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FURTHER STRENGTHENING OF THE 'GOLDEN POWER SHIELD'

By Decree of 21 March 2022, no. 21 (published in the Official Journal of 22 March 2022), further and important changes were introduced in the framework of the national regulation on control on foreign direct investments (so-called Golden Power). The new provisions further strengthen the strategic asset protection regime and set up an attempt to simplify the scrutiny procedure of notified transactions.

The first and most important aspect of the legislative change concerns the extension of the scope of application of the Golden Power.

The changes, unlike what happened in the recent past (with the changes occurred in the course of 2020), do not imply the extension of the discipline to further economic sectors, but rather strengthen the shield in some of the sectors already included in the scope of the Golden Power.

Below, we provide a summary of the main news introduced.

1. National defense and security sector

With regard to the defense and national security sector, the regulatory provisions relating to the obligation to notify endosocietary deeds (Article 1, paragraph 1, letter b - such as the shareholders' resolutions) are adapted to those already in use in the corresponding provision contained, for other sectors, in art. 2 of the D.L. 21/2012, making reference to changes in ownership, control or availability of assets. It also provides for the obligation to notify the assignment of real rights or use of tangible and intangible assets as guarantee.

The buyer-target joint notification is also provided ("where possible"), with the alternative possibility of notification even only by the buyer, but with the burden, in this case, of transmitting a notice on the filing to the target company in order to allow the latter be part of the proceeding.

This is a measure aimed at including the acquired company in advance and automatically in the procedure, thus avoiding to qualify it as a 'third party'. This provision, which could appear to be of secondary importance, can instead take on value with regard to the procedural timescales, to the extent that the target company receives, for example, a request for information by the FDI task force. In fact, pursuant to current legislation, requests for information addressed to the parties to the procedure suspend the deadline for clearance for only 10 days. Otherwise, in the case of requests to third parties, the term is suspended for up to 20 days, with a greater burden on the timing of the transaction.

Moreover, the possibility to submit briefs and documents within 15 days of notification has been introduced. This provision is equally useful since, at present, the filing form has a fairly rigid scheme and does not properly allow for particular considerations, beyond the aseptic description of the notified transaction. The briefs can instead give room to considerations and broader arguments regarding the expected impacts, market strategies and other useful elements for the scrutiny by the task force.

2. Sectors covered by Article 2 of the Golden Power Decree (D.L. 21/2012)

Amendments to art. 2 of the Golden Power Decree imply equally important innovations. The most significant is that which provides for the extension, starting from 1 January 2023, of the notification obligation also to subjects established or resident in Italy for transactions – implying the acquisition of control - in the communications, energy, transport, health, food and finance (including credit and insurance) sectors.

The provision also implies the 'full implementation' of notifications by EU subjects, which as known had so far been entrusted to extensions of the initial temporary regime. From 2023, therefore, the previous 'emergency' regime will become ordinary.

Also with reference to Article 2 sectors joint notification is envisaged (always "where possible"), without prejudice to the possibility of involving the target company through an alternative solution, by separate communication addressed to it. The main purpose always appears to be that of reducing the procedural deadlines in the event the task force sends a request for information to the target company.

3. Broadband communications sector (5G and cloud technology)

Important news have been introduced also with regard to the broadband communications sector: the extension to cloud technologies and 'other assets' (which will probably be specified in a subsequent decree) is expected, as well as the obligation to notify, before the acquisition, the annual plan containing, among other things, information on the sector concerned, the program of acquisitions, information on current contracts on the development projects of the 5G network, and much more.

Decrees will be adopted which may provide for further information content, as well as specifications on the notification methods as regards the annual plan and any exclusions 'also in consideration of the small size of the transaction'. The annual plan - which is notified annually - is approved (or not - and with or without conditions) within 30 days of notification.

4. Procedural news: the pre-filing

As far as the procedure is concerned, the important, awaited and desired novelty of pre-filing will be introduced (with a decree to be adopted specifying the procedure), *i.e.* the preliminary procedure that allows, prior to the formal notification of an operation, to receive a preventive assessment. on the applicability of the legislation to the transaction concerned and on the possibility that it is authorized.

This procedure responds to the need to establish a channel for prior discussion with the task force in the face of the degree of complexity of the legislation, also considering the not always easy to

understand scope of the same, and goes in the direction of reducing the number of notifications that, precisely due to the aforementioned difficulties, often take place on a precautionary basis, amounting to non-applicability decisions (so-called 'No GP').

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