

Task Force Golden Power

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The “Golden Power” in times of Covid-19: new sectors, tighter control

1. Introduction

In Italy, the governmental powers of control over investments (foreign, but also national ones) in strategic sectors take on the evocative name of “golden power”. With the spread of the Covid-19 epidemic, the fear has spread that low market values might favour predatory acquisitions of strategic assets for the national interest by foreign capital. On April 9, also by impulse of new guidelines issued by the European Commission, the Law Decree 23/2020 came into force, significantly amending the so-called “golden power regulation”.

Last November, this Task Force published a note on the extension of procedural deadlines for golden power decisions and the extension of the sectors subject to control. More recently, the Task Force also issued a note on the suspension of deadlines for golden power notifications and decisions, and on Consob (the Italian national commission for listed companies and the stock exchange) resolutions during the Covid-19 emergency.

Now, with the new decree, the deadlines are further extended, the sectors already included are partly clarified, and other sectors are added. In addition, the Government’s powers of control can now also be exercised over intra-European transactions and the acquisition of minority shares and can now be activated ex officio. At the same time, further amendments to the Consolidated Law on Finance (Testo Unico della Finanza, “TUF”) follow the recent Consob resolutions imposing greater transparency requirements for investments in listed companies. Finally, these amendments also allow greater control over small and medium-sized enterprises (SMEs).



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2. The main novelties

2.1. Suspension of terms

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The new decree extends the suspension of the terms of administrative proceedings provided for by the “*Cura Italia*” decree. The suspension is now foreseen **from 23 February to 15 May** (58 working days). In the golden power area, the suspension applies, in particular, to the time limits for filing notifications, the time limits for responding to requests from the Prime Minister’s Office and the maximum time limits for decisions. During this period, notifications may be filed, and suspension shall not necessarily result in the postponement of the proceedings, because the Offices proceed in their activities. However, the deadline for the decision shall begin on 16 May and the Presidency may avail itself of the suspension. The deadline for tacit consent shall be adjusted accordingly.

In any case, the *Cura Italia* decree encourages public administrations to adopt all appropriate organizational measures to ensure the reasonable duration and the rapid conclusion of proceedings, with priority for those to be considered urgent, also on the basis of justified requests from the parties concerned. Notifying parties may therefore submit an **instance of urgency** to the Presidency of the Council to justify the priority of their proceedings.

2.2. Clarification and extension of the sectors included

As of today, the sectors identified by the golden power legislation have been defense and national security, 5G, energy, transport and communications, for which lists of strategic assets exist. Additional assets remained and legal relations to be identified in the areas defined by the European reference framework, [Regulation \(EU\) 2019/452](#). These assets and relations, pending the issuing of the implementing decree that would have (and still should) have identified them, made them coincide with (all) the assets and relations in the following two areas:

- a) **critical infrastructure**, physical or virtual, including energy, transport, water, health, communications, media, treatment or archiving data, aerospace infrastructure, defense infrastructure, **electoral** or **financial** infrastructure, and sensitive facilities; as well as investments in land and buildings that are essential for the use of such infrastructure;
- b) **critical technologies** and dual-use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnology and biotechnology.

The reference to **financial infrastructure** had raised doubts as to whether banks and credit institutions were also included in the golden power regulation.

The new decree maintains the sectors already included and specifies that the **financial, credit and insurance sectors** fall within the golden power perimeter.

Three other categories of activities are also added:

- c) security of supply of critical products, including energy and raw materials, as well as food security;
- d) access to confidential information, including personal data, or ability to control that information;
- e) freedom and pluralism of the media.

These five categories of sectors are taken from the European framework. In particular, with regard to the **health sector**, the European Commission, in its guidelines, has indicated that the protection of hospitals, pharmaceutical companies and manufacturers of health equipment can be included not only in the critical health infrastructure, but also in the supply of critical products, such as medicines, masks or ventilators.

2.3. Parties required to notify

Pending the issuance of the implementing decree, which should identify the assets in detail, non-EU operators are required to notify in case of **acquisition** of controlling interests in companies that hold assets or legal relations in the five strategic sectors identified as follows.

In addition, the new decree **temporarily** extends the number of operations requiring a golden power authorization until **31 December 2020**.

Resolutions that lead to changes in ownership, control or availability of assets in the five strategic sectors (company transfer, merger or demerger resolutions, etc.) must also be notified. In this regard, it is recalled that the practice of the Presidency of the Council is to consider as a resolution subject to notification also the appointment of a new Board of Directors following a change of control of the company, which may result, *inter alia*, from an acquisition transaction by an EU operator.

