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Law Decree no. 23/2020: strengthening of government's special powers in sectors of strategic importance and additional transparency obligations relating to listed companies

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Authors: Vincenza Altieri, Marella Lavarone

The new provisions in Section III of Law Decree no.23/2020, that is articles 15, 16 and 17, provide "*Urgent provisions on the exercise of special powers in sectors of strategic importance*". Provided Law no. 56/2012 on special government control powers continue to apply¹, please see below main aspects and changes (some of which apply until 31 December 2020):

- **Extended strategic sectors** (art. 15) – the obligation for Italian companies to notify in advance the Italian Government in respect of certain acts (as described below) is extended to more sectors until 31 December 2020, that is, those referred to in such European Regulation no. 452/2019.² Therefore, in addition to the “traditionally considered strategic sectors” pursuant to Law 56/2012, being defence, telecommunications, national security, transportation and energy sectors, now the Italian government's golden powers cover, by making reference to the said EU Regulation, also the following sectors: financial, credit and insurance; critical infrastructures and technologies, including energy, transport, water, health, food safety; access to sensitive information, including personal data, artificial intelligence, robotics, semiconductors, cyber security; nanotechnology and biotechnology (the “Strategic Sectors”);

¹Law no. 56/2012 introduced a new regime of control (so called “golden powers regime” replacing the former “golden share” regime) attributing to Italian government special veto/conditions powers on corporate acquisitions and other extraordinary transactions involving Italian companies (i) carrying out “strategic” activities in the field of defense and national security, or (ii) owning “strategic” assets, for the national interest, in the field of energy, transport or communications.

² EU Regulation no. 452/2019, paragraph 1, letters a) to e), identify as strategic sectors , (a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities as well as investments in land and buildings essential for the use of such infrastructure; (b) critical technologies and dual-use items as defined in Article 2(1) of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cyber security, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnology and biotechnology; (c) safety of supply of critical production items, including energy and raw materials, and food safety; (d) access to, or the ability to control, sensitive information, including personal data; or (e) media freedom.

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- **Transactions to be notified** (art. 15) – compared to Law no. 56/2012, additional circumstances have been introduced and are applicable until 31 December 2020 requiring notification of transactions to the government. Therefore the following acts, taking into account also the provisions of Law no. 56/2020, need to be notified (see underlined new circumstances):
 - (i) resolutions or transactions, adopted by a company holding assets and rights in any of the Strategic Sectors that have the effect of changing the ownership, control or right of use or changing their destination;
 - (ii) acquisitions, for whatever reason, of controlling interests (as contemplated in Article 2359 of the Italian Civil Code) in companies operating in any of the Strategic Sectors by foreign parties, including, until 31 December 2020, those based within the European Union;
 - (iii) acquisitions of participations by foreign parties based outside the European Union (reference to parties outside the EU applies until 31 December 2020, otherwise Law no. 56/2012 referred to parties based outside the European Economic Area) attributing corporate capital or voting rights of at least 10% (taking into account also participations already directly or indirectly held) and the total value of the investment is equal to or higher than one million euro; such acquisitions are however subject to the reciprocity conditions in accordance with international treaties entered into by Italy or the EU, as already provided by Law No. 56/2012. In any event any acquisitions until 31 December 2020 determining the exceeding of the thresholds of 15%, 20%, 25% and 50% must to be notified;
- **Notice procedure** - as already provided by Law no. 56/2012: notice to the government is required within 10 days of any relevant acquisition or resolution; there is a waiting period of 45 days (such period may be suspended if the government requests further clarifications which must be provided within 10 days from request) during which the government can veto or impose conditions as mentioned below; such notice to the government does not require disclosure of sensitive market information, unless specific notice obligations apply in case of purchase of interests in listed companies (see below); the effectiveness of the resolution or transaction is suspended during notice and waiting periods;
- **Government's powers** (art. 16) – in addition to the government's powers already provided by Law no. 56/2012 (to prohibit the acquisition of interests, to veto the passing of resolutions, to impose specific conditions on transaction), the government

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has now also an investigation power (with no time limit) to collect data and information (it can enter into agreements with research entities for such purpose) and take the initiative to exercise the above mentioned special control powers on transactions;

- **Sanctions** – as already provided by Law no. 56/2012, failure to notify or comply with the government's decision renders transactions null and void and substantial fines apply (equal to double the value of the transaction and not lower than 1% of the turnover resulting from the latest accounts);
- Financial transparency in respect of listed companies (art. 17) – article 120 of the Italian Financial Code (TUF) has been amended attributing more disclosure powers to CONSOB (with no time limit), which has therefore adopted on 9 April 2020 the following two resolutions (coming into force as of 11 April for 3 months, until 11 July 2020) increasing disclosure obligations by investors investing, also in smaller, listed companies with a widespread allocation of stakeholders:

(i) With regard to article 120, paragraph 2-bis, of TUF, thresholds triggering the disclosure obligation to CONSOB by investors, investing in any of the 104 listed Italian companies having a widespread allocation of stakeholders (list mentioned in CONSOB website), have been lowered from 3% to 1% for "non-SMEs" and from 5% to 3% for SMEs; importantly, Law Decree no. 23/2020 has eliminated the "high current market value" requirement for target companies, thus protecting with disclosure obligations also smaller enterprises;

(ii) With regard to article 120, paragraph 4-bis of TUF, a lower threshold triggering the "declarations of intentions" (that is the obligation for investors to disclose their investment objectives within 6 months from the acquisition) has been introduced, so that now investors acquiring participations of at least 5% in any of the above mentioned 104 listed Italian companies having a widespread allocation of stakeholders, are required to provide to CONSOB the said declaration and supporting documents; in any event, the additional thresholds of 10%, 20% and 25% mentioned in the article 120, paragraph 4 bis of TUF, remain applicable.

For any clarification or further queries please contact valtieri@delfinowillkie.com.

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