

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

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INVESTMENT MEASURE RELATING TO NATIONAL SECURITY

Notification by Italy

In early 2013, Italy, has notified the Organisation of the introduction of measures concerning foreign direct investment operations in Italy which may have a bearing on Italy's position under the Code of Liberalisation of Capital Movements and under the National Treatment instrument [DAF/INV/RD(2013)4]. Italy has made this notification pursuant to its obligations of notification under Article 11 of the OECD Codes of Liberalisation and Article 1 of the Third Revised Decision on National Treatment.

The present revision provides more detailed information on Italy's measure, especially with regard to investments in the energy, transport and communications sectors.

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INVESTMENT MEASURE RELATING TO NATIONAL SECURITY

NOTIFICATION BY ITALY

Introduction

Italy has endorsed the objectives and principles of the OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations, hereinafter “Codes of Liberalisation”.

Pursuant to the provisions of Article 11(a) “Notification and Information from Members” of the Codes of Liberalisation, Italy notifies, for transparency and information, the Decree-Law n. 21 of 12 March 2012, converted into law, entitled “Rules on the special powers over corporate assets in the sectors of defence and national security, as well as over the activities of strategic importance in the fields of energy, transport and communications”, aimed at ensuring the protection of public safety and national essential security interests, in coherence with Article 3 of the Codes of Liberalisation.

Law n. 56 of 11 May 2012 which converted and modified Decree-Law n. 21 of 12 March 2012, was published in the Official Journal of the Italian Republic n.111 of 14 May 2012 and is now in force.

The new law establishes a mechanism for government review of transactions regarding assets of companies operating in the sectors of defence or national security, as well as in strategic activities in the energy, transport and communications sectors.

The new law accords special powers to the Government, in cases where an acquisition or other form or transaction triggers a threat of severe prejudice to essential interests of the State, based on objective and verifiable conditions, in compliance with European Law and according to the principle of proportionality.

Main characteristics of the new discipline

The Decree-Law of 15 March 2012, n. 21, converted by Law 11 May 2012, n. 56 abolishes the Italian so-called “golden share” rules – contained in law 30 July 1994, n.474 and in other acts.

Contrary to the previous Italian legislation on "golden share", which was applicable to companies operating in the defence, energy, transport and communication sectors, directly or indirectly controlled by the State, the new rules and special powers set forth by the Decree no. 21/2012, apply to all companies operating or owning strategic assets in specific sectors, irrespective of whether the State is their shareholder.

Special powers are exercised by the Government in cases where an acquisition or other form or transaction triggers a threat of severe prejudice to essential interests of the State.

The strategic activities and assets are to be identified by the Italian Government:

- by way of one or more implementing Decrees of the Prime Minister, updated every three years, in the defence and national security sectors;
- by way of one or more Regulations, in the sectors of energy, transport and communications.

The new rules have been adopted in light of the following principles:

- the exercise of the special powers applies to whatever company, depending on the seriousness of the threat to national interests;
- the new discipline applies regardless of the nationality of the subject, except for the case of a buyer from outside the EU taking control of a company in the energy, transport and communications sectors (see below);
- the seriousness of the threat must be real and appraised case-by-case on the ground of the objective and specific criteria predetermined in detail by the Decree-Law n. 21/2012;
- the depth of State intervention is different depending on whether the sectors of national defense and security, or the sectors of energy, transports and communication, are concerned (see below);
- the special powers must always be exercised according to the principle of proportionality;
- the special powers are put upon the Government as a whole;
- the mechanism of subsequent eventual opposition of the Government replaces the mechanism of previous authorization.

The law sets out which authorities carry out the risk assessment and the criteria to follow for it and it defines timeframes and obligations on companies to provide information to the Government about the investment project.

Defence and national security

As provided for in Article 1 of Decree-Law of 15 March 2012, n. 21, in the defence and national security sectors, in connection with the activities identified by the implementation Decrees and upon an effective threat of serious detriment of the fundamental national defence and security interests, the Government may exercise the following special powers:

1. the right to veto resolutions on the company ownership, nature or structure, or restricting the exercise of real rights;
2. the imposition of specific conditions relating to security of supply, security of information, technology transfer and export control on acquisition of participation in companies engaged in activities that are strategic to the system of defense and national security;
3. the right to oppose the acquisition of ownership in such companies by subjects other than the Italian State, Italian public entities or entities under their control, in cases where the acquirer (buyer) would end up holding shares with voting rights that may compromise national interests in defence and national security.

The company has to notify the Government the above-mentioned resolutions and acquisitions.

Defence and national security – implementation Decree

The Prime Minister Decree of the 30 November 2012 identifies the activities of strategic importance in the system of national defence and security for the exercise of the special powers identified by Article 1 of the Decree 15 March 2012, n. 21, converted by Law 11 May 2012, n. 56.

Article 1 of the Decree, containing the above-mentioned activities, is reported below (unofficial translation).

