



## FURTHER UPDATES ON THE ITALIAN LEGISLATION ON THE FOREIGN DIRECT INVESTMENT SCREENING: IDENTIFICATION AND UPDATE OF THE STRATEGIC ASSETS AND EXTENSION OF THE PROVISIONAL REGIME

### 1. Introduction

On 30 December 2020, the following Decrees of the President of the Council of Ministers were published on the Italian Official Journal, significantly modifying and clarifying the scope of the 'strategic assets and activities' which are subject to the Italian regulation on the Foreign Direct Investment screening (so-called "Golden power" or "FDI" Regulation):

- Decree no. 179/2020, identifying the strategic assets and activities in the so-called "high tech sectors", listed under Article 4(1) of Regulation (EU) 2019/452 (the "**High Tech Decree**");
- Decree no. 180/2020, updating the list of strategic assets and activities in the energy, transportation and communication sectors (the "**Energy, Transportation and Communication Decree**").

Both Decrees entered into force on January 14, 2021.

Moreover, Law no. 176/2020 has extended until 30 June 2021 the duration of the restrictive provisional regime introduced by Law Decree no. 23/2020 in the context of the Covid-19 emergency.

### 2. Extension of the provisional regime

The recent Law no. 176/2020 has extended the restrictive provisional regime introduced by Law Decree no. 23/2020 in the context of the Covid-19 emergency, providing that the following transactions (already described in our previous newsletter of June 2020, available [here](#)) will continue to be subject to FDI filing until 30 June 2021:

- any resolution and transaction adopted/entered into by any EU or extra-EU entity holding strategic assets in the energy, transportation and communications sectors, as well as high tech, resulting in change of control, change of ownership, or change of use with respect to the above strategic assets/businesses (asset deals);
- any acquisition of shareholdings, by any EU or extra-EU entity, in companies holding strategic assets in the sectors of energy, transportation and communications, as well as high tech, resulting in a change of control of the target company (share deals);
- any acquisition of shareholdings, by any extra-EU entity, in companies holding strategic assets in the sectors of energy, transportation and communications, as well as high tech, resulting in the acquisition of at least 10% of share capital or voting rights, provided that the total investment value is equal to or higher than Euro one million. Such acquisitions will be also subject to communication whenever the holding thresholds of 15%, 20%, 25% and 50% are exceeded (share deals).



### 3. The Energy, Transportation and Communication Decree

The Energy, Transportation and Communication Decree identifies and updates the scope of the strategic networks, plants, assets and activities falling within the energy, transportation and telecommunications sectors and subject to FDI screening.

It almost entirely reflects the provisions set forth by Presidential Decree no. 85/2014 (previously identifying the strategic assets in said sectors) and will replace the latter as of January 14, 2021.

The main innovative aspects introduced by the Decree are summarized below:

- (i) with reference to the energy sector, the Decree includes in the scope thereof the fundamental real estate properties which are key for the use of strategic networks and facilities - in addition to the strategic assets already provided under the previous regulation (*i.e.* national natural gas transportation networks and related compressor stations and dispatching centres, electricity and gas supply facilities from other states, national electricity transmission network and the management thereof);
- (ii) with reference to the transportation sector, the Decree includes in the scope thereof spaceports, freight villages, roads and highways of national relevance - in addition to the strategic sectors already provided under the previous regulation (*i.e.* harbours, airports of national interest and the railway network relevant to the trans-European connections);
- (iii) with reference to the telecommunication sector, the Decree does not substantially amend the scope defined by Presidential Decree no. 85/2014 (*i.e.* TLC networks, equipment and plants for the access of the service to the end users, as well as the other elements related to the connectivity, security and management of fixed networks).

### 4. The High Tech Decree

The long-awaited High Tech Decree identifies the relevant critical assets and strategic activities in all the sectors other than those already identified by the Energy, Transportation and Communication Decree.

Until today, the high tech assets falling within the scope of the FDI regulation were defined very broadly, including in the scope all the general sectors listed at Article 4(1) of EU Regulation no. 452/2019. As a consequence of such genericity, the number of the filings in the last year has significantly increased.

