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Chapter 10

ITALY

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I INTRODUCTION

Foreign investments (mainly, although not exclusively, by non-EEA[2] 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, 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,[3] such investments still represent an essential part of the economy (according to World Bank research, in 2017, foreign direct investment net inflows amounted to US$19.8 billion).[4] Although the new investment control regime has been in force for a relatively short period, and thus conclusive remarks on its effects on foreign investments can only be based on a limited set of information and data, the overall impression after the first six years of application is that foreign investors have not considered this regime to be a deterrent; however, in recent cases, the government has relied on these powers to address issues of a seemingly more political nature underlying the relevant investments. 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 2015 acquisition of the telecommunications tower business unit of Wind Telecomunicazioni SpA (the Italian telecommunications company) by Abertis Infraestructuras SA (the Spanish conglomerate);

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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 http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=IT&view=chart.

b the 2015 creation of a joint venture between CK Hutchinson Holdings Limited (the Hong Kong conglomerate controlling H3G SpA, an Italian telecommunications operator) and VimpelCom Ltd (the global provider of telecommunications services controlling Wind Telecom SpA, an Italian mobile and fixed-line operator) relating to their Italian telecommunications operations, which was followed by a merger of their respective Italian subsidiaries;

c 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;

d 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);

e 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);

f the proposed spin-off of Telecom Italia's fixed-access network and related infrastructure into a separate company;

g the acquisition of a 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); and

h the announced 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).

II FOREIGN INVESTMENT REGIME

As a general rule, investments in Italian companies active in the fields of defence and national security, 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 government is required to determine periodically[5] which assets are subject to the investment regime set forth in the Law. Indeed, as a condition for the Law to become effective, the government is required to identify:

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).

5 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 has not been subject to any change and therefore it is unclear whether this is the result of a specific choice by the government not to amend the list.

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.iii) and any applicable antitrust clearance.[6] However, certain sector-specific regulatory authorisations may be necessary (see Section II.iv).

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).

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[7] and the Ministry of Interior.[8]

6 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 €495 million and the individual turnover of at least two of the companies involved in the transaction exceeds €35 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.

7 Specifically, these activities are defined as the study, research, design, development, production, integration and support to the life cycle (including logistics) of (a) certain systems and materials, as further specified in the 2014 Decree, including (1) command, control, computer and information (C4I) systems, (2) advanced detectors integrated into C4I networks, (3) manned and unmanned systems that are suitable to oppose improvised explosive devices, (4) advanced weapons and aeronautical systems, integrated into C4I networks, and (5) aerospace and military navy propulsion systems ensuring high performance and reliability; and (b) 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.

8 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 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.

With respect to companies performing any such strategic security activity (or holding any such asset), in the event that fundamental interests of national defence or security could be materially affected, 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), 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;[9] 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, winding up and amendments concerning the corporate purpose or equity ownership caps in the by-laws of certain state-controlled companies,[10] or relating to the transfer of ownership or other rights on assets or the creation of encumbrances on assets).

ii 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,[11] the overall regime applies only to investments made by non-EEA persons.[12]

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[13] (i.e., those entities authorised to provide the related services).[14]

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9 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.

10 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.

11 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.

12 Non-EEA persons are defined by the Law as any individual or entity that is not resident, is not domiciled and does not have its registered office, headquarters or centre of main interest in any EU or EEA Member State, nor is it established therein.

13 In certain fields (such as gas and electricity), however, the law requires 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.

14 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

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[15] that would result in a change of ownership or control of the asset,[16] 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;[17] 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 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 (the Review Regulation),[18] the government could exercise its special powers under point (a) (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

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.

15 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.

16 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).

17 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).

18 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'.

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.

iii 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, dual-use technologies, 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, the ability of the government to exercise its special powers depends on identifying 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; 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.ii).

iv Reciprocity

Pursuant to a general principle of Italian law,[19] 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

19 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.

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 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[20] and breakthrough rule[21] 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.[22] 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.

v 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.

20 Pursuant to Article 104 of Legislative Decree No. 58 of 24 February 1998 (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.

21 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.

22 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.

The sectors in which such obligations may be required include:

a banking and investment services;[23]
b telecommunications;[24]
c broadcasting;[25]
d gas networks;[26] and
e electricity networks.[27]

Moreover, in certain fields the law sets limits on the acquisition of controlling interests by non-EU persons (for instance, as regards airline companies[28] and television broadcasters).[29]

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).

23 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.

24 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.

25 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.

26 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.

27 Pursuant to Article 36 of Legislative Decree No. 93 of 1 June 2011 (which also implements EU Directive 2009/72), 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.

28 Pursuant to Article 4 of EU Regulation No. 2407/1992, an EU airline company 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.

29 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.

