

Italy Extends Its COVID-19 Emergency FDI Review Regime Through 2022

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On December 30, 2021, the Italian Government extended until the end of 2022 Italy's emergency foreign direct investments ("FDI") regime, which enables it to review also acquisitions of controlling stakes by European Economic Area ("EEA") investors, as well as certain minority investments by non-EEA investors, in any strategic sector.¹

By contrast, under ordinary rules, these transactions would be reviewable only in the defense and national security sector.

This regime was initially introduced in April 2020 as part of certain COVID-19 emergency measures, and was due to expire at the end of 2021 (after two extensions).

In parallel, the scope of the Italian FDI review was expanded as of January 2021 with the addition of a number of new strategic sectors.

The combination of the emergency regime and new strategic sectors has caused a dramatic increase in the number of transactions reviewed by the Government in 2020 and 2021;² the same trend is expected to continue throughout 2022.

This memorandum provides an overview on the expanded scope of Italian FDI review, as well as the enforcement trends since the COVID-19 outbreak.

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¹ Pursuant to the Italian Constitution, decree-laws must be ratified by Parliament within 60 days of their adoption, otherwise they lapse. Accordingly, the decree-law of December 30, 2021 must be ratified by February 28, 2022.

² According to the latest Government report to Parliament regarding the application of the FDI Law, the number of transactions notified to and reviewed by the Government increased from 83 in 2019 to 342 in 2020.



I. Extension of the CoViD-19 emergency rules

On December 30, 2021,³ the Italian Government adopted Decree-Law No. 228 which, among other things, extended to December 31, 2022 certain FDI emergency measures, originally adopted in April 2020 in connection with the first CoViD-19 outbreak.

As a result, through 2022 the FDI framework (set forth in Decree-Law No. 21 of March 15, 2012; the “FDI Law”) also applies to:⁴

- acquisitions by EEA investors⁵ of a controlling interest in businesses active, in Italy, in so-called strategic sectors (“Strategic Companies”);
- acquisitions of a non-controlling interest in a Strategic Company, provided that (i) the investor is a non-EEA investor and (ii) the interest is at least equal to 10% of the share the capital (and the aggregate value of the investment is at least equal to Euro 1 million) or exceeds the thresholds of 15%, 20%, 25% and 50% of the capital (regardless of the value of the transaction).

II. New lists of strategic sectors

A. *Strategic assets and activities*

The strategic sectors are only generally identified in the FDI Law, which mandates the Government to determine, from time to time, which specific assets and activities are comprised in such sectors.

Originally, these sectors consisted only of (i) defense and national security,⁶ and (ii) energy, transport, and communication infrastructures.

Subsequently, the FDI Law was amended to add 5G-based technologies and, more recently, a number of “critical” infrastructures and technologies, as discussed below.

B. *The EU Regulation sectors*

As part of the CoViD-19 emergency response in April 2020, the scope of the FDI Law was substantially and permanently expanded by adding to the list of strategic sectors the critical infrastructures and technologies and other assets listed in Article 4(1) of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (the “EU Regulation”).⁷

The implementing decree (Prime Minister Decree No. 179 of December 18, 2020, effective as of January 14, 2021), contains a detailed list of specific assets and activities, divided into 11 different categories, substantially corresponding to those set forth in the EU Regulation. The main features of the implementing decree may be summarized as follows:

³ Decree-Law No. 228 of December 30, 2021.

⁴ Under ordinary rules, only in the defense and national security sector would the Government have the power to review investments (including minority investments) by EEA investors. In all other sectors, its powers are generally limited to acquisitions of control of a Strategic Company by non-EEA investors.

⁵ The FDI Law defines the “non-EEA investors” as (i) any individual or entity whose residence, habitual abode, registered office, headquarters or center of main interest is not in a Member State of the European Economic Area (*i.e.*, the European Union, Norway, Iceland and Liechtenstein); (ii) the EEA-subsiidiary of any individual or entity that is not resident nor has its habitual abode or its registered office, headquarters or center of main interest in the European Economic Area; and (iii) any individual or entity whose residence, habitual abode, registered office, headquarters or center of main interest is in the European Economic Area exclusively for the purpose of avoiding the application of the FDI Law.

⁶ On which, see our memorandum dated December 2, 2013: <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/the-italian-governments-golden-share-implementation-measures.pdf>.

⁷ These include: (a) critical infrastructures, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructures; (b) critical technologies and dual-use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, 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; and (e) the freedom and pluralism of the media.

