The Foreign Investment Regulation Review

Editor
Calvin S Goldman QC

Law Business Research

The Foreign Investment Regulation Review

This article was first published in
The Foreign Investment Regulation Review, 1st edition
(published in September 2013 – editor Calvin S Goldman QC).

For further information please email
Adam.Sargent@lbresearch.com

The Foreign Investment Regulation Review

Editor

Calvin S Goldman QC

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT
Lucy Brewer

PRODUCTION COORDINATOR
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Joanne Morley

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-79-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALRUD

AMARCHAND & MANGALDAS & SURESH A SHROFF & CO

BENTSI-ENCHILL, LETSA & ANKOMAH

BLAKE, CASSELS & GRAYDON LLP

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CONSORTIUM CENTRO AMÉRICA ABOGADOS

DARROIS VILLEY MAILLOT BROCHIER

ENGLING, STRITTER AND PARTNERS

FRESHFIELDS BRUCKHAUS DERINGER LLP

HENGELER MUELLER

KING & WOOD MALLESONS

MATHESON

MINTER ELLISON

MJLA LEGAL

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STIBBE

URÍA MENÉNDEZ

VEIRANO ADVOGADOS

CONTENTS

EDITOR'S PREFACE

This inaugural edition of *The Foreign Investment Regulation Review* aims to provide readers with a practical and comprehensive guide to foreign investment laws, regulations, policies and practices in key jurisdictions around the world. The topic of foreign investment has garnered significant attention in recent years, and is likely to become increasingly important as market barriers continue to fall, cross-border acquisitions continue to increase and national governments continue to regulate – or consider regulating – foreign investment in their jurisdictions. It is of particular interest to multinational companies seeking to expand the geographical scope of their operations through an acquisition, joint venture or other type of foreign investment. The number of foreign investment reviews of major transactions has grown in recent years, and this trend is expected to continue as the global economy becomes more integrated.

This book includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions. It provides relevant information on and insights into the framework of laws and regulations governing foreign investment in each of the 23 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other practices that are specific to each jurisdiction. In describing the laws, regulations and policies related to foreign investment reviews, the focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition or otherwise seeking to do business in a particular jurisdiction. Recent trends and emerging issues include the growing role of national security considerations in the review of foreign investment, as well as the increasing scrutiny of foreign investments made by state-owned enterprises. In addition, given the fact that parallel regulatory reviews may indeed take place in a number of jurisdictions, the interface between foreign investment review and competition and other sectoral reviews is also discussed.

Foreign investment regimes face the difficult challenge of striking the right balance between, on one hand, maintaining the flexibility required to reach an appropriate decision in any given case and, on the other, creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive

investment climate. The reality faced by foreign investors is that without sufficient advanced planning, foreign investment reviews, which sometimes takes place in a politicised environment and under close media scrutiny, can potentially result in delay, increased costs and even the blocking or unwinding of a transaction. Given these risks, parties to a proposed investment are well advised to gain a thorough understanding of the regulatory regimes in each jurisdiction – particularly given the significant variation in the foreign investment review regimes in place in various countries – and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed.

We hope this publication will provide a valuable guide for parties considering a transaction that may trigger a foreign investment review.

I would like to personally express my appreciation to each of the chapter authors and their firms for the time and expertise that they have contributed to this book, and also thank Law Business Research for its ongoing support and for taking the initiative to launch this publication.

Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

Calvin S Goldman QC
Blake, Cassels & Graydon LLP
Toronto
August 2013

Chapter 13

ITALY

Giuseppe Scassellati-Sforzolini and Francesco Iodice[1]

I INTRODUCTION

A recent reform of the government 'golden share' has for the first time introduced a comprehensive investment control regime in certain strategic sectors in Italy, which is expected to impact mainly, although not exclusively, investments by non-EEA[2] persons.

The new Italian investment control framework is set forth in Decree Law No. 21 of 15 March 2012, as amended and ratified by Law No. 56 of 11 May 2012 (the Law). However, as described in greater detail below, the Law is not yet entirely effective.

The Law grants the government certain special powers to veto or condition the purchase of interests in the share capital of, or the implementation of certain extraordinary transactions by, Italian companies that are active in the fields of defence and national security, or energy, transport and communications.

