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CORPORATE

Golden powers

On March 25, 2019, the Italian law decree no. 22/2019 (the “Decree”), aimed at extending the government's golden powers to all electronic communication broadband services based on the 5G technology, came into force.

Under the Decree, whoever intends to enter into an agreement with non-EU entities (or subsidiaries of such non-EU entities based in the EU territory) either for the purchase of goods or services relating to the design, implementation, maintenance and management of electronic communication broadband services based on the 5G technology, or for the purchase of high-technology components involved in the above implementation or management activity, is required to file with the Italian Government – prior to the execution of such agreements - a complete and exhaustive set of information on the relevant agreement and undergo a specific procedure aimed at enabling the government to exercise specific veto powers in respect of the above transactions.

As background information, the Decree reflects the Italian Government's intention to qualify the above sector as a strategic business for natural security and defense system and, in practical terms, is aimed at preventing and controlling potential risks which may arise from recent attempts from certain Chinese telecommunication companies (such as Huawei) to install backdoors capable of going through the security systems of Android smartphones and gain access to sensitive data. Further, the Decree implements the already existing legislation on golden powers (i.e. the Italian law decree no. 21 of 2012, converted with amendments into law no. 56 of 2012), which provides for a broad number of case scenarios in which the Italian Government is entitled to exercise its golden powers (i.e. by exercising its veto right or imposing certain restrictions, as the case may be) in order to protect the national defense and security system or a defined range of activities deemed worthy of particular protection under the law.

The golden powers process comprises several steps aimed at enabling the Italian Government to make an assessment on the possible danger in which the national security might incur in case of implementation of the relevant transaction/ agreement. The process might slightly differ depending on the type of transaction/ agreement at stake, but is mainly structured as follows:

- a) filing of a complete and exhaustive set of information on the relevant agreement with the Italian Government;
- b) the Italian Government shall communicate – within 15 days from the filing mentioned under letter a) above - its intention to exercise the veto (and prohibit the execution of the relevant agreement) or to impose specific restrictions to the terms and conditions of the relevant agreement. As a general comment, the evaluation carried out by the Italian Government in this context is aimed at preventing any threaten to the national defense and security system;

- c) the term mentioned under letter b) above is subject to suspension if the Government requests additional information on the relevant agreement – to be provided by the party within the following no. 10 days;
- d) if the Italian Government has submitted no communication at all to the party within the term mentioned under letter b) – as potentially suspended in accordance to letter c) above – then the party is free to enter into the transaction/ agreement.

As a final comment, it must be noted that, pursuant to Article 77 of the Italian Constitution, the Decree must be converted into law by and no later than no. 60 days from its publication. As a consequence thereof, the effectiveness of the provisions included therein is subject to, and conditional upon, the approval by the Italian Parliament of the relevant law within the abovementioned term.

TRUST

Claw-back action

The Italian Supreme Court has issued a significant decision concerning the fraudulent conveyances.

The Italian Supreme Court has issued on 15 April 2019 the decision n. 10498 in which it ruled that it is possible to exercise a claw-back action directly vis-à-vis a trust deed and not only vis-à-vis the subsequent deed of transfer of the assets in favour of the trustee.

This decision is quite innovative, changing the previous position of the Supreme Court (constantly followed by the lower courts) on the basis of which the claw-back action could have been exercised only with respect to the deed of transfer of the assets from the settlor to the trustee, as it is only this deed that causes a reduction of the settlor's estate suitable to defraud his creditors.

The Supreme Court has remarked that the trust deed is normally "empty", i.e. only provides for programmatic rules, and the assets are usually transferred later by means of the subsequent transfer deed. However, when the latter has been put in place, it is possible for the creditor, claiming that he suffered a prejudice from the settlement of the trust, to ask for the claw-back challenging directly the deed of trust instead of the subsequent deed of transfer of the assets. The Supreme Court grounds its reasoning on the basis of the fact that the deed of transfer is inseparably linked to the deed of trust and thus it is a mere execution of the latter.

This decision does not change the substance of the claw-back action but it has procedural effects, widening the means available to the defrauded creditor to challenge illicit trusts.

Trusts are well-known under Italian laws and they are common used since decades.

The last year the Supreme Court issued another important decision (n. 9637/2018) confirming that trusts are fully compatible with the Italian legal system and that they pursue – by operation of law – purposes that are to be considered as deserving of legal protection. Therefore, should a trust be challenged before Italian courts, the judge is not required to verify on a case by case basis if the trust scheme is compatible with the Italian legal system, as such checking has been done once by the Italian legislator ratifying the Hague convention of 1 July 1985 and such decision is final and binding.

BREXIT

Information guide on “Hard Brexit” scenarios

The Italian Government has issued an information guide (the “Guide”) providing specific indications about the consequences and the plans for the case of “Hard Brexit” scenarios.

Following the notice of withdrawal served by the UK to the EU on 29 March 2017 pursuant to Article 50 of the EU Treaty, the Italian Government has established a Brexit task force in order to follow and coordinate the negotiations on Brexit and to prepare all the necessary measures to make Italy ready to face any possible scenario arising from the Brexit, including an “Hard Brexit” crisis scenario.

In consideration of the uncertain political situation of the UK and in light of the various votes of rejection of the Withdrawal Agreement by the UK Parliament, the Italian Government has issued the Guide with the aim of providing detailed information about the plans that Italy is currently implementing in order to face an “Hard Brexit” crisis scenario. Such plans are consistent with the EU collective plan and aim at ensuring, also implementing legislative measures: (i) the protection of the Italian citizens residing in UK and of the UK citizens residing in Italy; (ii) the preservation of the financial stability and of the operative continuity of the markets and of the banking, financial and insurance sectors (both in Italy and in UK) in order to avoid liquidity risks and guarantee the certainty of transactions; (iii) the preparation of the various corporations and the management of any emergencies regarding the following sectors: transports, customs, health system, agriculture, research, education and other sectors in which specific interventions maybe necessary.

The Guide offers very detailed information and analysis for the “Hard Brexit” consequences in any major sector and for any stakeholder: citizens; social security systems; professional qualifications; financial services; customs; medical and phytosanitary requirements; direct and indirect taxes; import-export authorizations; intellectual property; civil proceedings, company law and consumer protection; data protection; air transports; street transports; railways; maritime transports; healthcare (pharmaceutical products, medical devices, clinic tests and human derived substances); food; industrial products; chemical substances; rubbish; public tenders; digital sector; criminal and police cooperation; international agreements.

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