

THE FOREIGN  
INVESTMENT  
REGULATION  
REVIEW

SEVENTH EDITION

**Editors**

Calvin S Goldman QC and Michael Koch

THE LAWREVIEWS

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INVESTMENT  
REGULATION  
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**Editors**

Calvin S Goldman QC and Michael Koch

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# PREFACE

This seventh edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. It includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions.

Foreign investment continues to garner a great deal of attention. This trend is expected to continue as the global economy further integrates, the number of cross-border and international transactions keeps increasing, and national governments continue to regulate foreign investment in their jurisdictions to an unprecedented degree. Reviews of cross-border mergers have, in some instances, been characterised recently by a rising tension between normative competition and antitrust considerations on the one hand, and national and public-interest considerations on the other; the latter sometimes weighing heavily against the former. As a result, more large, cross-border mergers are being scrutinised, delayed or thwarted by reviews that are progressively broad in scope.

Many factors are driving these emerging trends – the rise in populist political movements has increased the focus on national interest considerations such as protectionism; there are concerns over the export of jobs and industrial policy; heightened concerns over cybersecurity have led to enhanced national security protection measures; and an increased focus in some jurisdictions on the stream of capital flowing from state-owned enterprises has driven greater scrutiny of proposed investments, particularly those in economic sectors such as information technology and natural resources. Where, historically, national security concerns were limited to businesses involved in manufacturing or supplying military equipment and to infrastructure industries critical to national sovereignty, the scope of transactions reviewed on the basis of national security has broadened significantly. Transactions in sectors such as banking and finance, media, telecommunications, and other facets of the digital economy, as well as transportation industries and even real estate, may be potential focal points for foreign investment review.

Efforts to overhaul the regulatory landscape have been seen in the United States with the expansion of the review authority of the Committee of Foreign Investment in the United States (CFIUS), including a broadening of transactions under CFIUS's scrutiny. In turn, France is trying to generate support to revise the European Union's competition reviews to, among other things, more closely scrutinise mergers in the technology sector. Other major jurisdictions in Europe, including Germany and the United Kingdom, have shown greater interest in increased regulatory authority in regard to foreign investment reviews.

Differences in foreign investment regimes (including in the timing, procedure, thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) are contributing to the relatively uncertain and unpredictable

foreign investment environment. This gives rise to greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant ‘chilling’ effect on investment decisions and economic activity. Foreign investment regimes may be challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate.

The American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law has built on the work of the ABA ALS previous Task Force on Foreign Investment Review. It has looked more closely at the potential implications of national interest considerations and evolving breadth of national security reviews, including, in some cases, as they may relate to, or interface with, normative competition reviews. In so doing, the Task Force has examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In August 2019, the report of the Task Force was considered and approved by the Council of the ABA ALS.

These emerging trends and the evolving issues in the interface of foreign investment and competition reviews were the subject of panel discussions at the Annual Conference of the International Bar Association in Rome in October 2018 and the ABA ALS Global Seminar Series in Düsseldorf, Germany in May 2018, among others in recent years. The evolving issues have also attracted attention in recent years in international fora of public authorities, such as the International Competition Network and the Organisation for Economic Co-operation and Development’s Competition Committee.

In the context of these significant developments, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. It provides relevant information on, and insights into, the framework of laws and regulations governing foreign investment in each of the 17 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition, or otherwise seeking to do business in a particular jurisdiction. The recent trends and emerging issues described above and their implications are also examined in this publication. Parties would be well advised to thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed.

We are thankful to each of the chapter authors and their firms for the time and expertise they have contributed to this publication, and also thank Law Business Research for its ongoing support in advancing such an important and relevant initiative.

Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients or the editors or publisher.

**Calvin S Goldman QC and Michael Koch**

Goodmans LLP  
Toronto  
September 2019



# ITALY

*Giuseppe Scassellati-Sforzolini, Francesco Iodice and Simone Marcon*<sup>1</sup>

## I INTRODUCTION

Foreign investments (mainly, although not exclusively, by non-EEA<sup>2</sup> entities) in certain strategic sectors of the Italian economy are subject to a comprehensive investment control regime, set forth in Decree Law No. 21 of 15 March 2012, as amended (the Law).

The Law grants the government certain special powers to veto or impose conditions on the purchase of interests in the share capital of, or the implementation of certain extraordinary transactions by, Italian companies active in the fields of defence and national security (including, more recently, 5G technologies), or energy, transport, communications and high-tech.

Although in recent years Italy has ranked behind certain significantly smaller economies in terms of the value of the net inflows of foreign direct investments,<sup>3</sup> such investments still represent an essential part of the economy (according to World Bank research, in 2018, foreign direct investment net inflows amounted to US\$30.899 billion).<sup>4</sup> After the first six years of application, it appears that foreign investors have not considered this regime to be a deterrent to their proposed investments (in fact, the number of cases submitted to the government's scrutiny under the Law has consistently increased over the years).<sup>5</sup> However, in recent cases, the government has relied on these powers to address issues of a seemingly more political nature underlying the relevant investments; likewise, growing security concerns, which are not peculiar to Italy but rather shared globally, have resulted in the government

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1 Giuseppe Scassellati-Sforzolini is a partner, Francesco Iodice is an associate and Simone Marcon is a trainee attorney-at-law at Cleary Gottlieb Steen & Hamilton LLP.

2 The European Economic Area (EEA) comprises the 28 Member States of the European Union plus Iceland, Liechtenstein and Norway.

3 Defined by the World Bank as 'the sum of equity capital, reinvestment of earnings, and other capital. Direct investment is a category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy. Ownership of 10 per cent or more of the ordinary shares of voting stock is the criterion for determining the existence of a direct investment relationship'.

4 Data available at [data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=IT&view=chart](https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=IT&view=chart).

5 The report submitted by the government to Parliament on 11 April 2019 (the Report), regarding the application of the Law in the period between 1 July 2016 and 31 December 2018 ([www.governo.it/sites/governo.it/files/GP\\_RelazioneParlamento\\_2018.pdf](https://www.governo.it/sites/governo.it/files/GP_RelazioneParlamento_2018.pdf)), shows a very significant increase in the number of notifications received by the government, as compared to the previous 3 October 2014 to 30 June 2016 period: in the fields of defence and national security, the notifications increased by 357 per cent, while in the field of energy, transport and communications, the notifications increased by 225 per cent.

seeking to extend the scope of the Law by adding further sectors to government scrutiny. The impact of the Law upon future investments will, of course, continue to depend on how the government applies its powers in practice.

Foreign investments in Italy have traditionally involved a wide set of targets, from manufacturing industries to infrastructure. Headline transactions in the past three years involving sensitive sectors under the Law include:

- a* the 2016 acquisition of the independent gas transmission operator Società Gasdotti Italia SpA by Sole Bidco SpA, a newly incorporated company controlled by a fund owned by Macquarie Infrastructure and Real Assets and, indirectly, by Swisslife Asset Managers;
- b* the 2016 acquisition of Avio SpA (the Italian space propulsion company) by Space 2 SpA (then a special acquisition company) and Leonardo SpA (formerly Finmeccanica SpA, the Italian aerospace, defence and security company);
- c* the acquisition of a 23.9 per cent interest in Telecom Italia SpA (the Italian telecommunications company) by Vivendi SA (the French mass-media conglomerate);
- d* the 2018 acquisition of an 8.8 per cent interest in Telecom Italia by Elliott Management (the investment and activist fund) and subsequent appointment of the majority of Telecom Italia's board of directors as a result of a proxy fight with Vivendi SA (holding a 23.9 per cent interest in Telecom Italia);
- e* the 2018 acquisition by CK Hutchinson Holdings Limited of sole control over Wind Tre SpA (the Italian mobile operator) by acquiring the 50 per cent share interest therein held by Veon Limited (previously known as Vimpelcom Limited);
- f* the proposed spin-off of Telecom Italia's fixed-access network and related infrastructure into a separate company and its possible combination with the fibre-based access network that Open Fiber SpA (a joint-venture between ENEL SpA (the Italian multinational energy company) and CDP Equity SpA, a company of the group headed by Cassa Depositi e Prestiti SpA, the Italian state-controlled investment bank) is currently building across the Italian territory;
- g* the 2018 acquisition and subsequent delisting of EI Towers SpA (the Italian company owning and operating a large network of broadcasting towers and mobile sites across Italy) by 2i Towers SpA (a vehicle participated by F2i – Fondi Italiani per le Infrastrutture SGR SpA (the Italian infrastructure investment fund) and Mediaset SpA (the Italian mass-media group)); and
- h* the 2019 announced partnership between Telecom Italia and Vodafone Italia SpA (the Italian subsidiary of the UK-based telecommunication conglomerate) regarding the joint development of their 5G networks and possible combination of their respective passive tower networks.

## II FOREIGN INVESTMENT REGIME

As a general rule, investments in Italian companies active in the fields of defence and national security (including, more recently, broadband electronic communication services based on 5G technologies), energy, transport, communications, or high-tech are subject to a prior review procedure, as a result of which the government may exercise certain special powers that, depending on the target, may be more or less stringent.

The Law identifies the general categories of assets and activities with respect to which the government may exercise its special powers; however, it is for the government to determine periodically,<sup>6</sup> in detail, which assets are subject to the investment regime set forth in the Law. The following are the categories of assets and activities contemplated by the Law:

- a* activities deemed strategic for the defence and national security system (strategic security activities);
- b* networks, plants, assets and relationships deemed strategic for the national interest in the fields of energy, transportation and communications (strategic assets); and
- c* assets in the high-tech sector in respect of which there could be a danger to security and public policy (high-tech assets).

The government may exercise its special powers under the Law exclusively with respect to companies performing any strategic security activities or holding any strategic or high-tech assets.

Accordingly, in principle, foreign investments in any other sector are not subject to any further general limitation or prior review apart from the general reciprocity rules (see Section II.v) and any applicable antitrust clearance.<sup>7</sup> However, certain sector-specific regulatory authorisations may be necessary (see Section II.vi).

#### **i Defence and national security**

The review procedure and the government's special powers relating to investments in a company performing a strategic security activity are particularly strict and apply to investments made by any person, regardless of nationality (including EEA persons or entities).

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6 Pursuant to Article 1, Paragraph 7 and Article 2, Paragraphs 1 and 1-*ter* of the Law, the government shall review and update the list of assets at least every three years. However, since 2014 the list of strategic security activities and strategic assets set forth in the secondary regulations adopted by the government has not been subject to any change; however, more recently (see Sections II.ii and II.iv) the government has sought to extend the scope of the Law to include 5G-based technologies and high-tech assets.

7 Pursuant to Article 16 of Law No. 287 of 10 October 1990 (Italian Antitrust Act), notification of acquisitions and other concentration transactions must be made to the Italian Antitrust Authority prior to closing when the aggregate turnover produced at the domestic level by the target and acquirer exceeds €498 million and the individual turnover of at least two of the companies involved in the transaction exceeds €30 million. In any event, if the concentration meets the requirements set out in Council Regulation (EC) No. 139/2004 (the Merger Regulation (EUMR)), both in terms of thresholds and the cross-border effects of the transaction, notification of the transaction must be made instead to the European Commission.

