



M&A AND GOLDEN POWER IN ITALY:

THE PANDEMIC CONTINUES TO BE THE REASON FOR PROTECTIONIST PRACTICES OF THE GOVERNMENT – A SHORT GUIDE THROUGH THE PROCESS

The deep recession that hit Europe in 2020 spurred on by the global pandemic, concomitant uncertainty (which continues to date), and certain structural factors in the country, all of which have contributed to a significant increase in cross-border European and non-European M&A activity around Italian companies¹. These factors are still contributing to protectionist barriers that aim to isolate transactions of national strategic importance to the Government of Italy.

For this purpose, the Government of Italy has extended until 31 December 2022 the application of the so called “golden power” rules.

1) General Framework

“Golden power” is a set of rules according to which the Italian Government may exercise some veto rights in relation to certain corporate resolutions and/or to share purchase agreements (together “transactions”) in specific economic sectors or for assets of specific sectors.

The scope of the veto rights differ according to the economic sector involved but, in general, the Italian Government is allowed to veto, or to impose particular prescriptions, every time a transaction is contemplated when it deems it necessary to protect the national interests involved, especially if the transactions are in favour of foreign beneficiaries (located inside or outside the European Union).

The Italian Government’s evaluation procedure begins when a notification is issued by the company or by the purchaser, within **10 days** from the adoption of the company resolution or the execution of the purchase agreement (the notification can also be made prior to the purchase, as long as it contains the relevant information about the transaction).

Within **45 days** of the notification (such term might be extended if in-depth review, hearings or further information, including from third parties, is required), the Italian Government may choose any of the following:

- a) take no action (with the consequence that the transaction is implicitly approved);
- b) impose specific requirements or prescriptions for pursuing the transaction, such as, for example: obligations to relocate strategic assets, approval of certain key decision in the company, separation of certain assets in favour of other national beneficiaries, special obligations for the treatment of data, etc.; or
- c) veto the adoption of the transaction.

¹Notoriously exposed due to their small size and/or their “family owned business” structure.

During the 45-day term, or until the conclusion of the Government's procedure, if earlier, the voting rights associated with the corporate shareholding remain frozen. This veto right may be exercised also if the parties did not give notice of the transaction to the Government.

Following the exercise of the veto right, shareholder voting rights are definitely frozen, and the purchaser is obliged to sell the shares or quotas within one year, failing which, the court, at the request of the Prime Minister's Office, may order their sale in accordance with the process provided by art. 2359-ter of the Italian Civil Code.

Up to December 31, 2022, the Law Decree 23/2020 and subsequent amendments and additions, impose an obligation to notify corporate resolutions and shareholding purchase agreements in the relevant economic sectors, even if the beneficiaries are located within the European Union.

This decision has led, starting 2020, to a significant increase in the number of notifications to the Prime Minister's office compared to the previous years. In the first two months of 2021, normally a period with fewer M&A deal flow, there have been about 54² notifications, in 2020, there were 342, whilst only 83 notifications were made during 2019.

Looking at the 2020 data, 286 notifications were made in the economic sectors referred to in EU Regulation 452/2019, (as specified by the Prime Ministerial Decree no. 179 of December 18, 2020). In these sectors under the ordinary rules, the obligation to notify exists only in those cases where the beneficiary of the transaction is located outside of the EU³. The trend highlighted above also confirms the confusion surrounding the matter. In fact, in 2020, the Government declared that 154 notifications did not fall within the scope of application of the golden power rules because the sectors or assets fell outside those listed by the regulations, or because the transactions did not reach the thresholds provided by the law (see tables below). Most likely, as evidenced by the proliferation of notifications, it is the failure to distinguish between the wider concept of business sector and that of a strategic asset being a smaller part of a business sector. In fact, it should be specified that the obligation to notify does not arise solely because a company belongs to one of the above-mentioned sectors, since it is also

² Official 2021 statistics yet to be disclosed by Spring 2022.