ART. 1

(Identification of activities of strategic importance and key strategic activities in the fields of defence and national security)

1. For the exercise of the special powers referred to in Article 1 of the Decree 15 March 2012, n. 21, converted, with amendments, by Law 11 May 2012, n. 56, the activities of strategic importance for the system of national defence and security, including the key strategic activities, are identified in the study, research, design, development, production, integration and support for the life cycle, including the supply chain, of the following systems and equipment:

a) Command, Control, Computers and Information Systems (C4I), together with the related measures to ensure the security of information; in this context, the activities are qualified as key strategic when they are related to:

1) terrestrial, naval and aeronautical complex netcentric operational capabilities and related cyber defence capabilities;

2) electronic and acoustics warfare systems with a high level of automation and able to cover the full range of current and future threats;

3) management systems of the phases of collection, processing and dissemination of products of the military-technical information activity;

4) crypto systems and algorithms for the protection and secure transmission of information, telephone communications and radio transmission, including the application of new technologies and new algorithms for encryption and decryption, including quantum technologies and steganography;

b) advanced sensors integrated C4I networks, in this context, the activities are qualified as key strategic when they are related to:

1) active and passive acoustic sensors and electro-optical integrated high-resolution sensors, conventional and hyper spectral, and multispectral electronic scanning radar;

2) military high-performance and protection satellite systems, both in the terrestrial and the spatial component (including the management of the related services), for (optical and radar) terrestrial observation and communications;

3) *unmanned air vehicles and pertinent mission systems, both for surveillance target acquisition and exploration of vehicles apt to medium altitude and long range (MALE UAV) and for combat (UCAV);*

4) *systems of underwater exploration, with related software for modelling and simulations, as well as systems for the reduction of the acoustic signatures of vessels;*

c) *manned and unmanned systems suited to combat the multiple forms of improvised explosive devices, in this context, the activities are qualified as key strategic when they are related to:*

1) *systems and sensors for discovery and active and passive ballistic protection, including systems protecting vehicle hulls and turrets against improvised explosive devices (IED) and mines, as well as related information fusion systems;*

2) *individual systems of protection;*

d) *advanced weapons systems, integrated in C4I networks essential to ensure a margin of advantage over potential adversaries and, therefore, to safety and efficiency in operations; in this context, the activities are qualified as key strategic when they are related to:*

1) *advanced missile systems with high reliability and accuracy in the segments air/air, air/surface, surface/air and surface/surface, with particular reference to guidance systems;*

2) *guided munitions for precision long-range terrestrial and naval artillery;*

3) *advanced high reliability and precision underwater systems (heavy and light torpedoes, countermeasures);*

4) *warships and integration of weapons systems, electro-optical sensors operating in the different electro-optic or electro-magnetic bands or systems as well as active and passive safety systems, platform and propulsion systems;*

e) *advanced aircraft systems, equipped with advanced sensors integrated in C4I networks; in this context, the activities are qualified as key strategic when they are related to:*

1) *advanced military aircraft training systems, both in the air and terrestrial component, capable of forming pilots for the new generation of military air vehicles;*

2) *rotorcraft high performance military air vehicles, with particular reference to speed and to mission control systems;*

f) *high performance and reliability aerospace propulsion and naval military systems; in this context, the activities are qualified as key strategic when they are related to:*

1) *power transmissions and accessory drive aircraft engines;*

2) *solid and liquid propellant propulsion systems for space launchers.*

2. *The activities of study, research, design, development, production, integration and support for the life cycle; including the supply chain, are also qualified as key strategic activities when they are related to:*

a) radar stealth technologies, nanotechnologies, technologies for composite high thermal grade materials, technologies for the design and manufacture of meta materials, technologies for the design and manufacture of surfaces in the Frequency Selection (FSS);

b) Radar Absorbing Materials (RAM); FSS radome materials (aeronautical, naval and terrestrial); high thermal grade materials for space, aircraft, nuclear engines, materials for manufacture of satellites, space shields and parts of weapons (gun mounts, launchers and tubes); materials for the removal of infrared and acoustic track.

Energy, transport and communications

As provided for in Article 2 of Decree-Law of 15 March 2012, n. 21, in the sectors of energy, transport and communications, a company owning strategic assets therein is bound to notify the Government of:

1) any resolution, act or operation that may affect the ownership of such asset, such as resolutions of shareholders' and board of directors' meetings concerning the merger and demerger, a change in the company's registered office outside of Italy, the transfer of a subsidiary owning a strategic asset. The Government has the right to veto any of these resolution, action or operation, when:

- i. such change of ownership or control causes an exceptional real threat to the public interests relating to the safety and the functioning of the networks and systems and the continuity of supply, and
- ii. such exceptional situation is not addressed by any relevant domestic or European legal provision;

2) the acquisition of ownership in such companies, when the acquirer comes from a country outside Europe and would, this way, be established within the Union. In this case, the Government, when envisaging a threat of serious detriment of the public interests listed above, has the right:

- i. to impose specific conditions on the effectiveness of the acquisition or, if this is not sufficient,
- ii. to oppose it.

These powers shall be exercised solely on the basis of objective and non-discriminatory criteria. To this end, the Government shall consider:

a) objective reasons that suggest, also taking into account the official position of the European Union, the possible existence of links between the buyer and third Countries that do not recognise the principles of democracy and the rule of law, that does not respect the rules of international law or that have adopted a risk behaviour in relation to the international community inferred from the nature of their alliances, or having relations with criminal or terrorist organisations or persons anyhow connected to them;

b) the capability of the acquisition resulting from the legal act or operation, taking into account the mode of financing the acquisition and economic, financial, technical and organisational capacity of the buyer, to ensure:

- i. the safety and continuity of supplies;

- ii. the maintenance, safety and operability of networks and systems.

The implementation Regulations identifying the relevant strategic asset in the sectors of energy, transport and communications are still to be issued.