The more detailed list of strategic assets now contained in the Decree, and the introduction, in certain cases, of a specific materiality threshold related to the target (*i.e.*, an annual net turnover of at least € 300,000,000 and an average annual number of employees equal to at least 250 units), aims at clarifying the scope of application of the FDI regulation.

At the same time, since the Decree continues to include some general concepts and definitions (e.g. with respect to the notion of 'critical' infrastructures, technologies, assets, information etc.), a careful *ex ante* assessment of the applicability of the Italian FDI rules to a prospective transaction will still be required.

The list of strategic assets in the security and defense sector remains subject to the separate Governmental Decree no. 108/2014.



The new list of strategic assets and activities in the relevant sectors, as well as some exceptions from the exercise of the special powers, are summarized below.

## A. Energy

- Critical infrastructures where fuels, nuclear materials or radioactive waste are placed or treated, managed and transported;
- coastal storage of oil and natural gas as well as LNG storage infrastructures having capacity higher than specific thresholds;
- critical technologies, including platforms, for the management of the wholesale markets of gas and electricity;
- in any event, activities of strategic importance carried out in this sector by entities achieving an annual net turnover of at least € 300,000,000 and an average annual number of employees equal to at least 250 units.

## B. Water

- Critical infrastructures and technologies which guarantee the continuity of water supply for human consumption and for irrigation purposes (including dams), as well as sewerage and wastewater treatment;
- in any event, activities of strategic importance carried out in this sector by entities achieving an annual net turnover of at least € 300,000,000 and an average annual number of employees equal to at least 250 units.

## C. Health

- Critical technologies which are key to the supply, also through remote access connection, of health services (including booking services);
- critical technologies aimed at the analysis of data and use of biological knowledge for health purposes, diagnostics, prognostics, therapy and related follow-ups;
- critical bioengineering technologies and nanotechnologies used in the pharmaceutical and medical devices sector, in the diagnostics, prognostics and therapy sector, as well as in the chemical and agro-food sectors;
- in any event, activities of strategic importance carried out in this sector by entities achieving with an annual net turnover of at least € 300,000,000 and an average annual number of employees equal to at least 250 units.

## D. Storage, process, access and control of personal and sensitive data

- Critical data which are *per se* strategic, including: information related to critical infrastructures and to the census and monitoring of the safety of public works; data collected through satellite navigation systems for mapping fields, seas and watersheds and for the creation of production and prescription maps, through sensors for the recognition of soil and water status, through systems used for the management of spatial and temporal variables for agriculture, farming, fishing, water-culture and related to the guarantee of the safety and security of the management and control systems of means of transport, passenger and goods flows and logistic systems; data related to the management of the gas, electricity and hydrocarbons markets; data collected and managed through the IT systems of judicial offices;



- personal and sensitive data, judicial data, data collected through the use of specific technologies (such as Smart Metering, Smart Car, Smart Building, Smart City, Smart Home, Cloud Computing, digital technologies to provide health services, etc.), which are considered strategic only when such data relate to at least 300,000 individuals or entities.

## **E. Electoral infrastructure**

- Platform for the Informative Electoral System managed by the Ministry of Internal Affairs for the collection and circulation of electoral data.

## **F. Financial, banking and insurance**

- Critical infrastructures, including platforms, for the multilateral trading of financial instruments or monetary deposits, for the supply of basic services of central securities depositories and clearing services as a central counterparty, as well as for the clearing or settlement of payments;
- critical technologies such as artificial intelligence and distributed ledgers which are key to the innovation of services and products in the financial, credit, insurance and regulated markets sectors, as well as digital technologies relating to payment systems and services, electronic money and money transfer systems, liquidity management, lending activities, factoring, trading and payment management; digital technologies applied in the insurance sector (*i.e.*, Insurtech); those for the development of software for the protection of personal data, the negotiation and exchange of data and products, and document management; blockchain technologies connected to "smart contracts";
- in any event, activities of strategic importance carried out in this sector by entities (including intermediaries) achieving an annual net turnover of at least € 300,000,000 and an average annual number of employees equal to at least 250 units.