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, if the ultimate foreign investor originates from a non-EEA country, such a structure may be insufficient in the event that the intermediate EEA company does not qualify as an EEA person for the purposes of the Law.[30]

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[31] or the obligation to launch a tender offer in cases of acquisition effected while acting in concert.[32]

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).

30 See footnote 12.

31 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).

32 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.

i Process

The Law requires that the following be filed[33] 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;[34] and

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.[35] Purchases of equity interests in a listed company active in the fields of defence or national security trigger the notification obligation if they exceed the thresholds of 3, 5, 10, 20 or 25 per cent.

The notification of the resolutions or transactions must be made through *ad hoc* forms issued by the government[36] and filed by means of certified email.

The review procedure is coordinated by the Department of Administrative Coordination (a specific government office),[37] 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 15 business days begins,[38] during which the ministry in charge of the initial assessment carries out its review of the proposed investment or resolution and, taking into account the work of the coordination group, formulates a proposal to the Presidency of the Council of Ministers (and a draft of the related government decree).

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.

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

34 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.

35 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.

36 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 www.governo.it/Presidenza/DICA/6_EVIDENZA/golden_power/DSG180215 per cent20_modulistica_golden_power.pdf.

37 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 the relevant company belongs in).

38 This term may be extended only once, for a period of 10 business days, if the government requests additional information.

Until completion of the review procedure, voting rights[39] 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).[40] 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,[41] to allow the government to conduct its review properly and to make an informed decision by the statutory deadline.[42]

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.[43]

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.[44]

39 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.

40 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.

41 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.

42 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.

43 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.

44 The fine shall be at least 1 per cent of the turnover resulting from the latest financial statements. The Law did not expressly provide that this fine also applies in cases of failure on the part of the purchaser or the company holding the strategic security activity in the fields of defence and national security to notify the government of the relevant resolution or transaction (thereby causing a misalignment with the rules applicable in the fields of energy, transportation and communications). The 2017 Decree amended the Law to clarify that this failure can henceforth be punished with this fine.

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,[45] 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 2017 Decree clarified that the government may take into account whether the foreign investor is controlled by the government of a non-EU country, including as a result of significant public funding); 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.

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, since 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).

45 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'.

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,[46] Italy introduced a specialised section within several major courts[47] 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 set out under the Law envisages a particularly tight time frame within which the government is required to carry out its assessment (in some cases, it is likely that 15 business days will not be sufficient). Therefore, it cannot be ruled out that the government may elect to suspend the transaction in the event that, upon expiry of the review deadline, it has not completed its review or collected sufficient information to conclude that no prejudicial consequence may 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.

In light of the above, as well as in consideration of standard practice, it seems advisable to approach the government informally prior to submitting an application triggering the start of the review procedure. Prior informal talks may 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 a still a relatively recent piece of legislation and, as far as we are aware, 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

46 Decree Law No. 145 of 23 December 2013, as ratified and amended by Law No. 9 of 21 February 2014.

47 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.

complete the transaction). However, more recently the government has paid greater attention to the transactions notified to it under the Law and adopted a more proactive approach, which has resulted in notable cases in which it exercised its powers.

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.

In particular, on 6 June 2013, the government[48] 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,[49] the appointment of Italian citizens to certain sensitive positions[50] and certain industrial commitments.[51] 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.[52]

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[53] 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 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.[54]

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

49 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 Italy participates in, and (3) a prohibition against reducing or disposing of technological or industrial know-how in certain key strategic activities.

50 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.

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

52 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.

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

54 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 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.

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.[55]

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.[56]

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[57] imposed by the government.

On 7 June 2018, the government imposed certain conditions and prescriptions[58] in relation to the proposed acquisition of Next Ingegneria dei Sistemi SpA (a company providing IT services and products in the industrial areas of defence, space, transportation and telecommunications), which is a key supplier to Leonardo SpA (the state-controlled aerospace, defence and security company previously known as Finmeccanica SpA), by Defence Tech Holding Srl (a company active in the provision of technological solutions and innovative logistics to critical infrastructures).

On the same day, the government also exercised its powers by imposing certain conditions and prescriptions[59] in relation to the resolution of the shareholders' meeting of Rete Telematiche Italiane SpA (Retelit) (a listed company providing data and infrastructure

55 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.

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

57 The nature of these conditions and prescriptions are not in the public domain but – based on press reports – it appears that these included an obligation on the seller to invest the proceeds of the sale in Piaggio Aerospace's military unit.

58 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.

59 See the company's press release of 8 June 2018: https://www.retelit.it/public/CMS/Files/4792/PR-Decree-CdM.pdf.

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.[60] 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' (which would suggest that the company did not believe the notification was due nor that, accordingly, the government was entitled to exercise its powers).

