

Golden Power Task Force

19 September 2023

Recent Golden Power news: application of the rules to intra-group transactions and public tenders

1. Introduction

In recent months, the Italian Government has introduced important changes to Golden Power legislation. This was accompanied by the publication of the Government's annual report on the exercise of special powers in 2022.

Below we briefly analyse the main legislative changes and the most relevant aspects that emerge from the Presidency's annual report.

2. Stronger powers for the Presidency over intra-group transactions

Law Decree 104/2023 (“**Omnibus Decree**”) extends the cases in which the Government may exercise special powers under Golden Power legislation.¹ Before this decree, transactions within the same group of companies were subject to the notification requirement but qualified for a special exception to the ordinary application of Golden Power rules.² The Omnibus Decree has partially done away with this exception, as special powers may now be exercised without limitation in relation to intra-group transactions if the transactions involve non-EU entities that operate in certain sectors identified as strategic under Golden Power legislation. These include intra-group transactions relating to AI, semiconductor manufacturing machinery, cybersecurity, aerospace, energy storage, quantum and nuclear technologies, and food production technologies.

This extension of the application of Golden Power legislation demonstrates the Government's attention to certain internal reorganisations and thus requires operators to be more cautious in assessing any strategic aspects of those transactions.



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¹ Law Decree No. 104 of 10 August 2023, published in Italy's Official Gazette No. 186 of 10 August, amending Art. 2(1-ter) of Law Decree 21/2012.

² Art. 14(3) of Prime Ministerial Decree 179/2020.

3. Simplification of access to public tenders: changes in reporting

Decree of the President of the Council of Ministers 189/2022 regulates the mechanisms for linking the notification obligation and tender procedures; it also established a simpler and shorter notification procedure:³

- The public or private contracting authority can file a pre-notification before the tender notice is published or the contract awarded.
- The contracting authority and the successful tenderer can file a notification, including jointly, after the best bid is selected and before the contract with the successful tenderer is signed.
- The ordinary time limits for completing the procedure are halved.

These simplifications concern the procedure for awarding a concession concerning a strategic asset but not transactions carried out by a company that already holds such a concession.

4. Golden powers 2022: highlights of the Presidency's annual report

As usual, the Presidency's annual activity report to the Senate offers a considerable amount of useful information to understand how the legislation is applied.

Below are some key data regarding 2022:

- The number of notified transactions increased by 22.6% compared to 2021, from 496 to 608.
- The authority found more than half of notified transactions (54%) to be outside the scope of the regulation, which indicates that companies often filed notifications out of precaution.
- The pre-notification mechanism was used 42 times (with 33 decisions of non-applicability, 6 of non-exercise of special powers and 3 requests for a formal notification) between its introduction in September 2022 and the end of the year.
- The transactions notified concerned the following: (a) 64%: the acquisition of shareholdings; (b) 13%: corporate resolutions; (c) 11%: intra-group transactions; and (d) 10%: annual plans for 5G.
- The Government's exercise of special powers was very limited: it occurred in only 8% of notified transactions to which the legislation was found applicable and 4% of notified transactions overall.
- The Government exercised its veto over a notified acquisition or opposed the notified transaction in only 4 cases, whereas conditions were imposed in 18 cases, 10 of which were in the 5G

³ Decree of the President of the Council of Ministers No. 189 was published in Italy's Official Gazette No. 285 of 6 December 2022 and came into force on 21 December 2022.

sector.

4. Conclusion

Recent changes to Golden Power legislation have extended its full application to certain intra-group transactions and detailed the methods of application in tender procedures.

These changes are aimed at combining the protection of strategic interests with clearer and more flexible application methods. Inevitably, they also add further layers to the regulation and entail the need for operators to pay even greater attention to an ever-expanding regulatory area, not least to avoid the considerable penalties the regulation envisages.

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