FROM ‘GOLDEN SHARE’ TO ‘GOLDEN POWERS’

1. SUMMARY

By way of Italian Law Decree No. 21 dated 15 March 2012, subsequently passed, as amended, by Italian Law No. 56 dated 11 May 2012, Italy issued innovative rules and regulations on the State’s intervention powers in the event of extraordinary transactions concerning companies ("Strategic Companies") doing business, as the case may be, in the defence and national security, and in the communications, energy and transports strategic sectors ("Strategic Sectors"). The aforesaid laws and regulations were adopted through a fast-track procedure with the declared intention to rationalise and define the scopes and criteria for exercising the powers of the State, as well as in order to resolve the EU dispute deriving from the former regime. In short, the new regulations renounce the ‘golden share’ principle passing to the system pursuant to which some general ‘golden powers’ are granted to the State, which may be exercised in the event of any extraordinary transactions concerning the companies doing business in the Strategic Sectors. The aforesaid powers shall consist in the right to object and/or to put a veto on and/or dictate conditions for the carrying out of any extraordinary transactions, as the case may be and provided that certain conditions are met.

2. BACKGROUND

Originally, the Italian laws and regulations on ‘golden share’ were mainly spread following the public companies’ privatisation process and provided for the allocation to the State of shareholding vested with special powers such as to allow the exercise of special prerogatives capable of affecting the decisions of the companies concerned. The aforesaid powers were structured in different ways: from the objection to the acquisition of significant shareholding, to the veto on some corporate resolutions, to the right to appoint the members of the management bodies. Some subsequent laws and regulations then widened the ‘golden share’ concept, by foreseeing that the aforesaid special prerogatives could be directly included in the By-laws of the companies doing business in certain sectors, in particular, the defence, energy and public services sectors, regardless of the shareholding owned by the State.

As from the respective introduction, the aforesaid laws and regulations were on different occasions deemed to be incompatible with the principles of free circulation of capital ruled under the EU treaties, since they were deemed to be forms of dissuading other member State players from investing in the companies characterized by
the ‘golden share’. Therefore, the European Court of Justice imposed a sanction on Italy requesting to introduce more certain rules allowing an *ex ante* assessment of the possible limits to the business and transactions concerning the companies doing business in the sectors concerned.

### 3. THE NEW LAWS AND REGULATIONS

#### 3.1 General principles of the rules and regulations

The new laws and regulations shall apply to the companies doing business in the Strategic Sectors, namely to the companies carrying out, using the words of the legislator ‘an activity of strategic significance for the defence and national security system’ and those holding ‘the networks and systems, the assets and relationships of strategic significance for the energy, transports and communications sector’.

It is envisaged that notice of the carrying out of certain transactions identified by the law (“Significant Transactions”) be served whereby, following the aforesaid notice, the State may make its own decisions on the exercise of the “golden powers”. Sanctions are foreseen in the event of breach of the procedure and/or of the imposed conditions, ranging from the suspension of the voting rights, to the invalidity of the actions carried out, to the application of administrative penalties (for amounts proportionate to the value of the transaction and to the turnover of the companies concerned).

In addition to the general requirements, it needs be stressed that the reciprocity condition is foreseen in the event in which the Significant Transactions consist in the purchase of shareholding in companies doing business in the Strategic Sectors by non-EU persons and/or entities. Therefore, the transaction shall not be permitted should a regime for the access of Italian players to the Strategic Sectors by non-EU persons and/or entities.

Given its special importance, the defence and national security sector has been subject to a more restrictive regime compared to that applicable to the other sectors and, from the aforesaid point of view, it shall be interesting to understand how the companies doing business in different fields (for instance defence and communications) will be qualified by the implementation decrees.

In any event, the implementation decrees (“Decrees”) foreseen in the laws and regulations shall have a decisive role in defining the latter’s scope of application, which shall have the duty to identify the significant activities, assets and relationships for the purposes of exercising the “golden powers”. The aforesaid Decrees shall be issued no later than four months following enforcement of the law and shall be updated on a three-year basis.

#### 3.2 The applicable regime in the national defence and security sector

In the defence and national security sector, (i) in connection with the activities to be identified by the Decrees and (ii) ‘upon an effective threat to the serious detriment of the fundamental national defence and security interests’, it is foreseen that in the event of any:

a) Acquisition, by any way whatsoever, of any shareholding in the Strategic Companies, specific conditions related to the security of supplies, to the security of information, to technological transfers, to the control of exportations, may be imposed;

b) Resolutions of the Shareholders’ Meetings or of the management bodies of the Strategic Companies on extraordinary subject-matters, amongst which, by way of example, the company’s merger or spin-off, the transfer of business and/or of other assets and the transfer of the registered office abroad, the veto may be exercised;

c) Acquisition, by any way whatsoever, of shareholding in Strategic Companies by a party other than the Italian State, Italian public entities or parties controlled by the latter, should the purchaser hold, either directly or indirectly (also following the entering into of shareholders’ agreements), a level of shareholding in the share capital with voting rights capable of jeopardising the interests of the national defence and security, the right to object to the acquisition may be exercised.

The law identifies the criteria to assess the threatening situation to the detriment of the aforesaid interests and, for the aforesaid purpose and as stated above, the President of the Council of Ministers shall be fully informed on the transaction, following a standalone procedure, depending on whether it is the case of transactions leading to the exercisability of the powers under a), b) or c) above.

#### 3.3 The applicable regime to the strategic assets in the communication, energy and transports sectors

In the communications, energy and transports sector, the law requests the Decrees to identify networks and systems, assets and relationships of strategic significance (hereinafter, the “Strategic Assets”).

After having identified the Strategic Assets, the law sets forth that any resolution, act and/or transaction by a company holding one or more Strategic Assets be notified to the Government in advance, in the event that the aforesaid activity has as result amendments to the ownership, control and availability of the assets or the change to their respective use.

Following the aforesaid notice, the veto may be put on those transactions entailing an exceptional situation of effective threat to the serious detriment of the public.
interests concerning the security and operation of the networks and systems, as well as the continuity of supplies. The aforesaid veto power may also be exercised by imposing specific provisions or conditions if deemed sufficient to ensure the protection of the interests safeguarded by the rule.

Furthermore, it is foreseen that the transactions of acquisition by non-EU parties of any controlling shareholding in companies holding Strategic Assets, and provided that the aforesaid purchase entails the purchaser’s permanent establishment, shall be notified to the Government in advance. Should the aforesaid purchase entail an effective threat to the serious detriment of the State’s fundamental interests, the respective effectiveness may be conditional upon the purchaser’s undertaking of direct commitments aimed at ensuring the protection of the aforesaid interests. The Government may object to the transaction in exceptional cases of risk for the protection of the aforesaid interests, which may not be removed by undertaking specific commitments.

All the powers described above may be exercised based on objective and non-discriminatory criteria explained by the law. By way of example, it is possible to mention the existence of relationships between the purchaser and third party Countries which do not recognise the principles of democracy or of the State of law, which do not comply with the rules of international law or which have held conducts at risk towards the international community inferred from the nature of their alliances or which liaise with criminal or terrorist organisations or with persons in any event related thereto.

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