

The New Italian Government's "Golden Share" - Update¹

May 17, 2012

This memorandum provides a general overview on the new "golden share" rules recently introduced by Italian Law Decree No. 21 of March 15, 2012 (which came into effect on March 16, 2012), as amended and ratified by Law No. 56 of May 11, 2012 (the "Law").

The Law grants to the Italian Government certain special powers² 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.

For the first time, this new legislation sets forth a comprehensive investment control regime in the affected sectors, imposing prior notice to the Government and a waiting period. The prior authorization regime will impact particularly, although not exclusively, investments by non-EEA³ persons.

¹ An initial version of this memorandum was circulated on March 26, 2012

² The Law repeals the current special Government powers (set forth in Article 2 of Law No. 474 of July 30, 1994 and Article 4, paragraphs 228-231, of Law No. 350 of December 24, 2003, and the respective implementing measures), with effect as of the date of the relevant Government regulations (to be adopted by September 11, 2012) identifying the strategic assets for defense and national security and for the national interest in the fields of energy, transportation, and communications. Accordingly, the "golden share" provisions in the by-laws of certain state-controlled companies will also cease to be effective.

³ The EEA (European Economic Area) comprises the 27 member states of the European Union, Iceland, Liechtenstein and Norway.

I. Defense and national security

With respect to companies carrying out strategic activities⁴ for the defense and national security system, in the event that fundamental interests of national defense or security could be materially affected, the Government may:

- (a) impose specific conditions on the purchase of an interest in any such company – by any person – relating to the security of procurement and of information, 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, may jeopardize defense or national security;⁵ 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, assets disposals, winding up, and bylaws amendments concerning the corporate purpose or equity ownership caps in certain state-controlled companies).⁶

Prior to exercising its special powers, the Government shall assess, among other matters, (a) whether the economic, financial, technical and organizational characteristics of the proposed buyer (including consideration of any financing conditions), as well as its business plan, are suitable to regularly carry on the relevant businesses, safeguard their technological portfolio(s) and honor their contractual commitments, and (b) the existence of any links between the prospective purchaser and third countries that do not respect democracy and the rule of law or maintain relations with criminal or terrorist organizations.

⁴ Such activities will be identified by the Government through subsequent decrees by August 13, 2012. Such decrees shall specify which actions or transactions occurring within the same group of companies are not subject to the golden share powers of the Government.

⁵ In which case the buyer may not exercise any right, other than the economic rights attached to the shares, and must dispose of the shares within one year.

⁶ Namely, companies operating in the fields of defense, national security, energy, transport, communications, and other public services.

II. Energy, transport and communications

The Government shall periodically identify the networks, plants, assets and relationships that are deemed strategic for the national interest in the fields of energy, transportation and communications (the “Assets”).⁷

The Law empowers the Government to veto any resolution or transaction by any company owning any Asset that results in a change of ownership or control of such Asset, provided that (a) such change of ownership or control could cause an exceptional situation where the public interest relating to the safety and operation of any Asset may be materially jeopardized, and (b) such 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 Asset may be conditioned by the Government on such buyer undertaking certain commitments aimed at protecting the above-mentioned public interests. However, should the acquisition raise an exceptional threat of a material prejudice to such public interests (which may not be addressed by commitments undertaken by the buyer), the Government may veto the acquisition.⁸

In exercising its special powers, the Government shall assess, among other matters, (a) the existence of any links between the prospective purchaser and third countries that do not respect democracy and the rule of law or maintain relations with criminal or terrorist organizations, and (b) whether the situation resulting from the relevant 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 Asset in question.

III. Reciprocity Clause

Without prejudice to the special powers granted by the Law, the purchase by a non-EEA person of an interest in a company owning any asset identified as strategic by the Government in the fields of defense, national security, energy, transport, and communications is permitted only on the basis of reciprocity conditions and in accordance with the international treaties entered into by Italy or the European Union.

⁷ The relevant Government regulations shall be adopted by September 11, 2012. Such regulations shall specify which actions or transactions occurring within the same group of companies are not subject to the Government veto powers.

⁸ In which case the buyer may not exercise any right other than the economic rights attached to the shares and must dispose of the shares within one year.

IV. Notification procedures

Pursuant to the Law, the Government must be notified of any relevant resolution or acquisition.⁹ 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 interests¹⁰ in any relevant company must be sent to the Government within 10 days of the acquisition.¹¹ Such transactions may be implemented unless the Government exercises its powers within 15 days.¹²

The Government's decisions must be adopted by the Prime Minister and may be appealed to the administrative court of Rome. In 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.¹³

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If you have any questions concerning this memorandum, please feel free to contact Giuseppe Scassellati-Sforzolini in our Rome office (+39 06 69 52 21), any of our other Italy-based partners and counsel listed under M&A or Capital Markets Practice Areas under the "Practices" section of our website at www.clearygottlieb.com, or any of your regular contacts at the firm.

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⁹ The notice to the Government does not trigger disclosure obligations concerning material non-public information under market abuse rules.

¹⁰ Purchases of the share capital of a listed company active in the fields of defense or national security trigger the notification obligation if they exceed the threshold of 2, 3, 5, 10, 20, or 25%.

¹¹ The administrative rights attached to the acquired interest are frozen from the date of the acquisition until the date on which the Italian Government exercises its powers. Such rights are also frozen in the event that the purchaser does not comply with the conditions or commitments imposed by the Government, for so long as non-compliance persists.

¹² Which term may be suspended – only once and for a period of 10 days – if the Italian Government requests additional information.

¹³ The fine shall be at least 1% of the turnover resulting from the latest financial statements.

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