



# What is the “Golden Power” in Italy?

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The Golden Power is the special power of the Italian government to limit or stop (i) foreign direct investments (“**FDI**”) and (ii) corporate transactions involving Italian strategic assets.

All transactions falling within the field of application of Golden Power must be reported in advance to the Italian Presidency of the Council of Ministers (the “**Presidency**”).

The Golden Power originally entered into force in 2012 and was limited to defense, national security, and infrastructure (transportation / energy / communications). It has recently been extended to additional strategic sectors (i.e., high technology, fintech, insurtech, etc.) following Law Decree 23/2020 and as a consequence of the Covid-19 pandemic.

Therefore, all foreign investors intending to carry out acquisitions in Italy within certain sensitive sectors are required to first consider any application of the Golden Power regime.

This contribution by **Ughi e Nunziante** offers useful guidelines for foreign investors to better understand the new legal framework.

For any help or additional clarification, please seek proper legal guidance.

# Scope of Golden Power

The Covid19 pandemic has prompted a broadening of the scope of Golden Power in an attempt to cope with hostile manipulations and speculations on assets considered strategic.

Law Decree 23/2020, and two more recent Decrees of the Presidency (“**DPCMs**”), have expanded the list of sectors considered strategic and subject to the Golden Power regime.

This “expanded” regime will remain in force until the end of June 2021.

*The Golden Power to date applies inter alia to the following sectors:*

- i. Defense and national security
- ii. Infrastructure networks (transport, energy, communications)
- iii. Critical infrastructures (both virtual and physical) including water, health, and financial infrastructures (including insurance and credit sectors), among others
- iv. Critical technologies and dual-use products, including artificial intelligence, nano-technologies, and bio-technologies, among others
- v. Security in critical productive factors’ supply, such as energy and raw materials, access to sensitive information or the ability to control it, media liberty, and pluralism
- vi. Iron and steel industry and agri-food sector
- vii. 5G
- viii. Fintech
- ix. Insurtech
- x. Smart contract

## The new scenario...

Investors are required to face this new scenario with extreme caution, as it is not always easy to understand the scope and definition of these new strategic assets.

The changes will apply (at least) throughout 2021 and will affect the market in two ways:

- i. The number of industries and sectors affected by the Golden Power has been significantly expanded.
- ii. The Golden Power now also applies to EU investors – including Italian investors – and not only with reference to the defense and national security sectors as has historically been the case in Italy.

## ...and the new role of the advisors

A correct approach to investments in Italy now requires an early and close look at the type of FDI and transactions with a specific focus on the type of assets involved.

Appropriate legal advice should be sought to specifically:

- analyze the type of FDI/transaction (parties and assets involved);
- review and understand whether the FDI/transaction directly or indirectly falls within the sectors to which Golden Power regime applies (including in the Due Diligence process);
- address any sensitive impact of the FDI/transaction with the investor in order to prepare for and manage the notice to the Presidency;
- discuss with the investor possible risks and consequences and whether, and to what extent, investors are willing to accept certain modification to the transaction to mitigate those risks;
- closely monitor any future legislative changes as a result of market changes and of the evolution of the pandemic in Italy.

