

Newsalert

Golden Powers: The Regional Administrative Court of Lazio rejects Syngenta's appeal against the veto to the purchase of Verisem

The Regional Administrative Court (*Tribunale Amministrativo Regionale*, hereinafter also only "T.A.R.") for Lazio – Rome of first instance rendered its decision no. 4488/2022, published on 13 April 2022, rejecting the appeal filed by Syngenta Crop Protection Ag ("**Syngenta**") against the Prime Ministerial Decree which, in October 2021, imposed a veto pursuant to the so-called *golden powers* regulation on the proposed purchase of the entire corporate capital of Verisem B.V. ("**Verisem**") and of its Italian subsidiaries.

This decision is one of the very few judicial precedents regarding the application of the special powers of the State over corporate entities and activities of strategic importance (the so-called *golden powers*), a fact that in itself would be sufficient to acknowledge its special nature and relevance.

Decision no. 4488/2022 is even more relevant in light of the indications expressed therein, which can be grouped according to a twofold argument: on one hand, it investigates how the *golden powers* procedures and related powers are positioned in the classic categories which characterize the theory of administrative law (an argument that could be deemed to belong to the world of "general theory", but that it implies practical consequences of immediate relevance nonetheless); on the other hand, it highlights some distinctive features of the sectorial discipline at hand, with particular reference to the process of identification of activities considered strategic and to the requirements for the exercise of the special powers.

1. Factual background

In June 2021, the US investment fund Paine Schwartz Partners announced the signing of binding agreements providing for the acquisition by Syngenta, a Swiss company linked to the ChemChina Group (in turn, owned by the Chinese Government), of the entire corporate capital of Verisem and its subsidiaries (the "**Verisem Group**"), including the Italian entities Suba Seeds Company S.p.a., Royal Seeds S.r.l., HortuSi S.r.l., Verisem Distribution S.r.l. and Franchi Sementi S.p.a..

The Verisem Group is active in the agri-food sector, and in particular in the seed industry. The transaction described above immediately received a great deal of media attention as well as the firm opposition of Italian business operators of the mentioned sector, including Coldiretti, resulting in the submission by some Italian Members of the European Parliament of a formal enquiry to the EU Commission (enquiry no. E-002990/2021).

Following the FDI filing submitted by the purchaser, Prime Ministerial Decree no. 3693 of 21 October 2021 exercised the veto power pursuant to Law Decree no. 21/2012, thus blocking the proposed acquisition of the Verisem Group. In particular, the aforementioned Prime Ministerial Decree found that the transaction at hand involved strategic assets mentioned by Articles 6, 9 and 11 of Prime Ministerial Decree no. 179/2020 (*i.e.* one of the key implementing regulations of the golden powers discipline) and that it was detrimental for national security interests in the agri-food sector¹.

Given that the last Report to Parliament publicly available - the main source of public information on *golden powers* - is updated to 31 December 2020, no further official information on the matter was available. Thanks to this decision, however, a window has now been opened on the procedural steps and, above all, on the legal reasons underlying the exercise of the veto power.

2. Legal qualification of the FDI filing and of the special powers

As mentioned above, decision no. 4488/2022 appears first of all particularly interesting in the light of its attempt to address, in an innovative manner, the collocation of the golden powers regime within the traditional categories in which the theory of administrative law is articulated, thus providing useful guidelines for the operators in the sector.

Without claiming to be exhaustive, particular attention should be posed to:

- the **confirmation of the qualification of the decision to exercise the special powers as an act of "high administration"**, *i.e.* the borderline category between the world of politics and the world of law (to which it still belongs), entailing widely discretionary choices subject to a limited scrutiny by the administrative judge, limited to the manifest illogicality of the decisions taken. Some indications in this direction have already been noted in case law (see judgment no. 727/2021 of the Regional Administrative Court for Piemonte);
- the description of the FDI filing made pursuant to Law Decree no. 21/2012 as "**... a mandatory informative communication**, assisting the exercise of the special powers pursuant to Law Decree no. 21/2012 through the commencement of a special proceeding, which may also be activated by the administration *ex officio*". This excludes that the filing due prior to the implementation of the relevant transaction constitutes a party's request aimed at obtaining an extension of its legal domain, in relation to which the public

¹ More specifically, according to what seems possible to infer from the decision under examination, the reference to the "goods and relationships of strategic importance" identified by the mentioned articles of the D.P.C.M. no. 179/2020 relates, in this case, to the "economic activities of strategic importance" and to the "supply of critical productive factors of the agri-food chain" (Art. 11); to the treatment of sensitive information, including personal data, among which, in particular, the collection of data carried out using also machines trained according to the principles of "machine learning" (Art. 6); and, finally, to the sector of critical technologies, among which, in particular, "*the technologies related to computerized automatic learning (Machine Learning)*". In the words of the T.A.R. Lazio, "*in substance, Verisem's strategic assets are properly identified, and they are relevant in terms of critical production factors, manufacturing technologies and information*".