Strategic security activities, currently identified by Prime Ministerial Decree No. 108 of 6 June 2014 (the 2014 Decree), include activities falling within the remit of the Ministry of Defence<sup>8</sup> and the Ministry of Interior.<sup>9</sup>

With respect to companies performing any such strategic security activity (or holding any such asset), in the event of a threat of serious prejudice to fundamental interests of national defence or security, the government may:

- a impose specific conditions (relating to the security of procurement and information, the transfer of technologies and export controls) on the purchase of an interest in any such company;
- b veto the purchase by any person (whether directly or indirectly, individually or jointly<sup>10</sup>), other than the Italian state or state-controlled entities, of an interest in the voting share capital of any such company that, given its size, may jeopardise defence or national security interests;<sup>11</sup> or
- c veto the adoption of resolutions by the company's shareholders or board of directors relating to certain extraordinary transactions (such as merger, demerger, asset disposal,

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8 Specifically, these activities are defined as the study, research, design, development, production, integration and support to the life cycle (including logistics) of (1) certain systems and materials, as further specified in the 2014 Decree, including (i) command, control, computer and information (C4I) systems, (ii) advanced detectors integrated into C4I networks, (iii) manned and unmanned systems that are suitable to oppose improvised explosive devices, (iv) advanced weapons and aeronautical systems, integrated into C4I networks, and (v) aerospace and military navy propulsion systems ensuring high performance and reliability; and (2) certain specific technologies, such as stealth technologies, nanotechnologies, technologies for high thermal degree composite materials, meta-materials technologies and design and production of frequency selective surfaces (FSS) or materials.

9 The strategic security activities over which the Ministry of Interior has jurisdiction are defined by the 2014 Decree as the study, research, design, development, production, integration and support to the life cycle (including logistics) of, among others, (1) systems and sensors to be used for observation purposes, monitoring and control of the territory for the protection of public security, public rescue and civil defence; observation systems (optic and radar) for the monitoring and control of the territory, installed in aircraft, boat units and amphibious and land vehicles; propulsion systems, power transmissions and remote-command transmissions that are ancillary to high-performance and fidelity air and naval engines relating to aircraft and boat units to be used in observation tasks, monitoring and control of the territory; ballistic protection systems; and information and communication systems, as well as systems for the collection, classification and management of information and data developed and used for civil defence protection purposes, and (2) virtual private networks used for public security, public rescue, civil defence, justice and international relationships; telecommunications networks owned by the Ministry of Interior used for the protection of public security, public rescue and civil defence; connections used to establish and ensure the functioning of inter-police networks used by police forces and the Ministry of Defence; systems and related algorithms used to elaborate, protect and transmit classified information securely; the Ministry of Interior's real-time monitoring of radioactivity; and information systems used to collect, classify and manage information and data when implementing directives issued by the Ministry of Interior, or when developed and used to prevent or prosecute crimes against public security, border controls and clandestine immigration.

10 Interestingly, the Second 2019 Decree (as defined below) amended the Law to clarify that the notification obligation applies not only when the relevant equity interest has been acquired by two or more investors having entered into a shareholders' agreement, but also in case the relevant threshold (see Section IV.i) is exceeded, in the aggregate, by shareholders having responded to a proxy solicitation under Article 136-bis, Paragraph 1(b) of Legislative Decree No. 58 of 24 February 1998 (the Italian Securities Act).

11 In which case, the buyer may not exercise any rights other than the economic rights attached to the shares, and must dispose of the shares within one year.

winding up and amendments concerning the corporate purpose or equity ownership caps in the by-laws of certain state-controlled companies,<sup>12</sup> or relating to the transfer of ownership or other rights on assets or the creation of encumbrances on assets).

## ii 5G technologies

As mentioned above, growing concerns on national security related to the introduction and utilisation of 5G technologies have resulted globally in an enhanced scrutiny of the governments<sup>13</sup> on foreign investments (and alleged interference) in this crucial field. In the wake of this international trend, on 25 March 2019 the Italian government adopted Decree Law No. 22 (which Parliament ratified with amendments through Law No. 41 of 20 May 2019; the First 2019 Decree), which expanded the scope of the Law to include broadband electronic communication services based on 5G technologies among the strategic security activities in the fields of defence and national security. Subsequently, on 11 July 2019, the government also adopted Decree Law No. 64 (the Second 2019 Decree and, together with the First 2019 Decree, the 2019 Decrees), which further amended the Law to, among other things, enhance the procedural rules applicable to foreign investments in 5G technologies.<sup>14</sup>

In particular, pursuant to the amendments introduced by the 2019 Decrees, the Law now requires any Italian company acquiring 5G-based assets or services to notify the government about the execution of agreements with non-EEA entities concerning:

- a* the purchase of assets or services regarding the design, manufacturing, maintenance and management of networks relating to broadband electronic communication services based on 5G technologies; and
- b* the purchase of high-tech components instrumental to the building or operation of networks relating to broadband electronic communication services based on 5G technologies.

In particular, in the event of a threat of serious prejudice to the fundamental interests of national defence or security, the Italian government may veto, or impose specific conditions

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12 Pursuant to Article 3 of Decree Law No. 332 of 31 May 1994 (as amended and ratified by Law No. 474 of 30 July 1994), the by-laws of state-controlled companies active in the fields of defence and national security may provide for ownership caps of up to 5 per cent of their share capital. Any persons holding any interest in excess of this threshold may not exercise voting rights relating to their exceeding portion of the shares. Clauses to this effect may not be amended for three years following their introduction. However, the ownership cap does not apply in the event that the threshold is exceeded as a result of a tender offer, provided that tenders amount to at least 75 per cent of the voting share capital.

13 For instance, on 15 May 2019, the US President issued an executive order [www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/](https://www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/) pursuant to which US companies were effectively prohibited from using information and communications technology from anyone considered a national security threat; simultaneously, Chinese group Huawei was added to a 'black list' of entities engagement with which requires prior approval of the US government.

14 Based on press reports, it appears that the amendments brought about by the Second 2019 Decree may not be ratified by the Parliament by the applicable deadline (under Italian constitutional law, a law decree is adopted by the government but must be ratified by Parliament within 60 days of its publication in the official journal, otherwise it lapses). It seems that the government intends to reflect the same amendments to the Law by means of a more extensive reform that apparently will be implemented through the adoption of a new law decree relating to cybersecurity.

to, the signing and performance of such agreements, substantially as provided with respect to foreign investments in strategic assets in the fields of defence and national security (of which, as mentioned, 5G technologies are deemed part). The government may also order the parties to the agreement, at their expenses, to reinstate the situation preceding the entry into and performance of the agreement.

As noted above, pursuant to the amendments brought about by the 2019 Decrees, the government may exercise its special powers only in relation to agreements entered into with non-EEA entities. This is a significant departure from the general rule applicable to the fields of defence and national security, where instead the government may exercise its powers regardless of the nationality of the investor.

As regards the notion of ‘non-EEA entity’, the Law already set forth a specific definition, although this applied only to investments regarding the energy, transport and communication sectors (Section II.iii). The original definition, however, was always deemed not entirely clear and the government has used the 2019 Decrees to introduce a new definition of ‘non-EEA entity’. In particular:

- a* The original definition covered any individual or entity that is not resident or domiciled and does not have its registered office, headquarters or centre of main interest in any Member State of the European Economic Area, nor is it established therein. Based on this definition, it was unclear whether the government could consider also the ultimate parent company or should limit its review to the entity making the investment.
- b* By contrast, the definition introduced by the 2019 Decrees expressly extends the status of ‘non-EEA entity’ to: (1) any entity whose registered office, headquarters or centre of main interest is in a Member State of the European Economic Area or however is established therein but is controlled, directly or indirectly, by any individual or entity that is not resident or domiciled or does not have its registered office, headquarters or centre of main interest in any Member State of the European Economic Area, nor is it established therein; and (2) any individual or entity that is resident or domiciled, or has its registered office, headquarters or centre of main interest in a Member State of the European Economic Area, or however is established therein, for the purpose of circumventing the application of the Law.<sup>15</sup>

This new definition also applies to investments in the fields of energy, transport and communications.

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<sup>15</sup> This extension of the notion of ‘non-EEA entity’ is consistent with recital (10) of the EU Regulation No. 2019/452 of 19 March 2019 by the European Parliament and the Council establishing a framework for the screening of foreign direct investments into the European Union, pursuant to which: ‘Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU’.

### iii Energy, transport and communications

The investment regime relating to strategic assets in these fields is less burdensome than that applicable to defence and national security. Not only is the scope of the government's special powers more limited and subject to more significant conditions, but, according to the Law,<sup>16</sup> the overall regime applies only to investments made by non-EEA persons.

The government identified these strategic assets by means of Prime Ministerial Decree No. 85 of 25 March 2014 (the 2014 Regulation). This Regulation identifies certain energy, transport and communications infrastructures (such as the national electricity grid, the telecommunications fixed-line and gas transport networks), but not the relevant service providers<sup>17</sup> (i.e., those entities authorised to provide the related services).<sup>18</sup>

Transactions relating to a strategic asset are subject to prior review by the government, which as a result may:

- a veto any resolution or transaction by a company holding any strategic asset<sup>19</sup> that would result in a change of ownership or control of the asset,<sup>20</sup> provided that the change of ownership or control could cause an exceptional situation whereby the public interest relating to the safety and operation of any strategic asset could be materially jeopardised, and the exceptional situation is not addressed by any relevant domestic or European legal provision;<sup>21</sup> and
- b make the purchase by any non-EEA person of a controlling interest (whether individually or jointly) in a company holding any strategic asset conditional upon the investor undertaking certain commitments aimed at protecting the above-mentioned

16 Pursuant to Article 2, Paragraph 5, of the Law, the purchase by a non-EEA person of a controlling interest in a company holding a strategic asset is subject to the provisions of the Law.

17 In certain fields (such as gas and electricity), however, other provisions of law require the operation of the network and provision of the related services to be carried out by the same company. It follows that, in practice, cases of acquisition of any such service providers will be subject to the government's special powers outlined below.

18 In particular, the following strategic assets have been identified: (1) energy networks of national interest and the underlying contract relationships (the 2014 Regulation expressly refers to the national network for the transport of natural gas, the related compression and dispatching centres and gas storage facilities; the infrastructures for the supply of gas from non-EU countries and the onshore and offshore regasification plants; the national network for the transmission of electricity and the relevant control and dispatching centres; and the operations related to use of the aforementioned networks and infrastructure); (2) large transport networks and facilities of national interest, which also ensure the main trans-European connections, including ports and airports of national interest and the rail network relevant to the trans-European rail networks; and (3) dedicated telecommunications (telecom) networks and 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 and the related contractual relationships.

19 If the company holding the strategic asset is a subsidiary of another company, the resolutions of the corporate bodies of the parent company resulting in the transfer of ownership or control over its subsidiary may also be subject to the government's special powers under the Law.

20 The scope of this power is currently being subject to careful scrutiny by the government as a result of the recent developments in the *Telecom/Vivendi* case (see Section VII.iii).

