

Italian Golden Power Law: 5 Years Old and Beginning to Speak

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The Italian Golden Power Law is five years old and recent amendments have created new uncertainty for acquisition and sale processes.

October 2017 updates to the Golden Power Law

The Golden Power

- The Italian Golden Power Law (the “**GPL**”) entered into force in 2012¹ and was recently amended pursuant to a law² passed on 16 October 2017 (the “**2017 Amendments**”).
- The 2017 Amendments aim to fill certain gaps of the existing legislation and to strengthen the powers of the Government under the GPL in certain new sectors.
- The new rules deal with the following matters:
 - Expanding the special powers of the Italian Government to cover acquisitions in the high-tech sector, for example acquisitions of critical or sensitive infrastructures, storage and data management and critical technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual-use applications, network security, space and nuclear technology. The Italian Government is required to implement special regulations defining the «high-tech sectors» within 120 days after the date of approval of the 2017 Amendments (*i.e.* by no later than 13 February 2018).
 - The new rules clarify that the special powers apply also when there is a threat to national security or public order relating to security and to the operation of networks and plants (*i.e.* the Italian Government will assess if the investment, particularly by non-EU entities can impact national security

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¹ Law Decree No. 21 of 15 March 2012, converted with amendments into Law No. 56 of 11 May 2012.

² Law Decree No. 148 of 16 October 2017, converted into law No. 172 of 4 December 2017.

or public order)³.

- New monetary penalties up to twice the value of a transaction and, in any case, not less than 1% of the aggregate turnover of the companies involved in the transaction. This sanction is now applicable in all cases where a mandatory notification was not made, regardless of the sector in which the target company operates. Previously the sanctions⁴ only applied in relation to filings in the Energy, Transport and Communications sectors and these have now been expanded to the Defense and National Security sectors.

The 2017 Amendments are applicable only to deals approved by resolutions of the corporate bodies passed after 16 October 2017.

Five years of implementation of the GPL by the Italian Government

Focus on the action by the Italian Government⁵

Following adoption of the GPL in 2012 the Italian Government exercised the “golden power” only in six (6) out of over forty (40) reported⁶ cases. Specifically, the “golden power” has been exercised in relation to the following transactions:

- **Defense and National Security Sector:**

- transfer of Avio’s aeroengine business division to General Electric (2013);
- acquisition of Piaggio Aero Industries by Mubadala Development Company (2014);
- transfer of a branch of business GeoRadar of IDS Ingegneria dei Sistemi to Hexagon Geosystems (2016);
- acquisition by Vivendi of a relevant stake in TIM (2017);
- transfer of the EVO branch of business from Piaggio Aero Industries to PAC Investment (2017).

- **Transport Sector:**

- listing of ENAV for the purposes of the initial public offering of up to 49% of the share capital (2016).

Transactions under scrutiny by the Italian Government

In relation to the GPL procedures completed in the last five (5) years, the Italian Government mainly focused its attention on the following matters:

- **Changes in governance** and internal policies which were considered to be capable of harming national interests;
- **Transfer of headquarters** outside of the Italian territory or the total or partial transfer of the manufacturing activities outside of Italy;
- **Transfer of know-how** outside of Italy and for the benefit of a foreign purchaser, mainly in relation to companies operating in the infrastructure (energy, transportation and TLCs) and high-tech sectors.

³ The exercise of the special powers will take place based on the existing regulations and no additional secondary rules will need to be implemented.

⁴ *I.e.* monetary penalties up to twice the value of a transaction and, in any case, not less than 1% of the aggregate turnover of the companies involved in the transaction, applicable in the event of a breach of the duty to notify in relation to transactions in the Energy, Transport and Communications sectors.

⁵ See Report by the Italian Chamber of Ministries to the Italian Parliament in relation to the special powers carried out in the sectors of strategic relevance of defense, national safety, energy, transportation and communications as at 30 June 2016. Press Releases by the Italian Chamber of Ministries from 1 January 2017 to 19 October 2017.

⁶ Since GPL procedures (i) do not involve public hearings and (ii) can be considered completed through a no objection (*silenzio assenso*) of the Italian Government once the relevant term has elapsed, it is not possible to confirm the exact number of procedures actually completed since 2012 in addition to those referred to in footnote 3 above.

Measures adopted by the Italian Government under the GPL

Generally, under the GPL the Italian Government enjoys a broad power to impose restrictions (i.e. the power to veto or impose special conditions) in relation to transactions involving the acquisitions of shares or assets. The main measures and special conditions that have so far been imposed by the Italian Government during the past five (5) years in the cases we examined include:

- **Control measures**, particularly relating to corporate governance and composition of the management bodies of the target companies (e.g. by requiring that a member of the board of directors of the acquired company must be designated by the Italian Government). This measure was applied in the TIM acquisition in relation to TIM itself and its subsidiaries Sparkle and Telsy;
- **Safety measures**, such as the approval of a safety contingency plan to monitor strategic assets and operations and the appointment of a chief safety officer approved by the Italian Government (e.g. this measure was imposed to TIM and GE Avio, the company formed to hold the aeroengine business of Avio sold to General Electric, respectively);
- **Monitoring measures**, such as the establishment of an independent committee tasked to monitor the target company's compliance with the measures imposed by the Italian Government (e.g. the monitoring measures have been imposed to TIM and to GE Avio);
- **Other management, organizational and technical measures** aimed at (i) maintaining the confidentiality of information and compliance with confidentiality obligations of the acquired company (e.g. this type of measure has been imposed in relation to ENAV) and (ii) preserving the technological know-how and the research and development activities of the target (e.g. these measures have been imposed in relation to GeoRadar in the form of specific organizational and technical guidelines to be implemented within the company's structure).

Conclusions

The 2017 Amendments significantly broaden the Golden Power rules and both purchasers and sellers should carefully evaluate any Golden Power implications involving the transfer of assets or shares of companies operating in the affected sectors. Early contacts on an informal basis with the competent authorities should be initiated in order to efficiently plan the timetable and structure of the transaction.

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