

## Covid – 19 coronavirus

### The Italian Government increases its special powers on foreign investment control ("*Golden Powers*")

#### KEY INFORMATION

As of 2014, golden powers have been set out under a number of implementing regulations and subsequent laws, which have, *inter alia*, extended the Government's powers to high technology and 5G networks.

The Italian Government "golden powers" were first introduced with law decree 15 March 2012, no. 21, in the sectors of defense and national security, as well as for strategically important assets in the energy, transport and communications sectors. The special powers of the Government to protect the ownership structure of strategic companies and assets can be exercised, among other things, by opposing (or dictating specific conditions for) the acquisition of equity interests, or vetoing the adoption of certain corporate resolutions.

The Liquidity Decree of 8 April 2020 issued in the wider context of the Covid-19 coronavirus emergency extends the reach of "golden powers" to many sectors, inclusive of the banking and insurance industries, and to EU buyers, by also increasing the powers of Consob (the Italian Stock Exchange Supervisory Authority) and the disclosure duties relating to significant shareholdings in listed companies.

#### Overview

By Law Decree n. 23, published in the Official Gazette of April 8, 2020 (**Liquidity Decree**), the Italian Government has amended Legislative Decree no. 21/2012 on the so-called "Golden Powers", by extending the scope of application of the Government's special powers to sectors that had been excluded so far, and by extending the notification obligations to transactions carried out by foreign EU and non-EU entities.

The new rules, in force as of 9 April 2020: (i) aim at containing the negative effects of the Covid-19 coronavirus emergency on assets of national strategic importance and many of them have a limited temporal application, to expire on 31 December 2020; and (ii) amend and supplement provisions under the initial "Golden Powers" legislation, enacted mainly with Law Decree no. 21/2012 (as converted by Law no. 56/2012), and the more recent Law Decree no. 105/2019 (as converted by Law no. 133/2019) that had introduced new rules, *inter alia*, to adopt decisions on transactions related to 5G networks.

## I. Which share deals are subject to notification?

The Liquidity Decree extends the duty to notify the acquisition, under any transaction, of participations held in companies which own assets in the sectors listed under article 4.1 of EU Regulation 2019/452, i.e.:

- a) 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; credit and insurance sectors are expressly included by the Liquidity Decree in the broader financial sector notion;
- b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- c) supply of critical inputs, including energy or raw materials, as well as food security;
- d) access to sensitive information, including personal data, or the ability to control such information; or
- e) the freedom and pluralism of the media (the sectors from (a) to (e), **Strategic Sectors**).

Notably, the acquisition is to be notified if carried out by:

- a foreign, non-EU purchaser, if it leads to the latter getting control of the company whose shareholding is the subject of the purchase (this rule is due to survive the 31 December 2020 term and extend to acquisitions carried out beyond that date);
- a foreign, EU purchaser, if it leads to the latter getting control of the company whose

shareholding is the subject of the purchase (this rule is due to expire on 31 December 2020);

- a foreign, non-EU purchaser, if it leads to the latter getting 10% of voting capital of the target company, whenever the value of the investment is higher than Euro 1 million control of the company whose shareholding is the subject of the purchase (this rule is due to expire on 31 December 2020); also acquisitions that determine the exceeding of 15%, 20%, 25% and 50% thresholds must be notified.

## II. Which other transactions are subject to notification?

Any resolution, act or transaction, adopted before 31 December 2020 by a company that holds one or more assets in the Strategic Sectors, which has the effect of changing the ownership, control or availability of the assets themselves or the change of their destination, including, without limitation, the resolutions of the shareholders' meeting or of the administrative bodies concerning the merger or de-merger of the company, the transfer of the registered office abroad, the modification of the corporate purpose, the dissolution of the company, the transfer of the going concern (*azienda*) or branches thereof in which said assets are included or the assignment of the same as guarantee, as well as any resolution concerning the transfer of subsidiaries that hold the aforementioned assets.

## III. What are the prerequisites for the exercise of special powers in the Strategic Sectors?

The special powers can be activated by the Government to the extent that the protection of the essential interests of the State, or the protection of security and public order, is not considered as

adequately guaranteed by the existence of specific sector regulations.

What are the special powers of the Government?

