

C L I F F O R D
C H A N C E



**FOREIGN INVESTMENT CONTROL
TASK FORCE**

ITALY
2021

REGULATORY FRAMEWORK

FOREIGN DIRECT INVESTMENTS/GOLDEN POWER

In the context of the economic shock caused by the Covid-19 outbreak, initiatives have been taken – both at EU and national level – to strengthen those powers the public administration can exercise in case of acquisition of strategic assets.



EU Level

The EU Commission issued guidelines, on 25 March 2020, ahead of the application of the EU Screening Regulation in which it:

- called upon the Member States that have an existing screening mechanism in place to make full use of tools available to them under EU and national law to prevent capital flows from non-EU countries that could undermine Europe's security or public order;
- called on the remaining Member States to set up a fully-fledged screening mechanism; and
- clarified that foreign acquisitions taking place before October 2020 already fell under the EU Screening Regulation and could be reviewed under the cooperation mechanism established by the Regulation.

The EU Commission has recently published a White Paper dealing with the 'distortive effects' caused by foreign subsidies which sets out three proposals:

- Establishing a general market scrutiny instrument to capture all possible market situations in which foreign subsidies may cause distortions in the Single Market.
- Granting the EU Commission supervisory powers.
- Implementing a mechanism under which foreign bidders in EU public procurement procedures would have to notify the contracting authority of financial contributions received from non-EU countries.



National Level

On 8 April 2020, Italian Law Decree 23/2020 (the so-called "Liquidity Decree" or "Italian FDI Regime") extended the scope of application of the existing regime in three macro areas:

- introducing additional strategic sectors including the ones listed under the EU Screening Regulation;
- temporarily tightening the criteria for acquisitions of Italian strategic companies required to be notified to the Italian Government; and
- allowing the Italian Government to commence review proceedings *ex officio*.

What sectors/activities are affected by the new measures?

- Critical infrastructure, whether physical or virtual (including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructures and sensitive facilities), as well as land and properties that are key for the use of such infrastructures;
- Critical technology and dual-use products (e.g. AI, robotics or semiconductors that may be used for military and civilian purposes);
- Supply of essential produce;
- Sectors with access to sensitive information;
- Media sectors; and
- Financial, banking and insurance sectors.

What are the thresholds?

Defence and national security: acquisition exceeding 3% of the target's capital. Other sectors (temporary regime): (i) if EU acquirers, acquisition of control (i.e. majority of the voting rights or decisive influence in the shareholders' meetings, even based on shareholders' agreements), (ii) if non-EU acquirers, (1) acquisitions of 10% AND investment's value equal to € 1 million; OR (2) acquisition of 15%, 20%, 25% or 50%. For the 5G sector, special provisions apply.

Do these new measures apply to investments from any foreign countries?

The Italian FDI Regime applies to both EU and non-EU investors. The structure and residence of the ultimate beneficial owner/management of the investment funds must be analysed in order to conclude whether an investor is considered foreign for the purposes of the Italian FDI Regime.

Is the new FDI regime limited in time duration?

The thresholds set out by the Italian FDI Regime in respect of non-EU investors are temporarily in place until 31 December 2020, however the extension of the Italian FDI screening over the strategic sectors is permanent.

Does it affect transactions that have already signed?

Yes, the Italian FDI Regime applies with immediate effect to any acquisitions which have been signed but have not yet completed. Such transactions must be notified to the Italian Government.

BEST PLACED TO ASSIST YOU

Our regulatory group is the ‘go to’ team for clients’ most important instructions, a vital guide in relation to their pressing regulatory issues in hugely demanding market conditions. What sets us apart:



Top-tier advisory

In this regulatory scenario, our team of experts in Italy has strengthened the expertise in the field of foreign investments regulation and advising a wide range of renewed international clients (EU and extra EU).

We are at the forefront of developments and regularly participate in consultations and interest groups concerning regulatory and competition aspects. We seek innovative solutions to protect our clients' strategic interests.



Direct access to decision makers

Our strong relationships with federal ministries and antitrust authorities enable us to find commercially acceptable solutions for our clients even when remedies are required.



Access to an international network

We work seamlessly as one team across all jurisdictions worldwide, including Europe, Asia-Pacific and North America. Having one firm appointed to advise on all foreign direct investment filings ensures that you will receive a cost-effective, coordinated, high-quality and seamless service.

The team will build up a deep knowledge of your business and the preferences of your legal function to deliver efficiencies and ensure that no “learning curve” is required for each new transaction.

Practical information

Indirect acquisitions under a GP-LP partnership by an passive LP (with no governance rights) **shall be notified**, should the participation acquired **on a look-through basis** into the strategic target company meet the thresholds.