- *New sectors.* The sectors comprise: the entire financial sector, which includes not only infrastructures (stock exchange platforms, central counterparties and block-chain technologies) but also banks and insurance companies, the health sector,⁸ certain advanced industrial technologies,⁹ media pluralism,¹⁰ a broad list of data,¹¹ and certain “critical production factors”¹²;
- *The “materiality” threshold.* In principle, only investments regarding “critical infrastructures” or “critical technologies” in the relevant sectors are deemed relevant. The definition of what is “critical”,¹³ however, is rather generic and unlikely to assist investors and advisors in determining whether a transaction is actually subject to the FDI Law;
- *Catch-all.* In certain sectors, in addition to the detailed list of assets and activities, the decree contains a final “catch-all” provision seemingly independent of whether a company holds any strategic asset or performs any strategic activity and instead based exclusively on a dimensional threshold which is deemed a proxy of its

strategic relevance. In particular, in the energy, water, health, and financial sectors, if a company books an annual turnover of at least Euro 300 million and employs, on an annual average, at least 250 employees, it is automatically deemed “strategic” and as such a relevant investment in, or other transaction carried out by, such company would be subject to the screening mechanism set forth in the FDI Law.

C. *Energy, transport, and communications*

On December 23, 2020, the Government also adopted Prime Minister Decree No. 180, which identifies the strategic assets in the energy, transport, and communication sectors, replacing a previous Government regulation¹⁴ on the same sectors.

The updated list of assets is largely consistent with the previous one,¹⁵ except that, in the transport sector, the following have been added:

- national spaceports;
- freight villages (*interporti*) of national relevance; and

⁸ Such as digital critical infrastructures instrumental to the provision, even from remote, of health services or whose objective is the analysis of data and the application of biological know-how to health and diagnostics, prognostics, therapy and related follow-ups; and bio-engineering critical infrastructures and critical nanotechnologies applied in the pharmaceutical sector and in the sectors of medical devices, diagnostics, prognostics, therapy, as well as in the chemical and agri-food sectors.

⁹ Including artificial intelligence, robotics, machine learning, machine-to-machine communication, semiconductors, microprocessors, advanced manufacturing, big data & analytics technologies, chatbot technologies.

¹⁰ Consisting of the nationally relevant economic activities carried out by providers of video and radio broadcasters, press agencies and press editors registered with the national communications register.

¹¹ In addition to data collected through various technologies or activities (such as satellite navigation, wholesale markets, the judicial system, transportation monitoring), this also includes sensitive data under Article 9 of GDPR, either collected through certain means identified in the decree (including data bases, cloud computing and servers) or regarding at least 300,000 individuals or entities.

¹² These include: (a) the procurement of certain essential raw materials identified at EU level, including coking coal and

platinum group metals; (b) the procurement of critical production factors utilized in the steel industry; (c) strategically relevant economic activities and procurement of critical production factors in the agri-food supply-chain.

¹³ Notably, an infrastructure, technology, production factor or information which is essential to maintain the vital functions of society, health, security and economic and social well-being of people.

¹⁴ Decree of the President of the Republic No. 75 of March 25, 2014.

¹⁵ The other assets comprise: energy networks of national interest (including the national network for the transport of natural gas and gas storage or dispatching facilities; the infrastructures for the supply of gas and electricity from other countries, the onshore and offshore regasification plants; the national network for the transmission of electricity); large transport networks and facilities of national interest (including ports and airports of national interest, the rail network relevant to the trans-European rail networks); and telecom networks (including the public telecom network ensuring connection of end-users to the metropolitan area telecom network, services routers, long-distance telecom networks, and the telecom facilities used to provide the universal telecom service to end users, as well as broadband and ultra-broadband services).

- networks of roads and highways of national interest.

III. Recent enforcement trends

Possibly prompted by the CoViD-19 emergency, in 2021 the Government seems to have taken a stricter stance as regards certain foreign investments (particularly by Chinese investors), which have resulted in three vetoes (previously, only once¹⁶ had the Government exercised its veto powers), notably in respect of:

- the proposed acquisition of LPE S.p.A. (a company active in the semiconductor industry) by Shenzhen Investments Holdings (a Chinese state-owned investment company specialized in technological investments);
- the proposed acquisition of Verisem (a vegetable seed production company) by Syngenta (a subsidiary of China's Sinochem, a chemical group). According to press reports Syngenta recently appealed this decision;
- the proposed acquisition of certain Italian activities (related to semiconductor-based applications for renewable energy plants) of Applied Materials by Zhejiang Jingsheng (a Chinese industrial investor active in the semiconductor and LED sectors).

Perhaps consistently with this trend, the number of cases in which the Government has authorized an investment subject to prescriptions has also materially increased: based on the latest Government report to Parliament regarding the application of the FDI Law, in 2020 the Government issued prescriptions in 40 cases, whereas in 2019 it did so in 13 cases and in 2018 in 10 cases.

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¹⁶ Specifically, the 2017 proposed acquisition of Next Ast S.r.l. (a subsidiary of Next Ingegneria dei Sistemi S.p.A., into which the latter had contributed its software and complex systems production unit) by Altran

Italia S.p.A. (the Italian subsidiary of Altran, the French innovation and engineering consulting group).