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

As noted, in all 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),[61] 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 recent government report,[62] submitted to Parliament on 23 December 2016, providing an update on the application of the Law, disclosed that the coordination group (i.e., the inter-ministerial office assisting the government 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.[63]

60 Based on a press release issued by Rete Telematiche Italiane SpA of 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. Another candidate slate was submitted by Fiber 4.0 but it was not voted by the majority and therefore only appointed one director.

61 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.

62 Available at www.camera.it/leg17/494?idLegislatura=17&categoria=249&tipologiaDoc=elenco_categoria.

63 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 Infraestructures 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

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 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. As mentioned in Section I, 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 provide 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.

During 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

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, and (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).

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).

Finally, on 10 April 2018, the government decided not to exercise its powers in relation to the acquisition by Leonardo SpA (the state-controlled aerospace and defence company) 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.

iii The Telecom/Vivendi case

A review of the recent 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.[64]

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 is also Vivendi's CEO) and acknowledged that Vivendi had started to exercise powers of 'direction and coordination' over the company.[65] 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.[66]

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64 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.

65 '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).

66 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

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 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[67] over Telecom Italia.[68]

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,[69] the appointment of qualified Italian citizens to certain sensitive positions,[70] the maintenance on the Italian territory of certain activities[71] and to ensure that certain activities are adequately

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.

67 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.

68 In its reply to CONSOB, Vivendi denied the exercise of control over Telecom Italia. However, on 13 September 2017, CONSOB found otherwise and Vivendi appealed this decision before the Administrative Court of Latium in Rome. 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.

69 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.

70 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.

71 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;[72] 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.[73] 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[74] and an obligation to notify proposed transactions involving strategic assets;[75] 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). Telecom Italia has appealed this government decision to the Administrative Court of Latium in Rome, which on 4 July 2018 temporarily suspended the fine, pending a decision on the merits (which is expected in mid 2019).

While the specific grounds on which Telecom Italia's challenge on the merits have not been fully disclosed, in a press release it issued on 8 May 2018, Telecom Italia argued that the qualification of the relationship between Vivendi and Telecom Italia was irrelevant for the

72 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.

73 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.

74 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.

75 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.

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

Even 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.

Although these announcements were followed by the approval on 16 May 2017 of two motions by the lower house of Parliament,[76] requesting the government to revise and enhance its powers to control investments by foreign companies, neither the government nor Parliament has yet taken any formal step, other than the adoption of the 2017 Decree: in fact, although the 2017 Decree sought to expand the category of assets in respect of which the government could exercise its special powers, the government has not yet adopted the necessary implementing regulation.

76 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.

Meanwhile, as a result of the general elections held in March 2018, a new cabinet has been appointed and its intentions on the control of foreign investments have not been disclosed in clear terms. On the one hand, no formal step has been made to reform the Law nor has any intention to proceed in that direction been made public. However, during the few months the new cabinet has been in office, it has already exercised its powers twice,[77] which would seem to indicate a stronger attitude as regards protection of strategic assets.

Finally, whether the new government will seek to 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 proposal made by the European Commission on 13 September 2017 on the adoption of a regulation by the European Parliament and the Council establishing a framework for screening foreign investments in the European Union.[78] Pursuant to the proposed regulation, although Member States would be entitled to maintain their existing foreign investment control regimes, the European Commission would also become empowered to screen foreign investments 'that are likely to affect projects or programmes of Union interest on the grounds of security or public order'.[79] Accordingly, the European Commission envisages a framework whereby the domestic and European regime would coexist, subject to some degree of coordination: in particular, each Member State reviewing a foreign investment under its domestic regime should notify the European Commission and the other Member States within five working days of the start of its review. If any Member State considers that such foreign investment might affect its own security or public policy, within 25 working days it may provide comments to the notifying Member State, which shall duly consider such comments. By contrast, if the European Commission believes that the notified foreign investment might affect projects or programmes of Union interest on the grounds of security or public policy, it would be entitled to issue an opinion to the notifying Member State, which would have to 'take utmost account' of that opinion and, if the notifying Member State disregards it, explain why.

77 Namely, the decision of 7 June 2018 to impose specific prescriptions on the proposed acquisition of Next Ingegneria dei Sistemi SpA by Defence Tech Holding Srl and to impose prescriptions on Reti Telematiche Italiane SpA after the shareholders' meeting of this company on 27 April 2018.

78 https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF.

79 Pursuant to Article 3(2) of the proposed regulation, 'projects or programmes of Union interest shall include in particular those projects and programmes which involve a substantial amount or a significant share of EU funding, or which are covered by Union legislation regarding critical infrastructure, critical technologies or critical inputs'.

Appendix 1

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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.

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