

Golden Power Decree

By means of Decree-Law 21/2012 ("**Golden Power Decree**"), converted with amendments into Law 56/2012, the legislator has intervened several times on the discipline of the so-called "Golden Powers".

The Golden Power Decree aims at safeguarding the structures of companies, active in areas considered strategic and of national interest, through the attribution to the Government of "special powers".

Such "special powers", in particular, granted to the Government, which differ according to the case and are to be exercised on the basis of objective and non-discriminatory criteria, are essentially as follows: (i) opposition to the purchase of shareholdings; (ii) veto of the adoption of company resolutions; and (iii) imposition of specific requirements and conditions.

Legislative Decree no. 23 of April 8, 2020 ("**Liquidity Decree**"), has extended the application of Golden Power even over the traditional sectors of defense and national security, energy, transport and communications (collectively, the "**Strategic Sectors**") to the New Strategic Sectors, which include, inter alia:

- financial services,
- infrastructures and critical technologies,
- energy,
- transport,
- water and health,
- food security,
- access to sensitive information and personal data,
- artificial intelligence,
- robotics,
- semiconductors,
- cybersecurity,
- nanotechnology and biotechnology.

Recently, the Italian government has extended the temporary regime introduced with the Liquidity Decree until 30 June 2021, issuing the Decree of the President of the Council of Ministers no. 179 of 18 December 2020 ("**Decree No. 179/2020**") and the Decree of the President of the Council of Ministers no. 180 of 23 December 2020

("Decree No. 180/2020" jointly with Decree No. 179/2020 the “New Golden Power Decrees”).

The New Golden Power Decrees - published on the Official Gazette on 30 December 2020, entered into force on 14 January 2021 - identify assets of strategic importance in (i) the energy, transport, and communications sectors and (ii) the other relevant sectors referred to in Article 4 of EU Regulation No. 452/2019 of the Parliament and of the Council of 19 March 2019 which establishes a framework for monitoring foreign direct investment in the European Union ("EU Regulation No. 452/2019").

In particular, the Decree No. 179/2020 identifies the assets and structures of national interest in the sectors referred to in article 4, paragraph 1, of EU Regulation No. 452/2019 (establishing a framework for monitoring of foreign direct investment in the EU) whereas the Decree No. 180/2020 identifies the assets of strategic importance in the energy sectors, transport and communications.

Notably, with regard to the energy sector, the foreign investment regime (provided for by EU Regulation No. 452/2019 mentioned above) applies to the following energy networks of national interest, and in related contractual relationships under Article 3 of Decree No. 179/2020:

- “critical” infrastructures (ie those essential to the health, safety and economic and social well-being of the population) in which fuels, nuclear materials or radioactive waste are stored, as well as the technologies and infrastructures for the processing, management and transport of those fuels, nuclear materials or radioactive waste;
- buildings essential for the use of the above critical infrastructures;
- coastal deposits of crude oil and oil products with a capacity of one hundred thousand or more cubic meters used for the domestic market, LNG storage capacity infrastructures equal to or greater than 10 thousand cubic metres, import pipelines and oil pipelines for intercontinental airports’ supply;
- “critical” technologies (ie those essential the health, safety and economic and social well-being of the population), including platforms, for the management of natural gas wholesale markets and electricity; and
- economic activities of strategic importance carried out in the energy sector by undertakings with an annual net turnover of no less than Euro

three hundred million and an average annual number of employees of at least two hundred and fifty.

The assets mentioned above are enrolled in addition to the following ones, which are already listed under Ministerial Decree No. 85 of 25 March 2014, now replaced by Article 1 of Decree No. 180/2020:

- national natural gas transmission network, related compression stations and dispatching centres, as well as gas storage facilities;
- infrastructures for the supply of electricity and natural gas from other States, including onshore and offshore LNG regasification facilities;
- national electricity transmission grid and relevant control and dispatching facilities; and
- management activities related to the use of the networks and above mentioned infrastructures.

Furthermore, the New Golden Power Decrees clarify that Governmental Powers are excluded (but notification to the Presidency of the Council of Ministers has, nonetheless, to be carried out):

- if the safeguard of security and public order, including protection of the essential interests of the State in safeguarding the security and operation of networks and installations and of the continuity of supplies, is adequately guaranteed by specific sector regulations, including those stemming from a concession; and if the safeguard of security and public order, including protection of the essential interests of the State in safeguarding the security and operation of networks and installations and of the continuity of supplies, is adequately guaranteed by specific sector regulations, including those stemming from a concession; and
- for intragroup transactions of mergers, spin-offs, acquisitions or transfers of shares, transfer of the registered office to non-EU country, change in the corporate purpose, dissolution of the Company, amendments to the articles of association adopted pursuant to art. 2351, paragraph 3 of the Italian Civil Code or pursuant to art. 3, paragraph 1 of Legislative Decree no. 332/1994, the creation or transfer of property rights or intangible assets, the adoption of restrictions on use, also due to the fact that the company is subject to insolvency proceedings. These exclusions do not apply if the relevant transaction may lead to a prejudice to the continuity

of supply or a danger to security and public order. However, the practical implementation of this exclusion may be problematic due to an unclear and somehow contradictory provisions.

In addition, due to the extension of the Liquidity Decree, until June 30, 2021, acquisitions of majority shares with voting rights by EU investors and the acquisition by any non-EU party of a stake equal to or greater than 10% of the voting rights, as well as any subsequent acquisition of more than 15%, 20%, 25% and 50% (provided that the value of the investment exceeds 1 million euros) will be subject to mandatory notification.

Nevertheless, with reference to certain sectors, the obligation to notify is subject to the following limits below which the obligation to notify does not apply. The size threshold that imposes the obligation to notify concerns companies with an annual net turnover of no less than 300 million euros and an average annual number of employees of no less than 250.

While appreciating the Government's efforts to complete and clarify the regulatory framework, there are still uncertainties regarding the subjective and objective scope of Golden Powers, therefore making it essential to carry out a specific case-by-case assessment of individual case-by-case assessment of individual transactions and guidance from specialists.

Avv. Marco Muscettola
marco.muscettola@lexia.it

Avv. Giuseppe Andrea D'Alessio
giuseppe.dalessio@lexia.it