³ Regarding to the ascertain that a beneficiary is located inside or outside the European Union, paragraph 5-bis of art. 2 of Law Decree no. 21 of 2012 defines such as:

- i) any natural person or legal entity that does not have its registered residence, habitual residence, registered office or administration or main center of activity in a member state of the European Union or the European Economic Area or that is not in any case established there;
- ii) any legal person that has its registered office, central administration or principal place of business in a Member State of the European Union or the European Economic Area, or is otherwise established there, and is controlled, directly or indirectly, by a natural person or legal person referred to in point a);
- iii) any natural person or legal entity that has established its registered residence, habitual residence, registered office or administrative headquarters or principal place of business in a member state of the European Union or the European Economic Area, or is in any event established therein, where there is evidence of a conduct aiming to circumvent the application of the regulations set forth in this decree.

necessary that it holds in those sectors, assets that are considered as strategic by the golden power rules. Additionally, it is required that the economic thresholds or relevance are evaluated carefully (see tables below).

Clearly, compliance with the golden power rules cannot be achieved through a generalized practice to notify any possible M&A transaction or corporate resolution in specific business sectors (which inevitably slows down the transactions).

Nevertheless, the Italian Government continues to be very sensitive in applying the golden power rules in 2021, during which the Draghi Government has so far (as of November 30) vetoed the acquisition by foreign investors of the shareholdings of two Italian companies. The first operating in the semiconductors sector and the second in the agri-food industry (both relevant sectors under Prime Ministerial Decree 179 of December 18, 2020). Furthermore, the Government is currently evaluating, for the purposes of exercising the golden power, the friendly takeover bid announced by the KKR fund of the national telephone operator TIM⁴ and, it is rumoured, that it will likely oppose an acquisition in the technology sector for the construction of solar panels.

What has become clear is that every M&A transaction carries a risk that the golden power rule may apply. The Government’s veto power, along with the time frame needed to conduct a Government’s evaluation are two reasons for carefully drafting contracts and corporate resolutions related to transactions that may fall within the golden power ambit.

A coordination that necessarily passes through the provision of specific clauses⁵ that address the risk of opposition by the Government, or the Government imposing prescriptions or limitations so onerous as to frustrate the economic, planning and strategic utility connected with the transaction.

2) Chart 1

This chart shows the notification obligations with reference to the sectors/industries governed by Law Decree 21/2012 and its decrees, also as amended by the emergency regulations still in force.

CHART 1		
Sectors	Obligation of notification of corporate resolutions	Obligation to notify share purchase agreements (SPA)
Defense and national security	Regardless of the nationality of the beneficiary, resolutions concerning mergers, demergers,	Regardless of whether or not the purchase creates a position of control, all SPAs carried out by

⁴ According to some rumors, the Draghi Government could impose the spin-off of the fiber optic network or of the so-called last mile or impose limits to layoffs.

⁵ In principle via conditions precedent, or conditions subsequent, or other schemes.

