

Alert | Corporate/Mergers & Acquisitions



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Italy's 'Golden Powers': Latest Legislative Developments

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Italian government intervention powers concerning private investments in strategic companies (**Golden Powers**), already subject to intense reinforcement by the Law Decree no. 23/2020 (so-called “*Decreto Liquidità*”), **have been subject to further recent regulatory amendments aimed at defining and specifying when the economic activity of a company can be considered of national interest.**

The purpose of this document is to provide an overall picture of the evolution of the Golden Powers, with a focus on the most recent innovations provided for by the Prime Ministerial Decrees no. 180/2020 and 179/2020, together with a brief overview on the recent case history concerning Golden Powers enforcement by the Italian government.

1.1 The original framework and the 2019 amendment

The original regulation of the Golden Powers, contained in **Law Decree no. 21/2012, converted into Law no. 56/2012**, allowed the Italian government to exercise the Golden Powers only in the event that a relevant prejudice to the strategic interests of the State was found with respect to companies active in the

sectors of **(a) defense and national security**; and **(b) energy, transport and communications**. In particular, the Golden Powers consisted of:

- i. power to oppose or set specific conditions on the acquisition of shares of companies carrying out activities of strategic importance in sectors listed under letters (a) and (b), above;¹; and
- ii. veto power or power to impose specific requirements with respect to the adoption of certain corporate resolutions, the performance of acts or the execution of transactions by companies active in sectors under letters (a) and (b), above;².

According to the original framework, the powers of the Italian government to oppose or set particular conditions on the purchase of a company's shares with regard to companies operating in the **energy, transport and communications sectors** were limited to those acquisitions made by a **non-European entity**; as to the **defense and national security sector** the same powers could have been exercised by the Italian government whenever the purchaser was an entity **other than the Italian state**.

The aforementioned original regulation was amended by Law Decree no. 105/2019, converted into Law no. 133/2019, to extend the Italian government's powers to companies active in the industries identified by **article 4, paragraph 1, letters a) and b) of Regulation 2019/452/EU**, namely:

- i. critical infrastructures (physical or virtual), including energy, transportation, water, health, communications, media, data processing or storage, aerospace, defense, electoral, financial infrastructures, sensitive areas (*strutture sensibili*), as well as investments in land and buildings essential for the use of such infrastructures³; and
- ii. critical technologies and dual-use products, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear energy (*energia quantistica e nucleare*), as well as nanotechnology and biotechnology⁴.

1.2 Amendments made by the so called “Decreto Liquidità”

Within the context of the COVID-19 pandemic, the Italian government, in order to enhance Italian companies' protection from speculative law priced purchase offers, has adopted Law Decree no. 23/2020, converted into Law no. 40/2020 (**Decreto Liquidità**). This new amended decree has, on the one hand, broadened the areas of intervention by the Italian government and, on the other hand, increased the number of transactions subject to filing.

Articles 15, 16 and 17 of the Decreto Liquidità have, *inter alia*:

- i. extended the possibility of exercising Golden Powers to companies active in the areas referred to in the remaining points (c), (d), (e) and (f) of article 4(1) of Regulation 2019/452/EU, namely: **(i) security of supply of critical inputs** (*sicurezza dell'approvvigionamento di fattori produttivi critici*), **including energy and raw materials, as well as food security**; **(ii) access to**

¹ Article 1, paragraph 1, letters a) and c) Law Decree no. 21/2012, converted into Law no. 56/2012.

² Article 1, paragraph 1, letter b) Law Decree no. 21/2012, converted into Law no. 56/2012.

³ Article 4(1)(a) of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.

⁴ Article 4(1)(b) of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.

sensitive information, including personal data; and **(iii) freedom and pluralism of media** (*libertà e pluralism dei media*);

- ii. allowed the Italian government - **until 31 December 2020** - to exercise Golden Powers also in the event that the purchaser of shares of companies considered strategic for the Italian economy - *i.e.* those active in the sectors listed in number i above and those listed in the previous paragraph **1.1.** - is a **European entity**⁵.

