
CHANGES TO THE "GOLDEN POWER" RULES: A TOOL OF PROTECTION AGAINST "HOSTILE TAKEOVERS".



1. Preliminary remarks

The spread of the Covid-19 within the Italian territory and the lockdown imposed to contain its further diffusion gave rise to an economic crisis that is now affecting Italian companies: consequently, foreign

investors might be interested in made some investments in Italy to acquire shareholdings in some Italian companies, whose value is lower than just few months ago.

The above might happen especially if the ownership structure of such targets companies is not characterized by a strong controlling shareholders' group. On the other hand, a change of the controlling shareholders' group with foreign investors could have negative consequences if it occurs in companies operating in strategic sectors for Italian economy.

For these reasons, to protect Italian companies from the risk of hostile takeovers, the Law Decree, approved by the Government on April 6, 2020 (hereinafter, the "**Liquidity Decree**"), amended some provisions of the law relating to the so-called "golden powers" granted to Italian Government or to some other public authorities, introduced by Law Decree no. 21 of March 15, 2012 and further integrated by

Law Decree no. 105 of September 21, 2019 (hereinafter, the “**Golden Power**”).

2. The Golden Power in Italy.

The law provisions regulating the Golden Power entitle the Italian Government to exercise special powers in case of some extraordinary transactions involving companies operating in strategic sectors of national interest, such as defense and national security, as well as in certain areas of activity of strategic importance in the sectors of energy, transport and communication (including, pursuant to Law Decree no. 105 of September 21, 2019, also broadband telecommunications networks using 5G technology).

More in particular, in order to protect the ownership structure of companies operating in strategic sectors, the Italian Government is entitled to:

- (i) impose specific conditions to acquire stakes in companies holding strategic assets related to defense and national security;
- (ii) oppose, for any reason, the acquisition of

shareholdings in a company performing activities of strategic relevance in defense and national security system, if the purchaser is an entity other than the Italian State (or other Italian public bodies) and it is going to hold, directly or indirectly, a stake with voting rights capable to compromise the interests of defense and national security; and

- (iii) exercise a veto right should certain resolutions are adopted (*e.g.* mergers, demergers, winding-up or in case of amendments to some clauses of By-Laws).

However, the Italian Government might use these powers only when there is a risk for defense and national security interests, complying with the principles of proportionality and reasonableness (cf. art. 1 of Law Decree n. 105 of 21 September 2019).

Therefore, by virtue of the laws regulating the Golden Power, who intends to acquire a stake in companies operating in strategic sectors shall notify

its intention to the Prime Minister's Office which, within the following 45 days, in compliance with the above mentioned principles, may oppose the acquisition or approve it under specific conditions.

Should a breach of the procedure and/or conditions occur, various sanctions are provided and they may vary from the suspension of voting rights to the invalidity of the acts performed, up to the application of administrative sanctions (whose amount is determined proportionally with the value of the transaction and the revenue of the companies).

3. The amendments introduced by the Decree Law of 6 April 2020.

In order to protect Italian companies operating in strategic sectors from the increasingly risk of hostile takeovers by foreign buyers, the Liquidity Decree has introduced the following main innovations.

3.1 Extension of the sectors included

The Law Decree no. 105/2019, through a direct reference to the list introduced by EU Regulation no. 452/2019, had extended the scope of application of

the Golden Power also to companies holding assets or part of strategic relationships in some sectors other than the ones of security, defense, energy, transport, communications and 5G networks.

However, the extensions introduced on September 2019 by the Law Decree 105/2019 were not easy to apply because the decrees required for this purpose were not adopted.

In particular, the reference to "financial infrastructures" provided by EU Regulation no. 452/2019 and applicable in Italy by virtue of the direct and express reference to it by the Law Decree 105/2019 had raised the doubt whether or not banks and credit institutions were included within the scope of the Golden Power rules.

The new Liquidity Decree, on one hand, **expressly specified** that the financial, credit and insurance sectors also are included within the scope of the Golden Power and, on the other hand, added other new categories of activities (*i.e.*, the food industry).

Therefore, by virtue of the amendments introduced by the Liquidity Decree, the following sectors (jointly,

the “**Strategic Sectors**”) fall within the scope of the Golden Power rules:

- a) critical infrastructures, whether physical or virtual, including energy, transportation, water, health, communications, media, data processing or storage, aerospace, defense, electoral or **financial infrastructures**, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructures. As previously said, the Liquidity Decree clarified that the within the “*financial infrastructures*” are included the financial, banking and insurance sectors;
- b) critical technologies and dual use items as defined according to EU regulation no. 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, 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;

e) the freedom and pluralism of the media.

3.2 Extension of the duty to notify

The Liquidity Decree temporarily extended the obligation to notify acquisitions of shareholdings in companies operating in Strategic Sectors or the execution of some other transactions involving such companies.

Indeed, until 31 December 2020, the following transactions are required to be notified to the Prime Minister’s Office:

- a) **acquisition of shareholdings**, by any **intra-EU entity or extra-EU entity**, in companies holding strategic assets in the Strategic Sectors and giving rise to a **change of control** in the ownership structure of the target company;
 - b) **acquisition of shareholdings**, by any **extra-EU entity** in companies holding strategic
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assets in the Strategic Sectors: (i) should the threshold of **10%** of share capital or voting rights be exceeded (if the value of transaction is higher than one million Euro); and (ii) should the thresholds of **15%, 20%, 25% and 50%** of share capital or voting rights be exceeded;

- c) **resolution and transaction** adopted by companies holding strategic assets in the Strategic Sectors and giving rise to a **change of ownership or use destination** of such strategic assets.

3.3 Ex officio proceedings

The Liquidity Decree, expressly provided that the Prime Minister's Office is entitled to initiate *ex officio* proceedings in all sectors subject to its Golden Power and, therefore, not only in case of lack of notification, but also in the absence of any obligation to do so.

3.4 Small and medium-sized enterprises

The Liquidity Decree also granted Consob (*i.e.*, the Italian Stock Exchange Authority) with new powers to

protect the financial market's transparency and stakeholders' interest *vis-à-vis* hostile takeovers of Italian listed companies.

In particular, Article 120 of the Consolidated Financial Act (*i.e.* Legislative Decree 58/1998) already required the shareholders owning more than 3% of the shares of Italian listed companies (or 5% in case of listed SMEs) to inform Consob of their shareholdings.

By virtue of the paragraph *2-bis* of such provision, in case of companies «*with a particularly widespread shareholder base*», Consob, for a limited period of time, is entitled to set lower shareholdings thresholds that trigger the need to inform Consob itself: the Liquidity Decree has removed any previous reference to companies' market capitalization and, consequently, the area of application of such provision has been extended.

Moreover, the Liquidity Decree granted Consob with the temporarily power to set a 5% shareholdings threshold that triggers the duty of the potential buyer to inform Consob in case of acquisition of

stakes in Italian companies with a particularly widespread shareholder base. Hence, Consob, with the resolution no. 21327 of April 9, 2020, provided that – for a period of three months and subject to early revocation – the additional threshold of 5 percent applies.

These provisions, together with the strengthening of the duty to notify to the Prime Minister's Office, extended the area of application of the Golden Power to protect Italian SMEs.

4. Findings

In light of the new set of rules provided by the Liquidity Decree, the transactions falling within the scope of the Golden Powers rules is significantly increased.

For these reasons, a specialist technical and legal advice is an appropriate tool to precisely identify regulatory constraints, choose the best strategy and follow notification procedures.

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