Although in recent years Italy has ranked behind certain significantly smaller economies in terms of the value of the net inflows of foreign direct investments,[3] such investments represent an essential part of the Italian economy (according to World Bank research, Italy ranked 15th in the world in 2011, at US$28 billion).[4] Whether the new investment control regime will have a deterrent effect, or on the contrary will attract new

1 Giuseppe Scassellati-Sforzolini is a partner and Francesco Iodice is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 The European Economic Area (the EEA) comprises the 28 member states of the European Union, Iceland, Liechtenstein and Norway.

3 Defined by the World Bank as the 'net inflows of investment to acquire a lasting management interest (10 per cent or more of voting stock) in an enterprise operating in an economy other than that of the investor. It is the sum of equity capital, reinvestment of earnings, other long-term capital, and short-term capital as shown in the balance of payments'.

4 Data available at http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD.

capital through a more transparent framework for the exercise of investment oversight, will depend on how the government applies its new powers in practice.

Foreign investments in Italy have traditionally involved a wide set of targets, from manufacturing industries to infrastructure. Headline transactions in the past two years involving potentially sensitive sectors include:

a the 2011 acquisition of Wind Telecom SpA (an Italian telecom operator) by VimpelCom Ltd (a Russian telecom group) in the context of a business combination with Orascom Telecom Holding Sae;

b the 2012 acquisition of Edison SpA (an Italian energy company) by Électricité de France SA (a French electric utility company); and

c the 2013 acquisition of the aero-engine business of Avio SpA (an aviation group) by US conglomerate General Electric.

II FOREIGN INVESTMENT REGIME

As a general rule, investments in Italian companies active in the fields of defence and national security, or energy, transport and communications, are subject to a prior review process, as a result of which the government may exercise certain special powers that, depending on the target, may be more or less stringent.

The government will determine periodically which assets are subject to the investment regime set forth in the Law. Indeed, as a condition for the Law to become effective, the government is required to identify:

a activities deemed as strategic for the defence and national security system (strategic security activities); and

b networks, plants, assets and relationships deemed strategic for the national interest in the fields of energy, transportation and communications (strategic assets).

The government may exercise its special powers under the Law exclusively with respect to companies exercising any strategic security activities or holding any strategic assets.

Accordingly, in principle, foreign investments in any other sector are not subject to any further general limitation or prior review apart from the general reciprocity rules (see Section II.iii, *infra*) and any applicable antitrust clearance.[5] However, certain sector-specific regulatory authorisations may be necessary (see Section II.iv, *infra*).

5 Pursuant to Article 16 of Law No. 287 of 10 October 1990 (the Italian Antitrust Act), acquisitions and other concentration transactions must be notified to the Italian Antitrust Authority prior to closing when the aggregate turnover produced at the domestic level by the target and the acquirer and the turnover produced at the domestic level by the target exceed certain thresholds, which are periodically updated by the Italian Antitrust Authority (in 2013, €482 million and €48 million, respectively). However, in the event that the concentration meets the requirements set out under EU Regulation No. 139/2004 (both in terms of thresholds and cross-border effects of the transaction), the transaction must be notified to the European Commission instead.

i Defence and national security

The review process and the government's special powers relating to investments in a company exercising a strategic security activity are particularly strict and apply to investments made by any person, regardless of nationality.

The strategic security activities were identified by a Prime Minister Decree dated 30 November 2012, which was published on the Italian Official Journal on 4 February 2013.[6]

With respect to companies exercising any such strategic security activity, in the event that fundamental interests of national defence or security could be materially affected, the government may:

a impose specific conditions relating to the security of procurement and information, the transfer of technologies and export controls, and the purchase of an interest in any such company;

b veto the purchase by any person (whether directly or indirectly, individually or jointly), other than the Italian state or state-controlled entities, of an interest in the voting share capital of any such company that, given its size, may jeopardise defence or national security interests;[7] and

c veto the adoption of resolutions by such company's shareholders or board of directors relating to certain extraordinary transactions (such as mergers, demergers, assets disposals, winding up and amendments concerning the corporate purpose or equity ownership caps in the by-laws of certain state-controlled companies,[8] or

