

FRANCESCO M. DI MAJO

**I PORTI ITALIANI QUALE *ASSET* STRATEGICO DEL PAESE.
MECCANISMI DI TUTELA E DI CONTROLLO
DELLE CONCESSIONI DEMANIALI
IN BASE ALLA NORMATIVA SULLA *GOLDEN POWER*
E SULLA PORTUALITÀ.
LA NUOVA STRATEGIA INDUSTRIALE EUROPEA
E NUOVI STRUMENTI DI TUTELA
DELLA *BLUE ECONOMY* EUROPEA**

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1. *L'applicazione della normativa sulla «golden power» ai porti e ai trasporti marittimi.*

La normativa italiana ed europea sulla tutela degli *asset* strategici rispetto ad eventuali investimenti stranieri c.d. «ostili» comprende anche i porti, sebbene fino ad oggi il Governo italiano non abbia ancora esercitato in tale settore i poteri speciali di cui gode ai sensi della normativa sulla *golden power* ⁽¹⁾. Attraverso tali poteri, come è noto, il Governo ha la pos-

⁽¹⁾ La normativa italiana è vigente dal 2012 con l'adozione del d. l. del 15 marzo 2012 n. 21. Tale decreto è stato successivamente più volte modificato e ne è stato progressivamente ampliato l'ambito di applicazione (V. d. l. n. 148/2017; d. l. n. 22/2019; d. l. n. 105/2019; d. l. n. 23/2020). Con i d.P.C.M. n. 179 e n. 180 del dicembre 2020 (entrati in vigore il 14 gennaio 2021) sono stati precisati, in attuazione dell'art. 2 del d. l. n. 21/2019, a completamento del quadro normativo della materia, gli attivi e i beni e rapporti di rilevanza strategica per l'interesse nazionale ed in alcuni settori specifici è stata ulteriormente rafforzata la disciplina sulla *golden power*. Occorre precisare che con decreto legge n. 23 dell'8 aprile 2020 (c.d. “decreto liquidità”) il Governo oltre ad aver ampliato l'ambito di applicazione dei poteri speciali a fini di tutela della sicurezza e dell'ordine pubblico, ha

SUMMARY OF THE ARTICLE BY AVV. FRANCESCO MARIA DI MAJO: “ITALIAN PORTS AS A STRATEGIC ASSET OF THE COUNTRY - EU REGULATION NO.452/2019 ON FOREIGN INVESTMENTS AND THE GOLDEN POWER REGIME”

In this article is first examined the Regulation No. 452/2019 establishing a framework for the screening of foreign direct investments into the Union. This Regulation provides for a detailed cooperation mechanism that entails information obligations (e.g. regarding the ownership structure of the foreign investor including information on the ultimate investor and participation to the capital) from the Member States towards the Commission and Member States that request it. This measure can be exercised either on Foreign Direct Investments, (FDI) which are the subject of an ongoing screening by a member state, or on FDI that are not, as long as, in either case, the relevant FDI is likely to affect the security or public order of the "third" member state that intends to implement the cooperation mechanism and hence the control.

Although this mechanism is quite detailed and includes the possibility of obtaining additional information, it should be noted that this mechanism appears to be “soft” in terms of effectiveness, insofar as the Member States and the EU Commission will be able to make comments or opinions respectively (not of a binding nature) that the Member State on which the relevant FDI is implemented will only take into "*due consideration*." In essence, the final decision regarding a FDI subject to an ongoing control remains with the Member State conducting that control (Art. 6(9) of Regulation No. 452/2019), while the Regulation does not impose an obligation on a State of which the FDI is planned or completed to conduct such screening (Art. 1(3) of Regulation No. 452/2019). The article emphasizes a more "balanced" policy adopted by the EU Commission towards foreign investments. This approach also stems from the observation that, in 2019, more than 35 % of the EU's total assets were held by foreign-owned enterprises and Chinese state-owned companies (which invested heavily in the "transportation services and logistics" sector) contributed to a substantial growth in foreign investment.

In this context also falls the Commission's pending proposal for a Regulation to fight distortions of competition and the internal market in the EU caused by foreign subsidies to companies doing business in the EU (defined by the press as the "anti-subsidy shield").

The pandemic emergency has provided further justification for this "balanced" European policy, already in place, in the openness to foreign investment along with the process of re-delocalization (re-shoring) of European companies, as well as the need to better control the supply of critical input factors and the agri-food security. Additionally, the pandemic has brought out the strategic role of ports. In fact, in the period of the health emergency, Italian ports (internally coordinated by the Port System Authorities) have never stopped to work. Conversely, they have always ensured full operation, especially in the freight and Ro-Pax traffic (namely, along the Motorways of the Sea e.g., the Civitavecchia-Barcelona route operated by the Grimaldi group).

In the recent years, the European ports, as the gateway of the 75% of non-EU trade and the privileged access point for the supply of raw materials, have been the subject to strong interest mainly by Asian (often state-controlled) companies. They were granted major commercial terminals (most recently the acquisition of shares by the Chinese state-owned company Cosco Shipping in the port of Hamburg) as well as even control of the governance of the Port Authorities (e.g. Cosco Shipping's control of the Port Authority of Piraeus) in European ports where this is legally possible.

Undoubtedly, the control by a foreign entity (perhaps even a public entity that receives large subsidies from the State) of an important terminal or even of an entity/company that manages the

port, can result in the shifting of international shipping lines in that port, especially where the foreign entity is also a shipping carrier (effectively resulting in vertical integration).

This article then identifies and examines the transactions in the port sector that are likely to fall under the application of Italian legislation on *golden power*, and subsequently examining the competences that fall to the Italian Port System Authorities in the application of such legislation, with reference to the assignment of maritime state concessions, from the assessment of the ownership structure of the foreign investor to the control of the exercise of the concession.

The analysis of the Italian legislation on *golden power* brings, in fact, to light the fact that the specific "sector regulation, also of a conventional nature, connected to a specific concessionary relationship" (Art. 4, paragraph 1, DCPM no.180/2020), should ensure the protection of economic activities of strategic importance (or critical infrastructure) within ports. Therefore, it would be up to the Port System Authorities, pending the adoption of the ministerial decree regulating the granting of commercial state-owned concessions (Art.18, Paragraph 1 Law 84/94), to identify the conventional measures within the concession act aimed at ensuring the protection of the aforementioned national interests. The article examines what measures could be included in the concession deed by the Authorities also in connection with the subjective components of the concession relationship. In this regard, it should be noted that the latest amendments to the basic legislation on *golden power* (i.e. Decree Law No. 21/2012 converted by Law No. 56 of May 11, 2012), contained in Articles 24-28 of Decree-Law No. 21/2022, have extended state control powers and stabilized the obligation to notify also if the purchaser of strategic assets is a European Union entity and even if it is resident in Italy, (the latter provision had been introduced on a temporary basis due to the COVID-19 emergency and then repeatedly extended).