# Strategic Sectors and equity investments

	National Defense and Security	Transport, Energy, Communications	Strategic Sectors Pursuant to Regulation (Eu) 2019/452
Equity investments subject to notification	Purchase of shareholdings in companies that carry out activities of strategic importance for the national defense and security system.	Three cases: no. 1: Purchase of shareholdings in strategic companies in order to <b>determine the permanent establishment</b> of the purchaser. no. 2: Purchase of shareholdings granting voting rights or a participation in the share capital of at least 10%, also taking into account any shares held either directly or indirectly. no. 3: Purchase of more than <b>15%, 20%, 25% and 50% of share capital</b> .	Three Cases: no. 1: Purchase of shareholdings in strategic companies in order to <b>determine the permanent establishment</b> of the purchaser. no. 2: Purchase of shareholdings granting voting rights or a participation in the share capital of at least 10%, also taking into account any shares held either directly or indirectly and provided that the investment value is equal to or over <b>EUR 1 million</b> . no. 3: Purchase of more than <b>15%, 20%, 25% and 50% of share capital</b> .
Investors	<b>EU investors</b> and <b>Non-EU Investors</b>	Case no. 1: <b>EU Investors</b> and <b>Non-EU Investors</b> Cases no.2 and 3: <b>Non-EU Investors</b>	Case no. 1: <b>EU Investors</b> and <b>Non-EU Investors</b> Cases no. 2 and 3: <b>Non-EU Investors</b>
Thresholds	Target company <b>listed</b> : purchase of more than 3% of share capital.  Target company <b>non-listed</b> : purchase of more than 5% of share capital.	Case no. 1: <b>Control</b> of the target. Case no. 2: Investment value is equal to or over <b>EUR 1 million</b> .  Case no. 3: Exceedance of the above indicated thresholds.	Case no. 1: <b>Control</b> of the target. Case no. 2: Investment value is equal to or over <b>EUR 1 million</b> .  Case no. 3: Exceedance of the above indicated thresholds.

# Strategic Sectors and corporate resolutions or other transactions

	National Defense and Security	Transport, Energy, Communications	Strategic Sectors Pursuant to Regulation (Eu) 2019/452
<b>Corporate resolutions and other transactions subject to notification</b>	<p>Resolutions or transactions of the shareholders' meeting or the management bodies regarding the:</p> <ul style="list-style-type: none"> <li>• merger/demerger of the company;</li> <li>• transfer of the company, branches or subsidiaries;</li> <li>• transfer abroad of the registered office;</li> <li>• modification of the corporate purpose;</li> <li>• dissolution of the company;</li> <li>• amendment of certain statutory clauses;</li> <li>• transfer of rights in rem or rights of use in relation to tangible or intangible assets, or the taking on of restrictions on their use, including due to the company being made subject to bankruptcy proceedings.</li> </ul>	<p>Resolutions or transactions leading to changes in the ownership, control, or availability of the assets, or the change of their purpose including resolutions of the shareholders' meeting or the management bodies regarding the:</p> <ul style="list-style-type: none"> <li>• merger/demerger of the company;</li> <li>• transfer of the company, branches or subsidiaries;</li> <li>• transfer of subsidiaries that hold strategic assets;</li> <li>• transfer abroad of the registered office;</li> <li>• modification of the corporate purpose;</li> <li>• dissolution of the company.</li> </ul>	<p>Resolutions or transactions leading to changes in the ownership, control or availability of the assets or the change of their purpose, including resolutions of the shareholders' meeting or the management bodies regarding the:</p> <ul style="list-style-type: none"> <li>• merger/demerger of the company;</li> <li>• transfer of the company, branches or subsidiaries;</li> <li>• transfer of subsidiaries that hold strategic assets;</li> <li>• transfer abroad of the registered office;</li> <li>• modification of the corporate purpose;</li> <li>• dissolution of the company.</li> </ul>
<b>Investors</b>	<b>EU investors and non-EU investors</b>		

# The notification procedure

When an FDI or an extraordinary corporate transaction falls within the scope of the Golden Power, the investors (or the company) are required to notify the Presidency in advance of the transaction within certain mandatory deadlines, after which the Presidency begins the screening process, which must be completed according to the below timeline.

Notification of the FDI involving an acquisition	Within 10 days from the signing
Notification of shareholders / management body's resolutions or transactions	▶ Within 10 days and in any case before the execution and implementation of the resolutions or corporate transactions
Screening by the Presidency of the Council of Ministers	▶ Maximum 45 days
Possible request for additional information to the investor / company	▶ Suspension of the 45 day term for a maximum of 10 days
Possible request for further information to third parties	▶ Suspension of the 45 day term for a maximum of 20 days
From October 2020: 1: EU Member States can provide comments 2: the EU Commission can provide comments	▶ Term of 45 days suspended until receipt of comments

# The powers of the Presidency

In case of notification, the Presidency is required to issue a decision within 45 days of receipt unless the procedure is suspended because of lacking documents.