<p>(art. 1 Law Decree 12/2021)</p>	<p>transfers of registered offices, transfers of companies or branches, amendments of the articles/bylaws or other types of corporate resolutions, including those relating to insolvency proceedings, must be notified to the Government.</p>	<p>parties other than the Italian State, an Italian public body or companies in which they have a shareholding, must be notified.</p>
<p>Energy, Telecommunication, and transports (art.2 comma 1 Law Decree 21/2012 (see chart 2))</p>	<p>Regardless of the intra-or extra-EU nationality of the beneficiary who takes control or has control of the assets identified as strategic, the resolutions involving mergers, demergers, transfers of registered offices, transfers of companies or branches, amendments to the articles/bylaws or other types of corporate resolutions that may in any event affect the availability or control of the strategic assets, must be notified.</p>	<p>Until December 31, 2022, all SPAs executed by foreign beneficiaries must be notified as follows:</p> <ul style="list-style-type: none"> - For EU beneficiaries: if a controlling interest is acquired (as defined by art. 2359 of the Italian Civil Code); - For non-EU beneficiaries: if an acquired interest is 10% or more of the total voting rights, and the overall value of the investment is equal to 1 million euros or more.
<p>Sector referred to in art.4 Reg. 452/2019 EU and Prime Ministerial decree no. 179 of 18 December 2020 (see chart 3)</p>	<p>In all cases in which the resolution concerns mergers, demergers, transfer of registered office (until December 31, 2022 even if located within the EU), transfer of business or branches, amendments to the articles/bylaws or other types of corporate resolutions, which may in any case affect the availability or control of assets identified as strategic in favor beneficiaries located outside the European Union. Until December 31, 2022, the above resolutions must be notified even if the beneficiary is located inside the European Union.</p>	<p>Until December 31, 2022, all SPAs executed by foreign beneficiaries must be notified as follows:</p> <ul style="list-style-type: none"> - For EU beneficiaries: if a controlling interest is acquired (as defined by art. 2359 of the Italian Civil Code); - For non-EU beneficiaries: if an interest is acquired of 10% or more of the total voting rights, and the overall value of the investment is equal to 1 million euros or more.



5Gsector	<p>In addition to the existing regulations in the telecommunications sector, further and more specific regulations apply to the 5G sector, which have been imposed by the Government for contracts related to this technology.</p> <p>In fact, all transactions are subject to notification within 10 days from execution, if any party is a non-EU national, and the purpose is:</p> <ul style="list-style-type: none"> a) the acquisition, for any reason, of goods or services related to the design, implementation, maintenance and management of networks inherent to broadband electronic communication services based on 5G technology; b) the acquisition, for whatever reason, of high-tech components functional to the aforementioned implementation or management. <p>Within 30 days from the notification, the Prime Minister communicates the golden power either by way of veto, the imposition of specific prescriptions or conditions, or by simply not acting (i.e. implicitly allowing the transaction to proceed).</p>
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3) Chart 2: energy, transport and communications sectors

Article 2, paragraphs 2 and 5 of Law Decree no. 21 of 2012 govern the exercise of the golden power with reference to the energy, transport and telecommunications sectors pursuant to paragraph 1 of the same article. Within this sector, Prime Ministerial Decree no. 180 of December 23, 2020 recently updated the list of the relevant strategic assets.

In particular, the assets identified as strategic and therefore subject to the golden power are:

CHART 2	
Energy sector	<ul style="list-style-type: none"> - national transport and transmission systems, gas and electricity supply infrastructure; - management activities of the real estate properties essential for the use of the above-mentioned infrastructures.
Transportation sector	<ul style="list-style-type: none"> - ports of national interest; - airports of national interest; - national spaceports;

	<ul style="list-style-type: none"> - national rail systems relevant to the trans-European transport system; - interports of national interest; - roads and highway systems of national interest.
Telecommunications sector	<ul style="list-style-type: none"> - bespoke and public access networks to end-users in connection with metropolitan networks, service routers and long distance networks; - facilities used for the provision of access to end-users of services covered by universal service obligations and broadband and ultra-broadband services; - dedicated elements, even where the use is not exclusive, for connectivity (voice, data and video), security, control and management relating to fixed location telecommunications access networks.

4) Chart 3: additional sectors of EU Reg. 2019/452 as identified by Prime Minister’s Decree no. 179 of December 18, 2021

The Prime Minister’s decree no.179 of December 18, 2020 identified the strategic assets in the sectors listed by art. 4 paragraph 1 Reg. EU 452/2019, subject to the notification obligation.

CHART 3	
Relevant sector	Strategic assets
Energy	<ul style="list-style-type: none"> a) critical infrastructure⁶ dedicated to the storage, treatment, transport and management of fuel, nuclear material or radioactive waste b) buildings essential to the use of the above critical infrastructure; c) coastal storage facilities for oil, petroleum products and LNG that meet certain size requirements;

⁶Infrastructure that is essential to the maintenance of vital functions of the society, health, safety, economic and social well-being of the people.



