

## Introduction

Pursuant to the current Italian Golden Powers regulation<sup>1</sup> (**Golden Powers Rules**), investors in Italian companies (**Strategic Companies**) operating in sectors deemed of strategic importance for national interests and holding strategic assets (**Strategic Sectors**) may require a notification to and approval from the Italian government. The government may require additional information and impose specific conditions in return for such approval.

The Golden Powers Rules are complex and broad. Some of their features are unique and set them apart from other foreign investment control regimes in the EU. For example, a notification requirement may apply to EU as well as national buyers in certain instances and may apply to Strategic Companies whose strategic assets in Italy consist merely of a contract of strategic importance for national interests, as detailed further below.

The purpose of this note is to provide a summary of the Golden Powers Rules, including the most recent changes introduced by Law Decree no. 21 of 21 March 2022 in light of the Ukraine crisis.

## Recent Changes

Law Decree no. 21/2022 has introduced some changes to the Golden Powers Rules to seek to mitigate the effects of the ongoing Ukrainian crisis on the national economy.

These changes include the following:

- The introduction of a joint notification regime for both the acquiring and the target companies in case of the purchase of equity interests in Strategic Companies – before the notification requirement was only on the buyer
- Certain notification obligations introduced after the COVID-19 outbreak on a temporary basis – and reflected in the overview below – have now been rendered permanent
- For the defence and national security sectors, a notification requirement has been extended to internal resolutions, acts or restructurings and refinancing by Strategic Companies resulting in a change of ownership, control or availability of assets
- For the 5G and cloud technology sectors, entities aiming at acquiring goods or services relating to the design, construction, maintenance and operation of 5G communication services and networks or related high-intensity component technology, must notify an annual plan on how they intend to develop the acquired 5G and cloud technology assets as part of the notification to the Italian government

- Simplified notification procedures, which will, however, need to be implemented by secondary legislation

These changes are immediately effective but are expected to be converted into law by the Italian parliament within 60 days of its publication in the Official Journal (i.e. by 21 May 2022).

An overview of the Golden Powers Rules, as amended and supplemented by Law Decree no. 21/2022, is set forth below.

## Strategic Sectors

According to the Golden Powers Rules, the Strategic Sectors include:

- Defence and national security
- 5G and cloud technology
- Energy, transport and communications
- Healthcare, agri-food and finance (including banking and insurance)
- Other sectors identified by Regulation (EU) 2019/452 of the European Parliament and of the Council dated 19 March 2019 – the so-called EU FDI Regulation (see our separate [client alert](#))

## Defence and National Security Sectors

The Golden Powers Rules<sup>2</sup> require a notification to and approval from the Italian government of the acquisition of Strategic Companies holding certain critical assets in the defence and national security sectors, including the following:

- Nanotechnologies
- Weapons
- Crypto systems
- Military systems and military satellites
- Observation and monitoring systems in the context of the protection of public order, defence and national security

This notification requirement applies to any buyer, regardless of its nationality, including EU and Italian companies (with the exception of Italian public entities and their subsidiaries). The notification requirement applies to a wide range of transactions types, including the following:

- The adoption of any acts, resolutions or transactions by Strategic Companies resulting in a change of ownership, control or availability of assets, including those resolutions or transactions that concern the merger or demerger of Strategic Companies; the transfer of Strategic Companies, their branches or their subsidiaries; the transfer of Strategic Companies' registered office abroad; changes to Strategic Companies' corporate purpose; dissolution of Strategic Companies; modification of Strategic Companies' by-laws; and the assignment of tangible or intangible assets by way of collateral.

<sup>1</sup> Law Decree no. 21 of 15 March 2012, as subsequently amended and supplemented, and further applicable domestic and European regulations on foreign direct investments.

<sup>2</sup> Prime Minister Decree no. 108 of 6 June 2014.

- The acquisition of equity interests in Strategic Companies. In particular, notifications are required when the thresholds of 5%, 10%, 15%, 20%, 25% or 50% are exceeded (except for listed companies, for which the minimum threshold is 3%). Moreover, for extra-EU investors, acquisitions are allowed only under condition of reciprocity.
- Intragroup reorganisations and transactions carried out by Strategic Companies.<sup>3</sup> However, the government's power to require conditions in return for clearance is more limited in these instances.

## 5G and Cloud Technology Sectors

The Golden Powers Rules<sup>4</sup> require a notification to and approval from the Italian government of the acquisition of Strategic Companies holding certain critical assets in the 5G and cloud computing sectors, including the following:

- Goods or services relating to the design, construction, maintenance and operation of 5G networks, including further goods, relationships, activities and technologies relevant for cybersecurity and cloud technology (which are identified by secondary legislation)
- High-intensity component technology functional to the above-mentioned implementation or management

This notification requirement applies to any buyer, regardless of its nationality, including EU and Italian companies (with the exception of Italian public entities and their subsidiaries). An additional peculiarity of the regime is the need to provide an annual plan on how the buyer intends to develop the acquired 5G and cloud technology assets as part of the notification to the Italian government.