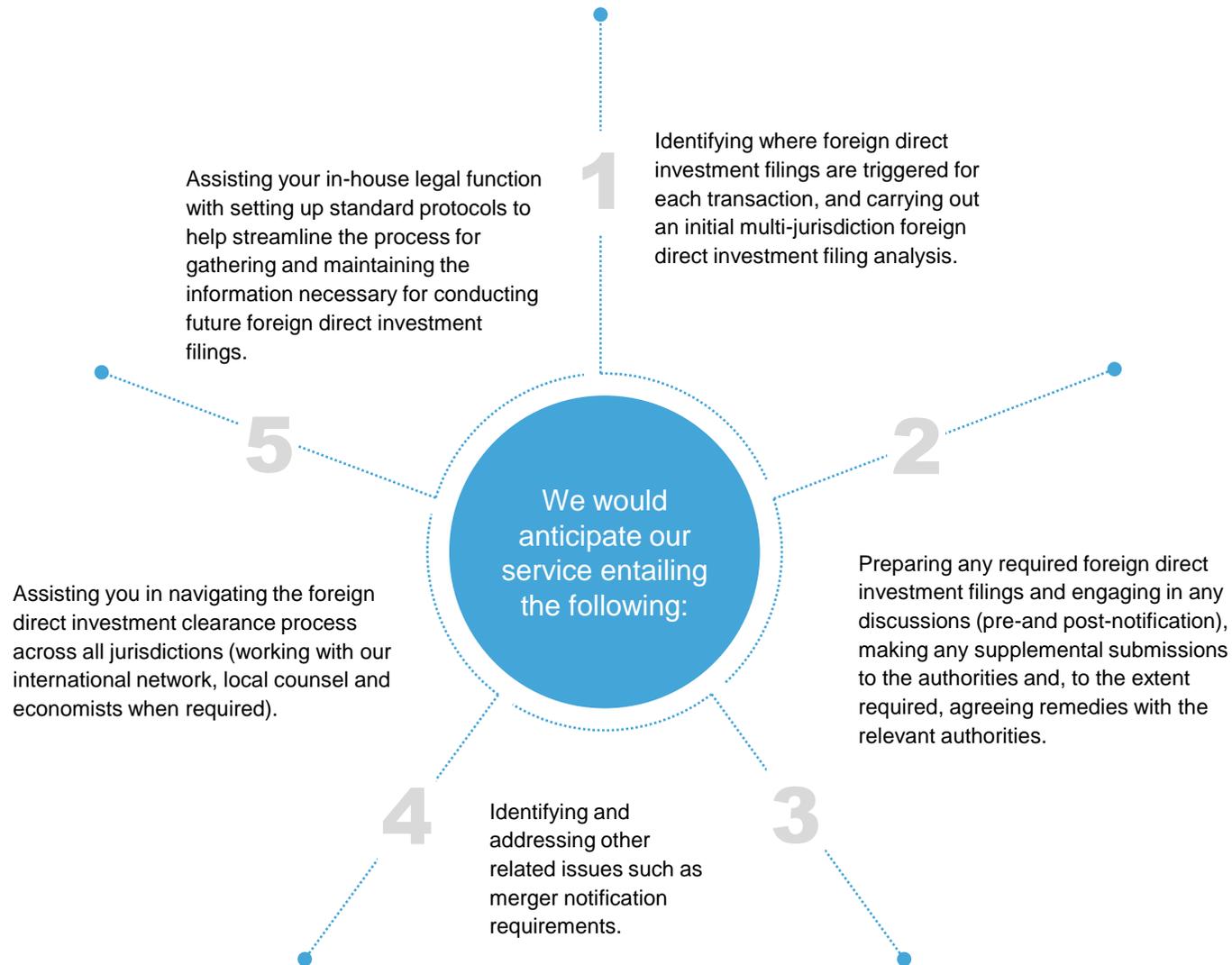
Duty to notify is upon the **buyer**. In case of transfer of ownership, control or availability of strategic assets even the seller is bound to notify the resolution approving the dismissal of assets. A joint notification between the buyer and the seller is allowed.

Filing is due by **10 calendar days** from signing. The review process last **45 calendar days** at most.

“There is a growing number of instances in which foreign subsidies seem to have facilitated the acquisition of EU companies or distorted the investment decisions, market operations or pricing policies of their beneficiaries, or distorted bidding in public procurement, to the detriment of non-subsidised companies.”
European Commission (17 June 2020)

SUPPORTING YOU ON ALL FUTURE INVESTMENTS

NAVIGATING FOREIGN DIRECT INVESTMENT REGIMES CAN BE CRITICAL FOR SUCCESS ON A TRANSACTION



OUR UNRIVALLED TRACK RECORD AND KEY CONTACTS IN ITALY

FDI ITALY DESK

Incomparable experience in the submission to the Italian *Presidenza del Consiglio dei Ministri* of FDI filings in many sectors, including:

- Energy;
- Infrastructure;
- Telecommunication;
- Pharma;
- Biotechnology;
- Defense;
- Robotics;
- Food.

Regularly issuing opinions:

- To European and non-European players on the obligations stemming from European and Italian rules on golden power.
- On the syndication of EU and non EU private equity and sovereign funds, even for the cases in which the ownership of shares did not entail a change of control or in the size of voting rights.

FDI ITALY DESK



LUCIANO DI VIA
Partner, Head of the Antitrust Group in Italy

Head of the Antitrust department in Italy, Luciano is considered one of the primary antitrust experts in the country with wide experience on FDIs. He wrote several articles for a legal review directed by a former Italian Prime Minister and he regularly speaks in conferences about FDI and golden power in Italy.



UMBERTO PENCO SALVI
Partner, Head of the Energy and Infrastructure Group in Italy

Umberto Penco Salvi heads the Italian Energy & Infrastructure Group and specialises in M&A, joint ventures, tender offers, restructuring, construction and project contracts with a focus on regulated sectors such as Energy & Infrastructure, Healthcare, Chemicals and TMT.



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