



Exercise of golden powers by the Italian Government in the “cyber sensors” case against the 2023 geopolitical background

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Roberto A. Jacchia

On 15 June 2023, the Italian Government exercised its “golden powers” and prescribed measures of protection of the national interest with respect to a transaction affecting the governance structure of Pirelli & C. SpA (Pirelli) and the position of its shareholder, China National Tire and Rubber Corporation Ltd. (CNTRC), in relation to a particular industrial project.

Golden powers are the current version of the erstwhile “golden share”, which bestowed on the Government special rights attaching even to a single share held in the equity of a sensitive or strategic company - such as in the fields of telecoms, energy, mining, rail, sea and air transport, port, and airport facilities, etc. – essentially with the ability to override the rules of ordinary corporate governance. With the passage of time, the golden share evolved into the more

comprehensive and flexible concept of “golden powers”, no longer necessarily derived from the ownership of shares, and substantially consisting of the power to forbid, or impose conditions and undertakings in respect of, extraordinary transactions involving or affecting the structure and decision-making processes of the company concerned. For practical purposes, golden powers enable the Government to counter the entry of non-EU (and, on different conditions, sometimes EU) foreign shareholders into the company’s capital or intervene on its governance rules, to de-potentiate such shareholders’ administrative and voting rights. Golden powers do not as a rule affect economic rights (such as the right to receive dividends and winding up proceeds).

The main piece of legislation to be nowadays looked at is Decree-Law 21/2012, which is a statutory instrument with force of law, and was followed by



several implementing and regulatory acts. Golden powers supplement at the national level Regulation (EU) 2019/452 providing a common framework for the control of foreign direct investments (FDI) in the European Union.

The procedure that is put in place by Decree-Law 21/2012 for the exercise of golden powers is not too dissimilar from a merger filing and starts with a compulsory previous notification of qualifying transactions to the Presidency of the Council of Ministers (Prime Minister's Office) where certain sectors are involved and certain thresholds or conditions are met. The form of the transaction is unimportant, and a general principle of substance-over-form applies. There is a simplified procedure for less relevant cases. There is a first phase of preliminary investigation following the notification, and a possible second phase of in-depth investigation. The Government is entitled to pose questions, acquire documents, information, and any other relevant evidence from both the parties and third parties. The decision is an administrative act, which can be challenged before the administrative courts. There is a standstill rule forbidding the closing of the transaction until after the Government's decision, and the failure to comply with golden power legislation and rules may trigger injunctive powers and involves the levy of huge penalties.

In the past, broadly speaking until prior to the 2020 pandemic, golden powers were seldom exercised and did quite rarely hit the news. With the pandemic, right after the adoption of Regulation 2019/452, the need for adequate legal tools allowing an extent of public control by the Member States and the Union over vital pharma and healthcare resources became dramatically evident. More or less around that time, numerous key-sectors, such as 5G technology, advanced agri-food technologies, quantum and nano-technologies, dual use and military goods, artificial intelligence (AI), autonomous mobility, internet infrastructure, semi-conductors, and others experienced an unprecedented leap forward in scientific and technological progress. This resulted in

the need for stronger legal protection to the subjacent resources and intangibles, than that supplied by the ordinary tools of private and intellectual property law. With the outburst of the Ukrainian crisis in 2022 and the war that followed, the exponential upgrade of tensions between major geopolitical regions and powers, and a fading popularity of globalization doctrines, a novel, strong political rationale commenced to inspire FDI legislation and measures at both Union and Member States level. Golden power cases became more frequent and more closely scrutinized.

The case that we comment provides a significant exemplification of the current background of golden powers exercise in Italy.

Pirelli is a public company and historically the leading player in Italy and one of the important players worldwide of the tire and rubber industry. CNTRC is the leading Chinese manufacturer of tires and rubber products and a global player.

