

THE NEW "GOLDEN POWER" OF THE ITALIAN GOVERNMENT ON STRATEGIC ASSETS: IMPLEMENTING REGULATION FINALLY ADOPTED AND IMPLICATIONS FOR THE NPL MARKET

The veto right of the Italian government in deals regarding strategic sectors is not something new. Since 2012,¹ certain transactions have been subject to notification to the Italian government which, within 45 days, may veto the deal for reasons of national interest (the so-called "golden power").

In the attempt to further protect national security and public order amidst the economic and financial turmoil caused by the COVID-19 pandemic and the consequent market volatility, in April 2020², Italy widened the scope of the domestic legislation on foreign direct investment screening so as to capture dealings in additional types of strategic assets and activities.

The reinforced regime is temporary (expiring on 30 June 2021)³ as it is intended to provide a stricter safeguard to companies controlling sensitive assets, which due to the recession caused by the pandemic, may encounter economic and financial difficulties and be an easy target for foreign investors.

Although the reform has an obvious relevance for Italian M&A deals, it seems to have also raised questions as to its application to the disposal of NPE portfolios by Italian originators to foreign investors.

On 30 December 2020, the Italian government adopted the long-anticipated implementing regulation⁴ (the "**Implementing Regulation**") which was expected to provide some clarity on the actual reach of the new golden power.

The following paragraphs will provide certain highlights of the new regime and brief considerations on its possible application to the transfer of non-performing loans.

¹ Reference is to the Law-decree no. 21 of 15 March 2012 (*Norme in materia di poteri speciali sugli assetti societari nei settori della difesa e della sicurezza nazionale, nonché per le attività di rilevanza strategica nei settori dell'energia, dei trasporti e delle comunicazioni*).

² With the Law-decree no. 23 of 8 April 2020 (*Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali*) converted into law with amendments by Law no. 40 of 5 June 2020.

³ Art. 10-ter of Law-decree no. 137, 28 October 2020, n. 137 (*Ulteriori misure urgenti in materia di tutela della salute, sostegno ai lavoratori e alle imprese, giustizia e sicurezza, connesse all'emergenza epidemiologica da Covid-19*) converted into law with amendments by Law no. 176 of 18 December 2020.

⁴ Reference is to the Decree of the President of the Council of Ministers no. 179 of 18 December 2020 (*Regolamento per l'individuazione dei beni e dei rapporti di interesse nazionale nei settori di cui all'articolo 4, paragrafo 1, del regolamento (UE) 2019/452 del Parlamento europeo e del Consiglio, del 19 marzo 2019, a norma dell'articolo 2, comma 1-ter, del decreto-legge 15 marzo 2012, n. 21, convertito, con modificazioni, dalla legge 11 maggio 2012, n. 56*).

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What is the “golden power”

Since 2012 the list of strategic assets and activities captured by the “golden power” has been steadily growing and now includes, not only defense and national security, 5G telecommunication infrastructures, power grid, transportation, and communications, but also a number of other assets and activities which are essential for preservation of the vital functions of the society, the health, security, and economic welfare of the population as well as the technological progress, namely:

- (a) energy
- (b) water
- (c) health
- (d) access to sensitive information, including personal data, or ability to control such information;
- (e) freedom and pluralism of media
- (f) electoral infrastructure
- (g) banking, finance and insurance infrastructure
- (h) artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnologies, biotechnologies
- (i) aerospace
- (j) raw materials, steel and food
- (k) dual use (items, including software and technology, which can be used for both civil and military purposes)

Companies holding assets or activities in the sectors listed above are required to notify the government of any resolution, act or transaction which entails a change in the ownership, control, availability or management of such assets and activities. Similarly, any transaction for the acquisition of participations in said companies above certain thresholds is subject to notification.

Transactions in breach of the notification procedure are null and void and fines are equal to the greater of twice the value of the relevant transaction and 1% of the turnover generated by the business(es) involved in the transaction. All voting rights are suspended.

In light of the wide scope of the new regime and the harsh sanctions, it is of the utmost importance that investors check carefully in advance whether any prospected deal should be subject to the prior scrutiny of the Italian government.



Golden powers and NPLs

The Implementing Regulation has clarified, *inter alia*, that the “golden power” targets infrastructures and technologies which are critical for the banking, financial and insurance sectors (e.g., multilateral trading facilities platforms, digital payment services, blockchains, etc.). However, the Implementing Regulation leaves the door open to any “economic activities of strategic relevance” in the aforementioned sectors being captured by the “golden power” regime, if carried out by any enterprise with a net turnover exceeding Euro 300 million a year and with at least 250 FTEs.

Bearing in mind that “economic activities of strategic relevance” are those which are “essential for preservation of the vital functions of the society, the health, security, and economic welfare of the population as well as the technological progress”, it appears doubtful that non-performing loans may *per se* qualify as such and, therefore, may be the subject matter of the “golden power”. Although lending can certainly be considered crucial to the “the economic welfare of the population”, the assets and activities attracting the attention of the government seem to be those directly influencing the origination and management process of the loans already made, rather than the loans themselves. For instance, there are grounds to believe that this may be the case for the sale of a major servicer or for the transfer of the network of promoters facilitating on the ground the origination of loans by a primary digital bank.

There is, however, another angle to be taken into account on the subject. The transfer of a specific loan may be relevant for the “golden power” regime if the borrower owns or controls critical infrastructures and technologies or other “economic activities of strategic relevance”⁵ and, based on a case-by-case assessment, the lender may be deemed to exercise a certain degree of control over the borrower or its assets and activities. This may be particularly relevant in the event of an NPL given that, as per market practice, financial documentation normally provides that, upon default of the borrower, key powers may be transferred to the lender by way of appropriation of assets or in the form of voting rights. Should this be the situation, the transfer of the loan could indeed imply a transfer of control over strategic assets and could, therefore, trigger the application a “golden power” regime.

⁵ In these cases, however, only where the relevant activities are carried out carried out by enterprises with net turnover exceeding Euro 300 million and 250 FTEs



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