21 The 2014 Regulation clarifies that government powers may be exercised only insofar as the essential interests of the state (including a suitable infrastructural development) are not sufficiently protected by a specific sector regulation (including pursuant to a contract related to a specific administrative permit).

public interests. The government may even veto such transactions in the event that the acquisition raises an exceptional threat of a material prejudice to the public interests (which cannot be addressed by commitments undertaken by the investor).

Based on government regulation No. 86 dated 25 March 2014, which governs the review process in the fields of energy, transport and communications (the Review Regulation),<sup>22</sup> the government could exercise its special powers under point (a) above (i.e., in respect of a relevant resolution adopted or a transaction carried out by an Italian company holding a strategic asset) regardless of the nationality of the investor, provided that the resolution or transaction results in a change of ownership or control of the strategic asset. By contrast, an investment consisting of the acquisition of a controlling interest in the share capital of the company holding the strategic asset would be subject to the government's special powers only when the investor is a non-EEA person.

However, the Review Regulation would appear not to be consistent with the overall regime applicable to the field of energy, transport and communications – where the government's intervention must be more limited in light of EU law principles – and would unreasonably discriminate against an investor acquiring ownership or control of a strategic asset through a corporate resolution of the target company or a transaction carried out by an Italian company, as opposed to an investor acquiring a controlling equity interest in a company owning a strategic asset. Not surprisingly, the exercise of the government's special powers in the context of the *Vivendi/TIM* case (see Section VII.iii) is currently being litigated in court on the basis of this discrepancy.

Similarly, the practice followed by investors (and the government) to date suggests that notification of the relevant transactions or resolutions in the fields of energy, transport and communications has often been made even if the investor did not qualify as a non-EEA entity.<sup>23</sup> The reason for this approach perhaps may be explained by the noted inconsistency between the Law and the Review Regulation, which may have led the investors or the corporate bodies of the relevant companies to take a more cautious approach and proceed with the notification even if either the letter of the Law or the principles of EU law would justify avoiding notification.

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22 In particular, pursuant to Article 6, Paragraph 2, of the Review Regulation, 'the proposal to exercise the special powers under Article 2, Paragraphs 3 and 4 of the Law (i.e., the powers under point (1) above – e.g., concerning a resolution of the company holding the strategic asset that results in a change of ownership or control of the same) is adopted in relation to EEA and non-EEA persons, while the proposal to exercise the special powers under Article 2, Paragraph 6 of the Law (i.e., the powers under point (2) above – e.g., the acquisition of a controlling interest in the company holding the strategic asset) is adopted only in relation to non-EEA persons'.

23 Based on the Report, it appears that, in the period between 1 July 2016 and 31 December 2018, out of 36 transactions or resolutions notified to the government in the fields of energy, transport and communications, only seven were investments made by non-EEA individuals or entities.



#### iv High-tech

In 2017, the government adopted Decree Law No. 148 of 16 October 2017, which Parliament ratified and amended through Law No. 172 of 4 December 2017 (the 2017 Decree), which has expanded the scope of the Law to include certain categories of high-tech assets. In particular, the 2017 Decree identified the following sectors:

- a* critical or sensitive infrastructures, including data storage and management and financial infrastructures;
- b* critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual-use applications, web security and space or nuclear technologies;
- c* security of critical input procurement; and
- d* access to, or ability to control, sensitive information.

As for the strategic security activities and strategic assets, in order for the government to exercise its special powers it would first need to identify the specific assets and activities falling within the mentioned categories, to the extent that the assets are exposed to a threat to security and public policy. The identification must be made through a government regulation that has not yet been adopted;<sup>24</sup> accordingly, the government cannot yet exercise its special powers with respect to high-tech assets. Once the relevant high-tech assets are identified, the government's special powers in this field will be subject to the same provisions, conditions and limitations outlined above with respect to strategic assets in the fields of energy, transport and communications (see Section II.iii).

#### v Reciprocity

Pursuant to a general principle of Italian law,<sup>25</sup> foreign persons (whether individuals or entities) are allowed to exercise any civil law right exclusively insofar as the reciprocity principle is complied with. In other words, in the event that an Italian citizen is prevented from exercising a specific right in the country of origin of the relevant foreign person, Italian law in turn prevents that foreign person from exercising the same right in Italy. Although the scope of this principle is very wide, in the context of foreign investments it seems to have been applied, in practice, exclusively to the purchase of real estate or the incorporation of a company, but not to the acquisition of an equity interest in an existing company.

The reciprocity principle is specifically restated in the Law, resulting in a significant limitation of the scope of the government's powers: the purchase by a non-EEA person of an interest in a company exercising any strategic security activity or holding any strategic asset is

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24 By contrast, the more recent changes to the Law introduced through the First 2019 Decree were immediately effective: the First 2019 Decree did not mandate the government to adopt a regulation further specifying the assets and transactions subject to the government's special powers, but rather did so by directly amending the Law.

25 Article 16 of the General Provisions on Law, attached to the Civil Code of 1942. Among EEA Member States, however, the reciprocity principle is overridden by the Treaty on the Functioning of the European Union and the Treaty on the European Economic Area, as well as by bilateral treaties (BITs) with non-EEA countries to which Italy is a party (for instance, the BIT between Italy and the United States). The Ministry of Foreign Affairs maintains a list of the BITs in force between Italy and other countries, specifying in which cases reciprocity has been ascertained: [www.esteri.it/mae/it/ministero/servizi/stranieri/elenco\\_paesi.html](http://www.esteri.it/mae/it/ministero/servizi/stranieri/elenco_paesi.html).

permitted exclusively on the basis of reciprocity conditions. This implies that, in the event that the government ascertains that there is a lack of reciprocity between Italy and the country of origin of the prospective investor, implementation of the transaction may not be permitted, regardless of any further consideration (including the economic desirability of the foreign investment and the absence of any significant prejudice to strategic interests). This provision can be contrasted with Article 25, Paragraph 2 of the Italian Antitrust Act, pursuant to which the Prime Minister, on grounds of essential national economic importance, may veto any concentration transaction notified to the Antitrust Authority by a company from a country that does not protect the independence of companies through legal provisions equivalent to the Italian Antitrust Act, or applies discriminatory rules or imposes conditions resulting in the same effects on acquisitions by Italian investors.

Finally, a reciprocity principle also applies to takeover bids on Italian companies whose voting shares are listed on an Italian regulated exchange. Generally, the passivity rule<sup>26</sup> and breakthrough rule<sup>27</sup> apply to prevent pre-bid or post-bid defences from undermining the success of a tender offer. However, in the event that the bidder would not be subject to equivalent limitations, the target company (or its shareholders) may apply the relevant defences.<sup>28</sup> In other words, should the foreign bidder, in its capacity as target of a tender offer, be permitted by its domestic law to frustrate a tender offer, the Italian target (or its shareholders) may apply any pre-bid or post-bid defence provided under the target's by-laws or shareholders' agreements.

## vi Sector-specific authorisations

As previously mentioned, depending on the investment target, foreign investments may be subject to specific additional review or authorisation processes conducted by sector-specific regulators.

The sectors in which such authorisations may be required include:

- a banking, insurance and investment services;<sup>29</sup>

26 Pursuant to Article 104 of the Italian Securities Act, from the date of announcement of a takeover bid, directors of the target may not adopt any measure that could undermine the achievement of the offer's goals, unless authorised to do so by a shareholders' meeting or empowered to do so under the target's by-laws.

27 Pursuant to Article 104 bis of the Italian Securities Act, during the tender offer period any transfer restriction set out in the target's by-laws, or voting limitations set out in the target's by-laws or in a shareholders' agreement, are not effective in relation to the bidder.

28 Article 104 ter of the Italian Securities Act. Within 20 days of the bidder launching its tender offer, the bidder or the target company may ask the Italian securities and exchange authority (CONSOB) to determine whether the bidder would be subject to equivalent limitations.

29 Pursuant to (1) Directive 2013/36/EU, (2) Directive 2014/65/EU and (3) Directive 2009/138/EC (Solvency II) as implemented in Italy by, respectively, (1) Article 19 of Legislative Decree No. 385 of 1 September 1993, (2) Article 15 of the Italian Securities Act, and (3) Article 68 of Legislative Decree No. 209 of 7 September 2005 and implementing regulations, a notification must be made to the competent authority of any proposed acquisition of a share interest in a bank or an investment services firm that (1) is equal to at least 10 per cent of the target's share capital; (2) would enable the acquirer to exercise a significant influence on the target; or (3) grants control over the target. The competent authority shall authorise the acquisition after assessing certain factors, including the reputation and financial soundness of the investor, and the ability of the target, following the acquisition, to comply with its obligations under the applicable supervisory regime.

- b* telecommunications;<sup>30</sup>
- c* broadcasting;<sup>31</sup>
- d* gas networks;<sup>32</sup> and
- e* electricity networks.<sup>33</sup>

Moreover, in certain fields the law sets limits on the acquisition of controlling interests by non-EU persons (for instance, as regards airline companies<sup>34</sup> and television broadcasters).<sup>35</sup>

### III TYPICAL TRANSACTIONAL STRUCTURES

Although no specific requirement is set under Italian law, typically, although not exclusively, foreign investments in Italy are carried out through an Italian or EEA corporate vehicle, depending on a number of factors (including tax considerations).

In theory, investing through an Italian or EEA company might also be considered for the purposes of complying with the above-mentioned reciprocity principles or to fall outside the scope of the government's review powers regarding strategic assets. However, in light of the recent revision of the definition of 'non-EEA entity' introduced by the 2019 Decrees, if the ultimate foreign investor originates from a non-EEA country, such a structure would be insufficient in case of investments regarding 5G technologies or in the fields of energy, transport and communications.<sup>36</sup>

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- 30 Pursuant to Article 25 of Legislative Decree No. 259 of 1 August 2003 (the Code of Electronic Communications), for instance, in the event that a company authorised to supply the network or provide electronic communication services intends to transfer the relevant authorisation to any third party (foreign or domestic), it must send prior notice to the Ministry of Economic Development, which may withdraw its authorisation if it ascertains that the prospective transferee does not meet the necessary requirements. In addition, Article 50 *ter*, Paragraph 4, of the Code of Electronic Communications addresses the case of an undertaking designated as having significant market power in one or more relevant markets intending to dispose of a substantial part or all its local access network assets to a third party.
  - 31 As a general rule, under Article 1, Paragraph 6(c), No. 13 of Law No. 249 of 31 July 1997, the Communications Authority is empowered to authorise the acquisition of an undertaking performing radio-television broadcasting activities. In addition, pursuant to Article 43 of Legislative Decree No. 177 of 31 July 2005, notification of concentration transactions must be made in advance to the Communications Authority, which ascertains whether the transaction may hamper media pluralism.
  - 32 For example, pursuant to Article 9 of Legislative Decree No. 93 of 1 June 2011 (which implements EU Directive 2009/73/EC), a gas transmission system operator (gTSO) must be certified by the Energy Authority to be compliant with one of the ownership unbundling models envisaged thereunder.
  - 33 Pursuant to Article 36 of Legislative Decree No. 93 of 1 June 2011 (which also implements EU Directive 2009/72/EC), the electricity transmission operator (currently, Terna SpA (eTSO)) must be certified by the Energy Authority as compliant with the applicable ownership unbundling model envisaged thereunder.
  - 34 Pursuant to Article 4(f) of EU Regulation No. 1008/2008, in order for an EU airline company to be authorised to operate, it must be owned directly or through majority ownership by EU Member States or nationals of EU Member States, or both, and must at all times be effectively controlled by such states or nationals.
  - 35 Pursuant to Article 3 of Law No. 249 of 31 July 1997, the authorisations relating to private radio or television broadcasting may be granted exclusively to Italian or EU persons, while non-EU persons may only acquire control of such companies subject to reciprocity conditions.
  - 36 See Section II.ii.