---

6 The Decree defines the strategic security activities as the study, research, design, development, production, integration, and support to the life cycle (including logistics) of:

a the following systems and materials, as further specified in the Decree – command, control, computer and information (C4I) systems; advanced detectors integrated in C4I networks; manned and unmanned systems that are suitable to oppose improvised explosive devices; advanced weapon systems, integrated into C4I networks, which are indispensable to ensure an advantage margin on possible adversaries and therefore aimed at security and effectiveness of operations; advanced aeronautical systems provided with advanced detectors integrated into the C4I networks; and aerospace and military navy propulsion systems ensuring high performances and reliability; and

b certain specific technologies – stealth technologies; nanotechnologies; technologies for high thermal degree composite materials; meta-materials technologies; and design and production of frequency selective surfaces (FSS) or materials (radar-absorbent materials; FSS radome materials; high thermal degree materials applied to produce space, aeronautical or nuclear engines; materials to produce satellites, space shields or parts of weapons including launchers; materials for the abatement of infrared or acoustic traces).

7 In which case the buyer may not exercise any rights other than the economic rights attached to the shares, and must dispose of the shares within one year.

8 Pursuant to Article 3 of Law Decree No. 332 of 31 May 1994 (as amended and ratified by Law No. 474 of 30 July 1994), the by-laws of state-controlled companies active in the fields of defence and national security (as well as energy, transport and communication and other public services, or banks and insurance companies) may provide for ownership caps of up to 5

relating to the transfer of ownership or other rights upon assets or the creation of encumbrances on assets).

ii Energy, transport and communications

The investment regime relating to strategic assets is less burdensome than that applicable to defence and national security. Not only is the scope of the government's special powers more limited and subject to more significant conditions, but the overall regime applies only to investments made by non-EEA persons.

The government has not yet identified the strategic assets.[9] However, according to information disclosed by the press in early 2013, the list should include energy, transport and telecom infrastructures (such as the national electricity grid, the telecom fixed line and gas distribution networks) but not service providers (i.e., those entities authorised to provide the relevant services).[10]

As a consequence, foreign investments in strategic assets are still subject to the pre-existing 'golden share' rules,[11] and the provisions in the Law will not apply as long as the government has not determined which assets qualify as strategic assets.

---

per cent of their share capital. Any persons holding any interest in excess of such threshold may not exercise voting rights relating to their exceeding portion of the shares. Such clauses may not be amended for three years following their introduction. However, the ownership cap does not apply in the event that such threshold is exceeded as a result of a tender offer, provided that tenders amount to at least 75 per cent of the voting share capital.

9 In March 2013, the press reported the upcoming adoption of the relevant regulation. However, shortly thereafter the Monti cabinet was replaced by a new government led by Prime Minister Letta as a result of the parliamentary elections held in February 2013.

10 In particular, as regards communications, the strategic assets should include the construction and operation of networks and plants to ensure the provision of universal service to end-customers; as regards energy, the construction and operation of energy networks bearing a national interest and their underlying contract relationships (including the national network for the transport of natural gas, including its compression and distribution centres; the procurement infrastructures relating to gas supplied from non-EU countries; and the national network for the transmission of electricity and the relevant control and distribution centres); and as regards transport, large networks and plants bearing a national interest that ensure the main trans-European connections, including ports and airports of national interest and the rail network relevant to the trans-European networks. See http://it.reuters.com/article/italianNews/idITL5N0CI2C620130326.

11 Pursuant to the Law, the 'golden share' rules in force at the time of adoption of the Law will be repealed upon the government issuing the implementation measures of the Law (i.e., the decree identifying the strategic security activities and the regulation identifying the strategic assets). Since the implementation measures have not yet been adopted as regards strategic assets, the pre-existing rules continue to apply to companies active in the relevant fields. Such rules are set out under Law Decree No. 332 of 31 May 1994 (as amended and ratified by Law No. 474 of 30 July 1994). Pursuant to Article 2 of that Law, prior to a transaction resulting in the state relinquishing its control, the government may identify the state-controlled companies active in

Once the government's regulation identifying the strategic assets is enacted, investments by non-EEA persons[12] in a company holding any strategic asset will be subject to the prior review of the government, which may:

a veto any resolution or transaction by a company holding any strategic asset that results in a change of ownership or control of such asset, provided that such change of ownership or control could cause an exceptional situation where the public interest relating to the safety and operation of any strategic asset may be materially jeopardised, and such exceptional situation is not addressed by any relevant domestic or European legal provision; and

b condition the purchase by any non-EEA person of a controlling interest (whether individually or jointly) in a company holding any strategic asset in such investor undertaking certain commitments aimed at protecting the above-mentioned public interests. The government may veto such transactions in the event that the relevant acquisition may raise an exceptional threat of a material prejudice to such public interests (which may not be addressed by commitments undertaken by the investor).