	<p>d) critical technologies⁷, including platforms, for the wholesale management of natural gas and electricity markets</p> <p>e) economic activities of strategic importance⁸ carried out in the energy sector by companies that meet the following size requirements:</p> <ul style="list-style-type: none"> (i) annual net revenue equal or exceeding 300 million euros; and (ii) average annual number of employees equal to or exceeding 250.
Water	<ul style="list-style-type: none"> a) critical infrastructure, physical or virtual, related to water treatment and water service delivery; b) critical technologies used in the management and efficiency of the infrastructures and services referred to in point a); c) economic activities of strategic importance carried out in the water sector by companies that meet the following size requirements: <ul style="list-style-type: none"> (i) annual net turnover equal or exceeding 300 million euros; and (ii) average annual number of employees equal or exceeding 250].
Health	<p>a) critical technologies:</p> <ul style="list-style-type: none"> (i) functional for the delivery, including remote delivery, of health services; (ii) that aiming at data analysis and the use of biological knowledge for health and diagnostics, prognostics, therapy and related follow-up; (iii) in bioengineering and nanotechnology used in pharmaceuticals and medical devices,

⁷ Technologies that are essential to the maintenance of vital functions of the society, health, safety, economic and social well-being of the people.

⁸ Such economic activities that are essential to the maintenance of the vital functions of society, the health, safety, economic and social well-being of the people, and the technological progress of the people.



	<p>diagnostics, prognostics and therapy, and the chemical and agri-food sectors;</p> <p>b) economic activities of strategic importance carried out in the health sector by companies that meet the following size requirements:</p> <p>(i) annual net turnover equal or exceeding 300 million euros; and</p> <p>(ii) average annual number of employees equal or exceeding two 250].</p>
Access, storage and control of sensitive information, including personal data	a) In general, any data collection activities regarding critical infrastructure of all relevant sectors as well as personal and sensitive data that falls within the scope of the GDPR.
Media freedom and pluralism	a) Economic activities of national relevance and strategic importance carried out by providers of communication services (media, audiovisual, radio, press) for which the provider is required to be registered in the appropriate register of communication operators.
Electoral infrastructure	a) The collection and dissemination of electoral data, concerning the elections of European, national and local representative and administrative bodies.
Banking, Finance and Insurance	<p>a) critical infrastructure related to payment services, depository and multilateral trading platforms for multilateral trading of financial instruments or settlement of payments;</p> <p>b) critical technologies related to digital services in banking, finance and insurance, including payment and credit transfer services, as well as those related to blockchain technology;</p> <p>c) economic activities of strategic importance carried out in these sectors by companies that meet the following size requirements:</p> <p>i) annual net turnover equal or exceeding 300 million euros; and</p>

	ii) average annual number of employees equal or exceeding 250.
AI, robotic, semiconductor, cybersecurity, nano technologies, bio technologies	a) all critical technologies related to industrial automation, robotics and AI, big data analysis and more generally those related to technological and digital developments in these sectors.
non-military aerospace industry	a) Critical technologies and infrastructures functional to the design, development, implementation, and delivery of space and aerospace products and services and related application solutions.
Raw materials, steel, food industry	<p>a) supply of essential raw materials in these sectors (also as qualified within the EU);</p> <p>b) supply of critical production factors used in the steel industry and the agri-food chain;</p> <p>c) economic activities of strategic importance in the agri-food chain;</p> <p>d) National Agricultural Information System (SIAN) and the system of agri-food controls, also for food safety purposes.</p>
Dual use (software and technologies usable in both civil and military fields)	a) Economic activities of strategic importance concerning dual-use items referred to in Article 3(1) of Council Regulation (EC) No 428/2009 of 5 May 2009 carried out by companies with an annual net turnover of not less than EUR 300 million.



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