In case no decision is issued within the 45-day period, the notified FDI/transaction can be implemented.

Very importantly: the Presidency's screening on FDIs does not involve a governmental or political scrutiny. The number of notified FDIs has increased in the last years and it will increase significantly: this does not mean that – so far - the Italian system is adopting a protectionist approach. Indeed, even Italian investors, just like other EU investors, are currently subject to the extension of the Golden Power and the increase in the transactions requiring notification.

Furthermore, the measures that the Presidency can adopt are administrative acts subject to control by the judiciary.

## *Ex officio procedure*

The changes in the Golden Power legal framework adopted in 2020 introduced the right for the Presidency to exercise the Golden Power ex officio in case of failed notification of the FDI or the transaction.

Should the Presidency start an ex officio procedure, the 45-day period runs from the end of the preliminary proceeding aimed at assessing the breach of the notification obligation.

### The powers of the Presidency of the Council of Ministers and possible outcomes of the screening

<p><b>1. Requirement of special conditions</b></p>	<p>Requirement of special conditions in case of:</p> <ul style="list-style-type: none"> <li>• the purchase of shareholdings in companies carrying out activities in strategic sectors;</li> <li>• resolutions or extraordinary corporate transactions.</li> </ul>
<p><b>2. Veto right</b></p>	<p>Veto against the adoption of corporate resolutions (shareholders / management body) or transactions.</p>
<p><b>3. Opposition to the acquisition</b></p>	<p>Opposition to the acquisition of shareholdings in a company carrying out activities of strategic importance, in cases of exceptional risk for the protection of national interests, which cannot be averted through the imposition of special conditions.</p>



# Sanctions

In case of investor's failure to notify the FDI/transaction or to comply with any measures adopted by the Presidency, the following sanctions apply:

**In case of FDI involving an acquisition.**

- Suspension of voting rights connected with the acquired participation.
- In case of opposition by the Presidency to the acquisition, the participation must be re-transferred within one year.

**In case of corporate resolutions and other transactions.**

- Invalidity of the resolutions and deeds adopted in breach of the notification obligation.
- The faculty for the Presidency to order the parties involved in the transaction to restore the earlier situation.

**Both for equity investments and corporate resolutions.**

- The payment of an administrative fine equal to double the transaction value and in any case not lower than 1% of the turnover realized by all the companies involved in the transaction in the last financial year.

# Measures adopted so far by the Presidency...

What has been the result of the notifications so far?

## 2018

**40 notifications**  
of FDI addressed to the Presidency

## 2019

The FDIs notified doubled  
and reached the  
**total of 83**

## 2020

It appears that the Presidency  
received about  
**300 notifications**

## 2021?

We expect that FDIs, and accordingly  
the notifications, to the Presidency  
will increase in 2021.

The data available to date confirms that there was only one case in which the notification ended with the exercise of the veto right by the Presidency. About 10% of the notifications were concluded with a resolution of the Presidency imposing special conditions (e.g., maintenance of production plants in Italy, employment levels, changes in the company's organizational structure etc.).

# Useful Legal Tips

Given the complexity and fluidity of the legislation relating to the Golden Power system in Italy, it is advisable to closely monitor any preparatory works for future changes as well as the trend of the Presidency decisions in relation to the latest investments.

Investors and their legal advisors should now consider the Golden Power application as one of the many already-existing regulatory conditions to be handled vis-à-vis different Authorities (such as Antitrust, Banking, Securities and Insurance):

- Applications to multiple authorities will need to be coordinated.
- It is unclear if and to what extent the Golden Power regime applies also to investments through hybrid / financial instruments such as warrants, options, derivatives, and convertible debt securities.

Accordingly, both the evaluation and negotiation phases of the transaction will be affected.

In particular:

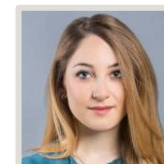
- The two-phase signing/closing appears an appropriate process to allow the investors to send the notice and make the contract conditional upon full or qualified approval by the Presidency.
- Appropriate provisions should be provided in the Contract to face the possible negative consequences of a veto and/or adoption of measures by the Presidency.



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