

New Italian measures to cope with covid-19 in light of EU and WTO law

On 6 April 2020, the Italian Government adopted a Law Decree (so-called “*Decreto Liquidità*”) laying down additional measures to support companies negatively affected by the economic consequences of the Covid-19 outbreak. These measures aim at alleviating the devastating effects of the outbreak on the Italian economy. However, it would appear that some of the measures may raise issues in light of EU and WTO law.

Since the final text of the Law Decree has not yet been published in the Italian Official Journal, this flash alert is based on the measures as described in the press release issued by the Italian Government on 6 April 2020.¹

1. EXPORT AND LIQUIDITY MEASURES IN SUPPORT OF italian companies

The Law Decree provides for, *inter alia*, measures aimed at securing liquidity of Italian companies and at supporting and fostering exports. In particular, the Law Decree provides that:

- 1) the Italian State guarantees the loans that the banks will provide to companies. The amount of the State guarantees will vary depending on the size, number of employees and turnover of the company requesting the loan. The guarantees will be provided through SACE SIMEST, the Italian Export Credit Agency (“SACE”);
- 2) an export credit co-insurance system will be made available to companies. This regime provides that 90% of the obligations deriving from SACE's insurance activity will be borne by the State and the remaining 10% by SACE itself.

The above measures clearly provide for advantages for Italian companies and, as such, they appear to constitute State aid. The lawfulness of these aid measures in the light of the EU State aid rules will have to be assessed, *inter alia*, on the basis of the Temporary framework adopted by the European Commission in view of the COVID-19 outbreak² and Article 107(2)(b) TFEU.³

In addition, it would appear that the measures listed above might constitute subsidies prohibited under WTO Law. If so, it is possible that WTO members could challenge the lawfulness of such measures before the WTO and/or initiate countervailing duty (CVD) investigations against exports from Italy benefitting from such measures.

¹ For reference, please see, <http://www.governo.it/it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-39/14417>.

² For reference, please see the [State Aid Temporary Framework](#) and the following [amendment](#). Please note that none of the above-mentioned temporary frameworks provides for a suspension of the obligation for Member States to notify aid measures to the European Commission in advance. Therefore, the measures at stake may have to be notified to the European Commission.

³ So far, the Commission has approved two Italian aid measures found to be in line with the Temporary framework, namely:
1) A €50 million aid scheme to support production and supply of medical equipment such as ventilators, masks and goggles and
2) a State guarantee to support a debt moratorium for SMEs, which includes the postponement of repayments of overdraft facilities, bank advances, bullet loans, mortgages and leasing operations.

2. measures relating to the exercise of the “Golden Power”

The Law Decree strengthens the mechanism of the so-called “golden power rule”, which provides for prior authorization from the Italian Government in respect of operations involving the acquisition of shareholdings in companies operating in industries held to be strategic for the national economy. The sectors originally covered by this regime are, *inter alia*, national defence, national security, energy, transport and communications (including broadband electronic telecommunications with 5G technology).

The Law Decree broadens the scope of application of the “golden power rule” by including the following sectors within the notion of strategic industries:

- Financial, credit and insurance;
- Critical infrastructure and technologies, including water and health;
- Food safety;
- Access to sensitive information, including personal data;
- Artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnologies and biotechnology.

Moreover, as concerns non-European transactions, the Italian Government will be allowed, on a temporary basis, to intervene in acquisitions of shareholdings of more than 10% by non-EU members, provided that they exceed the one million-euro threshold.

Most importantly, the Law Decree broadens, on a transitional basis until 31 December 2020, the scope of application of the “golden power” so as to include transactions concluded within the European Union, which will require prior authorization by the Italian Government where acquisitions of control of assets fall within the sectors described above.

Based on a preliminary examination, it is possible that the measures at stake could raise some concerns as to their compatibility with the free movement of capital enshrined in Article 63 TFEU.⁴ This is particularly the case when one considers that Italian provisions conferring such a “golden power” were found to be incompatible with EU Law by the Court of Justice of the European Union.⁵

We may provide additional views on the Decree after the full text is published in the Italian Official Journal. In the meantime, if you have questions on the content of this note, please do not hesitate to contact us.

⁴ It is important to note that the Spanish Government, although adopting similar measures relating to the golden power rule, has excluded intra-EU transactions from their scope of application.

⁵ See, for instance, *Commission v. Italy*, C-58/99, judgment of the Court of Justice of 23 May 2000, *Commission v. Italy* C-174/04, judgment of the Court of Justice of 2 June 2005 and *Commission v. Italy*, C-326/07, judgment of the Court of Justice of 26 March 2009.