



# **Italian Golden Power regime - the 2021 new provisions following DPCM 179-180/2020 and Law 176/2020**

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With Prime Ministerial Decree no. 179 of December 18, 2020 and Prime Ministerial Decree no. 180 of December 23, 2020, both published in the Official Gazette on December 30, 2020, the Italian government provided for certain regulations relating to the “Golden power” legislation.

Prime Ministerial Decree 179/2020 identifies assets and business relations of national interest, while Prime Ministerial Decree 180/2020 identifies assets of strategic interest in the energy, transport and communications industries.

As a preliminary remark, it should be noted that both the Prime Ministerial Decree 179/2020 and the Prime Ministerial Decree 180/2020 will be effective as of **January 14, 2021**.

## **Golden power - legal framework**

According to the “Golden power” regime, the Italian Government is entitled to oppose or make subject to satisfaction of certain conditions acquisitions and corporate transactions of companies which own assets defined as “strategic” in the Italian territory.

The regulation of Golden power in Italy was first introduced by Law Decree no. 21 dated March 15, 2012 and has been amended and integrated in the past few years.

On March 19, 2019, Regulation 2019/452/EU of the European Parliament and of the Council was enacted. The same provided that the European Union and its member States may, for security or public order reasons, take restrictive measures against foreign direct investment, provided that certain conditions were met.

It should also be noted that, due to the Covid-19 pandemic, with Law Decree no. 23 of April 8, 2020, the Italian government has recently introduced very broad measures aimed at strengthening the monitoring of foreign investment in Italian companies as well as ensuring transparency in the capital market.

In order to implement the provisions of the above-mentioned European Regulation, the Italian legislator introduced in article 2 of Law Decree no. 21/2012 the paragraph 1 *ter*, where it was indicated that, in the future, one or more Prime Ministerial Decrees would have identified:

- i. *“the assets and business relations of strategic interest for the national interest”* (in addition to those already identified by Law Decree 21/2012 and its implementing decrees) in the areas referred to in article 4, paragraph 1, of Regulation (EU) 2019/452; as well as
- ii. *“the type of activities or transactions within the same group”* to which the Golden power regulations pursuant to the aforementioned article 2, paragraph 1 *ter*, of Law Decree no. 21/2012 would not be applicable.

In compliance with the provisions of paragraph 1 *ter* of article 2 of Law Decree no. 21/2012, the Italian legislator has now enacted the Prime Ministerial Decree 179/2020.

**NOTE:** article 4, paragraph 1, of Regulation (EU) 2019/452 reads: “In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may consider its potential effects on, inter alia:

- 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;
- 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 Prime Ministerial Decree no. 179 of December 18, 2020**

As anticipated, with the Prime Ministerial Decree 179/2020, the Italian legislator implemented the provisions required by paragraph 1 *ter* of article 2 of Law Decree no. 21/2012. Indeed, the object of the Prime Ministerial Decree 179/2020 relates to the indication of the “[...] *assets and business relations of strategic significance for the national interest, in addition to those indicated in the decrees referred to in article 1, paragraph 1, and article 2, paragraph 1, of the same Law Decree no. 21 of 2012, in the areas referred to in in article 4, paragraph 1, of Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019, as well as the type of activities or transactions within the same group to which the discipline of the aforementioned article 2, paragraph 1 ter, does not apply*” (article 1 of Prime Ministerial Decree 179/2020).

In particular, Prime Ministerial Decree 179/2020 (in articles 3 to 13), identifies the specific assets and business relations of strategic significance for the national interest mentioned in article 1 of the same, divided by industries and areas.

The following are the industries and areas relating to the aforementioned assets and business relations of strategic significance for the national interest:

1. assets and business relations in the energy industry;
2. assets and business relations in the water industry;
3. assets and business relations in the healthcare industry;

4. assets and business relations in the areas relating to the processing, storage, access and control of sensitive data and information;
5. assets and business relations in the area of electoral services;
6. assets and business relations in the financial industry, including credit and insurance, and financial market infrastructures;
7. assets and business relations in the artificial intelligence, robotics, semiconductor, cybersecurity, nanotechnology, and biotechnology industries;
8. assets and business relations in the non-military aerospace engineering and technology industries;
9. assets and business relations concerning the supply of production resources and in the agro-industrial industry;
10. the dual use products industry;
11. assets and business relations in the media freedom and pluralism industry.