iii Reciprocity

Pursuant to a general principle of Italian law,[13] foreign persons (whether individuals or entities) are allowed to exercise any civil law right exclusively insofar as the reciprocity

---

the transport, communication, energy sectors and other public services, the by-laws of which may be amended to introduce any of the following government special powers:

a veto the acquisition of a share interest in excess of 5 per cent of the voting shares (or such lesser percentage as established by the Ministry of Economic Affairs);

b oppose entry into a shareholders' agreement representing at least 5 per cent of voting shares (or such lesser percentage as established by the Ministry);

c veto the adoption of certain extraordinary resolutions (e.g., merger, de-merger, winding-up, transfer of the registered office abroad); and

d designate a member to the board of directors not entitled to cast a vote.

The by-laws of certain companies active in the energy, transport and communications fields still provide for certain of such special powers (for instance, Telecom Italia SpA (the telecom operator), ENI SpA (the energy group) and Enel SpA (the electricity company).

12 Non-EEA persons are defined as any individual or entity that is not resident, is not domiciled, does not have its registered office, headquarters or centre of main interest in any EU or EEA Member State, nor is it established therein.

13 Article 16 of the General Provisions on Law, attached to the Civil Code of 1942. In respect of the relationship among EEA Member States, the reciprocity principle is overridden by the Treaty on the Functioning of the European Union and the Treaty on the European Economic Area, as well as by bilateral treaties (BITs) with non-EEA countries to which Italy is a party (for instance, the BIT between Italy and the US). The Ministry of Foreign Affairs maintains a list of the BITs currently in force between Italy and other countries, specifying in which cases reciprocity has been ascertained: www.esteri.it/MAE/Templates/GenericTemplate.aspx?NRM

principle is complied with. In other words, in the event that an Italian citizen is prevented from exercising a specific right in the country of origin of the relevant foreign person, Italian law in turn prevents said foreign person to exercise the same right in Italy. Although the scope of this principle is very wide, in the context of foreign investments it seems to have been applied, in practice, exclusively to the purchase of real estate or the incorporation of a company, and not to the acquisition of an equity interest in a pre-existing company.

The reciprocity principle is specifically restated in the Law, resulting in a significant limitation of the scope of the government' powers: the purchase by a non-EEA person of an interest in a company exercising any strategic security activity or holding any strategic asset is permitted exclusively on the basis of reciprocity conditions. This implies that, in the event that the government ascertains the lack of reciprocity between Italy and the country of origin of the prospective investor, implementation of the relevant transaction may not be permitted, regardless of any further consideration (including the economic desirability of such foreign investment and the absence of any significant prejudice to strategic interests).[14]

Finally, a reciprocity principle also applies to takeover bids on Italian companies whose voting shares are listed on an Italian regulated exchange. Generally, the passivity rule[15] and breakthrough rule[16] apply in order to prevent pre-bid or post-bid defences undermining the success of a tender offer. However, in the event that the bidder would not be subject to equivalent limitations, the target company (or its shareholders) may avail itself of the relevant defences.[17] In other words, should the foreign bidder, in its capacity as target of a tender offer, be permitted by its domestic laws to frustrate a tender

---

ODE=Published&NRNODEGUID=%7b84D9F895-AA12-4519-B404-504C3E268CC1%7d&NRORIGINALURL=%2fMAE%2fIT%2fMinistero%2fServizi%2fStranieri%2fElenco_Paesi%2ehtm&NRCACHEHINT=Guest#u.

14 This provision can be contrasted with Article 25, Paragraph 2 of the Antitrust Act, pursuant to which the Prime Minister, on grounds of essential national economic reasons, may veto any concentration transaction notified to the Italian Antitrust Authority by a company from a country that does not protect the independence of companies through legal provisions equivalent to the Antitrust Act, or applies discriminatory rules or imposes conditions resulting in the same effects, on acquisitions by Italian companies.

15 Pursuant to Article 104 of Legislative Decree No. 58 of 24 February 1998 (the Italian Securities Act), as of the date of announcement of a takeover bid, directors of the target may not adopt any measure that could undermine the achievement of the offer's goals, unless authorised to do so by the shareholders' meeting or empowered to do so under the target's by-laws.