The Italian government may approve such annual plan, impose conditions on it or exercise its veto power within 30 days following the notification (this period may be extended up to 100 days in case of complex transactions or where further investigation is needed).

In case of breach of such filing obligations or if the notifying party implements the transaction before the governmental approval, the government may exercise its Golden Powers to stop the implementation of the transaction – what this entails in practice will depend on a case-by-case basis and on the types of assets being acquired. In addition, the government may impose an administrative penalty of up to 3% of the buyer's total turnover.

## Energy, Transport and Communications Sectors

The Golden Powers Rules<sup>5</sup> identify as critical assets in the energy, transport and communications sectors, *inter alia*:

- As for the energy sector:
  - National natural gas transport systems and their compressor stations and dispatching facilities, as well as gas storage facilities

- Infrastructures for the supply of electricity and gas from other states, including onshore and offshore LNG regasification facilities
- National electricity transport system and related control and dispatching facilities
- The management activities related to the use of the aforementioned systems and infrastructures

- As for the transport sector:

- Ports and airports of national interest
- National train system

- As for the communication sector:

- Public access network to users in connection with metropolitan networks, service routers and long-distance networks
- Installations used for the supply of user access to services covered by universal service obligations, and broadband and ultra-wideband services, as well as in the related contractual relationships

A notification to and approval from the Italian government is required in case of:

- Adoption of any acts, resolutions or transactions by the Strategic Companies resulting in a change of ownership, control or availability of assets, as well as a change of the disposal or of the allocation of such assets, including those resolutions or transactions that concern the merger or demerger of Strategic Companies; the transfer of Strategic Companies, their branches or their subsidiaries; the transfer of Strategic Companies' registered office abroad; changes to Strategic Companies' corporate purpose; dissolution of Strategic Companies; modification of Strategic Companies' by-laws; and the assignment of tangible or intangible assets by way of collateral
- Acquisition of equity interests in Strategic Companies – however, in this type of transaction, different rules apply depending on the nationality of the buyer, namely:
  - EU-based investors (including Italian buyers) and extra-EU investors must notify the acquisition of an equity interest in Strategic Companies when the buyer intends to acquire control of such Strategic Companies<sup>6</sup>
  - Only extra-EU investors must also notify the acquisition of an equity interest in Strategic Companies (i) when the purchaser intends to acquire a share or voting rights or corporate capital of at least 10%, taking into account the shares or quotas already directly or indirectly owned and whose investment has a value of €1 million or more; or (ii) when the purchase entails an increase in share capital of the aforementioned company higher than 15%, 20%, 25% or 50%

<sup>3</sup> Article 4 of Decree no. 108/2014.

<sup>4</sup> Article 1-bis of Law Decree no. 21/2012.

<sup>5</sup> Prime Minister Decrees no. 180 of 23 December 2020.

<sup>6</sup> The legal definition of "control" is provided by Article 2359 of the Italian Civil Code and the Consolidated Law on Finance of 24 February 1998 (TUF).

## Healthcare, Agri-food and Financial Sectors

The Golden Powers Rules<sup>7</sup> identify as critical assets in the healthcare, agri-food and financial sectors, *inter alia*:

- As for the healthcare sector:
  - Critical digital technologies for the delivery of health care services
  - Critical technologies, the purpose of which is the analysis of data and the use of biological knowledge for health and diagnostics, prognostics and therapy
  - Economic activities of strategic importance, including those relating to the procurement of medicines, medical devices and equipment and related research and development activities, through the management, use or enjoyment of the above infrastructures and technologies
- As for the agri-food sector:
  - The supply of raw materials
  - The supply of critical inputs used in the steel industry
  - Economic activities of strategic relevance and the supply of critical inputs to the agri-food chain
  - The agri-food control systems
- As for the financial sector:
  - Critical infrastructures, including platforms, for multilateral trading of financial instruments or cash deposits, for basic services of central securities depositories and clearing services and for the clearing or settlement of payments
  - Artificial intelligence and distributed registers for the innovation of services and products in the financial, credit, insurance and regulated markets sectors
  - Payment systems, electronic money systems and money transfer systems and services, liquidity management, lending, factoring, trading and investment management
  - Critical technologies based on blockchain
  - Economic activities of strategic relevance in the financial, credit and insurance sectors, even if carried out by intermediaries, performed by companies with an annual net turnover higher than €300 million and an average annual number of employees higher than 250

