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ITALIAN GOLDEN POWERS AND THE ROLE OF INDEPENDENT AUTHORITIES

ABSTRACT. *With the judgment in question, the Regional Administrative Tribunal for Lazio, Section I, helped define the role of the independent authorities within the administrative procedure aimed at exercising the so-called special powers referred to in law-decree n. 21/2012. The judge sanctioned the principle that the opinions rendered by independent authorities during the investigation phase must necessarily be issued by competent bodies and the final provision cannot be limited to reproducing the content of those opinions in its entirety. The court also reported the possible infringement of the principle of legality deriving from a golden power decision that stealthy expands the definition of "strategic asset." This definition, in fact, constitutes a prerequisite for the exercise of power that can only be identified by the law and by the implementing regulations.*

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In 2018 the company Reti Telematiche Italiane S.p.A. (hereinafter Retelit) challenged the decree of the President of the Council of Ministers (d.P.C.M) of 7 June 2018, with which the Presidency exercised the golden power, i.e., the special screening powers provided for by the law-decree of 15 March 2012, n. 21, imposing on the company specific prescriptions and conditions, as well as the sanctions which derived to the non-fulfillment of the aforementioned prescriptions. The company, in fact, renewed the Board of Directors in 2018 and informed the Government of this change, since it feared that the corporate reform might have been under the scope of golden powers.

However, Retelit considered this administrative decision to be unlawful because of some procedural defects. Among those, the administrative decision would have been adopted on the basis of an assumption, the availability to Retelit of strategic assets, ascertained during the administrative procedure through technical considerations expressed by a body, the Secretary General of the Authority for Communications Guarantees (AgCom), lacking the competence to pronounce. Therefore, Retelit claimed the unlawfulness of the administrative decision in the part in which it would have identified new and different strategic assets than those included in the list of categories referred to in Art. 3 of the Presidential Decree n. 85 of 2014, thus violating Art. 2 of law-decree n. 21/2012, which provides that strategic assets can be identified only by law or through Government's subsidiary legislation. On the basis of these and other reasons, the Regional Administrative Tribunal for Lazio granted the appeals and annulled the administrative decision with decision n. 8742/2020.

The case in question allows us to carry out some reflections on the procedure for the exercise of the golden powers, since the decision was annulled by the judge because "the investigation carried out by the administration is unlawful since the evaluation about the "strategic nature" of the assets in Retelit's availability was based on an opinion of the AgCom issued by a subject lacking the competence to adopt it."

In general, the special powers referred to in law-decree n. 21/2012 are exercised through the issuance of a d.P.C.M. adopted collectively by the Council of Ministers. The d.P.C.M. can have various types of content: it can impose a veto on changes in the corporate governance and on the purchase of company's shares or it can consist in the provision of prescriptions and conditions for the economic activity.

The structure of the screening procedure has a profound influence on the rela-

tionship between the administration and private parties in the exercise of special powers. It is based on inter-ministerial coordination. The subjects who carry out an economic activity which may be subject to the exercise of the golden powers are required to notify the initiation or the intention to initiate them, within rather rigid deadlines, so that the Government can proceed with an investigation. Where the notification is actually sent, the Department for Administrative Coordination transmits it together with the documentation received to the offices of the responsible Ministries, to the President of the Council and to the members of the coordination group.

The investigation, of course, is that phase of the administrative procedure in which the facts are ascertained and the interests, public and private, are acquired, so that they can be evaluated by the public administration for the purpose of adopting a decision. In the case of the golden powers, this phase takes place in the very short term for the exercise of power for his experiment (thirty or forty-five days).

The Ministry responsible for the investigation, in the light of the findings that emerged at the meeting of the coordination group, sends the motivated proposal on the exercise of special powers to the Department for administrative coordination, to the President of the coordination group and to the other responsible Ministries. It will then be the Department for Administrative Coordination, having received the proposal, if it detects the exercise of special powers, to eventually submit the draft decree to the resolution of the Council of Ministers. The Ministry responsible for the investigation and the proposal, also taking into account any indications from the Presidency of the Council of Ministers or other interested Ministries, if he deems it necessary for the purposes of the assessment, may suspend the procedure and request clarifications or supplementary documentation to the notifying subject. In the same way, the Government can also request information and opinions from third parties.

On the other hand, despite the complex structure of the procedure, the involvement of various ministerial structures and the possibility of requesting information and opinions to external parties, some critical voices found the procedure to be flawed by a substantial lack of expertise, due to the fact that the investigation is mainly based on the means available to the responsible Ministry.