16 Pursuant to Article 104-bis of the Italian Securities Act, during the tender offer period any transfer restriction set out in the target's by-laws, or voting limitations set out in the target's by-laws or in a shareholders' agreement, are not effective in relation to the bidder.

17 Article 104-ter of the Italian Securities Act. Within 20 days of the bidder launching its tender offer, the bidder or the target company may request CONSOB (the Italian securities and exchange authority) to determine whether the bidder would be subject to equivalent limitations.

offer, the Italian target (or its shareholders) may apply any pre-bid or post-bid defence provided under the target's by-laws or shareholders' agreements.

iv Sector-specific authorisations

As previously mentioned, depending on the investment target, foreign investments may be subject to specific additional review or authorisation processes conducted by sector-specific regulators.

The fields where such obligations may be required include:

a banking and investment services;[18]

b telecoms;[19]

c broadcasting;[20]

18 Although Italy has not yet implemented Directive 2007/44/EC of 5 September 2007 on the acquisition of shares in a bank, on 12 May 2009 the Bank of Italy officially stated that it deems the Directive to be directly applicable (i.e., no specific Italian implementation measure is necessary for the purposes of applying the Directive's provisions). As a result, the proposed acquisition of a share interest in a bank or an investment services firm that is equal to at least 10 per cent would enable the acquirer to exercise a significant influence on the target or grants control to the target must be notified to the Bank of Italy, which may authorise the acquisition after assessing certain factors, including the reputation and financial soundness of the investor as well as the ability of the target, following the acquisition, to comply with its obligations under the Bank of Italy's supervisory regime.

19 Pursuant to Article 25 of Legislative Decree No. 259 of 1 August 2003 (the Code of Electronic Communications), any person that provides electronic communication networks or services must be authorised in advance by the Italian Ministry of the Economic Development, which assesses whether such person meets the necessary requirements. In the event that the authorised person intends to transfer such general authorisation to any third party (whether foreign or domestic), it must send prior notice to the Ministry, which may withdraw the authorisation in the event that it ascertains that the proposed transferee does not meet the necessary requirements. In addition, pursuant to Article 50, Paragraph 4 of the Code of Electronic Communications, in the event that the company designated to provide the universal telecom service intends to dispose of a substantial part or all of its local access network assets to a third party, it must inform the Communication Authority in advance in order to allow the Authority to assess the effects of the transaction on the provision of access at a fixed location and of telephone services. As a result, the national regulatory authority may impose, amend or withdraw specific obligations applicable to the designated company.

20 As a general rule, Article 1, Paragraph 6, Letter (c), No. 13 of Law No. 249 of 31 July 1997, the Communication Authority is empowered to authorise the acquisition of a company performing radio-television broadcasting activities. In particular, pursuant to Article 43 of Legislative Decree No. 177 of 31 July 2005, concentration transactions must be notified in advance to the Italian Communication Authority, which ascertains whether such transaction may result in anti-competitive effects (including in respect of media pluralism). Such notification is additional to the obligation to notify the same transaction to the Italian Antitrust Authority or the European Commission in the event that it meets the relevant requirements (see footnote 5).

d gas networks;[21] and
e electricity networks.[22]

Moreover, in certain fields the law sets forth limits to the acquisition of controlling interests by non-EU persons (for instance, as regards airline companies[23] and television broadcasters).[24]

III TYPICAL TRANSACTIONAL STRUCTURES

Although no specific requirement is set out under Italian law, typically, although not exclusively, foreign investments in Italy are carried out through an Italian or EEA corporate vehicle, depending on a number of factors (including tax considerations).

In theory, investing through an Italian or EEA company might also be considered for the purposes of complying with the above-mentioned reciprocity principles or to fall outside the scope of the government's review powers regarding strategic assets. However,

21 As an example, pursuant to Article 9 of Legislative Decree No. 91 of 1 June 2003 (which implements EU Directive 2009/73/EC in Italy), a gas transmission system operator (gTSO) must be certified by the Italian Energy Authority to be compliant with an ownership unbundling model as envisaged in the same law. While this provision applies to both Italian and foreign gTSOs, additional requirements apply in the event that the gTSO is not an EU national. Pursuant to Article 9 (implementing Article 11 of Directive 2009/73/EC), the Minister of Economic Development shall set the criteria that apply to the above-mentioned certification when a non-EU person acquires the control of the network. Such Decree, which has not yet been adopted, shall ensure that the issue of said certification does not jeopardise the security of energy procurement of Italy and the EU, as well as compliance with the international obligations.

