

Extension of Italy's foreign investment regulation to high-tech assets

April 5, 2019

On March 25, 2019, the Italian Government amended the existing legal framework governing foreign investments in Italy, set forth in Decree Law No. 21 of March 15, 2012 (as amended, the "Decree").

Pursuant to the Decree, the Italian Government has the power to veto or impose conditions on foreign investments in certain key sectors of the Italian economy (originally, defense and national security, and energy, transport, and communications), when such investments may jeopardize the national security or other public interests.

The purpose of the recent amendment is to extend the Decree's scope to 5G technologies.

This extension follows an amendment adopted in December 2017, which added various other categories of high-tech assets.

These changes to the Decree are intended to address growing concerns about foreign interference with strategic sectors of the Italian economy which may undermine national security.

The latest amendment to the Decree became effective as of March 26, 2019, but needs to be ratified by the Italian Parliament within 60 days or it will lapse.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

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I. 5G Technologies

The latest amendments to the Decree adds broad-band electronic communication services based on 5G technologies to the list of strategic assets in the fields of defense and national security.¹

The Decree now requires any Italian company entering into certain agreements with non-EEA counterparties regarding 5G technologies to notify the Government of such agreement. The Government has a term of 15 business days to exercise its powers to veto or impose conditions on the agreement, pending which term the agreement cannot be performed.

Specifically, the agreements that must be notified to the Government concern (i) the purchase of assets or the performance of services relating to the design, manufacturing, maintenance, or operation of networks which use the 5G technologies or (ii) the purchase of high-tech components which are instrumental to the mentioned manufacturing or operation.

II. Other High-tech Assets

In December 2017, the Decree was already amended to extend the scope of the Government powers in the fields of energy, transport, and communications to assets in certain high-tech fields, notably:

- critical or sensitive infrastructures, including data storage and management, and financial infrastructures;
- critical technologies, including artificial intelligence, robotics, semi-conductors, potential dual use technologies, web security, and space or nuclear technologies;

- security of critical-input procurement;
- access to, or ability to control, sensitive information.

However, unlike the latest changes regarding 5G technologies, this amendment is not yet effective, pending the adoption of a Government regulation that is supposed to identify in detail the high-tech sectors concerned.

III. The notion of “non-EEA entity”

As noted, the new Government powers regarding 5G technologies may be exercised only if the contract counterparty is a non-EEA entity. This is a departure from the general principle pursuant to which, in the defense and national security sectors, the investment control powers may be exercised regardless of the nationality of the investor.

The Decree already contains a definition of “non-EEA investor” in respect of investments made by foreign investors in the fields of energy, transport, and communications, which are subject to Government control only if made by a non-EEA investor. The definition covers any individual or entity whose residence, usual domicile, registered office, headquarters, or center of main interest is located outside the European Union or the European Economic Area,² or is not established therein.

However, this definition has been considered ambiguous, particularly because it does not clarify whether the Government could consider the ultimate parent company or should limit its review to the entity making the investment.

The latest changes to the Decree shed some light in this respect.³ The status of “non-EEA entity” has

acquiring control of the company owning the relevant asset).

² In addition to the EU member states, the European Economic Area comprises Iceland, Liechtenstein and Norway.

³ However, the definition of “non-EEA entity” has been introduced in the specific provision in the Decree regarding 5G technologies, while the definition of “EEA investor” set forth in the separate provision on energy,

¹ The Decree distinguishes between (i) assets in the fields of defense and national security, where the Government’s powers are more invasive (since, as a rule, they may be exercised regardless of the nationality of foreign investors and of the size of the investment), and (ii) assets in the fields of energy, transport, and communications, where the Government’s powers are subject to more significant limitations (as they may be exercised only in case of investments made by investors not established in the European Economic Area and provided that the investment results in such investor

been expressly extended to (i) those entities which, although registered, headquartered or however established within the European Economic Area, are controlled, directly or indirectly, by individuals or entities not meeting this condition and (ii) those individuals or entities who have established their residence, registered office or headquarters in the European Economic Area in order to avoid the application of the Decree.

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transport, and communication has not been repealed. Accordingly, it may be argued that this new definition of “EEA entity” applies only to agreements on 5G

technologies and not also to investments in the fields of energy, transport, and communications.