As indicated in the aforementioned article 1 of Prime Ministerial Decree 179/2020, the same also focuses on the type of activities or transactions within the same group to which the discipline of the aforementioned article 2, paragraph 1 *ter*, of Law Decree 21/2012 does not apply.

In particular, art. 14, paragraph 2, of Prime Ministerial Decree 179/2020, also states that, without prejudice to the notification obligation provided for by article 2 of Law Decree. 21/2012, *“the exercise of the special powers [i.e. the Golden power] referred to in article 2 does not apply to the types of activities and transactions carried out within the same group concerning mergers, demergers, incorporations, or transfers, including of equity interests, when the related resolutions of the shareholders’ meeting do not imply a transfer of the registered office to a country outside the European Union, a change in the corporate object, the wind-up of the company or the amendment of the clauses of the by-laws adopted pursuant to art. 2351, third paragraph, of the Italian Civil Code, or introduced pursuant to article 3, paragraph 1, of Law Decree no. 332 of 31 May 1994, converted, with amendments, by Law 474 of July 30, 1994, or, finally, the establishment or transfer of in-rem rights or rights of use relating to tangible or intangible assets or the establishment of restrictions that condition their use, also due to the company being subject to insolvency procedures”*.

However, paragraph 3 of article 14 of Prime Ministerial Decree 179/2020 clarifies

that the exclusions referred to in paragraph 2 “do not apply whenever there is information about the threat of serious prejudice to public interests relating to the safety and functioning of the networks and plants and the continuity of supplies, or a danger to safety and public order”. As a consequence, in these scenarios, the Golden power would still be applicable.

### **The Prime Ministerial Decree no. 180 of December 23, 2020**

By adopting Prime Ministerial Decree 180/2020, the Italian legislator aimed at the identification of the assets of strategic interest in the energy, transport and communications industries.

The assets of strategic interest in the energy industry (as indicated in article 1, paragraph 1, of the Prime Ministerial Decree 180/2020) are:

- a. the national natural gas transmission network and the relevant compression stations and dispatching centers, as well as gas storage facilities;
- b. electricity and gas supply infrastructure from other countries, including onshore and offshore LNG regasification facilities;
- c. national electricity transmission grid and related control and dispatching facilities;
- d. management activities and essential properties relating to the use of the networks and infrastructures referred to in the above letters.

The assets of strategic interest in the transport industry (as indicated in article 2, paragraph 2, of the Prime Ministerial Decree 180/2020) are:

- a. harbors of national interest;
- b. airports of national interest;
- c. national spaceports;
- d. national railway network of importance for trans-European networks;
- e. freight terminals of national importance;
- f. road and freeway networks of national interest.

The assets of strategic interest in the communications industry (as indicated in article 3, paragraphs 1 and 2, of the Prime Ministerial Decree 180/2020) are “dedicated networks and in the public access network to end users in connection with metropolitan networks, service routers and long-distance networks, as well

*as in the installations used for the provision of access to end users of the services included in the universal service obligations and broadband and ultra-wideband services, and in the related contractual relationships, without prejudice to the provisions of Directive 2009/136/EC of the European Parliament and of the Council of November 25, 2009 and Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016” (paragraph 1) and also include “dedicated assets, even where the use is not exclusive, for connectivity (voice, data and video), security, control and management relating to telecommunications access networks at a fixed location” (paragraph 2).*

Just like Prime Ministerial Decree 179/2020, Prime Ministerial Decree 180/2020 also focuses on the type of activities or transactions within the same group to which the discipline of article 2, paragraph 1 *ter*, of the Law Decree 21/2012 does not apply.

