

Italian FDI, When the Government may Rewrite Corporate Governance

June 29, 2023

Since the current Italian cabinet was sworn-in in October 2022, it has applied the Italian foreign direct investment (“FDI”) regime in a few relevant cases, which appear to be the bellwether of the new government’s approach to FDI review.

Recent landmark cases include the sale of Lukoil’s Priolo refinery to a Cypriot fund, the sale of Whirlpool white goods business to a Turkish buyer, and the renegotiation of Pirelli’s governance arrangements involving a Chinese state-sponsored investor, where industrial policy and geopolitical considerations seem to have played a material role along with traditional national security. At least in one case (Pirelli), the government review resulted in requiring significant changes to the corporate governance rights previously agreed between the parties, whereas in others the government imposed conditions regarding employment or the environment that appear to go beyond pure national security concerns.

Drawing from these cases, this memorandum outlines what investors could expect when planning an investment in Italian businesses caught by FDI rules.

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
fiiodice@cgsh.com

ROME

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



1. Recent statutory updates

As of January 1, 2023, the extraordinary FDI rules tied to the Covid-19 pandemic¹ are no longer in force, resuming instead the ordinary FDI regime, as prospectively amended in the course of 2022.

As a result, in certain sectors,² Decree-Law No. 21 of March 15, 2012 (as amended, the “FDI Law”) now permanently also applies to control acquisitions by EEA investors³ (a feature that characterized the Covid-19 extraordinary regime), including Italian investors.

In addition, as of September 2022, a pre-notification system has been made available, so that, pending the negotiation of a transaction, the parties may seek confirmation from the government as to whether the FDI Law would apply.⁴

II. Recent trends: general

The number of filings over the past few years has continued its dramatic growth, largely due to the material expansion in the scope of the FDI Law, particularly due to the emergency regime introduced in connection with the Covid-19 outbreak (whose scope has been largely confirmed upon resumption of the current ordinary regime).⁵

¹ See our alert memoranda dated [April 9, 2020, January 12, 2022](#) and [March 24, 2022](#).

² Notably: communications, energy, transportation, health, agri-food and financial (including credit and insurance) sectors, which have added to defense and national security (which applied to EEA (including Italian) investors since the inception of the regime in 2012). In all other sectors, instead, only non-EEA investors are caught by the regime.

³ 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.

Based on public reports, in 2020 the government received 342 filings, whereas in 2021 they were 496, and in 2022 over 600. The figures for 2023 are difficult to estimate, including because – as noted – the rules have changed since the beginning of this year,⁶ and at least the first half of 2023 M&A activity has slowed down globally.

III. Recent trends: main cases reviewed by the new government

Official statistics regarding the cases reviewed by the new cabinet since October 2023 are not available. However, based on public reports, certain cases are worth taking a closer look to gauge the government’s approach and identify potential criticalities for the future.

1. *Veto on the acquisition of Tecnologia Intelligente to Netherlands’ Nebius*

In March 2023, the new government vetoed a transaction for the first time since taking office.

The case involved the acquisition of Tecnologia Intelligente, an Italian company reported to be active in various services and products related to artificial intelligence, by Nebius, a Dutch tech company.

⁴ Parties seeking guidance are required to submit a report on the proposed transaction, including, to the extent then available, the information ordinarily required in a formal filing. Within 30 days of receipt of such report, a dedicated office within the Government must provide a written feedback, failing which the party is required to formally file the transaction if and when this actually goes ahead and signs.

⁵ The key difference being that since January 1, 2023 (a) in the following sectors, only investments from non-EEA investors are relevant (whereas under the extraordinary regime Italian and European investors were also caught): water, data, electoral infrastructures, advanced technologies, dual-use, non-military aerospace, critical supplies, and media pluralism, and (b) in the energy, transport, communications, health, agri-food, financial (including credit and insurance) sectors, the regime now expressly extends to Italian investors (in addition to EEA investors).

⁶ For instance, query whether the permanent extension of the FDI regime to Italian investors in certain sectors will be offset by the reduction of the sectors in which filings by EEA investors are required (see footnote 5).

Based on media reports, the veto was due to alleged ties between Nebius and Russia's Yandex.

2. *Sale of Lukoil's refinery in Priolo (Sicily)*

In April 2023, the government authorized the sale of Lukoil's oil refinery in Priolo (Sicily) to G.O.I. Energy, a company controlled by Cyprus's Argus New Energy Fund (reportedly backed by Israeli investors).

The sale was prompted by the EU sanctions against Russia, which resulted in the refinery (reported to process over 20% of fuel used in Italy) no longer being allowed to source crude oil from Russia (until then its primary supplier).

Before a buyer was found, the government had designated the refinery as an asset of strategic national interest and enacted special legislation allowing it to take over its management, unless a market solution could be found.