administration has a power of authorization/concession (an assumption from which it follows that the notice of rejection pursuant to Article 10-*bis* of Law no. 241/90 is not due in this case). In other words, the decision under scrutiny reminds us that, although generally speaking of "golden powers clearance" - a simplification which is often necessary especially in business contexts whereby international investors are involved, the dynamics of the golden power proceeding do not amount to an authorization procedure, but rather to the exercise of control powers (albeit "special" by definition, given their relevance to the core of national security interests);

- the highlighted independence between the preliminary investigation phase and the decisional phase, since the T.A.R. - Lazio - giving preference to the task of gathering elements for a technical assessment by the coordination group and the administrations involved, over the release of the preliminary proposal regarding the exercise the special powers - underlines the decision-making freedom of the Council of Ministries, which is therefore not "... bound or in any case required to adopt an enhanced motivation should it deviate from the proposal made in the preliminary phase".

3. Strategic assets in the agri-food sector

Having set out the general interpretative coordinates described above, decision no. 4488/2022 then focuses on (i) the possibility to qualify the Italian activities of the Verisem Group among the strategic assets and relationships identified by Prime Ministerial Decree no. 179/2020, as well as (ii) the justification for the decision to veto the completion of the transaction, which - in the regulatory framework set forth by Law Decree no. 21/2012, as well as in practice - is a measure of last resort, admissible to the extent that no other requirements or conditions are possible to adequately protect public interests.

As mentioned above, in view of the "*very wide discretion*" that characterizes the State's decision to exercise (or not) the special powers, the T.A.R. - Lazio emphasizes the need for a rigorous preliminary investigation in order to verify the actual presence of strategic assets and of the kind of transactions caught by the FDI regulation. This way, the assessment on the application of the golden powers regulation is brought back (necessarily, given the conflicting relationship with the European freedoms of establishment and movement of capital, as well as the rule of law which governs the administrative action so that it never crosses over into arbitrariness) within the boundaries of the specific categories predetermined, in this case, by Prime Ministerial Decree no. 179/2020 and by Article 2 of Law Decree no. 21/2012.

In this case, in particular, the following elements have been taken into account (and not considered illogical or inconsistent with the relevant regulatory framework): (i) "*the circumstance that Suba Seeds Company S.p.A. (one of the Italian target companies of the Verisem Group) interacts with the supply chain of both farmers and the mechanical industry in all sectors and stages of the seed value chain, from cultivation to product packaging*"; (ii) the *know-how* acquired in the field of mechanics and innovative technologies for agriculture (despite the absence of research and development activities in Italy), as well as (iii) the importance of the information assets of the Verisem Group, in relation to "*...national suppliers of precision mechanics for agriculture and the agricultural companies that interact with the Italian society*".

In light of the line of reasoning of the Prime Ministerial Decree challenged by Syngenta, which has been validated by the T.A.R. - Lazio, it seems possible to confirm that the very categories

of Prime Ministerial Decree 179/2020 used as benchmark for the rigorous screening required by the administrative judge contain in turn some (perhaps unavoidable) profiles of discretionary and subjective assessment, which may lead to diversified and not always predictable conclusions (this is the reason why, in practice, the so-called "precautionary filings" found so much room and why the recent introduction, by Law Decree no. 21/2022, of a pre-notification procedure has been welcomed favorably).

Upon confirming the qualification of Verisem Group's assets as strategic from a golden powers point of view, the Regional Administrative Court for Lazio concluded its examination by deeming "*entirely logical*" the rationale underlying the imposition of the veto on Syngenta's purchase. In such circumstances, the fact that the actual beneficial owner of the purchaser is the Chinese Government was considered decisive, due to the "*difficulties in implementing truly effective enforcement measures in case of non-compliance with the requirements eventually imposed to prevent the transfer of the assets abroad*".

*** **

This decision commented above offers interesting elements for reflection, which, together with the recent regulatory changes to the legal framework on special powers of the State, further confirm the importance for businesses and investors to carry out a preliminary assessment in order to verify whether their business or any acquisitions fall within the scope of the *golden powers* regulation, as well as to take into due account *golden powers* related profiles from the very start when structuring a transaction.

Chiomenti, thanks to its in-depth experience in the notifications and procedures related to the exercise of special powers, is well placed to provide investors and businesses with clarifications and in-depth analysis in this area, as well as dedicated and expert advice.

For further information, please reach out to your usual Chiomenti contacts, as well as the following:

Contacts

Prof. Avv. Giulio Napolitano

Partner - Chiomenti
Administrative Law Department
T. +39 06 46622 806
giulio.napolitano@chiomenti.net

Avv. Luca Masotto

Associate - Chiomenti
Administrative Law Department
T. +39 06 46622 812
luca.masotto@chiomenti.net
