

A LIGHTER SHADE OF GREY – GOLDEN POWERS IN SECTORS LISTED IN ARTICLE 4 OF REGULATION (EU) 2019/452

Following the adoption of Regulation (EU) 2019/452 (the “FDIR”), Italian Law Decree no. 21/2012 (the “GP Law”) – which grants the Italian Government with powers of intervention in respect of transactions involving companies operating in sectors which are critical for national interests (the “Golden Powers”) – was amended by Law Decree 105/2019 by including, among the sectors which are deemed critical for national interests and fall within the scope of the Golden Powers, those listed in article 4, paragraph 1), of mentioned FDIR, and providing that the extension of the Golden Powers to a part of such sectors would follow the issuing by the Italian Government of a catalogue of the relevant critical assets (the “Assets”).

In April 2020, due to the concern of predatory behaviors in respect to Italian companies during the first wave of the Covid-19 pandemic, the Italian Government, with Law Decree 23/2020, anticipated the extension of the Golden Powers to all sectors listed in article 4 of the FDIR; this was nonetheless made without providing any guidance on which Assets were relevant under the GP Law in the wide sectors listed in the European Regulation, which led to a steep increase in the number of notifications of transactions carried out in such sectors.

In late December 2020, the Government approved two Decrees of the President of the Council of Ministers (DPCM 179/2020 and DPCM 180/2020, which respectively list the relevant assets in the sectors under the FDIR and in the sectors of energy, transport, and communications, which were already regulated, in similar terms, by DPR 85/2014).

DPCM 180/2020 only slightly modified the existing framework laid out by Presidential Decree DPR 85/2014; on the other hand, DPCM 179/2020 provides long awaited guidance in respect to the Assets relevant for the purposes of the GP Law.

While DPCM 179/2020 still provides a catalogue encompassing wide ranges of assets in the FDIR sectors, such decree also limits the scope of the Golden Powers to assets (such as infrastructures, technologies, production factors, strategic relationships and information) which are “critical” for the national interests as they are essential for maintaining the vital functions of society, of health, of security, of economic and social wealth and for the progress of technologies. Moreover, DPCM 179/2020 provides that entities active in sectors of article 4 of FDIR which do not hold critical infrastructures / technologies / information may still fall under the Government’s scrutiny in case their dimension, in terms of turnover and employees, meets certain thresholds.

The DPCM 179/2020 has certainly adjusted the extension of the Government’s Golden Powers and granted additional criteria to the operators to assess if an Asset falls under the GP Law. Nonetheless, such criteria still fall short in terms of certainty and clarity. On one hand, therefore, the operations carried out in the sectors regulated by FDIR will still need to be carefully evaluated on a case-by-case basis; on the other hand, the Government’s action to clearly define the limits “by object” of the GP Law should continue, also considering the significant costs borne by companies that derive from any uncertainties on the matter.