

## 1. Introduction

Pursuant to the Italian Golden Powers regulation<sup>1</sup> (the “Golden Powers Rules”), investors in Italian companies operating in sectors deemed of strategic importance for national interests and holding strategic assets (the “Strategic Sectors”) may require a notification to, and approval by, 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 arguably apply to 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 guide is to provide an overview of the Golden Powers Rules.

## 2. Strategic Sectors

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

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

### 2.1 Defence and National Security Sectors

The Golden Powers Rules<sup>2</sup> require a notification to, and approval by, the Italian government of certain transactions involving companies holding certain critical assets in the defence and national security sectors, as detailed below. The strategic assets potentially triggering a filing requirement include business activities in the supply chain of the following products:

- (i) Nanotechnologies
- (ii) Weapons

- (iii) Crypto systems
- (iv) Military systems and military satellites
- (v) 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 transaction types, including the following:

- The adoption of any acts, resolutions or transactions by the target company resulting in a change of ownership, control or availability of assets, including those resolutions or transactions that concern the merger or demerger of the target company; transfers, including transfers of its branches, subsidiaries or registered office abroad; changes to its business purpose (*oggetto sociale*); dissolution; modification of its bylaws; and the assignment of tangible or intangible assets by way of collateral.
- The acquisition of equity interests in the target company. In particular, notifications are required when any of the following thresholds are exceeded: 5%, 10%, 15%, 20%, 25% or 50% (except for listed companies, for which the minimum threshold triggering a notification is 3%). Moreover, for extra-EU investors, acquisitions are allowed only under condition of reciprocity.
- Intragroup reorganisations and transactions carried out by the target company.<sup>3</sup> However, the government’s power to require conditions in return for clearance is more limited in these instances.

Moreover, a filing obligation applies to the incorporation of a company operating in the defence and national security sectors or holding critical assets in such sectors.

### 2.2 5G and Cloud Technology Sectors

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

- (i) Goods or services relating to the design, construction, maintenance and operation of 5G networks, including goods, relationships, activities and technologies relevant for cybersecurity and cloud technology (which are identified by secondary legislation)

<sup>1</sup> Law Decree no. 21 of March 15, 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 June 6, 2014.

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

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

(ii) High-intensity component technology functional to the implementation or management of the products listed in the previous bullet point

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 for 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 governmental approval, the government may exercise its Golden Powers to stop implementation of the transaction. What this entails in practice will vary 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.

## 2.3 Energy, Transport and Communications Sectors

The Golden Powers Rules<sup>5</sup> identify as critical assets in the energy, transport and communications sectors the following business activities

(i) 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
- The national electricity transport system and related control and dispatching facilities
- The management activities related to the use of the aforementioned systems and infrastructures

(ii) As for the transport sector:

- Ports and airports of national interest
- The national train system

(iii) As for the communications sector:

- The 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, and in the related contractual relationships

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

(i) Adoption of any acts, resolutions or transactions by the target company resulting in a change of ownership, control or availability of the strategic 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 the target company; transfer of its branches, subsidiaries or registered office abroad; changes to its business purpose (*oggetto sociale*); dissolution; modification of bylaws; and the assignment of tangible or intangible assets by way of collateral

(ii) Acquisition of equity interests in the target company – 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 only notify the acquisition of control in the target company<sup>6</sup>
- Extra-EU investors must also notify the acquisition of an equity interest in the target company below the level of control, as follows: (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 target company higher than 15%, 20%, 25% or 50%

(iii) Incorporation of a company operating in the energy, transport and communications sectors or holding critical assets in such sectors, if the transaction results in one or more extra-EU shareholders owning voting rights or corporate capital of at least 10%

## 2.4 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 the following business activities:

(i) As for the healthcare sector:

- Critical digital technologies for the delivery of healthcare 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

(ii) As for the agri-food sector:

- The supply of raw materials
- 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

5 Prime Minister Decrees no. 180 of December 23, 2020.

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

7 Prime Minister Decree no. 179 of December 18, 2020.

(iii) 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 product 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, 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 by, the Italian government is required in the following types of transactions involving a target company active in the above-listed business activities:

- (i) Adoption or implementation of any acts, resolutions or transactions by the target company 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, *inter alia*, the merger or demerger of the target company; transfer of its registered office abroad; changes to corporate purpose (*oggetto sociale*); dissolution; and modification of the bylaws
- (ii) Acquisition of equity interests in the target company – 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 only notify the acquisition of control in the target company<sup>8</sup>
  - Extra-EU investors must also notify the acquisition of an equity interest in the target company (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 target company higher than 15%, 20%, 25% or 50%
- (iii) incorporation of a company operating in the energy, transport and communications sectors or holding critical assets in such sectors if the transaction results in one or more extra-EU shareholders owning voting rights or corporate capital of at least 10%

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

In addition to the above Strategic Sectors, the EU FDI Regulation, as implemented in Italy by Decree no. 179 of 18 December 2020, identifies as further sectors of relevance for the exercise of the Golden Powers the following products and services:

