ALERT MEMORANDUM

Italy Further Broadens Its FDI Regime

March 24, 2022

On March 21, 2022, the Italian Government enacted a law-decree ("Decree") to address the economic and humanitarian effects of the ongoing Ukraine crisis.[1]

The Decree further broadens Italy's foreign direct investments ("FDI") regime, by giving the Government the permanent power to review (a) acquisitions of controlling stakes by European Economic Area ("EEA") investors (including Italian persons) in the energy, transport, communications, financial, health and agri-food sectors, and (b) minority investments made by non-EEA investors, in every "strategic" sector.

Prior to the Decree, these transactions would be reviewable only until the end of 2022 pursuant to certain CoViD-19 emergency measures.[2]

The extension of the Government powers to acquisitions by EEA investors outside the defense and national security sector raises doubts of compliance with EU law.

Moreover, the Decree envisages an active role of the target company in the screening process, and mandates the Government to introduce rules for the pre-filing process, as well as a simplified screening procedure.

Finally, the Decree reforms the rules on 5G technology procurement.

The structural extension in the scope of transactions subject to the Government review, combined with the recent expansion of strategic sectors, corroborates the expectation that the number of FDI filings will continue its steady growth, after the spike observed after the CoViD-19 emergency measures were introduced in 2020.[3]

This memorandum provides an overview on this further revision of the Italian FDI framework.

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

ROME

Giuseppe Scassellati-Sforzolini
gscassellati@cgsh.com

Francesco Iodice
fiodice@cgsh.com

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21

MILAN

Roberto Bonsignore
rbonsignore@cgsh.com

Matteo Montanaro
mmontanaro@cgsh.com

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81

[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 March 21, 2022 must be ratified by May 20, 2022.

[2] See our alert memorandum dated January 12, 2022: https://www.clearygottlieb.com/-/media/files/alert-memos-2022/italy-extends-its-covid-19-emergency-fdi-review-regime-through-2022.pdf

[3] 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. Permanent extension of the transactions subject to screening

The Decree[4] has extended the scope of transactions which must be notified to the Government under Decree-Law No. 21 of March 15, 2012 (the "FDI Law").

As a result, the following investments are now permanently subject to the FDI Law:

- acquisitions by EEA investors[5] of a controlling interest in businesses active, in Italy, in the communications, energy, transportation,[6] health, agri-food and financial (including credit and insurance)[7] sectors.

  The Decree also clarifies that "EEA investor" includes investors resident or established in Italy;

- acquisitions of a non-controlling interest in a company active in any strategic sector,[8] 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).

Until recently, 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 were generally limited to acquisitions of control by non-EEA investors.

However, in 2020, as part of a series of emergency measures introduced in connection with the first CoViD-19 outbreak, the Government was given the power to review both control acquisitions by EEA investors and the mentioned minority acquisitions by non-EEA investors.

These emergency measures were set to lapse at the end of 2022. Instead, they now will survive the expiry of the emergency legislation and become a structural feature of the Italian FDI regime.[9]

The extension to control acquisitions by EEA investors beyond the emergency period and outside defense and national security raises serious doubts of compatibility with the freedom of establishment under Article 49 of the Treaty on the Functioning of the European Union.

Also, the amendment renders permanent the overlap of the FDI review with other sector-specify regulatory review regimes, such as those applicable to banks, investment firms and insurance companies.

---

4 Decree-Law No. 21 of March 21, 2022.

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-subsidiary 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 As these have been identified in greater detail under the Prime Minister Decree No. 180 of December 23, 2020.

7 As these have been identified in greater detail under the Prime Minister Decree No. 179 of December 18, 2020.

8 Notably (in addition to defense and national security): energy, transport, and communications; and the critical infrastructures and technologies based on the general categories of Article 4(1) of Regulation (EU) 2019/452 (which 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).