2. The latest amendments

The full operation of the extensions made by the Decreto Liquidità was subject to the adoption of one or more Presidential Decrees, aimed at identifying, within the five sectors referred to in article 4, paragraph 1, letters a), b), c), d) and e) of Regulation 2019/452/EU, the assets and relations of strategic importance for the national interest in the presence of which the Golden Powers could be exercised. To this end, on 30 December 2020, the Prime Ministerial Decree no. 179/2020 was published in the Italian Official Journal (*Gazzetta Ufficiale*) (**Implementing Decree of the EU Regulation**)⁶.

The specifications contained in the Implementing Decree of the EU Regulation are analyzed below, with particular reference to the sectors of: **(i) energy**; **(ii) water**; and **(iii) health**.

In the energy sector, the Decree Implementing of the EU Regulation specifies that the following are considered **strategic sectors for the national interest**:

- i. **critical infrastructure** where fuels, nuclear materials or radioactive waste are located or to be located, including the essential buildings for the use of such infrastructure⁷;
- ii. coastal storages of crude oil (*greggio*) and petroleum products with a capacity of one hundred thousand cubic meters or more used for the domestic market⁸.

In the water sector, the Decree Implementing the EU Regulation specifies that the following are considered **strategic sectors for the national interest**:

- i. **critical infrastructure** that guarantees the continuity of the services of collection, purification, adduction, distribution and wholesale supply of drinking water for human consumption, including the critical technologies used in the management of such infrastructure⁹;

⁵ The extension of the notification obligation to European entity purchasers, and no longer only to non-European entity purchasers, only applies in the event that the acquisition determines the control of the target company, where the word *control* makes reference to Article 2359 of the Italian Civil Code. In the event that the acquisition does not require a transfer of control over the target company, as long as the relevant percentage of voting rights transferred is at least 10%, the notification obligation continues to be limited to the non-European purchaser. Furthermore, despite Golden Power rules initially covering only foreign investments and the need to impede such investment in strategic sectors, a change to the *status quo ante* the COVID-19 outbreak could risk national interests. This risk has seemingly led the authority in charge of the control to construe the above-mentioned rules as also covering transactions between Italian companies.

⁶ Previously, in order to fully implement the sectors governed by Law Decree no. 21/2012, the following had been issued: **(i)** the Prime Ministerial Decree no. 108/2014 concerning the identification of assets of strategic importance for the national defense and security system; and **(ii)** the Presidential Decree no. 85/2014 concerning the identification of assets of strategic importance in the energy, transport and communications sectors.

⁷ Article 3, paragraph 1, letters a) and b) of Prime Ministerial Decree of December 18, 2020 no. 179.

⁸ Article 3, paragraph 1, letter c) of Prime Ministerial Decree of December 18, 2020 no. 179.

⁹ Article 4, paragraph 1, letters a) and b) of Prime Ministerial Decree of December 18, 2020 no. 179.

- ii. **economic activities of strategic importance** carried out by companies with an annual net turnover (*fatturato annuo netto*) higher than Euro 300 million and an average annual number of employees higher than 250¹⁰.

In the health sector the Decree Implementing the EU Regulation specifies that the following are considered **strategic sectors for the national interest**:

- i. **critical digital technologies** for the delivery of health care services¹¹;
- ii. **critical technologies**, the purpose of which is the analysis of data and the use of biological knowledge for health and diagnostics, prognostics and therapy¹²;
- iii. **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 infrastructures and technologies referenced in numbers **i** and **ii** above¹³.