- (i) 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
- (ii) 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
- (iii) Supply of critical inputs, including energy or raw materials, as well as food security
- (iv) Access to sensitive information, including personal data, or the ability to control such information
- (v) The freedom and pluralism of the media

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

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

- (i) Adoption or implementation of any acts, resolutions or transactions by the target company resulting in a change of ownership, control or availability of assets in favor of an extra-EU investor, as well as a change of the disposal or of the allocation of such assets, including those resolutions or transactions that concern, *inter alia*, the merger or demerger of the target company; transfer of its registered office abroad; changes to its corporate purpose (*oggetto sociale*); dissolution; and modification of the bylaws
- (ii) Acquisition of equity interests in the target company by extra-EU investors when the purchase entails:
- 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 target company higher than 15%, 20%, 25% or 50%
- (iii) Incorporation of a company operating in the energy, transport and communications sectors or holding critical assets in such sectors if the transaction results in one or more extra-EU shareholders owning voting rights or corporate capital of at least 10%

<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 February 24, 1998 (TUF).

### 3. The Golden Powers Screening Procedure

With reference to share deals, where possible, the acquiring and the target companies should make a joint filing, submitting a form available online on the Presidency of the Council of Ministers website.<sup>9</sup> Although the notification requirement applies only to the buyer, making a filing will inevitably require the target's cooperation to provide the information necessary to complete a notification. If a joint filing is not possible, the government will invite the target to make written observations on the buyer's notification.<sup>10</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). For conditional agreements, the trigger event will occur at the time of signing or at the time of meeting the relevant conditions, depending on whether the conditions are conditions precedent (*condizione sospensiva*) as opposed to a condition for the termination of the agreement (*condizione risolutiva*). This is a matter of legal interpretation under Italian rules of contracts that may not be subject to Italian law as their governing law. Therefore, when in doubt, it is often best to notify the government as soon as possible after signing.

Following the notification, the government has 45 days in which the President of the Council of Ministers may, if it so determines, impose its veto or conditions on the envisaged transaction.<sup>11</sup>

The government may require further information from the notifying entity/ies and, in such case, the review period is suspended automatically 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 review terms are also suspended if another member state indicates its intention to make written observations under the EU FDI Regulation.

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

The review period is normally 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 (*silenzio assenso*).

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

Given the broad scope of the Golden Power Rules, deals have increasingly been notified on a precautionary basis to try to avoid delays in deal completion, even if the deal raised no national security concerns or even if it was unclear whether the deal fell within the scope of a mandatory filing regime. For example, the table below shows the exponential increase of the number of filings made on an annual basis in the last three years.

| Number of Filings | Year |
|-------------------|------|
| 83                | 2019 |
| 342               | 2020 |
| 496               | 2021 |

Decree no. 133 of 1 August 2022 introduced additional measures to reduce the number of transactions made on a precautionary basis and free up the resources of the government to intervene only in cases requiring a substantive review. Accordingly, Decree 133/2022 introduced the following changes:

- (i) A shorter 15-day waiting period for non-problematic cases not requiring further review.
- (ii) A new pre-notification process allowing the parties to ask the government to confirm, through a briefing paper, whether their deal does not require a formal notification. The government has 30 days from receiving a complete briefing paper to confirm whether the deal requires a notification or to make recommendations regarding changes to the deal that would be required to avoid a formal investigation.<sup>12</sup>
- (iii) A new coordination group to assist the Presidency of the Council of Ministers in investigation activities, as well as the collection and dissemination of pertinent information within the relevant government departments for the exercise of its powers.

However, the practical applicability of the briefing paper process remains to be seen because the information needed to consider a briefing paper complete is the same information needed to complete a formal notification and, at the end of the 30-day period, the government may request a formal notification, thus triggering a further 45-day review period. Therefore, it appears that the briefing paper route may only become practical in circumstances in which it is clear that the transaction may not fall within the scope of the Golden Powers Rules. In those cases, it may not be necessary to submit a briefing paper at all.

<sup>9</sup> The filing form is available on the following link: <https://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-att-goldenpower-moduli/9297>.

<sup>10</sup> In this case, 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>11</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.

<sup>12</sup> Pending legislative update, the pre-notification form is the same used in ordinary notification procedure, available on the following link: <https://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-att-goldenpower-moduli/9297>.

## 4. Financial Support Measures

Law Decree no. 187 of 5 December 5, 2022, introduced the possibility for target companies to request certain financial support measures if the exercise of the Golden Powers by the government were to put the financial viability of the target company at risk.

Such financial support measures may include:

- (i) Access to the “Patrimonio Destinato”, a fund set up by Cassa depositi e Prestiti S.p.A. to support the Italian economic production system
- (ii) Access to the fund for the preservation of employment levels and the continuation of business activity
- (iii) Access to development contracts and agreements for innovation set up by the Ministry of Enterprises and Made in Italy

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

### Additional Information

For further information on our experience in helping clients getting their deals through foreign direct investment control and national security interest regimes worldwide, explore the [Foreign Direct Investment and National Security Control](#) section of our website.

## Contacts

We have 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 a specific situation, please contact your usual lawyer at the firm or any of the contacts below for a confidential consultation.



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