Foreign investments may be implemented through the acquisition of an equity interest in an Italian target, either individually or through a corporate or contractual joint venture with an Italian or other person. Provisions of Italian company law may be relevant to certain agreements between the foreign investor and other shareholders or joint venture partners, such as limitations on the term of shareholders' agreements<sup>37</sup> or the obligation to launch a tender offer in cases of acquisition effected while acting in concert.<sup>38</sup>

No notable difference is established between a share purchase and an asset purchase deal by a foreign investor. With specific regard to the scope of the foreign investments review under the Law, the definition of strategic security activities or strategic assets is wide enough to trigger the application of the relevant provisions both in cases of acquisition of an equity interest and in those of ownership of a relevant asset (although, as noted, in the case of strategic assets, the regime would appear to be tighter if the investor seeks to acquire the asset, as opposed to gaining control of a company owning the asset). Likewise, the general reciprocity principle applies to both categories of transaction.

#### IV REVIEW PROCEDURE

Notification of foreign investments falling within the scope of the government's special powers outlined in Section II must be made in advance to the government.

The general rules of the review procedure are set out in the Law, with implementing provisions spelled out in the Review Regulation (relating to energy, transport and communications), Government Regulation No. 35 of 19 February 2014 (relating to defence and national security) and the subsequent Prime Ministerial Decree dated 6 August 2014. As mentioned, with respect to high-tech assets, no implementing provisions have been adopted yet (although we expect that, once the relevant assets are identified in detail, the Review Regulation will apply).

##### i Process

The Law requires that the following be filed<sup>39</sup> with the government:

- a notification of any relevant resolutions adopted, or transactions carried out, by a company exercising any strategic security activity or holding any strategic or high-tech asset within 10 days and in any event prior to their implementation;<sup>40</sup>

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37 As a general rule, the term of a shareholders' agreement relating to an Italian joint stock company (Article 2341 *bis* of the Italian Civil Code) may not exceed five years (three in the case of a listed company or its parent, pursuant to Article 123 of the Italian Securities Act).

38 As a general rule, the acquisition of an equity interest in a listed company of more than 25 per cent of the share capital (30 per cent in the case of small and medium-sized enterprises) triggers a mandatory tender offer. The same applies in the event that the threshold is exceeded, in the aggregate, as a result of the acquisitions made by two or more persons who are parties to a shareholders' agreement relating to the target company or its parent.

39 The notice to the government does not trigger disclosure obligations concerning material non-public information under market abuse rules.

40 The notification must include the minutes of the resolution and all documents provided to the members of the relevant corporate bodies, as well as any further information that may be necessary for the government to complete its assessment.

- b notification of any purchase of interests in any company exercising any strategic security activity or holding any strategic asset within 10 days of the acquisition.<sup>41</sup> Purchases of equity interests in a company active in the fields of defence or national security trigger the notification obligation if they exceed the thresholds of 3, 5, 10, 15, 20, 25 and 50 per cent;<sup>42</sup> and
- c notification of any agreement relating to 5G assets or services within 10 days of signing.<sup>43</sup>

The notification of the resolutions or transactions must be made through ad hoc forms issued by the government<sup>44</sup> and filed by means of certified email.

The review procedure is coordinated by the Department of Administrative Coordination (a specific government office),<sup>45</sup> which is assisted by a coordination group composed of representatives of the ministries involved in the review procedure and, where necessary, members of other bodies (including private organisations) whose competence is required for a deeper understanding of the issues and interests.

Upon receipt of the notification, a standstill period of 45 days begins,<sup>46</sup> during which the ministry in charge of the initial assessment carries out its review of the proposed investment, resolution or agreement and, taking into account the work of the coordination

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41 The notification must include the business plan pursued by the investor through the proposed acquisition, the related financial plan, a detailed description of the investor and any further information that may be necessary for the government to complete its assessment.

42 Prior to the adoption of the Second 2019 Decree, such thresholds applied only to listed companies. The Second 2019 Decree deleted such requirements, so that such thresholds apply to all companies holding strategic assets in the fields of defence and national security, whether listed or not.

43 The Second 2019 Decree clarifies that such notification shall be submitted by the recipient company of the relevant assets or services. According to the report submitted to the Italian Senate for the possible ratification of the Second 2019 Decree, the rationale underlying the obligation on the recipient to make the notification is to raise awareness on cyber security issues among domestic companies, on grounds the recipient is generally better suited to clarify not only the technical features of the agreement but also, more generally, how the notified transaction fits into the company's business plan and how it impacts the implementation of the company's activities that are of strategic importance for the Italian State.

44 The form was adopted by means of a Decree of the Secretary General of the Presidency of the Council of Ministers on 18 February 2015, and is available at [presidenza.governo.it/DICA/6\\_EVIDENZA/golden\\_power/DSG180215%20\\_modulistica\\_golden\\_power.pdf](http://presidenza.governo.it/DICA/6_EVIDENZA/golden_power/DSG180215%20_modulistica_golden_power.pdf).

45 The Department of Administrative Coordination, following a meeting with the coordination group, assigns the review of the notification to a corresponding office within the Ministry of Economy, if the relevant company is controlled by the Ministry; otherwise, the process is entrusted to the Ministry of Defence, the Ministry of the Interior, the Ministry of Economic Development or the Ministry of Infrastructure and Transport, depending on the specific circumstances (mainly depending on which Ministry is competent for the field in which the relevant company belongs).

46 This term was recently extended by the Second 2019 Decree (previously the Law provided for 15 days and the Review Regulation clarified that only business days would be considered). This term may be extended only once, for a period of 30 business days, if the government requests additional information or makes enquiries with third parties (e.g., public authorities). In case the initial notification is incomplete, the 45-business-day term starts only once the missing information or document is provided. With specific respect to notifications relating to 5G technologies, however, the Second 2019 Decree provides that the first 45-day term may be suspended for additional 45 days (which suspension may be extended once, for further 45 days), in case a deeper analysis is required to assess possible vulnerability factors that may undermine the integrity and safety of the networks and data transmitted through them.

group, formulates a proposal to the Presidency of the Council of Ministers (and a draft of the related government decree). To this end, the Second 2019 Decree clarified that certain sector-specific public authorities<sup>47</sup> must cooperate with the coordination group to facilitate its task, including by providing the necessary information (which they may not withhold on secrecy grounds).

The subsequent decree, whereby the government exercises its special powers, must specify the conditions or requirements imposed on the investor, the criteria and mechanics for monitoring compliance with the foregoing (including by identifying the specific administration) and the penalties applying in cases of infringements.

Until completion of the review procedure, voting rights<sup>48</sup> attached to the acquired interest are suspended.

Moreover, during the review, no specific procedural standing or right of the parties involved in the transaction are expressly provided for by the Law (except for limiting the application of standard transparency rules to the proceedings).<sup>49</sup> However, sound cooperation between the government and the notifying party is regarded as standard practice, possibly involving preliminary discussions prior to sending the formal notification,<sup>50</sup> to allow the government to conduct its review properly and to make an informed decision by the statutory deadline.<sup>51</sup>

In any event, should the government elect not to (or fail to) exercise its powers by the end of the standstill period, the proposed transaction may be legitimately carried out.<sup>52</sup>

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47 Notably, the Central Bank (Banca d'Italia), the Securities and Exchange Commission (CONSOB), the Pension Funds Authority (COVIP), the Private Insurance Authority (IVASS), the Transport Authority (ART), the Antitrust Authority (AGCM), the Communications Authority (AGCOM) and the Energy and Environment Authority (ARERA).

48 These rights are also suspended if the purchaser does not comply with the conditions or commitments imposed by the government, and for as long as the failure to comply persists.

49 In particular, pursuant to the general rule set forth in Law No. 241 of 7 August 1990, any person who holds a qualified interest in administrative proceedings can obtain access to and make copies of the administrative documentation. However, this general right to access does not apply with respect to the information and data contained in the documents filed in the context of the review procedure instrumental to the exercise of the government's special powers under the Law.

50 In a specific case, this approach was expressly mentioned in the measure whereby the government exercised its powers. Based on the preamble of the Prime Ministerial Decree of 6 June 2013 – whereby the government exercised its special powers in relation to the acquisition by General Electric of the Avio SpA aero-engine business – we understand that prior to the official notification by General Electric, dated 20 May 2013, the investor and the government had engaged in preliminary discussions documented by certain initial notices in which General Electric confirmed it could accept the conditions that the government would potentially impose for completion of the acquisition.

51 Likewise, no specific coordination is established between the government's review and any other clearance process that may be required in respect of the same transaction (e.g., antitrust), therefore the parties must submit various applications for the transaction to be cleared.

52 The Law empowers the government to determine which intra-group transactions are not subject to the possible exercise of special powers. Pursuant to the 2014 Decree and 2014 Regulation, certain intra-group transactions (such as mergers, demergers, divestitures and the creation or transfer of security interests) are not subject to the special government powers. However, prior notification to the government is required. Further, the aforementioned government measures provide that the exemption does not apply if the available information indicates a threat of serious harm to the fundamental interests of defence and national security, to public interests relating to the security and functioning of the networks and facilities, or to continuity in procurements.

As previously mentioned, the government's decisions must be adopted by a prime ministerial decree; the decree may be appealed only to the Administrative Court of Rome. In the event of non-compliance with the government's decisions, the related transactions are null and void, and the perpetrators are subject to administrative fines equal to twice the value of the transaction.<sup>53</sup>

## ii Criteria

In an attempt to address the criticism expressed by the European Court of Justice in its 2009 judgment concerning the previous 'golden share' regime,<sup>54</sup> the Law establishes certain specific objective criteria that the government must take into account as a condition to exercise its special powers.

In particular, in the context of the foregoing review procedure, the government must assess, *inter alia*:

- a* as regards companies exercising any strategic security activity, whether the economic, financial, technical and organisational characteristics of the prospective investor (including consideration of any financing conditions), as well as its business plan, are suitable to carry on the business regularly, safeguard its technological portfolios and honour existing contractual commitments;
- b* as regards companies holding any strategic or high-tech asset, whether the situation resulting from the transaction (including consideration of any financing conditions) is suitable to guarantee the security and continuity of procurement, as well as the maintenance, safety and operations of the strategic asset;
- c* as regards acquisition of controlling stakes in companies holding any strategic asset or high-tech asset, whether the transaction could jeopardise security or public policy (and, in such respect, the Second 2019 Decree clarified that the government may take into account whether the foreign investor is controlled by a public administration of a non-EU country, including its armed forces, also as a result of significant public funding; whether such investor was involved in activities affecting security or public order of a Member State of the EU; or whether there is a serious risk that such investor engages in illegal or criminal activities);<sup>55</sup> and
- d* in all cases, the existence of any links between the prospective investor and third countries that do not respect democracy and the rule of law, or maintain relations with criminal or terrorist organisations.