The Decree Implementing the EU Regulation also specifies which economic activities are strategic to the national interest in other sectors, including **(i)** processing, storage, access and control of sensitive data and information; **(ii)** electoral infrastructure; **(iii)** financial sector, including credit and insurance, and financial market infrastructure; **(iv)** artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnology and biotechnology; **(v)** non-military aerospace infrastructures and technologies; **(vi)** input supply (*approvvigionamento dei fattori produttivi*); **(vii)** dual-use items (*prodotti a duplice uso*); and **(viii)** freedom and pluralism of media (*libertà e pluralismo dei media*).

Lastly, the Decree Implementing the EU Regulation specifies that, in any of the sectors referred to in paragraph 2, **critical infrastructure**, **critical technologies**, **critical inputs** and **critical information** means, respectively, infrastructure, technologies, critical inputs and critical information that are **essential for the maintenance of the vital functions of society, health, safety and the economic and social well-being of the population**.

Among the relevant innovations regarding the exercise of the Golden Powers: **(i)** the issuance of the Prime Ministerial Decree no. 180/2020 containing rules for the identification of companies of strategic importance in the field of energy, transport and communications; and **(ii)** the extension to **31 December 2021** (the previous deadline was 30 June 2021) of the possibility that the Golden Powers can be exercised even if the purchaser of shares of companies considered strategic is a **European entity**¹⁴.

3. Enforcement of Golden Powers by the Italian Government in recent years

According to the press, the new Italian government headed by Mario Draghi has recently applied the Golden Powers with reference to several recent transactions. For instance, on 25 March 2021, the government intervened with respect to a supply contract concerning the purchase, by the Italian company Linkem S.p.A., of hardware and software elements owned by the foreign technology companies. The press indicates that the government imposed certain limitations on the transaction due to the possible threat to national security caused by the risk that equipment in question could be used for espionage purposes.¹⁵

¹⁰ Article 4, paragraph 1, letter c) of Prime Ministerial Decree of December 18, 2020 no. 179.

¹¹ Article 5, paragraph 1, letter a) of Prime Ministerial Decree of December 18, 2020 no. 179.

¹² Article 5, paragraph 1, letter b) of Prime Ministerial Decree of December 18, 2020 no. 179.

¹³ Article 5, paragraph 1, letter d) of Prime Ministerial Decree of December 18, 2020 no. 179.

¹⁴ Such an extension was provided by the Decree-Law no 56 of 30 April 2021.

¹⁵ See for instance: <https://formiche.net/2021/04/golden-power-accordo-linked-huawei-zte/>

Subsequently, a veto was imposed by the Italian government, on 31 March 2021, with reference to the purchase by a Chinese company of a controlling stake (70%) in LPE S.p.A., a company operating in the field of semiconductor production, a sector considered to be of strategic importance pursuant to article 2 of Law Decree no. 21/2012.

Finally, the sanctions issued by the Italian government for breach of the notification obligation imposed by the Golden Powers legislation occurred with reference: **(i)** to the failure to notify the sale of the shareholdings of TIM S.p.A. to the French company Vivendi SA, a failure to notify which led to the application to TIM S.p.A. of a fine of Euro 74,312,342.44¹⁶, amount corresponding to 1% of the combined revenues of TIM S.p.A. and Vivendi SA¹⁷; and **(ii)** to the delayed notification of the resolution of the ordinary shareholders' meeting of Reti Telematiche S.p.A. whereby the shareholders renewed the company's board of directors, in execution of a shareholders' agreement. Such delayed notification led Reti Telematiche S.p.A. being fined Euro 140,137.15¹⁸, corresponding to 1% of the revenues of the group to which the company belongs¹⁹.

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¹⁶ Fine imposed by Prime Ministerial Decree of 8 May 2018.

¹⁷ Report to Parliament on the exercise of the Golden Powers communicated to the Presidency of the Council of Ministers on 1 April 2019.

¹⁸ Fine imposed by Prime Ministerial Decree of 30 November 2018.

¹⁹ Report to Parliament on the exercise of the Golden Powers communicated to the Presidency of the Council of Ministers on 1 April 2019.