In order to fill any gaps in expertise, following the multiple reforms of the legislation on golden power, art. 2-bis of legislative decree n. 21/2012 today provides, in

the first paragraph, that the Bank of Italy, the Consob, the Supervisory Commission on Pension Funds, the Insurance Supervisory Institute, the Transport Regulatory Authority, the Italian Competition Authority, the Authority for Communications Guarantees, the Regulatory Authority for Energy, Networks and the Environment and the coordination group established pursuant to Article 3 of the Prime Minister's Decree of 6 August 2014 collaborate between them, including through the exchange of information, in order to facilitate the exercise of the functions referred to in the decree.

The second part of this article reiterates what is already provided for by other legal provisions, such as that in order to collect elements useful for the exercise of golden powers, the coordination group may request public administrations, public or private bodies, companies or others third parties who are in possession of it, to provide information and exhibit documents. The last part of the article, moreover, states that for the same purposes, the Presidency of the Council may enter into agreements or memoranda of understanding with research institutes or bodies.

The changes introduced in the body of the law-decree which regulates golden power, therefore, seem inspired by the desirable purpose of allowing a thorough investigation also through the collaboration of entities different from those that exercise the power. The effectiveness of these reforms can only be fully assessed over time, for example by analyzing the annual reports on the exercise of the golden power.

The examined case, however, is currently very useful for evaluating the possible degenerations of this model. The need, on the part of the coordination group, to rely on external subjects to make up for the lack of expertise, in fact, led to the aforementioned censorship by the Administrative Tribunal. This is because the Government requested a "technical report" from AgCom on the basis of which, after an examination of the assets available to Retelit, those assets were considered as strategic. If the request for an opinion to the independent authorities today is, as noted, admitted and promoted by law-decree n. 21/2012, especially following the introduction of Art. 2-bis, in this case the opinion of AgCom, however, played a very particular role.

In fact, although not mandatory, it was of central importance for ascertaining the existence of the objective prerequisite for the exercise of special powers. This is evident from the fact that, in addition to being expressly mentioned among the contributions taken into account in the investigation, its content has been almost faithfully

transcribed, both in the descriptive and in the evaluative part, of both the proposal of the Ministry of economic development of 7 June 2018, and the final administrative decision (the appealed d.P.C.M.). However, law-decree n. 21/2012 provides that the strategic assets are identified with Government's regulations, while there are no particular rules that attribute to the General Secretary of AgCom the task of interpreting, through an opinion, the content of laws and regulations, identifying new assets as strategic ones.

This story, therefore, should underline the importance of providing sufficient knowledge to the administrations which directly exercise special powers also in order to avoid problems capable, as in the case in question, of compromising the entire procedural chain and the final decision.

In this sense, it seems appropriate to reflect on the fact that the Committee on Foreign Investment in the United States (CFIUS) provides for the participation in the investigation of subjects who do not belong directly to the ministerial bureaucracy, but extends its borders only to a limited extent and very rarely to independent Authorities. The Committee, in fact, is made up of various ministers of the Federal Government: the Secretaries of the Treasury, Commerce, Internal Security, Defense, Energy, Labor, the Attorney General and the Secretary of State. They are complemented by the Director of National Intelligence (without voting rights) and all the other subjects at the head of a department, agency or office of the executive that the President or the Secretary of the Treasury deems necessary to involve on the basis of the circumstances relating to the concrete case under consideration. The reform brought by Executive Order no. 11858, introduced in 2008, also added as members with voting rights the Director of the Office of Science and Technology Policy and the United States Trade Representative as well as a series of other permanent members with an advisory role, also coming from the internal structure of the Presidency, as the Assistant to the President for National Security Affairs and the head of the Office of Management and Budget.

From this composition it can be deduced that in the US model the role of the Government and of the subjects connected to it is dominant. This is not surprising, on closer inspection, given the importance of special screening powers for the implementation of a broader industrial policy. The latter, it appears evident, can only belong to the natural powers of the executive branch and can hardly be entrusted to subjects born to perform very different tasks, such as independent authorities. Moreover, it should be

considered that entrusting the concrete decision on issues of this kind to a growing number of subjects would lead to the inevitable increase in interests involved in the issuance of golden power measures. This could result in both an extension of the cases subject to the discipline and a significant increase in the number of notifications sent on a purely prudential basis by individuals. These are two potentially paralyzing phenomena for the market, devoid of any clear utility for the government's industrial policy.