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53 The fine shall be at least 1 per cent of the aggregate turnover resulting from the respective latest financial statements.

54 Case C-326/2007, *Commission v. Italy*. The European Court of Justice held that the criteria (listed in the Prime Ministerial Decree of 10 June 2004) that the government was to consider prior to exercising its then 'golden share' powers (set out under Decree Law No. 332 of 31 May 1994) breached the EU proportionality principle, as 'the Decree of 2004 contains no details of the actual circumstances in which the power of veto may be exercised, and the criteria it lays down are not, therefore, based on objective verifiable conditions'.

55 The criteria introduced by the Second 2019 Decree are largely based on those set forth in Article 4, Paragraph 2, of the regulation No. 2019/452 of 19 March 2019 by the European Parliament and the Council establishing a framework for the screening of foreign direct investments into the European Union.

## V FOREIGN INVESTOR PROTECTION

As a member of the European Union, Italy is subject to all provisions under EU law aimed at favouring the creation of a European common market, which include the four fundamental freedoms enjoyed by EU persons under the Treaty on the Functioning of the European Union (TFEU) (i.e., the free movement of goods, capital, services and persons). Any breach of these principles by Italian law or the Italian authorities may therefore result in the EU investor accessing an Italian court to seek annulment of the infringing measure, redress of damages suffered in connection therewith, or both.

Moreover, Italy is a signatory of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes (ICSID). Thus, because Italy is a party to a number of bilateral investment treaties, any dispute arising thereunder may be submitted to ICSID arbitration if the agreements so provide (or to other forms of dispute settlement provided for in the relevant treaty).

Italy is also a signatory to the 1958 New York Convention, the purpose of which is to ensure that arbitration agreements are recognised in Italy (i.e., litigation before national courts is prevented if contrary to the parties' agreement), and foreign arbitral awards are generally enforceable in Italy.

Finally, in 2013,<sup>56</sup> Italy introduced a specialised section within several major courts<sup>57</sup> focusing on business and corporate law matters. These specialised sections have also been assigned jurisdiction over any civil proceedings to which a foreign company is a party (whether as defendant or plaintiff). However, these specialised sections have no jurisdiction over disputes concerning application of the Law, as the Administrative Court of Rome has exclusive jurisdiction.

## VI OTHER STRATEGIC CONSIDERATIONS

Situations in which (certain) foreign investments entail the involvement of the government need to be carefully considered. The interests that the Law seeks to protect are obviously other than merely commercial interests that are generally addressed in a transaction between two private parties. In elaborating the acquisition strategy, this aspect needs to be borne in mind.

The review structure originally set out under the Law envisaged a particularly tight time frame (15 business days) within which the government was required to carry out its assessment. Therefore, it could not be ruled out that the government could elect to suspend (for just 10 additional business days) the transaction in the event that, upon expiry of the review deadline, it had not completed its review or collected sufficient information to conclude that no prejudicial consequence could arise from the proposed transaction. As noted in Section IV, should the government fail to exercise its rights within the statutory time frame, the relevant investment may be legitimately implemented.

The 2019 Decrees addressed this issue by extending the review deadline to 45 days (which could be suspended for 30 days) and clarifying that, in case the initial notification is incomplete, the term starts on the date of submission of the missing information or

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<sup>56</sup> Decree Law No. 145 of 23 December 2013, as ratified and amended by Law No. 9 of 21 February 2014.

<sup>57</sup> More precisely, these are the Courts of Bari, Cagliari, Catania, Genoa, Milan, Naples, Rome, Turin and Venice. Their jurisdiction over a specific case is established on a territorial basis.



documents; however, in consideration of standard practice, it still seems advisable to approach the government informally prior to submitting an application triggering the start of the review procedure. Prior informal talks may also help the government become acquainted with the proposed transaction and suggest possible amendments that would allow the transaction to be cleared swiftly.

Preliminary discussions may also form the context in which potential industrial commitments (regarding, for instance, maintenance of certain employment levels, location of research activities and respect for international obligations) may be defined and then proposed by the foreign investor within the framework of the proposed transaction, to preserve the interests underlying the exercise of the government's special powers and to facilitate final clearance of the investment.

## VII CURRENT DEVELOPMENTS

The Law is still a relatively recent piece of legislation and, based on public records,<sup>58</sup> in most cases the government has decided not to exercise its powers and stated it did not intend to take any specific action, or else it let the review term expire (thereby enabling the parties to complete the transaction). However, more recently there has been an exponential increase in the number of transactions and resolutions notified to the government, which has paid greater attention to the transactions notified to it under the Law and adopted a more proactive approach.<sup>59</sup>

### **i Cases in which the government has exercised its special powers**

On the basis of publicly available information, to date it appears that the government has exercised its special powers almost exclusively in the field of defence and national security.<sup>60</sup>

In particular, it appears that the government has vetoed a transaction only once, while in the other cases in which it exercised its powers the government did so by imposing conditions and prescriptions on the transaction or its parties.

The only case in which the government exercised its veto power is the 2017 proposed acquisition of Next Ast Srl (a subsidiary of Next Ingegneria dei Sistemi SpA, into which the latter had contributed its software and complex systems production unit) by Altran Italia SpA (the Italian subsidiary of Altran, the French innovation and engineering consulting group). Based on the Report, the government vetoed the transaction to protect the essential interests of national defence and security, given that Next Ast Srl performed services of a classified and strategic nature to the national defence and security system.

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58 According to the Report, in the period between 1 July 2016 and 31 October 2018, out of 86 notifications, in 39 cases the government decided not to exercise its powers, in nine cases the notification was not due, and in 18 cases the parties notified intra-group transactions for which the Law requires a notification but, except in extreme cases, the government cannot exercise its powers.

59 The increase in notifications received may be explained precisely in light of the government's latest attitude of greater attention towards foreign investments in strategic sectors of the Italian economy. Investors arguably opt to notify the government pursuant to the Law even if not strictly required, for the purpose of avoiding the risk of being subject to fines.

60 According to the Report, from 1 July 2016 to 31 December 2018 the government exercised its special powers eleven times, but only once in the energy, transport and communications sectors.

Interestingly, in 2018 the parent company Next Ingegneria dei Sistemi SpA (a company providing IT services and products in the industrial areas of defence, space, transportation and telecommunications and a key supplier of Leonardo SpA, the state-controlled aerospace, defence and security company previously known as Finmeccanica SpA) was again involved in a transaction notified to the government under the Law, this time as a target. On this occasion, the government did not veto the transaction but imposed certain conditions and prescriptions<sup>61</sup> in relation to the proposed acquisition by Defence Tech Holding Srl (a company active in the provision of technological solutions and innovative logistics to critical infrastructures).

As mentioned, in other cases the government exercised its powers only in the form of prescriptions and conditions.

In particular, on 6 June 2013, the government<sup>62</sup> exercised (for the first time) its special powers in the field of defence and national security, authorising the acquisition of the aviation business unit of Avio SpA by General Electric. On this occasion, the government imposed certain conditions on the acquirer, including ensuring continuity of certain activities,<sup>63</sup> the appointment of Italian citizens to certain sensitive positions<sup>64</sup> and certain industrial commitments.<sup>65</sup> The government also provided the constitution of a joint committee (whose members are designated by the government and by General Electric) entrusted with the task of verifying whether the conditions imposed by the government are complied with.<sup>66</sup>

On 18 April 2014, the government again exercised its special powers in the field of defence and national security by authorising the acquisition of control over Piaggio Aerospace SpA (formerly Piaggio Aero Industries SpA) by Mubadala Development Company (the Abu Dhabi-based national wealth fund). This authorisation was reported to be subject to certain conditions<sup>67</sup> relating to the protection of technological and industrial know-how, continuity in production and certain strategic activities (particularly regarding remote control aircraft).

The government also authorised the privatisation of ENAV SpA (the Italian company providing air traffic control, flight information and aeronautical information services) by

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61 The government's press release did not specify what these conditions and prescriptions consist of, but only indicated that this step was taken to protect the essential interest of defence and national security.

62 By Prime Ministerial Decree dated 6 June 2013 and published in the Official Journal on 19 August 2013.

63 Mainly (1) compliance with national measures on security of procurements and information, (2) continuity of production, maintenance and support to the navy and aerospace systems supplied to the armed forces, and generally to ensure fulfilment of international cooperation programmes in which Italy participates, and (3) a prohibition against reducing or disposing of technological or industrial know-how in certain key strategic activities.

64 Namely, the officers holding the authority to represent GE Avio Srl (the acquisition vehicle) on matters relating to security and transfer and export of armaments. In addition, the majority of the employees active in strategic operations (including international military cooperation programmes) must be Italian citizens.

65 In particular relating to production and supply to the space business unit of Avio SpA of products or components for certain launchers.

66 Avio's aviation business unit was subject to further scrutiny by the government in connection with four additional transactions notified to the government between 2014 and 2015, but in each case the government did not deem it necessary to exercise its special powers.

67 The conditions were not disclosed in detail, as the government decree was not published.

means of an initial public offering concerning up to 49 per cent of the company's share capital, on 10 June 2016, subject, however, to certain prescriptions concerning the integrity, accessibility and confidentiality of sensitive data.<sup>68</sup>

On 15 June 2016, the government resolved to make the sale of Ingegneria dei Sistemi SpA's 'GeoRadar' business unit to Hexagon Geosystems Services SpA (a subsidiary of Hexagon AB, the Swedish global technology group) conditional on the latter adopting various technical means to preserve the technological know-how, and other management and organisational solutions aimed at ensuring compliance with manufacturing, export, transport, use, tracing, registration and storing of the relevant technologies.

On 24 November 2016, the government imposed certain conditions on the previously mentioned acquisition of Avio SpA by Space 2 SpA, Leonardo SpA and In Orbit SpA, and its subsequent merger into Space 2 SpA. Among these conditions, the government particularly stipulated that, considering the strategic relevance of Avio's activities for national defence and security systems, the company's chief executive officer (CEO) must be an Italian citizen and may be appointed only after consultation with the government.<sup>69</sup>

Moreover, on 3 March 2017, the government authorised the transfer of the production of certain components used by the Italian armed forces from GE Avio Srl's plant in Rivalta (Italy) to another General Electric plant, in the United States. However, the government imposed specific conditions to ensure that the transaction would not undermine the strategic interests of the Italian state and adversely affect the transferred production assets.<sup>70</sup>

On 19 October 2017, the proposed sale by Piaggio Aerospace SpA (the aerospace manufacturing company) of its 'Evo' (i.e., executive jet) business to PAC Investment SA (a Chinese state-backed consortium) was reported to have been subject to certain conditions and prescriptions<sup>71</sup> imposed by the government.

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68 According to the listing prospectus for ENAV SpA dated 8 July 2016, the government conditioned its authorisation on the company implementing governance structures, prior to the initial public offering (IPO), for the protection of the integrity of information by taking suitable internal organisational measures to safeguard access to and the confidentiality of sensitive data for the purposes of public security. By way of clarification, ENAV SpA stated in the listing prospectus that it had already established suitable structures, in particular an internal security regime governing the functioning of the company's central security body, which had been previously approved by the Prime Minister's Office and the National Security Authority.

