

TLC INFRASTRUCTURE AND DECRETO AIUTI: CRITICAL ASPECTS OF THE NEW “POSTHUMOUS” EXPROPRIATION POWER OVER PRIVATE REAL ESTATE ASSETS

Important and incessant regulatory interventions – even if not always organic and linear – are recently characterizing the telecommunications sector.

At the end of 2021, the Italian Government transposed the European Electronic Communications Code set forth in Directive (EU) 2018/1972, through the adoption of Legislative Decree 8 November 2021 no. 207; the latter amended large portions of Legislative Decree 1 August 2003 no. 259, containing the Italian Electronic Communications Code.

However, due to the NRRP pressure towards the development of the country's digital infrastructure, the legislative push towards a more favourable regulatory framework for operators did not stop with the transposition of the European Electronic Communications Code.

In particular, Article 30-*bis* of the Decree-Law 17 May 2022 no. 50 (the so-called *Decreto Aiuti*), converted by Law 15 July 2022 no. 91, concerning “*simplifications in the field of telecommunications*” should be noted.

Through this provision, the Parliament inserted, into Article 44 of Legislative Decree no. 259/2003 (dedicated to the authorisation procedures for electronic communication infrastructures), paragraph 1-*bis*, according to “*The provisions of Article 51, paragraph 3, are also applicable in cases in which the plants and works referred to in paragraph 1 of this Article are already built on real estate properties held by operators on the basis of private agreements*”.

Article 51, paragraph 3, of Legislative Decree no. 259/2003, in the text resulting from the amendments made by the same Article 30-*bis* of Law Decree No. 50/2022, provides that “*For the acquisition of ownership rights or rights in rem over the real estate assets necessary for the realisation of the plants and works referred to in paragraphs 1 and 2, the operator may carry out the expropriation procedure provided for by Presidential Decree 8 June 2001 no. 327. This procedure may be carried out after the attempts to reach an amicable settlement with the owners of the land on the sale price offered, to be assessed by the competent State technical offices, have failed or it has not been possible to carry out such attempts*”.

The direct consequences of the aforementioned amendments to Articles 44 and 51 of Legislative Decree No. 259/2003 are twofold:

- (i) whereas in the previous framework the operator could only carry out the expropriation procedure for public utility in order to realise new works or plants, the new paragraph 1-*bis* of Article 44 **allows to resort to expropriation also in order to preserve works or plants that have**

already been realised by virtue of private law agreements with the owners of the real estate assets concerned (e.g. lease contracts);

- (ii) through the amendment of Article 51, paragraph 3, it is clarified that expropriation may affect not only the full ownership of the real estate properties on which the facilities and works are located, but also rights in rem.

Evidently, the new legislation raises several perplexities, also of a constitutional nature, due to the imbalance that it introduces in the context of existing contractual relationships, to the benefit of the TLC operators who could be tempted by a distorted use of the rule aimed at profiting from contractual conditions outside the market.

Also of particular concern is the possibility that operators might use paragraph 1-*bis* to expropriate portions of roofs or solar pavilions, a circumstance that would give rise to significant problems for the marketability of real estate complexes.

The Firm will closely follow the upcoming regulatory and case-law developments, remaining at your disposal for any needs.

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