THE REFORM OF THE SO-CALLED GOLDEN POWERS REGIME AS A MEANS OF REACTING TO THE UKRAINIAN POLITICAL AND MILITARY CRISIS

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1. Introduction

Following the escalation of the Russian-Ukrainian conflict, the Italian Government deemed it was essential to react by issuing a number of emergency decrees in order to provide an immediate and effective political response to the numerous challenges posed by the outbreak of the war, including those relating to national security and economic stability.

In particular, the Italian legislator's primary aim was to safeguard the ownership structures of companies operating in sectors recognised as being strategic and of national interest, such as those of defence, national security, energy, transport and communications.

This aim called for a strengthening of the special powers that can be exercised by the Presidency of the Council of Ministers, which were already provided for by Decree-Law no. 21/2012, converted with amendments by Law no. 56 of 11 May 2012 (as repeatedly amended to reflect the various political sensitivities that have developed over time), by means of the specific amendment contained in Decree-Law no. 21 of 22 March 2022, ranging from Article 24 to Article 28.

If, on the one hand, the common thread of the reform in question would appear to be the extension of governmental control over legal transactions concerning the above-mentioned sectors, the introduction of a procedure to simplify the governmental control procedure which, as outlined by the recently introduced provisions, would appear to aspire to be a mandatory step in closing commercial transactions in which the control centre shits to a foreign operator (whether EU or non-EU), would also have a significant impact.

Equally important is the involvement, as outlined by the legislator, of both contractual parties who, preferably jointly, are required to submit the draft contract for governmental approval.

On this point, it should be noted that the parliamentary documentation accompanying the conversion into law of the Decree-Law in question (whose text is currently under examination by the competent committee of the Senate of the Republic), offers a rather aseptic interpretation of the reform in question.

2. Joint notification as an instrument of co-responsibility of the contracting parties.

As stated above, one of the main innovations introduced by Decree-Law no. 21/2022 is the provision of a joint notification by the seller and the purchaser, both with reference to the sectors pertaining to national security, governed by Article 1 of Decree-Law no. 21/2012, as well as with regard to those defined as strategic under Article 2 of the same Decree-Law.

The joint commitment of the parties, as outlined by the regulatory reform in question, concerns all the stages of the administrative procedure: its start, the preliminary investigation stage, the decision-making phase and, ultimately, the penalty phase.

Consequently, the two parties, in agreeing to contract, are required to undertake equivalent responsibilities, as regards both procedure and penalties.

In terms of the reform, the new Article 24, paragraph 1 c) amends Article 1, paragraph 5, of Decree-Law no. 21/2012, which governs the mandatory notification obligation that applies to anyone who acquires a stake in companies carrying out strategically relevant activities in the national defence and national security sector.

In particular, it is provided that the notification of the acquisition shall be made by the purchaser, where possible jointly with the company whose shareholding will be acquired, confirming of the terms (within ten days) and simultaneously transmitting the necessary information, including a general description of the envisaged acquisition, the purchaser and its area of operation.

Where the notification is not jointly made, the purchaser is required to send, together with the notification, information on the essential aspects of the transaction and of the notification itself, to the seller, in order to enable the latter to participate in the procedure, and providing proof of its receipt.

The mandatory information notice to the seller shall ensure the latter's participation in the preliminary stage of the procedure, since it is provided that the seller may submit, within fifteen days from the above-mentioned notification, written information and documentation to the Presidency of the Council of Ministers.

The inclusion of both parties in the above-mentioned proceedings also has implications in terms of any breach of the requirements to close the transaction that are imposed by the Government.

It should be noted that, if the requirements imposed by the Presidency of the Council are infringed, in addition to the financial penalties that were previously imposed on the purchaser, a financial liability has been introduced – on a cumulative and not on a joint and several basis – in respect of the seller who, on become aware of the notification, or by directly requesting the start of the procedure in question, is therefore deemed to be equally accountable for due compliance with the requirements imposed.

In the event that the requirements are infringed, the penalties imposed have been increased and made more serious by providing, albeit in the form of a specific proviso, for the criminal liability of both parties for non-compliance with the prescribed requirements.

A similar provision was also introduced by Article 25 of Decree-Law no. 21/2022 with reference to transactions involving entities operating in the energy, transportation, communications and other strategic sectors (as more accurately defined by Ministerial Decrees no. 179 and 180 of 2020), which are regulated in detail by Article 2 of Decree-Law no. 21/2012.

Furthermore, with respect to such transactions, it is now possible for the Government to impose on both parties the conditions precedent in order for the transaction involving the above-mentioned shareholdings to be effective: "*The effectiveness of the acquisition may be subject to the undertaking, by the purchaser and the company whose shareholdings are the subject matter of the acquisition, of commitments designed to guarantee the protection of the aforementioned interests.*"

Similarly, in the strategic sectors referred to in Article 2, both parties shall be held criminally and financially liable if they fail to comply with the provisions contained in the Presidency of the Council of Ministers' decree.

Finally, both Article 1 and Article 2 have introduced a new form of procedural participation for both parties as a result of the comments received by the Presidency of the Council following the initial notification. Therefore, both parties become interlocutors of the Presidency of the Council for the purposes of providing helpful elements for finalising the pending procedure.