69 According to the listing prospectus for Space 2 SpA, the government also imposed the following conditions (applicable following conclusion of the merger): (1) the company officer entrusted with the transfer and export of weapons must be an Italian citizen; (2) the company had to put in place management and organisational solutions to ensure that manufacturing and R&D operations relating to defence and national security (including know-how and patents) would be maintained in Italy; (3) the company had to put in place governance structures for the protection of the integrity of information, by taking suitable internal organisational measures to safeguard access to and the confidentiality of sensitive data for the purposes of public security; and (4) the company must ensure the continuity of the production operations necessary to guarantee that Italy complies with its obligations under international cooperation programmes.

70 No further details on the conditions actually imposed are available from public records.

71 Based on press reports, it appears that the conditions imposed by the government included an obligation on the seller to invest the proceeds of the sale in Piaggio Aerospace's military unit. Moreover, according to the Report and further publicly available information from press reports, the government required Piaggio Aerospace SpA, among other things, to: (1) set up a fully autonomous organisation unit in charge of carrying out the company's activities relevant for the Italian security interests, endowing it with appropriate financial and human resources to guarantee the independence of such unit; (2) adopt all suitable solutions to ensure that no technical information relevant to the production and sale of P1HH, P2HH and MPA aircraft is used or permitted to use, directly or indirectly, for the production and sale of, among other

On 7 June 2018, the government also exercised its powers by imposing certain conditions and prescriptions<sup>72</sup> in relation to the resolution of the shareholders' meeting of Rete Telematiche Italiane SpA (Retelit) (a listed company providing data and infrastructure services to the telecommunications market, operating more than 12,500 kilometres of optical fibre infrastructure) of 27 April 2018, which appointed a new board of directors on the basis of the slate submitted by a consortium of three shareholders.<sup>73</sup> Retelit challenged the decree whereby the government exercised its powers, on the ground that it had notified the government of the resolution only for 'prudential and cautionary reasons' and that, in fact, it did not hold any strategic asset and, in any event, the resolution did not entail any change in the control of the company. The government however disagreed with the position taken by Retelit and, in particular, on the basis of an opinion issued by the Italian Communications Authority, concluded that Retelit did hold strategic assets and that the appointment of a new board of directors had resulted in a change in the availability of such assets. Based on the Report, we understand that the government also issued a fine of €140,000 to Retelit because the company had belatedly notified the resolution; interestingly, the amount of the fine was determined on the basis of the turnover of the company generated with the strategic assets only, as opposed to the overall turnover.

On 8 August 2018, the government authorised Leonardo SpA to grant to Rohde & Schwarz GmbH & Co KG (a German company specialised in the fields of electronic test equipment, broadcast and media, cybersecurity, radio monitoring, radiolocation and radio communication) a licence to develop new radio transmission technologies;<sup>74</sup> on that occasion, however, the government imposed certain specific conditions and prescriptions intended to ensure that the transaction would not undermine the Italian essential and strategic interests of defence and national security.<sup>75</sup>

On 18 April 2019, the government exercised its special powers in the fields of energy, transport and communications by imposing certain prescriptions<sup>76</sup> in relation to the

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things, aircraft and drones; and (3) ensure that the security officer of such is appointed among the three individuals proposed by the Department of Information for Security of the Prime Minister's office. In addition, through the establishment of a special inter-ministerial committee, the government provided for a number of measures aimed at monitoring and controlling compliance with the requirements and conditions imposed on Piaggio Aerospace SpA.

72 See the company's press release of 8 June 2018: [www.retelit.it/public/CMS/Files/4792/PR-Decree-CdM.pdf](http://www.retelit.it/public/CMS/Files/4792/PR-Decree-CdM.pdf).

73 Based on a press release issued by Retelit on 27 April 2018, the winning slate was submitted by a consortium composed of Bousval SCA (a company controlled by Lybian Post Technology Company), Axxion SA and Shareholder Value Management AG, which had also signed a shareholders' agreement among themselves. Another candidate slate was submitted by Fiber 4.0 (which had then flagged the matter to the government) but it was not voted by the majority and therefore only appointed one director.

74 The licence was granted for the purpose of developing the HDR waveform WF (High Data Rate Waveform) as part of the ESSOR programme (the European secure software defined radio programme) launched by the Member States of the Organisation for Joint Armament Cooperation, which governs the cooperation activities in relation to defence equipment programmes between Italy, France, Belgium, Germany, Spain and the United Kingdom in the field of armaments.

75 Public disclosure and the press release issued by the government do not provide further details in relation to the conditions and prescriptions imposed on the transaction. However, the Report states that a proposal was made to condition the authorisation on the German government's formal adherence to the ESSOR programme.

76 The government's press release did not elaborate on what such prescriptions consisted of, but only indicated that the special powers were exercised for the purpose of protecting the strategic interests of the Italian

proposed acquisition of the 48.24 per cent stake held by Uniper Global Commodities SE (a German international energy company active in the business of generating, transmitting and distributing natural gas, electricity, water and district heating) in the share capital of OLT Offshore LNG Toscana SpA (the Italian company that owns and operates the floating regasification terminal located off the Italian coast between Livorno and Pisa) by First State SP Sàrl.

More recently, on 26 June 2019, the government also exercised for the first time its special powers introduced by the First 2019 Decree in relation to 5G technologies by imposing specific prescriptions<sup>77</sup> on the agreement entered into between Fastweb SpA (the Italian provider of network telecommunications services) and Samsung Electronics Co Ltd (the South Korean multinational electronics company) for the design, supply, configuration and maintenance of software equipment relating to radio components and core networks necessary for the implementation of the 5G fixed wireless access network in the cities of Bolzano and Biella.

## ii Cases in which the government decided not to exercise its special powers

As noted, in most<sup>78</sup> of the other disclosed cases in which the government was notified of a transaction under the Law it resolved not to exercise its special powers, although seldom providing sufficiently detailed reasoning for the underlying decision. We set out some examples.

On 23 October 2014, the government declared that it would not exercise its special powers in relation to the reorganisation of the infrastructure investments of Cassa Depositi e Prestiti SpA (a state-controlled holding company),<sup>79</sup> entailing the transfer of its share interest in Terna SpA (the Italian electricity grid operator) to CDP Reti Srl (a subsidiary of Cassa Depositi e Prestiti SpA, which already held a controlling stake in Snam SpA, the gas transport infrastructure operator); nor would it exercise its special powers in the subsequent sale of a substantial minority interest in CDP Reti Srl to State Grid Europe Limited (a subsidiary of State Grid Corporation, a state-owned Chinese company). A government report submitted to Parliament on 23 December 2016,<sup>80</sup> providing an update on the application of the Law, disclosed that the coordination group (i.e., the inter-ministerial office assisting the government

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State. However, based on publicly available press reports, it appears that these included: (1) the preservation of the infrastructure's strategic role in the Italian economy; (2) the maintenance of the OLT regasification plant off the Livorno coast; and (3) an obligation to notify the government in advance of any major changes in OLT Offshore LNG Toscana SpA's governance structure.

77 The press release issued by the government does not detail nor explain the prescriptions imposed. Based on press reports, it appears that the government approved the transaction on condition that, among other things, Fastweb SpA: (1) merges the corporate security function in the governance processes; (2) carries out audits for the purpose of confirming the absence of functional interactions between core and experimental networks, as well as allows monitoring actions, if deemed necessary; (3) submits to the government at the end of any testing activities the results of the audits carried out; (4) provides the government with regular updates, within 60 days as of 26 June 2019 and every six months thereafter, over compliance with certain security rules; and (5) promptly communicates any intention to expand the system architecture.

78 In the remaining cases, the simplified procedure envisaged for intra-group transactions (in respect of which the government may not exercise its powers except in extreme cases) was followed.

79 Press release available at [www.sitiarcheologici.palazzochigi.it/www.governo.it/dicembre%202016/www.governo.it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n34/1000.html](http://www.sitiarcheologici.palazzochigi.it/www.governo.it/dicembre%202016/www.governo.it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n34/1000.html).

80 Available at [www.camera.it/leg17/494?idLegislatura=17&categoria=249&tipologiaDoc=elenco\\_categoria](http://www.camera.it/leg17/494?idLegislatura=17&categoria=249&tipologiaDoc=elenco_categoria).

in the review process) recommended that the companies involved in the overall transaction proceed carefully so as to ensure the functioning and security of energy procurement, the maintenance of network efficiency and the protection of confidentiality of sensitive data and strategic information held by CDP Reti Srl and its subsidiaries. However, the government decided not to exercise its special powers altogether, as it concluded it was not appropriate to impose restrictive measures on the transaction.

Similarly, on 29 April 2015, the government confirmed that it would not exercise its special powers under the Law in relation to the disposal of up to 40 per cent of the share capital of INWIT SpA (the company operating Telecom Italia SpA's wireless tower network) by means of an IPO. The government explained that its analysis found there to be no material issues regarding the envisaged transaction.<sup>81</sup>

In the course of 2015, the government was also notified of several transactions concerning the proposed construction of a subterranean natural gas storage facility in Italy. In each case, the government decided not to exercise its powers, although in the first situation it provided some limited indication as to the practical application of the criteria for the exercise of its special powers. Specifically, in the first instance, the government received a notification concerning a reverse merger by incorporation of Gestioni e Partecipazioni Srl (a company that, according to the press, was controlled by the Italian bank Intesa Sanpaolo SpA), Gestioni Partecipazioni Old Srl and Petren Srl into Ital Gas Storage Srl (the licensee for the construction of the gas storage facility). Then, on 30 June 2015, the government concluded that the storage activity was subject to specific EU provisions (regardless of the shareholding structure of the relevant operator) and therefore declined to exercise its special powers. A few weeks later, the government was also notified of a share capital increase of Ital Gas Storage reserved to Sandstone Holding BV (controlled by an infrastructural investment fund managed by Morgan Stanley, which was reported to be a non-EEA person); on 6 August 2015, the

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81 Other cases in which the government concluded it would not exercise its special powers under the Law include: (1) the merger of Aeroporto di Firenze SpA (which operates Florence airport) into Società Aeroporto Toscano Galileo Galilei SpA (which operates Pisa airport); (2) the acquisition of the telecommunications towers business of Wind Telecomunicazioni SpA by Abertis Infrastructures SA; (3) the transfer of B-Max Srl's know-how in the manufacturing of defence-related materials; (4) the partial and proportional demerger of Vitrociset SpA (a company active in mission-critical, business-critical or life-critical systems for homeland security, counterterrorism and combating crime, space applications and transport of goods and passengers) resulting in the transfer of the share interests in Salaria Real Estate Srl and Tiburtina Real Estate Srl to the demerged company's shareholders (Ciset Srl and Finmeccanica SpA). The demerger was reported to be integral to a corporate reorganisation of Ciset group aimed at the entry of a new controlling shareholder interested only in the group's industrial business; (5) the partial demerger of Rete Ferrovie dello Stato SpA (which owns and operates the rail network), entailing the transfer of a business unit (consisting of the electricity grid related to the rail network) to SELF Srl and the subsequent transfer of SELF Srl to Terna SpA (the Italian electricity grid operator); (6) Terna SpA's acquisition of certain of A2A Gencogas SpA, AIM Vicenza SpA and Dolomiti Energia Holding SpA's high-voltage power stations; (7) the acquisition by F2I SGR SpA (an Italian infrastructure fund) of Infracom SpA (an Italian telecommunications service provider) from Serenissima SpA (the Abertis subsidiary operating a motorway in northern Italy); (8) the granting of a licence by Leonardo SpA in favour of the Ministry of Defence of the Republic of Egypt and the Egyptian Armed Forces to use intellectual property rights relating to the tool ART-CM117E Advanced, which allows reprogramming of the encryption algorithm adopted by the CM117-E devices (a multiprotocol digital voice and data crypto device for land, naval and airborne tactical applications); and (9) the acquisition by Leonardo SpA of a 98.54 per cent stake in the share capital of the aforementioned Vitrociset SpA through the exercise of a pre-emption right.

government decided not to exercise its special powers in respect of this transaction (no specific reasoning was provided). Finally, the government was notified that the construction of the gas storage facility would be carried out by means of a project financing transaction, whereby the lenders would be granted security interests upon certain (unspecified but presumably strategic) assets; in this case, on 23 December 2015, the government concluded that the public interest in the security and continuity of the functioning of the national natural gas system was adequately protected and again declined to exercise its special powers.

