

## INTERNATIONAL

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### IN THIS ISSUE

*The Golden Power is the special power of the Italian government to limit or stop (i) foreign direct investments and (ii) corporate transactions involving Italian strategic assets, such as defense, national security, infrastructure (transportation / energy / communications) as recently extended, following the Covid-19 pandemic, to encompass also high technology, including fintech and insurtech. All foreign investors - and their legal counsels - intending to carry out acquisitions in Italy within these sensitive sectors are required to consider an application under the Golden Power regime.*

## The Golden Power in Italy



### ABOUT THE AUTHOR

**Filippo Mazza** is a partner of Ughi e Nunziante Studio Legale based in the Rome office. After more than 15 years of experience in US firms, Filippo's practice mainly focuses on corporate M&A and real estate, both at domestic and international level. Further, Filippo has extensive experience in business restructuring with a special focus on executive dismissal related issues. His practice also includes handling regulatory and arbitration issues associated with corporate matters. He is particularly active in the insurance and energy markets, having assisted several large public corporations in their investments and restructuring operations in Italy. Filippo has published several articles on tender offers, international contracts, and comparative law and is a frequent lecturer at seminars and masters' programs held by Italian universities. He has been admitted to the Italian Supreme Court. Filippo is described by Legal 500 EMEA as a "highly professional lawyer" for Corporate and M&A. He can be reached at [f.mazza@unlaw.it](mailto:f.mazza@unlaw.it).

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The International Committee is the core international group in IADC and serves those members who have an interest in transnational or international legal matters including transactions, litigation, and arbitration. Thus any member, whether in the USA or abroad, who does cases with a foreign element (inbound or outbound) will find involvement in this committee extremely useful. Many of the members of the committee are from outside the USA, and this provides a rich mix of experiences and expertise as well as great networking opportunities. The International Committee also organizes European, South American, and Asian Regional Meetings and contributes to the International Corporate Counsel College. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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### **What is the “Golden Power” in Italy?**

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).

Over the past few years, as a consequence of the Covid-19 pandemic, the Golden Power has been extended to additional strategic sectors i.e., high technology, fintech and insurtech.

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.

### **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 recent Decrees of the Presidency (“DPCMs”) have expanded the list of sectors considered strategic and subject to the Golden Power regime.

*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.

Changes in the Golden Power regulations in recent years have affected the market primarily 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.

**Strategic Sectors and Equity Investments**

	National Defense and Security	Transport, Energy, Communications	Strategic Sectors Pursuant to Regulation (EU) 2019/452
<b>Equity investments subject to notification</b>	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 <b>taking into account</b> 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 <b>taking into account</b> 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> .
<b>Investors</b>	<b>EU investors and Non-EU Investors</b>	Case no. 1: <b>EU Investors and Non-EU Investors</b> Cases no.2 and 3: <b>Non-EU Investors</b>	Case no. 1: <b>EU Investors and Non-EU Investors</b> Cases no. 2 and 3: <b>Non-EU Investors</b>
<b>Thresholds</b>	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>	Resolutions or transactions of the shareholders' meeting or the management bodies regarding the: <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>	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: <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>	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: <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 fall 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
EU Member States and EU Commission can provide comments	Term of 45 days suspended until receipt of comments

## The Prenotification

On September 2022 the Italian government introduced a prenotification procedure, which allows companies to obtain a preliminary assessment on the applicability of the Golden Power to proposed transactions.

Companies might request the Presidency to assess whether a proposed incorporation, acquisition, resolution, deed, or transaction falls within the scope of the Golden Power regime before filing a formal notification, providing all documents and information, to the extent available, required for the formal notification.

Therefore, the prenotification can be submitted even before signing. Within 30 days of the prenotification, the Department for administrative coordination of the Presidency shall inform the companies that:

- the proposed transaction does not fall within the scope of the Golden Power, and therefore no formal notification is due;
- the proposed transaction is likely to fall within the scope of the Golden Power, in which case the company is required to submit a formal filing; or
- the proposed transaction falls within the scope of the Golden Power, but there are no grounds for the exercise of the special powers.

The mechanism of silent consent does not apply: if no decision is adopted within 30 days of the prenotification, the company is required to file a formal notification.

### 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.

The powers of the Presidency of the Council of Ministers and possible outcomes of the screening	
1. Requirement of special conditions	Requirement of special conditions in case of: <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>
2. Veto right	Veto against the adoption of corporate resolutions (shareholders / management body) or transactions.
3. Opposition to the acquisition	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.

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

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.

### 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.
- With specific reference to the 5G sector, the administrative fine is up to 3% of the turnover of the company required to notify.

**Measures Adopted so far by the Presidency...**

*What has been the result of the notifications so far?*

2018	2019	2020	2021
40 notifications of FDI addressed to the Presidency	The FDIs notified doubled and reached the total of 83	The Presidency received 341 notifications	The Presidency received 496 notifications with an increase of 45 percent over the previous year

**2022**

With 608 notifications received by the Presidency, the consistent growth in transactions subject to Golden Power scrutiny continued in 2022, with an increase of more than 22% from 2021.

85% of notifications have concerned Transport, Energy, Communications, and new strategic sectors under Regulation (Eu) 2019/452, 12 % National Defense and Security and 3% 5G Technology.

In some cases, the notification ended with the opposition to the acquisition of shareholdings by the Presidency. They include among others two China-related deals:

- The cancellation of the sale of a 75% stake in drone maker Alpi Aviation to Mars Information Technology, a state-owned Chinese investor affiliated with China Corporate United Investment and CRRC Capital, which are both controlled by the management committee of Wuxi Liyuan Economic Development Zone and the state-owned Assets Supervision and Administration Commission of China’s State Council.
- The blocking of a Euro 2 million investment in Robox, an Italian robotics company, by Chinese robot manufacturer Efort Intelligent Equipment, which would have

increased Efort's stake in Robox to 49%.

## 2023

We expected that FDIs, and accordingly, the notifications to the Presidency and blocking of foreign investments will increase even further in 2023.

- Most recently, the Presidency used Golden Power to block the acquisition of Italian company Tecnologia Intelligente by a Dutch-based cloud services provider over concerns that the proposed buyer would be funded by Yandex, Russia's leading provider of online platform services.
- Yandex was founded by Kazakh-Israeli billionaire Arkady Volozh, included on EU list of sanctions against Russian individuals and companies following Russia's war of aggression against Ukraine.
- As at end of March 2023, with the above decision, the first under Italian prime minister Giorgia Meloni, the Italian government blocked overall eight foreign investments since it first gained Golden Power, five of which occurred under former prime minister Mario Draghi's leadership. Previous governments only blocked two deals.

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