



**ECONOMIC PUBLIC LAW
COMPETITION AND ANTITRUST**

Important changes in the rules governing coordination activities in relation to the exercise of special powers

On September 24, Decree no. 133 of August 1, 2022 (the "**Decree**") came into force, which implements Decree Law no. 21/2022, and introduces important changes in the rules governing coordination activities in relation to the exercise of special powers. In particular, the Decree provides for a series of measures aimed at speeding up the process for obtaining the *Golden Power* authorization. The main features of the framework will be briefly summarized below (paras. 2 and 3).

1. STRATEGIC SECTORS

The matters now falling within the *Golden Power* discipline are, in summary, as follows:

- Assets related to essential defense and national security interests - including key strategic assets, which are the responsibility of the Ministry of Defense - are identified in the study, research, design, development, production, integration, life-cycle support and supply chain of technologies related to the performance of military activities in a broad sense (e.g., C4I, Radar, weapons, nanotechnologies, meta-materials, high-thermal grade materials, military aerospace and naval propulsion systems, etc.). The identification of these assets is referenced in the relevant implementing decree (Prime Ministerial Decree No. 108 of 6 June 2014);
- Assets relating to strategic interests in the Energy sector (national infrastructure for the transport, dispatching and storage of gas and electricity; infrastructures for the supply of electricity and gas from other States; management activities and key properties connected with the use of energy networks and infrastructures), Transport (ports of national interest; airports of national interest; national space-ports; national railway network

of relevance to the networks trans-European networks; freight villages of national importance; road and motorway networks of national interest), Communications (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 facilities 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). The identification of these assets is referenced in the relevant implementing decree (Prime Minister's Decree no. 180 of December 23, 2020);

- 5G broadband networks and other cybersecurity relevant assets, including *clouds*. In particular, it includes contracts or agreements for the acquisition of goods or services, when implemented with entities outside the European Union, related to the design, implementation, maintenance and management of networks for broadband electronic communication services based on 5G technology, or the acquisition, for any reason, of technology-intensive components functional to the aforementioned implementation or management.
- Relationships of national interest in the areas referred to in Article 4(1) of Reg. (EU) 2019/452 including energy, transport, water, and health, food safety, sensitive information, artificial intelligence, semiconductors, cyber security, as well as nanotechnology and biotechnology. The identification of these assets is referenced in the relevant implementing decree (d.P.C.M. December 18, 2020, no. 179).

2. NOTIFIABLE TRANSACTIONS

With regard to the operations to be notified, the following indications apply as general guidelines:

- In the area of Defense and National Security, *Golden Power* authorization is required whenever, as a result of the acquisition of shares, an Italian, European or non-European investor comes to hold a stake of 3% or more in a company holding strategic assets;
- In other sectors (i.e. with regard to energy, transport, telecommunications and the sectors mentioned in Art. 4, Reg. EU 452/2019) notification is mandatory:
 - in case of purchase of shares by a non-EU investor exceeding the 10% threshold¹;
 - in the event of a change of control in favor of an EU investor, including Italian operators².

Without prejudice to the foregoing brief summary, it is notable that - in addition to transactions involving the acquisition of equity interests in strategic sectors - the *Golden Power* regulations (and, therefore, the need to obtain prior governmental authorization) apply to a broader range of acts and transactions that have the effect of changing the ownership, control or availability of strategic assets, as well as any changes in their destination (e.g., mergers and acquisitions, transfer of the registered office abroad, liquidation or amendments to the company's bylaws). Furthermore, by virtue of the most recent regulatory changes, when a new company is established and operates in a strategic sector, subject to certain conditions, prior notification and prior authorization is required by the Prime Minister's office.

3. THE PROCEDURE AND THE NOVELTY OF PRE-NOTIFICATION

The notification procedure shall last for a minimum of 45 calendar days and a maximum of 75 calendar days if the Presidency intends to gather further elements with regard to the notified transaction (e.g. information, documents, statements by third parties, etc.)³.

¹ Provided that the total investment is equal to or greater than €1 million. A new notification is required whenever, after the acquisition, the acquirer exceeds the threshold of 15%, 20%, 25% and 50% of the voting rights in the *Target* company.

² From 1 January 2023, this provision will be applicable with reference to the telecommunications, energy, transport, health, agri-food and finance sectors (including banking and insurance).

³ Although for the purposes of calculating time limits, according to the rules, the days should be working days, the practice of the Presidency is to take calendar days into account.

