these water infrastructures and services; and (iii) as “residual assets”, any companies operating in the water sector with an annual turnover of more than EUR 300 million and more than 250 employees.
- In the **health** sector, the special powers will apply to (i) digital technologies used in the provision of health services; (ii) technologies for the analysis of data and the use of biological knowledge for health and diagnostics, prognostics, therapy and follow-up purposes; and (ii) bioengineering and nanotechnology technologies used in the pharmaceutical and medical devices sector, in the diagnostics, prognostics and therapy sector, and in the chemical and agri-food sectors. Finally, also in light of the current health emergency, the new decree provides for a residual category of strategic assets in the health sector, namely: (a) strategic activities in the health sector, including those relating to the procurement of medicines, devices and healthcare equipment and the related research and development activities, or (b) activities carried out by companies operating in the healthcare sector with an annual turnover of more than EUR 300 million and more than 250 employees.

- With respect to the processing, storage, access and control of sensitive data and information, the golden powers will cover activities relating to (i) data for the identification and monitoring of public works, (ii) data collected through satellite navigation systems for the tracking of fields, seas and water basins, (iii) air, road, rail and maritime traffic control data, (iv) data relating to the management of the wholesale market for gas, electricity and hydrocarbons, and (v) data collected and managed through the information systems of judicial offices. Also data collected through the use of technologies allowing geo-location and technologies related to the Internet of Things, such as, for example, remote reading and remote management of electricity, gas and water meters, digital systems for autonomous driving, or Smart Home systems, including digital technologies for surveillance and security systems, are considered as strategic assets. Personal data are considered of strategic importance when the quantity of data is such that it is essential for the maintenance of the vital functions of society, health, safety and economic well-being, and social of the population, and freedom and pluralism of the media, and in any case if they relate to more than 300,000 persons.
- In the financial sector, strategic assets include credit, insurance and financial market infrastructures and critical infrastructures, including platforms for multilateral trading in financial instruments or money deposits, for the provision of basic services of central securities depository and clearing services as central counterparties, and for the clearing or settlement of payments. Also artificial intelligence for service and product innovation, digital technologies related to payment, e-money and money transfer systems, liquidity management, lending, factoring, trading, investment management, and blockchain-based technologies are covered under the golden power rules. Finally, a “residual category” of strategic assets in the finance sector includes financial, credit and insurance activities carried out by companies with an annual turnover of more than EUR 300 million and more than 250 employees.
- Finally, with regard to the energy sector, Decree No. 179/2020 provides for a series of additional activities which extend the scope of application and strategic assets covered under the above mentioned Decree No. 180/2020, such as, for example, infrastructure for the storage of fuel, nuclear materials or radioactive waste, and infrastructure involved in the treatment, management and transport of these assets. Strategic assets also include key properties that are instrumental to the above mentioned activities and assets (similar to the formula also used in Decree No. 180/2020). Also strategic are (i) coastal deposits of crude oil and petroleum products with a capacity of 100,000 cubic metres or more, (ii) LNG storage infrastructure with a capacity of more than 10,000 cubic metres, (ii) pipelines for supplies from abroad and to intercontinental airports, (iii) technologies for managing wholesale markets for natural gas and electricity, and – as residual category – (iv) companies carrying out activities in the energy sector with an annual turnover of more than EUR 300 million and more than 250 employees.

It should be noted that, unlike assets in the energy sector under Decree No. 180/2020, in the case of the assets listed above, the notification obligation is only triggered if the purchaser is a non-EU entity<sup>3</sup>.

#### 4. Conclusions

The strengthening of the golden power rules and extension of the sectors has led to an exponential increase in the number of notifications, also for prudential reasons. Indeed, in the absence of implementing legislation on which assets and relationships are considered strategic, many transactions were notified to avoid the risk of heavy sanctions. While appreciating the Government's efforts to complete and clarify the regulatory framework, there are still uncertainties as to the subjective and objective scope of the golden powers, which will inevitably require a case-by-case analysis and guidance by specialists.

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<sup>3</sup> See Article 2, paragraph 2-bis of the Golden Power Decree.