On 22 September 2015, the government decided not to exercise its special powers in relation to the creation of a joint venture between CK Hutchinson Holdings Limited and VimpelCom Ltd concerning their respective Italian telecommunications operations. This joint venture was followed by a merger between the parties' respective Italian telecommunications subsidiaries, namely H3G Italia SpA and Wind Telecom SpA. Upon clearing the creation of the aforementioned joint venture, the government provided some recommendations as to the information that the parties would have to include in the notification of the merger under the Law, which to some extent may be regarded as advance notice of the conditions that the merger should meet or be subject to. Among other things, the government recommended that the parties provided specific information on the strategic planning on business and investments, with particular regard to the effects of the transaction on the national territory, technology and employment, and indicated also that the proposed strategy should not result in the transfer abroad of management and security functions that could undermine national security and continuity of services. Similarly, on 2 August 2018, the government did not exercise its special powers in relation to the subsequent acquisition by CK Hutchison Holdings Limited of the exclusive control over CKH Luxembourg Sàrl (the corporate entity whereby CK Hutchison and VimpelCom (now VEON) had established the mentioned joint-venture) and, therefore, of Wind Tre SpA (the Italian communications company resulting from the aforesaid merger between H3G Italia SpA and Wind Telecom Italia SpA). According to the Report, the government imposed the same recommendations issued in connection with the 2015 establishment of the joint venture. On 19 October 2017, the government also decided not to exercise its powers in the communications sector in relation to the project pursued by 2i Fiber SpA (a company controlled by infrastructure funds F2i SGR SpA and Marguerite) to create a communications business-to-business hub through the acquisition of Infracom SpA, MC-Link SpA and KPNPQWEST Italia SpA (which provide information and telecommunication technology services, including through their optical fibre network and data centres). Subsequently, on 8 August 2018, the government also decided not to exercise its special powers in relation to the acquisition by Irideos SpA (the company resulting from the merger of the above-mentioned entities into 2i Fiber SpA) of the entire share capital of Clouditalia Telecomunicazioni SpA (a company specialised in offering integrated telecommunications and cloud computing services).

On 10 April 2018, the government decided not to exercise its powers in relation to the acquisition by Leonardo SpA of the know-how relating to a naval transit security product owned by Orizzonte Sistemi Navali SpA (a joint venture between Leonardo and Fincantieri SpA, another state-controlled shipbuilding company), on grounds that the transaction did not raise any specific risk.

Finally, on the same day, the government decided not to exercise its special powers in relation to the proposed acquisition by 2i Towers SpA (a vehicle participated by F2i – Fondi Italiani per le Infrastrutture SGR SpA (the Italian infrastructure investment fund)

and Mediaset SpA (the Italian mass-media group)) of the exclusive control over EI Towers SpA (the Italian company owning and operating a large network of broadcasting towers and mobile sites across Italy).<sup>82</sup>

### iii The *Telecom/Vivendi* case

A review of the developments in the relationship between Vivendi SA, the French media conglomerate, and Telecom Italia SpA, the Italian incumbent owning the fixed-line telecommunications network and controlling two subsidiaries whose activities, according to the government, are included in the security and defence sector, provides helpful indications on the approach that the government may take as regards the exercise of its special powers, including the extent to which political factors may influence government decisions.

Between 2015 and 2016, Vivendi progressively built a 23.9 per cent equity stake in Telecom Italia. In connection with the general meeting of Telecom Italia of 4 May 2017, which was convened to appoint the company's new board of directors, the candidate slate submitted by Vivendi won by a slight margin of votes and, as a consequence, Vivendi managed to appoint 10 of the 15 members of Telecom Italia's board of directors.<sup>83</sup>

Following the resignation of Telecom Italia's CEO, on 27 July 2017, the board of directors of Telecom Italia temporarily granted the relevant powers to its then chairman (who was (and still is) also Vivendi's CEO) and acknowledged that Vivendi had started to exercise powers of 'direction and coordination' over the company.<sup>84</sup> This board resolution triggered significant criticism in the Italian media and among politicians, emphasising the perceived imbalance between the degree of exposure of Italian targets to potential takeovers relative to the challenges experienced by Italian companies investing abroad, particularly in France.<sup>85</sup>

In the wake of these discussions, on 2 August 2017, the government issued a press release stating that, at the request of the Ministry of Economic Development, it had opened

82 However, the government requested the buyer to submit the industrial plan promptly after its adoption.

83 By a decision adopted on 30 May 2017, the European Commission ruled that, as a result of the shareholder vote on the appointment of the new Telecom Italia board of directors, Vivendi had acquired de facto control over Telecom Italia pursuant to the EUMR and the Commission authorised the acquisition subject to the divestiture of an asset owned by Telecom Italia.

84 'Direction and coordination' as a concept is peculiar to Italian corporate law; although there is no statutory definition, it is generally maintained that an entity exercises direction and coordination powers over another company where a significant part of the management decisions of the latter is continuously and substantively taken or influenced by the management of the former, despite being formally implemented by the management of the latter. The direction and coordination regime entails the liability of the entity abusively exercising direction and coordination powers in respect of the company's shareholders (for any prejudice caused to its profitability and the value of their investment) and in respect of the company's creditors (for any impairment to the integrity of the company's assets).

85 On 26 July 2017, the French Minister for the Economy and Finance announced that France would temporarily nationalise the STX France shipyard, previously owned by South Korea's STX, which had been acquired by Fincantieri SpA (an Italian shipbuilding company controlled by the Italian Ministry of Economy and Finance) in the context of STX's bankruptcy proceedings. The decision gave rise to strident reactions by the Italian government, which were eventually settled through an agreement between the two governments pursuant to which (1) Fincantieri would take control of STX by acquiring 50 per cent of the shares (the remaining shares being acquired by the French state (34 per cent), Naval Group (10 per cent), STX employees and local suppliers) and borrowing a 1 per cent share interest from the French state for 12 years and (2) Italy and France would also explore the possibility of combining Fincantieri and Naval Group's respective military business.



an investigation as to whether Telecom Italia was required to notify the government of the mentioned resolution acknowledging Vivendi's direction and coordination. In parallel, the government conducted an investigation as to whether Vivendi's acquisition of its equity interest in Telecom Italia also required any notification to the government under the Law. Separately, on 4 August 2017, the Italian securities commission (CONSOB) requested Vivendi to clarify whether it exercised *de facto* control<sup>86</sup> over Telecom Italia.<sup>87</sup>

Pending the investigation, Vivendi notified the government on 15 September 2017, for purposes of the government powers in the defence and national security sectors, of its equity interest in Telecom Italia above the relevant threshold, which Vivendi had acquired between 2015 and 2016. On 16 October 2017, the government concluded that Vivendi's acquisition fell within the scope of the Law, because Telecom Italia owns controlling interests in two companies performing confidential security activities on behalf of the government, namely Telecom Italia Sparkle SpA (a company operating 530,000 kilometres of optical fibre cables, including major submarine cables) and Telsy Elettronica e Telecomunicazioni SpA (an ICT security solutions and service provider). The government further found that Vivendi's equity interest raised a threat of serious prejudice to the essential interests of defence and national security and resolved to exercise its powers. In particular, the government imposed conditions and prescriptions on the governance of Telecom Italia, Telsy and Sparkle, intended to ensure, among other things, the independence of the corporate functions related to national security,<sup>88</sup> the appointment of qualified Italian citizens to certain sensitive positions,<sup>89</sup> the maintenance on the Italian territory of certain activities<sup>90</sup> and to ensure that certain activities are adequately

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86 Under Italian corporate law (Article 2359 Civil Code), a company is controlled by another company if the latter (1) holds the majority of the voting rights at the former's ordinary shareholders' meeting, (2) holds sufficient voting rights to exercise a dominant influence at the former's ordinary shareholders' meeting, or (3) exercises a dominant influence on the former pursuant to particular contractual provisions between them.

87 In its reply to CONSOB, Vivendi denied the exercise of control over Telecom Italia. However, on 13 September 2017, CONSOB found otherwise; Vivendi appealed this decision before the Administrative Court of Latium in Rome, which however confirmed CONSOB's findings by a judgment dated 17 April 2019. Vivendi has also denied that it exercised control over Telecom Italia for accounting consolidation purposes pursuant to International Financial Reporting Standards 10, which establishes principles for presenting and preparing consolidated financial statements.

88 The government ordered the creation of a corporate organisation for each of Telecom Italia, Sparkle and Telsy, to which the corporate operations in the national security sector are to be entrusted, requiring that it be granted suitable financial and labour resources.

89 The government required that one member of the board of directors at each of Telecom Italia, Sparkle and Telsy should hold only Italian citizenship, hold a specific security certification, receive the powers to manage the corporate security business and receive government approval as to his or her suitability for the purposes of the protection of the essential interests of defence and national security.

90 Notably the operation and security of the networks and of the services supporting the strategic activities, as well as the security operations centre, the computer emergency response team, the data operations centre, the network operations centre, the information operations centre and the other data centres and logistics and information security devices ensuring the confidentiality and integrity of the corporate data.

developed;<sup>91</sup> the government also imposed the creation of a monitoring committee composed of government representatives to oversee compliance with the prescriptions set forth in the decree.<sup>92</sup> Vivendi has filed an administrative appeal against this government decision.

Similarly, on 10 October 2017, Telecom Italia notified the government of the aforementioned shareholders' resolution of 4 May 2017, electing a new board of directors, and board resolution of 27 July 2017, which acknowledged that Vivendi had started exercising 'direction and coordination' powers over Telecom Italia. As a result, on 2 November 2017, the government exercised its powers under the Law, though this time in connection with the strategic assets that Telecom Italia holds in the communications sector. In particular, the government found that Vivendi had acquired control of Telecom Italia and, in light of the 'different industrial mission' pursued by Vivendi, this could cause changes in the organisational and strategic choices made by Telecom Italia that would be relevant to the functioning and security of the fixed-line telecommunications network and thereby could seriously undermine the public interest protected by the Law. Accordingly, the government imposed on Telecom Italia the adoption of suitable industrial commitments<sup>93</sup> and an obligation to notify proposed transactions involving strategic assets;<sup>94</sup> the government also provided that the same monitoring committee created in connection with Vivendi's notification be also granted the power to monitor compliance with this additional set of prescriptions. Telecom Italia has filed an administrative appeal against this government decree.

