Golden Power in VC Transactions:

Frequently Asked Questions for Foreign Investors

1) What is golden power regulation?

The golden power regulation, introduced in 2012, requires the parties of a VC deal to prior notify the Government of their intention to carry out certain corporate transactions. The Government may assess whether to exercise the special powers (also known as "golden powers"). These special powers, at least in principle, are not intended as a protectionist measure but should be exercised by the Government solely to restrict, and in the most serious cases where no alternative measures are viable, to block transactions that may pose a serious threat to national and essential interests or affect public safety and order.

The regulatory framework is partially derived from EU Regulation 2019/452 regarding foreign direct investments (FDI). However, Italy's golden power legislation applies not only to non-EU investments in strategic sectors but also, albeit to a more limited extent, to intra-EU and domestic investments.

2) When is notification mandatory?

Golden power regulation applies exclusively when an Italian company is involved. Should this condition not be met, Italian legislation will not apply.

Without prejudice to the above, determining whether notification is really required depends on three key factors:

- the nature of the transaction (please also refer to questions 3 and 4 below);
- the industry in which the investment is made (please also refer to question 5 below);
- the nationality of the investor (please also refer to question 6 below).

Since these factors vary based on the specifics of each case, a comprehensive legal assessment is every time necessary.

3) Which are VC transactions interested by the golden power?

VC players should always conduct a golden power assessment in the presence of an equity round (regardless of the stage or the amount), as such transaction results in the subscription of a capital increase and the purchase of a minority interest by the investor(s) as well as, usually, in the granting of veto rights to the investors.

Indeed, for golden power purposes, the purchase of a minority interest, under certain circumstances, is per se relevant. For ease of reference, the minimum shareholding

acquisition to be considered is: (i) for the Defense Sector (as defined below) 3% (for either EU investors or extra-UE investors) and (ii) for Other Sectors (as defined below) 10% (for extra-UE investors) taking into account any shares already held, directly or indirectly, by the investor(s) and provided that the aggregate investment exceeds €1 million. Please note that such thresholds are the minimum relevant thresholds and that in the event of exceeding by the investors of certain incremental percentages of shareholdings set out by the law, the notification should be repeated.

In case of EU investors, the purchase of a minority interest should not be relevant, save in case the investors are granted with veto rights (through which they can control the company).

Furthermore, a recent ruling by the Regional Administrative Court released in May 2024 — although unrelated to VC transactions and instead concerning the extension of a pledge over shares — suggests that notification is mandatory not only when the finalization of the transaction really impacts the control of the company and its relevant assets (e.g., in case of subscription of capital increase with consequent changes in the corporate chain) but also whenever a transaction could, even only potentially, affect control over the company and its assets. If this principle were to be extended to VC transactions, a precautionary approach would suggest that semi-equity transactions may also need to be notified from the outset, rather than only when the conversion event is occurring and the investor is entering the company's share capital.

Additionally, the incorporation of a new company may itself trigger golden power notification, as could the licensing of intellectual property (IP).

4) Does golden power also apply to extension rounds that may change the relative ownership without adding new shareholders?

The golden power assessment is advisable any time that the veto rights are changed. If control (also through veto rights) is transferred from one existing shareholder to another, notification may still be required. Additionally, the screening (and thus the notification) might be required also in the event of increase by the same shareholder of his own interest, particularly in case of an extra-UE investment or if the investment benefits companies operating in the Defense Sector.

5) Which industries are covered under the golden power regulation?

The relevant industries are listed in Law Decree No. 21/2012 and detailed by DPCM 108/2014, DPCM 179/2020, and DPCM 180/2020. The list of strategic activities and assets is anyhow drafted to remain somewhat ambiguous, allowing for significant governmental discretion in performing the screening.

In a nutshell, key sectors captured by the Italian legislation can be divided into two main categories, each subject to different notification requirements:

1) national security and defense ("**Defense Sector**"); and

2) "other sectors": energy, water, health, sensitive data and information, electoral infrastructures, financial sector including insurance and credit industries, artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnology and biotechnology, non-military aerospace, supply of production factors and agri-food sector, dual use items, media freedom and pluralism, transport and communications ("**Other Sectors**").

Each macro area listed in items 1 and 2 above is then exploded in further subsectors, assets and activities detailed in the abovementioned decrees.