## **G. High tech**

- Critical technologies used for industrial automation (e.g., collaborative robotics, Machine to Machine Communication (M2M) and computer based machine learning), for advances manufacturing (including additive manufacturing, new materials and nanotechnologies) and for the nuclear sector, industrial engineering services and enabling rapid prototyping;
- critical technologies for artificial intelligence, virtual and augmented reality, robotics, related to semiconductors, microprocessors and computational systems, microelectronics, sensors and actuators;
- critical technologies deriving from the studies and applications of quantum mechanics, related to high computational impact processes, communications and sensors;
- critical technologies, including systems for the analysis of large volumes of data (Big Data & Analytics); systems for the development of critical or sensitive software designed to simulate conversations with human beings (chatbot), blockchain;
- critical technologies in the biological field, including technologies to decipher and use biological knowledge for the production of goods and services in the industrial and environmental fields;



- critical technologies, including systems, for non-military purposes, of remote or autonomous piloting, aspects related to mission systems and on-board sensors;
- critical technologies, including satellite navigation systems for mapping fields, seas and watersheds and for the creation of production and prescription maps, through sensors for the recognition of soil and water status, through systems used for the management of spatial and temporal variables for agriculture, farming, fishing, water-culture and related to the guarantee of the safety and security of the management and control systems of means of transport, passenger and goods flows and logistic systems;
- critical technologies, including land surveillance systems for the hydrogeological risk assessment;
- critical technologies to enable geolocation, tracking and reconstruction of the movement of people and goods.

## H. Aerospace

- Critical technologies and infrastructures which are key to the design, development, implementation and delivery of space and aerospace products and services and related application solutions.

## I. Agri-food and steel sector

- Supply of raw materials and critical production factors used in the steel sector;
- activities of strategic importance and supply of critical production factors within the agri-food chain, which can be considered critical insofar as they are necessary to ensure the productions that make up the national agri-food heritage;
- National Agricultural Information System (SIAN) and agri-food control system, also for food safety purposes.

## J. Dual-use products

- Activities of strategic importance concerning dual-use items referred to in Art. 3(1) of Council Regulation (EC) no. 428/2009 (i.e., items, including software and technology, which can be used for both civil and military purposes), carried out by entities achieving an annual net turnover of at least € 300,000,000.

## K. Freedom and pluralism of the media

- National activities of strategic relevance carried out by audio-visual or radio providers, associated interactive services or conditional access services providers, broadcasters, press agencies, publishers of daily newspapers, periodicals or magazines, publishers of electronic publishing, for which the operator is required to be registered in the register of communications operators.

Finally, without prejudice to the filing obligations, the High Tech Decree also identifies some exceptions to the exercise of the Government's review, namely:

- (i) in case a specific sectorial regulation exists, the special powers are exercised only in case the sectorial regulation does not guarantee the security and public order;
- (ii) in case of intra-group transactions, the special powers are exercised only in case the transaction threatens a serious prejudice to the national interests.

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The Corporate Finance, Administrative Law, EU, Antitrust and Regulation and Telecommunication, Media & Technology Departments of Legance are available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

For further information:

<p><b>Alessandro Botto</b></p> <hr/> <p><b>Partner</b></p> <p>T. +39 06.93.18.271 <a href="mailto:abotto@legance.it">abotto@legance.it</a></p>	<p><b>Cecilia Carrara</b></p> <hr/> <p><b>Partner</b></p> <p>T. +39 06.93.18.271 <a href="mailto:ccarrara@legance.it">ccarrara@legance.it</a></p>	<p><b>Vito Auricchio</b></p> <hr/> <p><b>Partner</b></p> <p>T. +39 06.93.18.271 T. +39 02.89.63.071 <a href="mailto:vauricchio@legance.it">vauricchio@legance.it</a></p>
<p><b>Ada Esposito</b></p> <hr/> <p><b>Counsel</b></p> <p>T. +39 06.93.18.271 <a href="mailto:aesposito@legance.it">aesposito@legance.it</a></p>	<p><b>Valerio Mosca</b></p> <hr/> <p><b>Counsel</b></p> <p>T. +39 06.93.18.271 <a href="mailto:vmosca@legance.it">vmosca@legance.it</a></p>	<p><b>Giovanna Russo</b></p> <hr/> <p><b>Counsel</b></p> <p>T. +39 06.93.18.271 <a href="mailto:grusso@legance.it">grusso@legance.it</a></p>

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