22 Pursuant to Article 36 of Legislative Decree No. 93 of 1 June 2003 (which implements EU Directive 2009/72 in Italy), the electricity transmission operator (currently, Terna SpA (the eTSO)) must be certified by the Italian Energy Authority as compliant with the applicable ownership unbundling model envisaged in the same law. While this provision applies to both Italian and foreign companies intending to acquire the eTSO, in the event that this acquisition were to be carried out by a non-EU national, additional requirements would apply. In particular, Article 36 also requires that the Minister of the Economic Development set out the criteria that apply to the above-mentioned certification in the event that a non-EU person acquires the control of Terna SpA. This Decree, which has not yet been adopted, will ensure that the issue of said certification does not jeopardise the security of energy procurement of Italy and the EU, as well as compliance with international obligations.

23 Pursuant to Article 4 of the EU Regulation No. 2407/1992, an EU airline company shall be owned directly or through majority ownership by EU Member States or nationals of EU Member States, or both, and shall at all times be effectively controlled by such states or nationals.

24 Pursuant to Article 3 of Law No. 249 of 31 July 1997, the authorisations relating to private radio-television broadcasting may be granted exclusively to Italian or EU persons, while non-EU persons may acquire the control of such companies exclusively upon reciprocity conditions.

if the ultimate foreign investor originates from a non-EAA country, such a structure may be insufficient in the event that the intermediate EEA company does not qualify as an EEA person for the purposes of the Law.[25]

Foreign investments may be implemented through the acquisition of an equity interest in an Italian target, either individually or through a corporate or contractual joint venture with an Italian or other person. Provisions of Italian company law may be relevant to certain agreements between the foreign investor and other shareholders or joint venture partners, such as limitations on the term of shareholders' agreements[26] or the obligation to launch a tender offer in cases of acquisitions effected while acting in concert.[27]

No notable difference is established between a share purchase and an asset purchase deal by a foreign investor. With specific regard to the scope of the foreign investments review under the Law, the definition of strategic security activities or strategic assets is wide enough to trigger the application of the relevant provisions both in cases of acquisition of an equity interest and the ownership of a relevant asset. Likewise, the general reciprocity principle applies to both categories of transactions.

IV REVIEW PROCEDURE

Foreign investments falling within the scope of the government's special powers outlined under Section II, *supra*, must be notified in advance to the government.

i Process

In particular, the Law requires that the following be filed[28] with the government:

a notification of any relevant resolutions adopted by a company exercising any strategic security activity or holding any strategic asset within 10 days of their adoption, and in any event prior to their implementation; and

b notification of any purchase of interests in any company exercising any strategic security activity or holding any strategic asset within 10 days of the acquisition. Purchases of equity interests in a listed company active in the fields of defence or national security trigger the notification obligation if they exceed the thresholds of 2, 3, 5, 10, 20 or 25 per cent.

25 See footnote 12.

26 As a general rule, the term of a shareholders' agreement relating to an Italian joint stock company (Article 2341-bis of the Italian Civil Code) may not exceed five years (three in the case of a listed company, pursuant to Article 123 of the Italian Securities Act).

27 As a general rule, the acquisition of an equity interest in a listed company in excess of 30 per cent of the share capital triggers a mandatory tender offer. The same applies in the event that such threshold is exceeded, in the aggregate, as a result of the acquisitions made by two or more persons that are parties to a shareholders' agreement relating to the target company or the parent thereof.

28 The notice to the government does not trigger disclosure obligations concerning material non-public information under market abuse rules.

Upon receipt of said notification, a standstill period of 15 days begins,[29] during which the government carries out its review of the proposed investment or resolution, and voting rights[30] attached to the acquired interest are frozen until the date on which the government exercises its powers.