A notification to and approval from the Italian government is required in case of acquisition of equity interests in Strategic Companies – however, in this type of transaction, different rules apply depending on the nationality of the buyer, namely:

- EU-based investors (including Italian buyers) and extra-EU investors must notify the acquisition of an equity interest in Strategic Companies when the buyer intends to acquire control of such Strategic Companies<sup>8</sup>

- Only extra-EU investors must also notify the acquisition of an equity interest in Strategic Companies (i) when the purchaser intends to acquire a share or voting rights or corporate capital of at least 10%, taking into account the shares or quotas already directly or indirectly owned and whose investment has a value of €1 million or more; or (ii) when the purchase entails an increase in share capital of the aforementioned company higher than 15%, 20%, 25% or 50%

Moreover, a filing obligation applies to internal acts, resolutions or transactions adopted or implemented by Strategic Companies that may determine a change of ownership, control or availability of assets owned by the same.

## Other Sectors Identified by Regulation (EU) 2019/452

In addition to those sectors identified by the Italian applicable law, the EU FDI Regulation (EU) 2019/452, as implemented in Italy by Prime Minister Decree no. 179 of 18 December 2020, identifies the following as further sectors of relevance for the exercise of the government's Golden Powers:

- Critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure
- Critical technologies and dual-use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies
- Supply of critical inputs, including energy or raw materials, as well as food security
- Access to sensitive information, including personal data, or the ability to control such information
- The freedom and pluralism of the media

With reference to such additional sectors, the Decree no. 179/2020 specifies the critical assets that are relevant for the notification requirements.

In particular, a notification is required in the case of acquisition of equity interests in Strategic Companies by extra-EU investors when the purchase entails:

- The control over such companies
- A share of voting rights or corporate capital of at least 10% of such companies, taking into account the shares or quotas already owned, directly or indirectly, and whose investment has a value of €1 million or more
- An increase in share capital of the aforementioned company higher than 15%, 20%, 25% or 50%

<sup>7</sup> Prime Minister Decree no. 179 of 18 December 2020.

<sup>8</sup> The legal definition of "control" is provided by Article 2359 of the Italian Civil Code and the Consolidated Law on Finance of 24 February 1998 (TUF).

Moreover, a filing obligation applies to internal acts, resolutions or transactions adopted or implemented by Strategic Companies that may determine a change of ownership, control or availability of assets owned by the same.

## The Golden Powers Screening Procedure

With reference to share deals, where possible, the acquiring and the target companies should jointly notify the acquisition of an equity interest in Strategic Companies. Otherwise, the notification requirement applies only to the buyer, although this often requires the target's cooperation to provide the information necessary to complete a notification<sup>9</sup>.

Such filings must be made within 10 days following specific trigger events (e.g. the execution of the binding agreement for the transfer of equity interests or adoption of the corporate resolution approving the transaction).

Following the notification, the government has 45 days by which the President of the Council of Ministers may, if it so determines, impose its veto or conditions on the envisaged transaction<sup>10</sup>.

The government may require further information from the notifying entity/ies and, in such case, the review period is suspended until receipt of the requested information. The government may also require further information from the target company or third parties, as the case may be.

The target company may submit additional documents and/or information within 15 days from the date of the notification.

The review period is normally of 45 working days from the date on which a notification is declared complete, unless extended on account of additional information requests.

After the expiry of such review period, if the government fails to adopt a decision, the resolution/transaction is deemed approved by default.

Failing to notify or completing a transaction prior to the expiry of the standstill period may result in the imposition of serious penalties, ranging from the suspension of voting rights, to the invalidity of the actions carried out, or the application of administrative penalties, as the case may be.

<sup>9</sup> In the event such joint filing is not possible, at the date of the filing to the Competent Office, the acquiring party must send an information notice concerning the transaction and the filing to the target company, which has the right to submit pleadings and documents with the Competent Office within 15 days from receipt of the notice.

<sup>10</sup> During such period, the voting rights related to the acquiring interests are suspended until clearance is given. A resolution adopted with the determining votes of such shares/quotas is null and void.

As mentioned in paragraph 2 above, Law Decree no. 21/2022 introduced the possibility to entertain pre-notification discussions with the government on the applicability of Golden Powers Rules to specific transactions and a simplified procedure for non-problematic cases.

However, the details, terms and conditions of such measures will be set out by secondary legislation.

Our firm has [extensive experience](#) advising companies on the application of the Golden Powers Rules and other FDI control regimes globally. If you have any questions or concerns in connection with specific situation, please contact your firm lawyer or any of the contacts below for a confidential consultation.

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