The special powers of the Government, to be applied according to the principles of proportionality and reasonableness, may consist in the imposition of prescriptions or conditions. In cases where implementation has taken place before the deadline for the exercise of special powers has elapsed, the Government may also order the company to restore the previous situation at its own expense.

#### IV. Which other provisions have been enacted?

The Liquidity Decree has also expressly provided that:

- a) in a number of circumstances where this had not been clearly disciplined under the previous "Golden Power" legislation, the Government has the power to promote *ex officio* the relevant procedures even when the interested party has failed to notify,
- b) the competent office of the Presidency of the Council of Ministers has the power to request from public administrations, public bodies or individuals, companies or other third parties, to provide information and documents, and
- c) Consob, the Italian Stock Exchange Supervisory Authority, may, with a provision grounded on reasons relating to the protection of investors as well as efficiency and transparency of the market, provide, for a limited period of time, lower disclosure thresholds for the disclosure of significant shareholdings in listed companies having a "*particularly widespread shareholder base*" and for the enforcement of the so-called anti-raid rules on such companies, also as a follow up to Consob resolution no. 21304 of 17 March 2020.

#### V. What is the timeframe for notifications under the "Golden Powers" legislation during the Covid-19 coronavirus emergency?

The Italian Government has normally up to 45 business days to issue decisions on notified transactions under the "Golden Powers" legislation. However, as a consequence of the implementation of Law Decree no. 18/2020 (the so called "*Cura Italia decree*", entered into force on 17 March 2020) the Golden Power proceedings have been subject to a 36 business days suspension period (between 23 February and 15 April). Furthermore, the Liquidity Decree extended this period until 15 May. For pending proceedings notified before 23 February, the timeframe for the decision is equal to the sum of the period from the date of notification until 21 February (i.e., the last business day before 23 February) and from 15 May until the 45th business day term is reached. For those notified on or after 23 February, the 45 days run as of 15 April. With regard to authorizations due to expire between 31 January and 15 April, their validity is extended until 15 June 2020.

#### VI. Which are the main laws and regulations regarding "Golden Powers" that have been enacted prior than the Liquidity Decree?

Following laws and regulations constitute the legal framework of the Italian "Golden Powers" discipline, to be supplemented now by the Liquidity Decree provisions issued by the Government to contain negative effects of the Covid-19 coronavirus emergency on assets of national strategic importance:

- a) Law decree 15 March 2012, no. 21 - Rules on special powers on corporate structures in the

defense and national security sectors, as well as for activities of strategic importance in the energy, transport and communications sectors;

- b) Presidential Decree 19 February 2014, no. 35 - Regulation for the identification of the procedures for the activation of special powers in the defense and national security sectors;
- c) Presidential Decree 25 March 2014, no. 86 - Regulation for the identification of the procedures for the activation of special powers in the energy, transport and communications sectors;
- d) Presidential Decree 25 March 2014, no. 85 - Regulation for the identification of assets of strategic importance in the energy, transport and communications sectors;
- e) Decree of the President of the Council of Ministries 6 June 2014, no. 108 - Regulation for the identification of activities of strategic importance for the national defense and security system;
- f) Decree of the President of the Council of Ministries 6 August 2014 - Identification of the organizational and procedural methods for carrying out the preparatory activities for the exercise of special powers;
- g) Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March

2019 - Establishment of a framework for the control of foreign direct investment in the European Union;

- h) Law decree 21 September 2019, no. 105 - Urgent provisions on the cybernetic national security perimeter and the discipline of special powers in sectors of strategic importance.

## VII. Are there any other "special powers" that the Italian Government may exercise apart from the "Golden Powers"?

In addition to "Golden Powers", other regulatory measures have pursued in Italy - in different ways - similar purposes of protecting companies operating in sectors deemed strategic for the national economy.

In particular, further special rights pertaining to the public shareholder are provided in the Italian Civil Code and in other special laws (see for instance art. 1, par. 381, of Law no. 266/2005 introducing a "poison pill" mechanism in the event of a public takeover bid over companies owned by the State; see also article 7 of Law decree no. 34/2011, as converted by Law no. 75/2011, which authorized *Cassa Depositi e Prestiti* to acquire holdings in companies of significant national interest).

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