During such review, no specific standing or right of the parties involved in the transaction are expressly provided for by the Law.[31] However, it is reasonable to expect that sound cooperation between the government and the notifying party may become standard practice, perhaps involving preliminary discussions prior to sending the formal notification to allow the government to properly conduct its review and make an informed decision within the statutory deadline.[32]

In any event, should the government elect not to (or fail to) exercise its powers within the end of said standstill period (as possibly extended), the relevant transaction may be legitimately implemented.[33]

The government's decisions must be adopted by a decree of the Prime Minister and may be appealed to the Administrative Court of Rome. In the event of non-compliance with the government's decisions, the relevant transactions are null and void, and the

29 Which term may be extended only once for a period of 10 days, in the event that the government requests additional information.

30 Such rights are also frozen in the event that the purchaser does not comply with the conditions or commitments imposed by the government, and for as long as such failure to comply persists.

31 As a general rule, Law No. 241 of 7 August 1990 sets out certain transparency provisions that apply to administrative proceedings by public authorities. Pursuant to such Law, any person that holds a qualified interest in the proceedings could obtain access to and make copies of the relevant administrative documentation. However, it is unclear whether such rules would apply to the government's review process under the Law. For instance, Article 24 of Law No. 241/1990 lists certain documents in respect of which the transparency rules do not apply, including documents classified as state secret; similar restrictions apply to such other cases, as identified by the government, where disclosure of documentation may result in a prejudice to, *inter alia*, national security and defence, exercise of national sovereignty and continuity in international relationships; or the relevant documents pertain to confidential information of an individual or a company with particular regard to professional, financial, industrial or commercial interests they hold.

32 Likewise, no specific coordination is established between the government's review and any other clearance process that may be required in respect of the same transaction (e.g., antitrust), therefore the relevant parties will have to submit various applications in order for the relevant transaction to be cleared.

33 The Law allows the government to determine which intra-group transactions are not subject to the review process and possible exercise of special powers. The decree which identified the security strategic activities clarified that prior notification to government is nonetheless required and that such exemption does not apply in the event that the information thereby provided shows a threat of a serious harm to the fundamental interests of defence and national security, or as regards the fields of energy, transport and communications.

perpetrators are subject to administrative fines equal to twice the value of the relevant transactions.[34]

ii Criteria

In an attempt to address the criticism expressed by the European Court of Justice in its 2009 judgment concerning the previous 'golden share' regime,[35] the Law establishes certain specific objective criteria that the government must take into account as a condition to exercise its special powers.

In particular, in the context of the foregoing review process, the government shall assess, *inter alia*:

a as regards companies exercising any strategic security activity, whether the economic, financial, technical and organisational characteristics of the proposed investor (including consideration of any financing conditions), as well as its business plan, are suitable to regularly carry on the relevant businesses, safeguard their technological portfolios and honour existing contractual commitments;

b as regards companies holding any strategic asset, whether the situation resulting from the relevant transaction (including consideration of any financing conditions) is suitable to guarantee the security and continuity of procurement, as well as the maintenance, safety and operations of the relevant strategic asset; and

c in both cases, the existence of any links between the prospective investor and third countries that do not respect democracy and the rule of law, or maintain relations with criminal or terrorist organisations.

V FOREIGN INVESTOR PROTECTION

Italy is a member of the European Union, and therefore subject to all provisions under EU law aimed at favouring the creation of a European common market, which include the four fundamental freedoms enjoyed by EU persons under the Treaty on the Functioning of the European Union (i.e., the free movement of goods, capital, services and persons). Any breach of such principles by Italian law or the Italian authorities may therefore result in the EU investor accessing an Italian court to seek annulment of the infringing measure, redress of damages suffered in connection therewith, or both.

Moreover, Italy is a signatory of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for Settlement of Investment Disputes (ICSID). Thus, since Italy is a party to a number of bilateral investment treaties, any dispute arising thereunder may

34 The fine shall be at least 1 per cent of the turnover resulting from the latest financial statements.

35 Case C-326/2007, *Commission v. Italy*. The Court held that the criteria (listed under the Prime Minister Decree of 10 June 2004) that the government was to consider prior to exercising its then 'golden share' powers (set out under Decree Law No. 332 of 31 May 1994) breached the EU proportionality principle, as 'the Decree of 2004 contains no details of the actual circumstances in which the power of veto may be exercised and the criteria it lays down are not, therefore, based on objective verifiable conditions'.

be submitted to ICSID arbitration, if such agreements so provide (or, alternatively, to other forms of dispute settlement provided for in the relevant treaty).

Finally, Italy is a signatory to the 1958 New York Convention, the purpose of which is to ensure that arbitration agreements are recognised in Italy (i.e., litigation before national courts is prevented if contrary to the parties' agreement), and foreign arbitral awards are generally enforceable in Italy.