9 Technically, the structural extension to control acquisitions by EEA investors becomes applicable as of January 1, 2023. However, in practice this is already applicable under the mentioned emergency legislation, which has not been repealed. It is worth noting that these emergency rules are partly broader, as they apply to all strategic sectors, not just those expressly mentioned above (and thus include, among others, advanced industrial technologies, data, and water); on the other hand, the emergency legislation does not expressly apply to Italian investors.

II. Other changes to the FDI Law

In addition, the Decree has amended the FDI Law as follows:

- the target company will become an active part of the filing and screening process: where possible, the investor and the target company shall make a joint filing or, alternatively, the investor, simultaneously with the filing, shall notify to the target company a report setting forth the key features of the transaction and of the filing. In such latter case, the target company may submit a brief with the Prime Minister's Office within 15 days. Finally, the Decree provides that the prescriptions issued upon clearance may also be addressed to the target company (and not just to the investor), which shall be responsible for any breach;
- in the defense and national security sector, the transactions that are subject to the Government screening now expressly include any resolutions of the shareholders' meeting or board of directors resulting in a change in the ownership, control, or availability of a strategic asset,[10] including the granting of security interests thereon;
- the Government shall adopt a decree to simplify the screening process in such cases in which the coordination group at the Prime Minister's Office, which is in charge of the technical review of a filing, unanimously resolves for an unconditional clearance, without the need for the decision to be submitted to the cabinet (unless otherwise indicated by the group or the applicants);
- by means of the same decree, the Government shall also introduce the possibility for the investor to submit a pre-filing, in order to obtain a preliminary assessment on the applicability of the FDI Law to the proposed investment and outcome of the review;
- in light of the increased scope of the FDI rules, the Prime Minister's office will be supported by an ad hoc group of newly-hired officials, and will be able to rely on the assistance of the tax police (*Guardia di Finanza*).

III. Reform of the rules on 5G technologies

Although typically the notion of FDI does not include procurement transactions, the FDI Law also governs the procurement of services and assets related to 5G networks. The Decree has reformed the previous framework, as follows:

- the Government may adopt a decree to extend the scope of the rules beyond 5G technologies, to any other technology that is relevant for cybersecurity purposes, including cloud technologies;
- the new rules no longer make reference to non-EEA suppliers or providers, so that they would now seem to apply regardless of the nationality of the providers;
- each year, the companies intending to acquire assets or services related to the design, manufacturing, maintenance and management of broad-band electronic communication services based on 5G technologies must submit an annual plan[11] setting forth, among other things, details of the proposed purchases and related suppliers, including the technical details of the relevant assets or services. The plan must also report on pending contracts and the perspective of development of the 5G network;
- pending the Government review, the plan cannot be implemented. It may however be updated on a quarterly basis by the applicant;
- the screening process lasts up to 30 days, which may be extended by up to 40 days in

[10] Previously, the relevant provision contained a specific list of relevant resolutions or transactions (*i.e.*, merger, de-merger, sale of business or subsidiaries, transfer of the registered office abroad, amendment to the corporate purpose in the by-laws, winding up of the company, certain other amendments to the by-laws).

[11] Previously, these companies were required to submit a notification for each such contract.

case of complexity, and up to 30 days in case of questions to the applicant or third parties;

- the Government screening may end with a clearance, possibly subject to prescriptions or conditions. If these are not sufficient to protect the integrity and security of the networks and data, the Government may grant a temporary authorization setting forth a deadline for the possible replacement of certain assets or services, if this is possible in light of the need not to slow down the development of the 5G technology in the country; alternatively, it may veto the plan;
- the breach of the applicant's obligations may result in penalties of up to 3% of the turnover of the applicant. The Government may also order the applicant to restore the situation existing prior to the breach and set a term to do so, failing which it may issue a fine of up to 1/12 of the above penalty for each month of delay;
- a committee made of representatives of various Ministries, as well as the national cybersecurity agency, monitors the implementation of the possible prescriptions. In any event, the applicant shall periodically (at least twice a year) report on the activities carried out pursuant to the plan, including with respect to any contract entered into thereunder and their suitability to ensure the compliance with the plan. The monitoring committee may also carry out inspections and technical controls.

…

CLEARY GOTTLIEB