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'Golden share': new special powers of the Italian Government in relation to defence, energy, transport and communication sectors

Law Decree no. 21 of 15 March 2012, published in the Italian official Gazette no. 63 on 15 March 2012 ("Decree no. 21/2012"), introduces a new set of special powers of the Italian Government in relation to defence and national security sectors and to strategic assets in the energy, transport and communications fields, amending the current Italian legislation on the "golden share".

The provisions set forth in Decree no. 21/2012 entered into force on 16 March 2012 and will be effective for a period of 60 days, during which the decree must be converted into law by the Italian Parliament, with any amendments that the Parliament may decide to implement. The full application of the Decree no. 21/2012 requires also further ministerial decrees that will indentify the strategic activities and assets which are subject to the new "golden share".

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Scope of application

Even if Decree no. 21/2012 has been considered by the press as a new "golden share" regulation, the provisions set forth therein have a wider scope of application.

Contrary to the previous Italian legislation on the "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 the all the following companies, irrespective of whether the State is their shareholder:

Companies carrying out strategic activities in defense and national security sectors

Companies owning strategic assets in the energy, transport and communications sectors

Strategic activities and assets to be identified by the Italian Government by way of one or more decrees of the Prime Minister, updated every three years

Decree no. 21/2012grants two distinct sets of powers: one for the defence sector and one for the energy, transport and communication sectors.

In both cases, the special powers of the Italian Government and when such special powers may be exercised are now subject to stricter and more objective limitations to comply with EU laws and to address the EU Court of Justice's proceedings against Italy.

Defence and national security sectors

With regards to the defence and national security sectors, the Italian Government may exercise the following special powers only in case of serious and actual risk to the fundamental national security interests:

- Impose specific conditions for the purchase of shareholdings in companies carrying out strategic activities for the defence and national security system
- Right to veto certain resolutions of companies that are strategically active in the defence and national security system (including resolutions concerning extraordinary transactions, amendments of the corporate object, liquidation etc.)

Prevent the purchase of a shareholding in a company carrying out strategic activities for the defence and national security system by any person or entity other that the Italian State or an Italian Public Authority, if following purchase the purchaser would directly or indirectly hold a percentage of the voting capital such as to prejudice national defence and national security interests

To exercise its veto, the company shall notify to the Italian Government an informative about the resolution or the action to be taken. The veto shall not be exercised if the abovementioned risk could be avoided with an approval subject to conditions and shall be communicated by the Italian Government within 15 days following the notification, otherwise the transaction may be implemented. Resolutions and actions not adopted in compliance with these provisions are ineffective and the Government may order that the original condition and status be restored.

Any non-compliance with the order to restore the original status quo is punishable by a maximum fine of twice the value of the transaction, or if greater of 1% of the revenues generated by the companies involved during the most recent financial year for which financial statements have been approved.

Energy, transport and communications

To grant the Government the powers to prevent, and to impose restrictions on, transactions and resolutions that may prejudice the public interest in the energy, transport and communications fields, Decree no. 21/2012 requires companies that own any asset indentified as strategic to notify to the Italian Government of any resolution, action or transaction that may affect the transfer of such asset by it, 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 going concern, the transfer of a subsidiary owning a strategic asset.

The special powers of the Government in relation to these sectors and the procedure, and the terms for exercise of these powers are described below.

Within 10 days (and in any event prior to the implementation of the transaction)	Notify the Government of all details on the relevant resolution, action or transaction
Within the 15 days after notice	The Government may exercise its veto right in the event that: • the resolution, action or may give rise to serious and actual risks for the public interest in connection with the operation of the energy transmission grids, energy plants and the continuity of energy procurements; and • An approval subject to conditions would not be sufficient to limit the foregoing risks

The effectiveness of the relevant resolution, action or transaction is suspended during the 15-day term, and the resolution, action or transaction can be implemented only after expiry of the term provided that the Government has not exercised its veto power.

Any resolution, action or transaction adopted or passed in non-compliance of with this process is null, and the Government may order that the pre-existing conditions and status be restored. Also in this case, any non-compliance with the order to restore the original status is punishable by a fine calculated with the same criteria mentioned above.

Moreover, Decree no. 21/2012 sets out a specific procedure for purchases, by non-EU residents, of a shareholding in a company that owns assets indentified as strategic and sufficient to cause the non-EU resident to have permanent establishment as a result of the acquisition of the control of the company it is acquiring. These transactions must be reported to the Italian Government with 10 days' prior notice and, in the event that the purchase is likely to give rise to serious and actual risk to the public interests, during the fifteen days following the report notice, the Government can:

Impose specific undertakings to ensure the safeguard of the interests at issue, or

Prevent completion of the transaction

During this 15-day term the non-economic rights attaching to the shareholding are suspended. The transaction can be implemented after expiry of the term if the Government has not exercised its veto powers.

Should the Government decide to veto the transaction, the purchaser will not exercise the voting rights attaching to the shares at issue and will be required to sell the shareholding within one year.

The veto right and the special power to block purchases made by non-EU residents is exercisable only on the basis of objective and non-discriminatory criteria. In particular, for the purpose of this evaluation, the Government must take into account:

(a) any relationship between purchaser and countries that do not recognise democratic principles, that violate principles of international law or that have relationships with terrorist or criminal organisations;

(b) whether the structure resulting from the implementation of the transaction is appropriate to ensure the continuity of the procurements, and the security and operations of energy grids and plants.

Effectiveness and conversion into law

The provisions set forth in Decree no. 21/2012 entered into force on 16 March 2012 and will be effective for a period of 60 days, during which Decree no. 21/2012 must be converted into law by the Italian Parliament; otherwise they will become ineffective with retroactive effects. During the procedure of conversion into law, both the Chamber of Deputies and the Senate of the Republic may propose amendments.

The current Italian legislation on "golden shares" will cease to be in force and effective as from the date of promulgation of the ministerial decrees that indentify the strategic activities and assets at issue, therefore, the new rules and powers provided for by Decree no. 21/2102 will be actually effective and replace the current "golden share" regulation only after entry into force of said implementing decrees.