VI OTHER STRATEGIC CONSIDERATIONS

Situations in which (certain) foreign investments entail the involvement of the government need to be carefully considered. The interests that the Law seeks to protect are obviously other than mere commercial interests that are generally addressed in a transaction between two private parties. In tabling the acquisition strategy, this aspect needs to be borne in mind.

The review structure set out under the Law envisages a particularly tight time frame within which the government is required to carry out its assessment. In a number of cases, it is likely that 15 days will not be sufficient to enable the government to complete its appraisal; therefore, it cannot be ruled out that the government may elect to suspend the transaction in the event that, upon the expiry of the review deadline, it has not completed its review or collected sufficient information to conclude that no prejudicial consequence may arise from the proposed transaction. As noted under Section IV, *supra*, should the government fail to exercise its rights within the statutory time frame, the relevant investment may indeed be legitimately implemented.

In light of the above, as well as in consideration of standard practice, it seems advisable to informally approach the government prior to submitting an application triggering the start of the review process. Informal talks may enable the government to become acquainted with the proposed transaction and suggest possible amendments that would allow the transaction to be swiftly cleared.

Such preliminary discussions may also form the context in which potential industrial commitments (regarding, for instance, maintenance of certain employment levels, location of research activities, respect of international obligations) may be defined and then proposed by the foreign investor within the framework of the proposed transaction, in order to preserve the interests underlying the exercise of the government special powers and facilitate the final clearance of the investment.

VII CURRENT DEVELOPMENTS

The Law is a recent piece of legislation that, as far as we are aware, has been applied only once since its enactment. Notably, on 6 June 2013, the government issued a notice on its website regarding the exercise of its special powers relating to the defence and national security system in respect of the transfer of a business unit of Avio SpA.[36] Although no further detail has been provided, and the relevant measure has not yet been published, it

36 Information available at www.governo.it/Governo/Provvedimenti/dettaglio.asp?d=71501.

would seem that the exercise of the government's special powers refers to the mentioned acquisition of the aviation business of Avio SpA by General Electric.

Based on press rumours, the various discussions relating to further transactions that would trigger the application of the Law seem to have reached an advanced stage. It is expected that in the next few months the Law will be applied in at least a few cases and, therefore, more clear details will be provided on how the review process actually works and which specific elements need to be considered.

Appendix 1

ABOUT THE AUTHORS

GIUSEPPE SCASSELLATI-SFORZOLINI

Cleary Gottlieb Steen & Hamilton LLP

Giuseppe Scassellati-Sforzolini is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in the Rome office. He is active in public and private mergers and acquisitions and capital markets transactions, corporate governance, securities and banking regulation, competition law and EU state aid law. He has worked on takeover bids, tender offers, negotiated acquisitions, divestitures, joint ventures and private equity investments involving Italian companies, particularly in regulated sectors such as financial services, energy, media, telecoms and airlines. He has co-authored several publications on business law issues. He graduated in law with honours from the University of Bologna in 1984 and obtained an LLM degree from the University of Michigan Law School in 1987.

Mr Scassellati-Sforzolini has been a member of the Bar in Italy since 1986 and a member of the New York Bar since 1988. He is admitted to practice before the Italian higher courts. He serves as a delegate of the Italian Bar to the Council of the Bars and Law Societies of the European Union.

FRANCESCO IODICE

Cleary Gottlieb Steen & Hamilton LLP

Francesco Iodice is an associate at Cleary Gottlieb Steen & Hamilton LLP, based in the Rome office. Mr Iodice's practice focuses on corporate and financial transactions, with particular regard to mergers and acquisitions, as well as financing, restructuring and insolvency matters. Mr Iodice graduated in law with honours from the University of Siena in 2007. In 2006 he obtained a diploma in legal studies from Worcester College, Oxford University, and in 2008 he graduated with distinction from St Catherine's College, Oxford University, receiving an MJur, for which he was also awarded the Clifford Chance Prize for best overall performance. Mr Iodice has been a member of the Milan Bar since 2010.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Piazza di Spagna 15
00187 Rome
Italy
Tel: +39 06 695 221
Fax: +39 06 69 20 06 65
gscassellati@cgsh.com
fiodice@cgsh.com
www.cgsh.com