

13 September 2022

GOLDEN POWER REGIME IN ITALY

THE NEW PROCEDURAL REGULATION

On September 9, 2022 (Official Journal No. 211/2022), **the Italian Government has finally adopted the new procedural regulation for the application of the Golden Power regime**, after its announcement in August. Decree No. 133/2022 afresh regulates the coordination activities of the Presidency of the Council of Ministers for the performance of activities preparatory to the exercise of special powers granted to the Government by the Golden Power Decree (No. 21/2012, as amended), providing for measures aimed at simplifying the administrative proceeding and case investigation, included the **long-awaited pre-filing procedure**.

The Decree has been adopted pursuant to the latest amendment to the Golden Power Decree (see our [Newsletter PeA of March 24th, 2022](#)), which provided, *inter alia*, for simplification measures aimed at strengthening the coordination activities of the Prime Minister's Office. The reform approved in March thus becomes operational with the introduction of significant innovations, also implying a more efficient management of an ever-increasing number of notifications of transactions subject to the Golden Power regime.

The Decree will enter into force on September 24, 2022.

THE PROCEDURAL REGULATION AT FIRST GLANCE

The Decree is going to have an appreciable impact on the procedure, as it touches both already existing elements of the Golden Power procedure, but also introduces **brand new tools** and elements in the overall system.

The Golden Power regime is definitely gaining its own structure.

First, the Decree provides for the official establishment of a **Coordination Group**, chaired by the Secretary General or the Deputy Secretary General of the Presidency of the Council and composed of the heads of the Ministries identified, on a case-by-case basis, to lead the technical analysis of the case, as well as by the designated heads of the National Cybersecurity Agency.

The already existing **Department for Administrative Coordination's** role and activities have been furtherly clarified. The Department ensures the performance of inter-ministerial activities, investigative activities as well as the collection, storage and dissemination of information for the exercise of Golden Powers, and prepares the annual report, taking care of its transmission to the Parliament. It also acts as the contact point with the European Commission in matters concerning the control of foreign direct investment under Regulation (EU) 2019/452. The latter is going to be a more and more relevant task for the Department, considering the growing number of EU notifications and "Phase 2" investigations.

The Decree also clarifies and explicitly sets out the **steps of the preparatory activities** for the exercise (or non-exercise, on which please also see below) of Golden Powers. This specification is very important as, until now, stakeholders have sometimes sailed in the dark during the proceeding, due to the unclear identification (and understanding) of the specific steps taken by the competent offices (and even *which* competent offices) in the analysis of cases.

Clarifications on that side touch several points, ranging from instructions for the material filing (mainly concerning the duties on the notifying party), to the request of supplementary information, to the adoption of a resolution of non-exercise of Golden Powers.

A specific simplified procedure is regulated with reference to the event of **non-exercise of Golden Powers**. Here are the main steps:

- **Resolution of non-exercise.** The Ministry responsible for the preliminary investigation and the proposal for the exercise of special powers, on the basis of the findings of the Coordination Group, promptly (and in any case at least fifteen days before the expiry of the deadline for the conclusion of the procedure) sends to the President, to the member Administrations of the Coordination Group and to the Department a statement highlighting the reasons for the resolution not to exercise the special powers.
- **Assessment by the Presidency of the Council.** Within 5 days of the notification or communication informing the company that it is a party to the proceedings, the parties may request that, in the event of a proposal not to exercise the special powers, the matter be referred to the Council of Ministers for assessment.
- **Preparation of the draft resolution.** At the Coordination group meeting, several administrations may request that the proposal be submitted to the Council of Ministers for deliberation. In any case, within 3 days of the meeting of the Group, by means of a reasoned note sent to the President, to the Administrations making up the Group and to the Department, the Administrations making up the Group may make such a request. Under this assumption, the Department prepares the outline of the measure for deliberation by the Council of Ministers.
- **Absence of requests for assessment.** In the absence of timely requests for assessment by the Council of Ministers, the Coordination group deliberates on the proposal not to exercise special powers and the Department sends the group's deliberation, signed by the President or his delegate, to the parties to the proceedings. In such cases, the non-exercise resolution may however include recommendations for the undertaking.

Last, but not least, **the pre-filing procedure**, definitely the most yearned measure by stakeholders.

The pre-filing tool is an important instrument in the procedural context, useful to shed light on cases where it is not clear whether the transaction (or act adopted) falls within the scope of the Golden Power regime. This issue – mainly due to the multi-layered set of decrees adopted in the Golden power context over the years – is hopefully going to be fixed through the pre-filing procedure, already existing and successfully applied in the not so different antitrust merger control context.

The new pre-filing procedure, regulated by Art. 7 of the Decree, works as follows:

- the undertaking concerned may send the Department a notice of proposed acquisition, resolution, act or transaction, providing all available documents and information required for a formal notification (pre-filing);

- within 30 days of the pre-filing, the Department, upon the outcome of the deliberation taken by the Coordination Group, informs the undertaking that (possible outcomes):
 1. the pre-filed transaction **does not fall within the scope** of the Golden Power regime, and therefore the formal notification is not due.
 2. the pre-filed transaction **is likely to fall within the scope of the Golden power regime**, in which case the company is required to proceed with the regular filing.
 3. the pre-filed transaction **falls** within the scope of the Golden power regime, **but** the conditions for the exercise of the special powers are **manifestly lacking**.

In the last two cases, the Coordination Group is entitled to make recommendations to the companies. It is however provided that, in any case, one or more administrations which are members of the Coordination Group may request the undertaking to make a formal notification, and also the parties can ask that a complete filing is done by the undertaking concerned.

Worth noting, if **no decision has been taken by the Coordination Group within 30 days** of the notification sent, the undertaking is required to make the **formal notification**.

The remaining articles of the Decree mainly deal with the cooperation phase with the European Commission and the other European States for notifications concerning foreign direct investment pursuant to Regulation (EU) 2019/452, with the procedure for the imposition of administrative fines in case of non-compliance with the Golden power regime, and with the simplified procedure for *intra-company* assets' change of control.

For more information

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