

## The Italian Government's "Golden Share" – Implementation Measures

This memorandum provides an overview on the Italian government's measures adopted for the purposes of implementing the new "golden share" rules introduced by Italian Law Decree No. 21 of March 15, 2012 (as amended and ratified by Law No. 56 of May 11, 2012) (the "Law").

As discussed in more detail in a prior version of this Memorandum,<sup>1</sup> the Law grants to the Italian government certain special powers to veto or condition the purchase of interests in the share capital of, or the implementation of certain extraordinary transactions by, Italian companies that are active in the fields of (i) defense and national security, or (ii) energy, transport, and communications.

The implementation measures adopted thus far are relevant to both the field of defense and national security and the field of communications and, therefore, their effects on the transactions concerning companies active in such fields should be carefully considered.

### I. The Implementation Measures

In order for the Law to become effective, the Italian government was required first to identify (i) the strategic activities for the defense and national security system (the "Security Activities"), and (ii) the networks, plants, assets, and relationships that are deemed strategic for the national interest in the fields of energy, transport, and communications (the "Strategic Assets").

The Security Activities have been identified by means of a Prime Minister Decree dated November 30, 2012 (the "Decree"). The Decree has recently been amended by means of a further Prime Minister Decree dated October 2, 2013, published in the Italian Official Journal of November 13, 2013 (the "Amendment"), which entered into force on November 28, 2013.

By contrast, the Strategic Assets have not yet been identified, although – as explained in more detail below – the Security Activities identified in the Amendment relate to the communications sector.

<sup>1</sup> An initial version of this memorandum was circulated on March 26 and May 17, 2012.

## II. Defense and National Security

The Italian government may exercise its special powers<sup>2</sup> in the field of defense and national security exclusively *vis-à-vis* the companies<sup>3</sup> exercising any Security Activity.

The Decree defines the Security Activities as the study, research, design, development, production, integration, and support of the life cycle (including logistics) of:

- A. the following systems and materials, as further specified in the Decree: command, control, computer, and information (C4I) systems; advanced detectors integrated in C4I networks;<sup>4</sup> manned and unmanned systems that are suitable to oppose improvised explosive devices; advanced weapon systems, integrated into C4I networks, which are indispensable to ensuring an advantage margin over potential adversaries and therefore aimed at security and effectiveness of operations;<sup>5</sup> advanced aeronautical systems, provided with advanced detectors integrated into the C4I networks; and aerospace and military navy propulsion systems ensuring high performance and reliability;<sup>6</sup> and
- B. certain specific technologies (stealth technologies; nanotechnologies; technologies for high thermal degree composite materials; meta-materials technologies; design and production of Frequency Selective Surfaces – FSS) or materials (radar-absorbent materials; FSS radome materials; high thermal degree materials applied to produce space, aeronautical, and nuclear engines; materials to produce satellites, space shields and parts of weapons including launchers; and materials for the abatement of infra-red or acoustic traces).

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<sup>2</sup> The government may: (a) impose specific conditions on the purchase of an interest in any company exercising any Security Activity – by any person – relating to the security of procurement and of information, and the transfer of technologies and export controls; (b) veto the purchase by any person – other than the Italian State (whether directly or indirectly, individually or jointly) – of an interest in the voting share capital in any such company that, given its size, could jeopardize defense or national security; and (c) veto the adoption of resolutions by the shareholders or the board of directors of any such company relating to certain extraordinary transactions (such as mergers, de-mergers, asset disposals, winding-up, and by-laws amendments concerning the corporate purpose or equity ownership caps in certain state-controlled companies). For more information, please see our memoranda of March 26 and May 17, 2012.

<sup>3</sup> For instance, the government exercised its special powers thereunder in connection with the acquisition of the aviation business of Avio S.p.A. by General Electric, by means of a Prime Minister Decree dated June 6, 2013, published in the Italian Official Journal of August 19, 2013.

<sup>4</sup> These include high performance and protection military satellite systems.

<sup>5</sup> These include high reliability and precision advanced missile systems, with emphasis on guiding systems.

<sup>6</sup> Aerospace and military navy propulsion systems are deemed strategic when, in particular, they concern propulsion systems with solid or liquid propellants for space launchers.

### III. The Strategic Security Activities Identified by the Amendment

As noted above, the Italian government has not identified the Strategic Assets yet, *i.e.* the networks, plants, assets, and relationships that are deemed strategic for the national interest in the fields of energy, transport, and communications. As a result, in principle the government may not exercise its special powers<sup>7</sup> in such fields, since their exercise implies the prior identification of the Strategic Assets.

However, the Amendment has supplemented the list of Security Activities set forth in the Decree adding certain assets that, *prima facie*, would appear relevant to the field of communications (and, therefore, included among the Strategic Assets). In particular, the Amendment identifies the following assets: the networks and plants applied to ensure the provision to end-customers of the universal service as well as broad and ultra-broad band services.