Moreover, the notification of **acquisitions** of shareholdings in companies that hold strategic assets in the transport, energy and communications sectors or that are active in the five strategic sectors already mentioned, is no longer limited to non-EU operators that take control of the company, but is extended to:

- **EU operators taking control of the company;**

- **non-EU operators that acquire a shareholding of at least 10%, if the transaction is worth more than €1 million, or a shareholding of more than 15%, 20%, 25% or 50% of the capital of the target company.** Exceeding each of these thresholds will determinate a new notification. These amendments apply to notification obligations arising between the entry into force of the rules and 31 December 2020. Eventual measures adopted by the Presidency shall remain valid even afterwards.

It should be noted the relevance of the extension to transactions carried out by EU operators, which is part of the **restrictions on the free movement of capital** for reasons of public policy or public security allowed to Member States under Article 65 TFEU. For example, recently, Spain also lowered the threshold for the authorization of foreign investment to 10% by [decreto-ley 8/2020](#), but reserved the need for such authorization exclusively to non-EU operators.

2.4. *Ex officio* proceedings and sources of information

The control of investments in strategic sectors in the pre-existing formulation was linked to the notification prepared by the acquiring or deliberating companies, thanks to which the public administration creates a continuous and dynamic map of the changes of control over strategic assets.

The new decree expressly introduces the possibility for the Presidency, in cases of violation of notification obligations, and even in the absence of the latter, to undertake ***ex officio* proceedings in all sectors affected by the golden power regulation** (defense and national security, 5G, energy, transport and communications, assets and further connections).

This provision may also be part of the **adaptation of the Italian legislation to the European Regulation**, which will become effective from 11 October 2020 and which provides for the possibility for the Commission and the other Member States to provide opinions and comments also on investments which have not been subject to control by the State in which they took place.

The rule guaranteeing the Presidency the possibility of requesting public and private bodies to **provide information and produce documents** supports the provision of *ex officio* proceedings, and in a certain way it constitutes its implementation. This provision strengthens not only the possibility of cooperation with the administrative authorities in the sector, but also the investigatory powers of the proceeding authority in relation to private individuals unrelated to the operation.

2.5. Enhanced transparency obligations and SMEs

The volatility of stock market indexes during the emergency due to the spread of Covid-19 led the legislator to focus also on protecting the market value of listed Italian companies. This change did not come about through the extension of the golden power regulation, a mechanism that is too slow for often very rapid financial transactions, but rather through the strengthening of Consob's margin of intervention with the same purpose of protecting the golden power.¹

First, the new decree follows the guidelines of Consob, which, after banning short selling, has **temporarily** introduced additional initial holding thresholds lower than the ordinary thresholds for disclosure requirements to which investments in 48 listed companies are subject.² Article 120, paragraph 2-bis of the TUF allowed Consob to temporarily introduce **additional initial holding thresholds lower than the ordinary thresholds** for “*companies with a high current market value and a particularly diffused shareholder base*”, such as the 48 companies indicated in the recent resolution, due to “*requirements of investor protection and efficiency and transparency of the corporate control and capital market*”. The notion of “*high current market value*” currently corresponds, according to Consob, to a capitalization of more than €500 million at 31 December 2019, a threshold that excludes many SMEs.

The new decree extends the scope of application available to Consob, abrogating the wording “*high current market value*” and potentially allowing Consob to introduce additional thresholds for **all companies with “*particularly diffused shareholder base*”**, thus also including SMEs.

The regulation therefore needs a further Consob resolution in order to be implemented.

Secondly, the decree also intervenes on the so-called ***anti-scorrerie*** rule (article 120, paragraph 4-bis of the TUF), introduced in 2017 with a law that already extended the golden power. The rule provides for the declaration of the investor's objectives to be made in the case of purchases of shares exceeding the declaration thresholds of 10%, 20% and 25%.

It is now envisaged that Consob may **temporarily** introduce, on the basis of the same conditions as the additional initial reporting thresholds and in addition to the already indicated declaration thresholds, **an additional 5% declaration threshold for companies with a “*particularly diffused shareholder base*”**.

¹ On the reinforced Consob transparency obligations introduced by Decree 23/2020 see, more in detail, the note published by this Study on April 9, 2020.

² On this point see, in addition to the already mentioned note of this Task Force, also the note of the Focus Team Capital Markets on 19 March 2020.

Even in this case the provision can be applied to SMEs, as the requirement of high current market value is not provided for, and it will need to be implemented by a Consob resolution.

In conclusion, the decree extends the scope the golden power. **The obtainment of the authorization will therefore have to be integrated into business decisions in an increasing range of operations and greater awareness on the part of companies is needed.**

Technical and specific legal advice is appropriate to precisely identify regulatory constraints, choose the best strategy and follow the notification process.

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