The notification - as requested by the Presidency of the Council - must be in two languages, English and Italian. If these deadlines are not met, the authorization is deemed to have been obtained, as the mechanism of silent consent operates.

The Decree introduces, following the procedure already known in the antitrust field (both at the community and national level), the institution of pre-notification.

By virtue of this amendment:

- Economic operators can send to the Presidency of the Council a briefing in Italian (as a translation into English is not required according to the latest indications of the Presidency of the Council) on the draft operations (draft constitution, acquisition, deliberation, act or operation), providing all the documents and information, as available, required for formal notification;
- Within 30 days, the latter shall take one of the following decisions in which it may determine:
 - that the transaction does not fall within the scope of *those* rules;
 - that the transaction is subject to the *Golden Power* regime and the parties are therefore required to make a formal notification;
 - that the transaction, although falling within the scope of the rules governing special powers, should not be notified on the ground that the conditions for its exercise are manifestly not met.

In the event that the Presidency does not rule within 30 days, the parties are obliged to make a formal notification pursuant to Law Decree no. 21/2012. Therefore, in the context of pre-notification, the mechanism of silence of consent does not operate.

Among other changes, the Decree also introduced measures to simplify the decision-making process. The Coordination Group, composed of Administrations, may unanimously decide not to exercise special powers. This will speed up the *Golden Power* review in those cases, which are doubtful, because it will not have to go through the Council of Ministers.

4. PENALTIES FOR FAILURE TO COMPLY WITH NOTIFICATION REQUIREMENTS

Violation of the notification requirements in the Defense and National Security, Energy, Transport and Communications sectors will result in the imposition of an administrative fine of up to twice the value of the transaction, but not less than one per cent of the aggregate turnover of the companies involved. A specific penalty is provided for the failure to comply with the obligation to notify annual plans in the 5G sector, where the consequence is the imposition of a pecuniary administrative sanction of up to three percent of the turnover of the party required to notify.

5. FURTHER NEWS ON GOLDEN POWER

There are further news on Golden Power contained in the recent (i) DPCM September 1, 2022, No. 189 (published in the Official Gazette on December 6 u.s.) and (ii) DL December 5, 2022, No. 187.

DPCM No. 189 introduces a coordination mechanism between tender procedures, awarding the concession of potentially strategic goods or services, and the related notification requirements. More specifically:

- With regard to “pre-notification,” the *procuring entity* will be entitled to send to a notice of the tender procedure (even prior to the publication of the tender notice) to the Presidency of the Council of Ministers so as to obtain a preliminary screening about the applicability of the Golden Power regulation within the next 30 days. The notice must contain “all documents and information, to the extent available, provided for formal notification.” Within 30 days of the notice, the *procuring entity* will be notified that the subject of the pre-notification:

- does not fall within the scope of the Golden Power regulations and, therefore, should not follow formal notification;
 - is likely to fall within the scope of application of the Golden Power regulations and, if so, formal notification will be required;
 - falls within the scope of application of the Golden Power regulations but the conditions for the exercise of special powers are manifestly lacking;
- In relation to the ordinary notification procedure, the *procuring entity* will have the power to perform the notification as early as the conclusion of the bid evaluation phase or prior to the proposal for award. Thereafter, the notification may also be performed by the firm to which the award proposal is addressed, possibly jointly with the *procuring entity*. In any case, the procedural and inquiry deadlines ordinarily provided for by the Golden Power regulations are halved as a matter of law.

With regard to DL 187/2022 (not yet converted into law), we point out the introduction of certain mechanisms in favor of notifying companies aimed at allowing, subject to the exercise of the special powers provided by the Golden Power regulations, priority access to certain economic support measures. Specifically:

- The notifying company will be able to request the Ministry of Enterprises to prioritize the existence of the prerequisites for access (1) to the measures to support the capitalization of the company and the fund to safeguard employment levels and the continuity of the business activity, referred to in Article 43 of DL 34/2020 (converted into L. 77/2020), and (2) to the interventions , aimed at supporting and relaunching the Italian economic-productive system as a result of the "Covid-19" epidemiological emergency, established pursuant to Article 27, paragraph 1, of DL 34/2020 (the so-called "Patrimonio Rilancio";
- In addition, in the two years following the exercise of special powers, the notifying company may apply with priority for access to the instruments of development contracts and innovation agreements.

The definition of the criteria and modalities for access to these support measures is left to future ministerial decrees.

Gatti Pavesi Bianchi Ludovici

Economic Public Law

Competition and Antitrust

Filippo Arena filippo.arena@gpblex.it

Stefano Grassani stefano.grassani@gpblex.it

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