Indeed, without prejudice to the obligation to notify and communicate certain transactions (provided for by the same Law Decree 21/2012 in articles 2 and 5), article 4, paragraph 2, of the Prime Ministerial Decree 180/2020 indicates that *“the exercise of the special powers [again, the Golden power] referred to in article 2 of the law decree does not apply to the types of acts and transactions, carried out within the same group [...] concerning mergers, demergers, incorporations, or transfers, including of equity interests when the relevant resolutions of the shareholders’ meeting or managing bodies do not involve the transfer of the company or branches thereof or of subsidiaries, or the transfer of the registered office, the change in the corporate purpose, the dissolution of the company or the amendment of the clauses of the by-laws adopted pursuant to article 2351, paragraph 3, of the Italian Civil Code, or introduced pursuant to article 3, paragraph 1, of Law Decree no. 332 of 31 May 1994, converted, with amendments, by Law 474 of July 30, 1994, or finally the establishment or transfer of in-rem rights or rights of use relating to tangible or intangible assets or the establishment of restrictions that condition their use”.*

Finally, article 4, paragraph 3, of Prime Ministerial Decree 180/2020 clarifies that *“the exclusions referred to in paragraph 2 do not apply whenever there is information about the threat of serious prejudice to public interests relating to the safety and functioning of the networks and plants and the continuity of supplies”.* Again, in these scenarios, the consequence would be that the Golden power would still be applicable.

## **Extension of the exercise of the Golden power and notification obligations**

As anticipated, with Law Decree no. 23 of April 8, 2020, the Italian government recently introduced very broad measures aimed at strengthening the monitoring of foreign investments in Italian companies as well as ensuring transparency in the capital market. Said broad measures relating Golden power's scope would have been applicable up to December 31, 2020.

However, in light of the economic consequences relating to the Covid-19 emergency, the Italian legislator deemed necessary to extend the aforementioned term.

Indeed, upon conversion of Law Decree 137/2020, the Italian legislator, by means of Law no. 176 of December 18, 2020, introduced the new article 10 *ter*, which provides for an amendment to article 4 *bis*, paragraph 3 *bis* and 3 *quarter*, of Law Decree 105/2019 (i.e. the piece of legislation whereby the powers the Italian Government is entitled to exercise the Golden power and provides for the notification obligations).

The original December 31, 2020 term has now been extended to **June 30, 2021**.

As a consequence, also the term relating to the obligation to notify the Italian Government the activities and/or transactions subject to the Golden power in relation to Law Decree 23/2020 has been extended.

The extension of the term of the notification obligation relates to two main areas:

- i. the resolutions, activities or transactions, passed by an entity holding assets and business relationships strategic interest in the areas indicated in the aforementioned article 4, paragraph 1, of Regulation (EU) 2019/452 (it should be noted that this provision of the Law Decree 105/2019 states that the credit and insurance industries are to be considered included in the financial industry) as well as the resolutions, activities or transactions referred to in Prime Ministerial Decree 179/2020, that result in a change in the ownership, control or availability of said assets or a change in their use (article 4 *bis*, paragraph 3 *bis*, letter a), of Law Decree 105/2019);
- ii. in relation to the assets and business relations described in Prime Ministerial Decree 180/2020 and the assets and business relations indicated in point (i) above:

1. the acquisition of participations, for any reason, by foreign entities, including those belonging to the European Union, *“of such importance as to determine the permanent settlement of the purchaser by virtue of the acquisition of control of the company whose shareholding is the object of the purchase, pursuant to article 2359 of the Italian Civil Code and the Consolidated Act [Testo Unico] referred to in Legislative Decree no. 58 of 24 February 1998”*; as well as
2. the acquisition of participations by foreign entities not belonging to the European Union, *“which grant a share of the voting rights or of the share capital of at least 10%, taking into account the shares or quotas already directly or indirectly held, when the total value of the investment is equal to or greater than one million euros”*; and
3. the acquisitions which determine *“the exceeding of the thresholds of 15%, 20%, 25% and 50% of the share capital”*,

(article 4 *bis*, paragraph 3 *bis*, letter b), of Law Decree 105/2019).

Finally, pursuant to article 4 *bis*, paragraph 3 *quarter*, of Law Decree 105/2019, the aforementioned provisions and scenarios whose term has just been extended to June 30, 2021 are the ones applicable to *“resolutions, activities or transactions, as well as acquisitions of equity investments [...] whose notification obligation arose during the abovementioned period, even if the notification was made afterwards or was omitted [...]”*.

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