As a result, transactions relating to the communications assets identified by the Amendment should<sup>8</sup> become subject to the enhanced powers held by the government in the fields of defense and national security. Namely, the most relevant effects are that: (i) the government may veto or condition the acquisition of an interest in a company holding any such asset, regardless of the nationality of the investor (*i.e.*, including *vis-à-vis* Italian or EEA<sup>9</sup> investors); and (ii) the government's powers may be exercised even if the investor acquires a non-controlling interest (provided that, however, the size of such interest could jeopardize defense or national security interests).

By contrast, if the assets identified in the Amendment had been included in the regulation that will identify the Strategic Assets in the field of energy, transport and communications, the scope of the government's power would have been subject to tighter limitations.

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<sup>7</sup> Subject to the identification of the Strategic Assets, the Law empowers the Italian government to veto any resolution or transaction by any company owning any such asset that results in a change of ownership or control of the Strategic Asset, provided that: (a) the change of ownership or control could cause an exceptional situation where public interest relating to the safety and operation of any Strategic Asset could be materially jeopardized; and (b) the exceptional situation is not addressed by any relevant domestic or European legal provision. In addition, the purchase by any non-EEA person of a controlling interest (whether individually or jointly) in any company owning any Strategic Asset may be conditioned by the government on the buyer's undertaking certain commitments aimed at protecting the above-mentioned public interests. However, should the acquisition raise an exceptional threat of material prejudice to such public interests (which may not be addressed by commitments undertaken by the buyer), the government can veto the acquisition. For more information, please see our memoranda of March 26 and May 17, 2012.

<sup>8</sup> Although this appears to be the logical result of the Amendment, it is worth noting that the wording used in the Amendment appears somewhat unclear, given that the relevant assets "*are included among the assets that bear a strategic relevance to the communications sector.*" In principle, the assets identified in the Decree should be relevant to the fields of defense and national security.

<sup>9</sup> The EEA (European Economic Area) comprises the 28 members of the European Union as well as Iceland, Liechtenstein and Norway.

### III. Intra-group Exemptions

The Decree clarifies that intra-group transactions are exempted from the scope of the government special powers (without prejudice to the notification requirements,<sup>10</sup> which remain applicable). However, it does not apply in the event that the information available to the government reveals a threat of serious harm to the fundamental interests of defense and national security.

### IV. Repeal of Previous Golden Share Rules

As at the date of entry into force of the Decree, the government's previous special powers<sup>11</sup> in the corresponding fields have been repealed. Accordingly, the "golden share" provisions in the by-laws of certain companies, which had been amended to reflect the special powers previously held by the government but have now become inconsistent with the Law, are no longer effective.<sup>12</sup>

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If you have any questions concerning this memorandum, please contact Giuseppe Scassellati-Sforzolini in our Rome office (+39 06 69 52 21) or Roberto Bonsignore in our Milan office (+39 02 72 60 81), any of our other Italy-based partners and counsel listed under M&A or Capital Markets Practice Areas in the "Practices" section of our website at [www.clearygottlieb.com](http://www.clearygottlieb.com), or any of your regular contacts at the firm.

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<sup>10</sup> Pursuant to the Law, the government must be notified of any relevant resolution or acquisition. In particular, notification of the relevant resolutions must be sent to the government within 10 days, and in any event prior to their implementation, whereas notification of any purchase of interests in any relevant company must be sent to the government within 10 days of the acquisition. Such transactions may be implemented unless the government exercises its powers within 15 days. In the case of non-compliance with the government's decisions, the relevant transactions are null and void and the perpetrators are subject to administrative fines equal to twice the value of the relevant transactions. For more information, please see our memoranda of March 26 and May 17, 2012.

<sup>11</sup> Which powers were set forth in Article 2 of Law No. 474 of July 30, 1994, and Article 4, paras. 228-231 of Law No. 350 of December 24, 2003, and the respective implementing measures.

<sup>12</sup> As a result of the Government identifying the networks and plants applied to ensure the provision to end-customers of the universal service as well as broad and ultra-broad band services as Security Activities, the provisions in the by-laws of the companies holding any such asset which are inconsistent with the Law should have become ineffective. However, the Amendment seems to have caused some degree of uncertainty in this respect as well, to the extent that, pursuant to the Law, such result should have been determined by the specific regulation that the government is required to adopt for the purposes of identifying the Strategic Assets in the fields of energy, transport and communications: it is not entirely clear, indeed, whether, once the government will adopt such regulation and potentially identify further assets in the field of communications, the relevant provisions in the by-laws of the companies holding such assets will then become ineffective or shall be deemed to have been ineffective since the date of entry into force of the Amendment.

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