Accordingly, although joint notification is not regarded as mandatory under the law, it is nevertheless essential once an actual multilateral administrative procedure has been put in place, which ultimately has effects on the parties' contractual balance, both in terms of investigation and measures, which they cannot evade under the penalty of severe financial penalties and specific criminal liability.

3. The extension of the golden powers regulation in respect of transactions concerning strategic sectors.

With specific reference to the transactions covered by Article 2 of Decree-Law no. 21/2012, Decree-Law no. 21/2022 identified additional quantitative and qualitative criteria for selecting the transactions subject to the notification requirement in question and to monitor potential takeovers of national ownership structures.

The notification obligation set forth in this Article also applies to "*acquisitions of shareholdings, by foreign non-EU entities, in companies holding assets identified as strategic within the meaning of paragraphs 1 and 1-ter, which grant a portion of the voting rights or of capital of at least 10%, taking into account the shares or shareholding already directly or indirectly held, and the overall value of the investment is equal to or greater than one million euros, and acquisitions exceeding the thresholds of 15% per cent, 20% per cent, 25% per cent and 50% per cent of the capital are also notified*".

Therefore, the above quantitative criterion seems to be an indicator of opportunistic conduct that needs to be monitored, given the current political sensitivity.

One of the most important developments is that the intra-EU purchaser is also under an obligation to notify.

In this respect, the new Article 2, paragraph 5, provides that, where the acquisition is such as to give rise to a "permanent establishment" of the purchaser, by virtue of obtaining control of the company whose shareholding is the subject matter of the acquisition, the notification obligation is also imposed on EU entities, including those established and resident in Italy, but only with respect to the communications, energy, transport, health, agrifood and financial sectors, including those pertaining to credit and insurance.

In order for the EU operator's notification obligation to be regarded as having been fulfilled, there are two requirements which must be verified with regard to the transaction.

Firstly, the transaction must relate to the above-mentioned sectors and, secondly, it must result obtaining control of the company, which would lead to a permanent establishment of the purchaser in the national territory.

On this point, it should be noted that the aforementioned concept of "control", together with that of "permanent establishment", are new to the Italian Civil Code. While Article 2359 of the Italian Civil Code[1] specifically identifies the cases of corporate control, there is no mention of the territorial

[1]Article 2359 of the Civil Code provides that the following must be qualified as subsidiaries:
"*(1) companies in which another company holds a majority of the votes that can be exercised in the ordinary shareholders'' meeting;*
2) companies in which another company has sufficient votes as to exercise a dominant influence in the ordinary shareholders' meeting;
3) companies that are under the dominant influence of another company by virtue of special contractual ties with it."

factor as an additional criterion for the purposes of defining the factual and legal situation in question.

4. Procedural simplification and standardisation of the Golden Powers notification.

The Government has ultimately established a general framework, which applies to all types of transactions that may be subject to the golden powers notification, by introducing a new Article 2-*quater* to Decree-Law no. 21/2012, entitled "*Simplification measures and pre-notification procedure*".

The said Article essentially provides that, by means of a decree of the Presidency of the Council of Ministers, after having consulted with the Coordination Group (established pursuant to Article 3 of the Decree of the Presidency of the Council of Ministers of 6 August 2014), which unanimously decided that measures may be identified to simplify the notification process, process and the terms and procedures relating to the preliminary investigation for determining the procedure in the event of that the special powers are not exercised, without prejudice, in any event, for each administration and the parties to be able to request that the notification be examined by the Council of Ministers.

Therefore, through this provision, the legislator appears to have intentionally attributed to the coordination group (set up pursuant to Article 3 of the Decree of the Presidency of the Council of Ministers of 6 August 2014) the role of acting as a filter, together with all the consequences that this entails in terms of granting special powers to a body set up by a government regulation.

The rationale for this is obviously to simplify the Government's investigative burden in cases where, for a given transaction, the members of the coordination group give their unqualified assent, without prejudice to any possible objection on the part of any administration and the parties.

This proviso is unusual in that, on the one hand, it empowers any administration irrespective of its specific competence, and, on the other hand, it legitimises a driving force that would seem, *prima facie*, to be unconstrained by the timeframe identified for the conclusion of the preliminary investigation procedure (*i.e.*, 45 days). With regard to the latter aspect, it would therefore seem reasonable to assume that the detailed rules will be able to harmonise the provisions of Decree Law no. 21/2012, notwithstanding the fact that they, in their amended form, can be immediately applied.

Finally, a further and final specific mechanism introduced by Law Decree is that concerning the pre-notification (which will be regulated by a separate decree of the Council of Ministers), and which enables the coordination group, or in the cases referred to in paragraph 1, the Council of Ministers, to examine the transactions, including those that are in an embryonic stage, in order to provide the contractual parties with a preliminary assessment on the applicability of the above-mentioned articles and on whether the transaction can be authorised.

While this input allows for a preliminary screening of the transaction as planned, it also has a purely moral persuasive function, aimed at inducing the parties to reconsider the terms of the transaction or to abort it during negotiations.

This prior verification, however, does not eliminate the risk underlying the formal notification, which should also be made once the terms of the transaction or prior resolution have been finalised.

In this way, it would appear that rather than a simplification process, the legislator's intention is to "standardise" the golden powers mechanism, with a view to rendering public control more procedural, even to the partial detriment of the freedom to negotiate in the strict sense of the term.

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