On 8 May 2018, the government issued a €74.3 million fine to Telecom Italia for failing to timely notify the adoption of the resolutions. The government determined the amount of the fine with reference to the aggregate turnover of Vivendi and Telecom Italia relating exclusively to the relevant strategic assets in the telecommunications sector: in other words, it did not consider the entire turnover of both companies (as a literal reading of the Law could suggest) but only a portion (€74.3 million was reported to correspond to 1 per cent of the relevant turnover).<sup>95</sup> Telecom Italia has appealed this government decision to the Administrative Court of Latium in Rome, which on 4 July 2018 and then on 23 May 2019 temporarily suspended the fine, pending a decision on the merits. Moreover, Telecom

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91 For instance, the adoption of a suitable investment and development plan for the operation, maintenance and modernisation of the network and systems (including submarine cables and internet exchange point) and the cryptographic products and solutions, to be submitted in advance to the monitoring committee established under the decree.

92 Although Vivendi failed to timely notify the government of the acquisition of stake in Telecom Italia for the purposes of the government special powers in the fields of defence and national security, at the time Vivendi notified the transaction to the government, the Law did not expressly provide that in event of failure to notify a transaction or resolution, the investor or the company could receive a fine (creating a misalignment with the sector of energy, transportation and communications). The government sought to address this discrepancy through the 2017 Decree but did not apply this retroactively; therefore, Vivendi could not be sanctioned.

93 Notably, the adoption of development, investment and maintenance plans intended to ensure the functioning and integrity of the network, the continuity of the universal service provision and the satisfaction of the general interest needs in the medium and long term.

94 In particular, the government required Telecom Italia to notify it of any change in the corporate governance of the company and the proposed sale of any asset that could affect the control and functioning of the network and the continuity of the universal service.

95 This is consistent with the criteria followed to determine the amount of the fine issued to Retelit SpA (see Section VII.i, above), where the government only considered the turnover generated with the strategic assets held by the company.

Italia also challenged the government's decision imposing the mentioned prescriptions on the company, by means of an appeal in front of the Council of State (Italy's supreme administrative court), before which the matter is currently pending.

In a press release Telecom Italia issued on 8 May 2018, it argued that the qualification of the relationship between Vivendi and Telecom Italia was irrelevant for the purposes of Telecom Italia's notification obligations under the Law and that these are governed by a provision that is different from that referred to in the government's decision. This line of argument would seem to suggest that Telecom Italia agreed with the argument made in Section II.ii (i.e., that the Review Regulation appears inconsistent with the Law and that the government's approach appears to lead to discriminatory results regarding transactions involving the acquisition of a strategic asset implemented through the acquisition of shares (which plainly falls outside the scope of the Review Regulation) as opposed to resolutions adopted by companies holding the same strategic asset).

Moreover, this enforcement approach, to the extent that it is applied outside the security and defence sectors, would be likely to infringe the TFEU.

#### **iv Expected future developments**

Before the *Telecom/Vivendi* case, the government's special powers under the Law had, according to public opinion, been perceived as somewhat insufficient to protect the national interests underlying foreign investments in key sectors of the Italian economy.

A first formal step towards a possible revision of the Law had come with a report by the Ministry for Parliamentary Relations, dated 22 December 2016, in which the government provided its annual update on the exercise of its special powers. The report stated that the toolkit provided under the Law belatedly becomes available to the government, when all key decisions have already either been defined or made by the relevant players. Accordingly, the report suggested the pursuit of a unified and consistent government approach, to be implemented by following and addressing the most significant decisions of the relevant companies from an earlier stage, so that the exercise of the government's special powers would only constitute the final step of a more structured process.

In addition, during the first months of 2017, the Ministry of Economic Development called repeatedly for the introduction of statutory 'anti-raid' provisions, including by reforming the special powers under the Law, mostly as a reaction to the perceived weakness of the Italian economic system in the face of aggressive takeovers attempted or completed by foreign investors.

These announcements were followed by the approval on 16 May 2017 of two motions by the lower house of Parliament,<sup>96</sup> requesting the government to revise and enhance its

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96 Both motions particularly stressed the imbalance between the value of acquisitions of Italian companies by foreign investors and the acquisitions of foreign companies by Italian investors; they also suggested that foreign investments often pursue national strategic assets through hostile takeovers that deprive the targets of control over technologies and industrial and commercial know-how essential to the Italian economic system. These parliamentary motions, therefore, urged the government to revise and enhance the existing set of special powers under the Law, including (1) the extension of the government's special powers to further fields (banks and financial services); (2) the introduction of more stringent disclosure and notification obligations for foreign investors, possibly preceded by an effective negotiation with the foreign investor to discuss its investment plan, with a view to ensuring the permanence in Italy of strategic assets, know-how and related jobs; and (3) the submission of a proposal to the European Union to coordinate national legislation on special powers.

powers to control investments by foreign companies. Such motions first resulted in the adoption of the 2017 Decree, which, however, as noted above, remains largely not applicable, at least as regards investments in high-tech assets because the government has not yet adopted the necessary implementing regulation.

On the other hand, the adoption of the 2019 Decrees, which expanded the scope of the government's powers to investments in 5G technologies, may be regarded as a more meaningful attempt of Italy to address growing concerns on the threat that certain foreign investments pose in the fields of defence and national security. In particular, the changes to the Law introduced by the 2019 Decrees may be explained as an initiative intended to address the strong concerns expressed by certain institutions and member states of the European Union, as well as US officials, in relation to Italy's signing up in March 2019 to China's 'Belt and Road Initiative'. The First 2019 Decree is a very recent piece of legislation and its impact still needs to be assessed. To date, the government powers relating to 5G technologies have been exercised only once; however, in the near future, given the expected expansion and impact of 5G technologies in a number of contexts, the new government powers and their practical application are likely to be duly tested.

More generally, following the general elections held in March 2018, the new cabinet, in addition to adopting the 2019 Decrees, seems to have taken (or at least shown) a stronger attitude towards the protection of strategic assets for the Italian national interests. Indeed, during the first 12 months the new cabinet has been in office, it exercised its powers more frequently compared to previous governments.

Finally, whether the incumbent government will seek to further enhance the existing set of powers, just apply them on more vigorous terms or leave the current regime as it currently stands, it will need to take into account the adoption of regulation No. 2019/452 of 19 March 2019 by the European Parliament and the Council establishing a framework for the screening of foreign direct investments into the European Union, which regulation will enter into force on 11 October 2020.<sup>97</sup> Pursuant to this regulation, although Member States would be entitled to maintain their existing foreign investment control regimes,<sup>98</sup> the European Commission would also become empowered to screen foreign investments that are 'likely to affect projects or programmes of Union interest on grounds of security or public order' and would be entitled to 'issue an opinion addressed to the Member State where the foreign direct investment is planned or has been completed', which would have to 'take utmost account' of that opinion and, if the notifying Member State disregards it, provide an explanation.<sup>99</sup> Accordingly, the European Commission envisages a framework whereby the domestic and European regime would coexist, subject to a cooperation mechanism: in particular, each Member State screening a foreign direct investment under its domestic regime should notify the European Commission and the other Member States by providing certain information

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97 Available at: [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN).

98 Pursuant to Article 3.1 of the regulation, 'Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order'.

99 Pursuant to Article 8.3 of the regulation, 'projects or programmes of Union interest shall include those projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order'. A list of such programmes and project is provided for in an annex to the regulation.

as soon as possible.<sup>100</sup> If any Member State considers that such foreign direct investment is likely to affect its own security or public order, or has information relevant for the purpose of carrying out the screening procedure, within 35 calendar days of receipt of the notice it may provide comments to the notifying Member State, which shall duly consider such comments. The Member State providing such comments is also required to simultaneously send those comments to the European Commission. If the European Commission believes that the notified foreign direct investment is likely to affect security or public order in more than one Member State, or is in possession of relevant information concerning such foreign direct investment, it would be entitled to issue an opinion to the notifying Member State within 35 calendar days of receipt of the notice, which would have to duly consider that opinion.

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100 Pursuant to Articles 6.1 and 9.2 of the regulation, such information include: '(a) the ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital; (b) the approximate value of the foreign direct investment; (c) the products, services and business operations of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed; (d) the Member States in which the foreign investor and the undertaking in which the foreign direct investment is planned or has been completed conduct relevant business operations; (e) the funding of the investment and its source, on the basis of the best information available to the Member State; and (f) the date when the foreign direct investment is planned to be completed or has been completed'.

## ABOUT THE AUTHORS

### **GIUSEPPE SCASSELLATI-SFORZOLINI**

*Cleary Gottlieb Steen & Hamilton LLP*

Giuseppe Scassellati-Sforzolini is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in the firm's Rome office. He is active in public and private mergers and acquisitions and capital markets transactions, corporate governance, securities and banking regulation, competition law and EU state aid law. He has worked on takeover bids, tender offers, negotiated acquisitions, divestitures, joint ventures and private equity investments involving Italian companies, particularly in regulated sectors such as financial services, energy, media, telecommunications and airlines. He has co-authored several publications on business law issues.

He graduated in law with honours from the University of Bologna in 1984 and obtained an LLM degree from the University of Michigan Law School in 1987.

Mr Scassellati-Sforzolini has been a member of the Bar in Italy since 1986 and a member of the New York Bar since 1988. He is admitted to practise before the Italian higher courts.

### **FRANCESCO IODICE**

*Cleary Gottlieb Steen & Hamilton LLP*

Francesco Iodice is an associate at Cleary Gottlieb Steen & Hamilton LLP, based in the firm's Rome office. Mr Iodice's practice focuses on corporate and financial transactions, with particular regard to mergers and acquisitions, as well as financing, restructuring and insolvency matters.

Mr Iodice graduated in law with honours from the University of Siena in 2007. In 2006, he obtained a diploma in legal studies from Worcester College, University of Oxford, and in 2008, he graduated with distinction from St Catherine's College, University of Oxford, receiving an MJur, for which he was awarded the Clifford Chance Prize for best overall performance.

Mr Iodice has been a member of the Milan Bar since 2010.

**SIMONE MARCON**

*Cleary Gottlieb Steen & Hamilton LLP*

Simone Marcon is a trainee attorney-at-law at Cleary Gottlieb Steen & Hamilton LLP, based in the firm's Rome office. Mr Marcon's practice focuses on corporate and financial transactions.

Mr Marcon graduated in law with honours from the University of Turin in 2017.

**CLEARY GOTTLIEB STEEN & HAMILTON LLP**

Piazza di Spagna 15

00187 Rome

Italy

Tel: +39 6 69 52 21

Fax: +39 6 69 20 06 65

[gscassellati@cgsh.com](mailto:gscassellati@cgsh.com)

[fiodice@cgsh.com](mailto:fiodice@cgsh.com)

[smarcon@cgsh.com](mailto:smarcon@cgsh.com)

[www.cgsh.com](http://www.cgsh.com)



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