Upon clearing the sale, the government is reported to have issued prescriptions (i) regarding the origin of the oil supplies under the new ownership, to avoid circumvention of the EU sanctions, and (ii) to protect employment, investments in the refinery, and compliance with environmental emission requirements.⁷

3. *Combination of Whirlpool EMEA operations with Turkey's Arçelik*

In May 2023, the government authorized the combination of Whirlpool's EMEA operations (including several manufacturing plants in Italy, which hosts also the group's EMEA headquarters) with Turkey's Arçelik.

The clearance is reported to be subject to various prescriptions "to safeguard technological assets, production and therefore employment levels, including in case of any overlap between plants of the new group".⁸

4. *Renewal of the shareholders' agreement regarding Pirelli*

In June 2023, the government authorized with prescriptions the renewal of a three-year shareholders' agreement concerning Pirelli, the Italian tyre-maker, between its main shareholders, ChemChina (a state-sponsored company) and Mr. Marco Tronchetti-Provera (including through Camfin). The renewal of the shareholders' agreement appears to have been deemed subject to the filing obligations because it impacts the control situation of Pirelli.

Based on the government [press release](#), Pirelli is caught by FDI rules because it owns a technology for cyber sensors that, when installed in its tyres, collect data on the use and performance of the vehicle which may be further processed and elaborated.

However, at the time the shareholders' agreement was first entered into, the FDI rules did not extend to this class of assets.

The government clearance was subject to certain material prescriptions, some addressed to ChemChina and others to Pirelli, which the government described as intended to protect the independence of Pirelli and its management, the security of its processes, the information of strategic relevance, and the company's know-how.

The primary feature of many of these prescriptions is that they appear to modify the governance set-up previously agreed by the parties to the shareholders' agreement. In particular, based on Pirelli's own [press release](#), the prescriptions:

- seek to avoid that that ChemChina exerts control over the company and its business, including in respect of decisions concerning the business plan and other strategic matters;
- affect the criteria of appointment of the board of directors, including with respect to the CEO (which shall be designated by Camfin and

⁷ <https://www.reuters.com/markets/deals/italy-likely-give-conditional-green-light-lukoil-refinery-sale-sources-say-2023-04-11/>

⁸ <https://www.efanews.eu/item/31217-italia-government-exercises-golden-power-over-whirlpool-affair.html>

included in the majority slate tabled by both shareholders);

- require the appointment of a chief operating officer who shall implement the business plan, budget, and ordinary course of the company, and that only the board members designated by Camfin may be granted managing powers;
- require that resolutions concerning the FDI-relevant assets and the appointment of the key managers be proposed by the CEO and that their adoption may be vetoed only by a qualified majority (of four-fifths of the board members);
- require that the company's by-laws be amended accordingly.⁹

Further, it appears that the parties to the shareholders' agreement ultimately accepted the government prescriptions, since shortly after the government decree Pirelli disclosed to the market that the shareholders' agreement was amended accordingly.¹⁰

IV. Key takeaways and what to expect

Based on these recent cases, some preliminary considerations can be made, notably:

- the nationality of investors continues to play a major role in the government assessment, with investors from, or with significant ties with, China and Russia in particular being subject to a deeper scrutiny and higher chances of the government taking a bolder stance;
- even when the strategic assets and technologies owned or operated by the target company do not seem to be particularly relevant in the broader context of the target business (as it arguably was the case in Whirlpool and Pirelli, whose core business does not appear to rest primarily on data and

related technologies), the government will intervene and exercise its powers if broader considerations (*e.g.*, of industrial policy or geopolitical nature) so require;

- consistently with a global trend, data appears to be an increasing focus of attention in the government scrutiny, particularly when it comes to access to, transfer or processing of the target data by non-European entities;
- as in the Pirelli case, the scope of the government intervention may be broad enough to affect the company's governance, possibly altering the balance reached in the parties' agreement. Therefore, it is important for foreign investors to build in adequate protections allowing them not only not to close a transaction if the FDI clearance comes with material prescriptions, but possibly also to exit the investment at fair value if such prescriptions are imposed after the fact, including as a result of a change in the law.

...

CLEARY GOTTlieb

⁹ Other prescriptions are more tied to the key concerns underlying the transaction and prevent certain data and information (concerning IP and related know-how, as well as the operational data, or any data collected or processed through cyber technologies) from being shared with the Chinese government and its affiliates; require the establishment of an independent body

responsible for the security, and require a specific industrial security clearance to have access to certain information.

¹⁰ <https://press.pirelli.com/download/bc2fc90a-c539-4ded-8a21-946e50b9f56f/cs-pirelli-adempimentipattogp-21giugno2023-ita-eng.pdf>