As previously recalled, pursuant to relevant legislation, certain transactions involving foreign entities and potentially affecting the national interest in several strategic sectors must be previously notified to and cleared by the Government. In this case, the notified transaction concerned a project involving novel technologies enabling so-called "cyber sensors" implanted in automotive tires to acquire in real time a broad array of data including traffic and land communications patterns, current state of infrastructures and vehicle geo-localization. The information thus collected is then relayed to cloud systems and high-capacity IT infrastructures, which, through AI tools, can be fed to ground-breaking digital systems such as, to exemplify, "Smart City" (towns structured and functioning with digital tools and support) and "Digital Twin" (digital replicas of physical objects and equipment) technologies. According to the Government's press release, the cyber sensor technology possesses strategic relevance in manifold areas, such as industrial automation, machine-to-machine communication (and autonomous vehicles), machine learning,

AI, advanced manufacturing processes, critical sensor and actuator technologies, Big Data and Analytics. The strategic relevance of the information is to be found in the risks that may be involved by their improper use, in the twofold perspective of national security and the protection of the personal data of an extremely huge numbers of data subjects.

The measures prescribed by the Government on cyber sensor technologies within the context of the CNTR project were adopted on the proposal of the Ministry of Enterprise and Made in Italy (MIMI) and aim at preserving the industrial independence of Pirelli and that of its management in decision-making processes, ensuring the security of internal procedures, and protecting the confidentiality and value of Pirelli's know-how.

Besides reconfirming certain previously assumed undertakings by foreign investor CNTRC, the Government's decision now provides Pirelli with additional legal tools, such as a general security clearance system that streamlines and strictly limits the access to information, the creation of an autonomous internal security unit at Pirelli and, finally, a supermajority of four-fifths within the Pirelli Board of Directors for the adoption of certain decisions. The monitoring of compliance is attributed to the MIMI.

The Government's decision in the Pirelli/CNTRC matter understandably makes no express reference to the more cautious approach that now seems to prevail with respect to Chinese FDIs, but the underlying rationale is fairly evident, and makes a good example of exercise of political discretion.

This seems well in line with the prevailing administrative case-law.

In a very recent case (judgement no. 289/2023), the Council of State (the highest administrative court of Italy), was seized of an appeal from the Rome Regional Administrative Court, lodged against a decision adopted by the Government, that forbade the acquisition by Chinese investor Syngenta of a leading Italian company in the seed industry (Verisem). The administrative court of first instance had denied the challenge.

Whilst confirming that governmental decisions taken under Decree Law 21/2012 constitute administrative (not political) acts subject as such to the review of the administrative courts, the Council of State at the same time held that the very concept of "national security" is an open one and hardly capable of a definition. Since Decree Law 21/2012 utilizes that concept and language, and the national interest that is at stake is particularly significant, this indicates that the Legislator intended that, within the procedural mainframe supplied thereby, the Government enjoyed a particularly broad discretion. This is confirmed by the two-phase procedural model adopted by Decree Law 21/2012, where the first, preliminary phase falls within the technical competence of the Coordination Group within the Prime Minister's Office, whilst the second, decision-making phase belongs to the exclusive competence of the Council of Ministers. The Council of State thus characterized the decisions of the Government in cases of exercise of golden powers as acts of so-called "high administration", whose merits are fundamentally not capable of intrinsic review. These holdings, which arguably became leading case-law, likely foreshadow a more frequent exercise of golden powers in the future, in the wake of the increasingly widespread perception of the need for a stricter scrutiny of FDIs.



Roberto A. Jacchia

PARTNER

 r.jacchia@dejalex.com

 +39 02 72554.1

 Via San Paolo 7
20121 - Milano

MILANO

Via San Paolo, 7 · 20121 Milano, Italia
T. +39 02 72554.1 · F. +39 02 72554.400
milan@dejalex.com

ROMA

Via Vincenzo Bellini, 24 · 00198 Roma, Italia
T. +39 06 809154.1 · F. +39 06 809154.44
rome@dejalex.com

BRUXELLES

Chaussée de La Hulpe 187 · 1170 Bruxelles, Belgique
T. +32 (0)26455670 · F. +32 (0)27420138
brussels@dejalex.com

MOSCOW

Ulitsa Sadovaya-Chernogryazskaya 8, build. 8 · 107078 Moscow, Russia
T. +7 495 792 54 92 · F. +7 495 792 54 93
moscow@dejalex.com