The full set of industries listed above, however, is relevant only in the event that the investor is a non-EU investor.

Should the investor qualify as EU-investor (including Italian), the number of industries to be considered for golden power purposes significantly decreases. In this case, the relevant industries are exclusively as follows:

a) Defense Sector;

b) energy, health, agri-food, transport, communications and financial sector, including insurance and credit industries (which, as you may have noticed, are just few of the Other Sectors).

For the sake of completeness, as last remark, please note that the 5G industry is also subject to the golden power regime and has its own peculiar regulatory framework which has not been taken into account for this paper.

6) Are EU and non-EU investors treated differently?

Yes, non-EU investors are subject to a more restrictive legal framework whilst EU investors (including Italian investors, acting alone or with other EU investors) benefit of a more favorable legal regime.

It is worth nothing that to verify whether an investor qualifies or not as non-EU investor, the entire ownership chain of the investor is to be checked. A company incorporated in the EU but ultimately controlled by a non-EU entity/individual will still be classified as a non-EU investor under golden power rules.

As mentioned, the number of industries the subject of screening in case of non-EU investors is broader and also the materiality thresholds triggering the screening applied to them are more restrictive (especially in case the notification is finalized by non-EU investors in relation to industries falling in Other Sectors basket).

7) What is the timeline for the procedure(s)? Are there other time constraints to be considered from a legal perspective?

The notification procedure lasts up to 45 days running from the date of submission, provided no additional information is requested. Notification must occur after signing of a binding agreement/deed but before finalizing the transaction.

The pre-notification procedure was introduced in 2022, allowing the parties to consult the Government for a preliminary assessment before formal notification. This procedure might be helpful to save time in case it is doubtful that the transaction falls within the perimeter of the golden power legislation or in the event that, although the transaction is subject to golden power legislation, it is very likely that the Government is not going to exercise the special powers.

The pre-notification procedure lasts 30 days and may be started also in the presence of a non-binding legal document (such as term sheet or letter of intents) signed by the parties.

There are no further time constraints to be considered in addition to the period required to complete the notification (or pre-notification) procedure.

8) If a startup is a licensee of a patent, should patent owners also be included in the golden power application?

If the transaction being notified concerns an equity round or semi-equity financing, the licensor is not going to be a notifying party. If the relevant transaction being notified is the signing of a license agreement and the licensor is an Italian company, the licensor must be included in the notification.

9) What are the possible outcomes of the procedure(s)?

Following notification, the Government may:

- authorize the transaction;
- authorize the transaction with conditions to safeguard the national interests;
- not authorize the transaction.

If the Government does not answer within 45 days, the transaction is deemed authorized by default and the parties can finalize the transaction.

Following pre-notification, the Government may:

- confirm that the transaction does not fall under golden power rules (i.e. green light);
- acknowledge that the transaction falls within the perimeter of golden power rules but there is no legal ground for the exercise of the special powers (i.e. green light);
- require formal notification.

If the Government does not answer within 30 days, the transaction is not deemed authorized by default and the parties must file a formal notification.

10) What are the sanctions if an investment is finalized without prior screening?

In the event of delayed or omitted notification, the golden power legislation provides for very severe sanctions. In particular, the parties shall pay a monetary fine up to twice the value of the transaction, which cannot be in any event less than one percent of the cumulative turnover generated by the involved companies as resulting in the last approved financial statements.

On top of the above, the parties would be subject to the unwinding of the transaction at their cost and expenses (implying very burdensome consequences, e.g., who would buy a minority interest? Has the company to return to the investor the amount paid by the latter following the subscription of a semi-equity instrument and, in the positive, will it still have money enough?).

Furthermore, any company's resolution adopted with the decisive vote of the investor is deemed null and void.

11) Are there best practices to avoid issues with the golden power regulation?

To mitigate risks, investors and founders should make a golden power assessment at the beginning of the deal structuring in order to properly and timely address this topic while the negotiations are still ongoing and be ready to file the pre-notification or the notification (as the case may be) as early as possible.

In addition, investors and founders should include specific golden power clauses in the investment agreement, such as a condition precedent that suspends closing until Government approval is obtained.

12) Are there any past VC transactions subject to golden power?

Publicly available information is limited. However, a notable case involves Satispay S.p.A. (fintech sector).

In 2021, the Government exercised special powers, imposing specific conditions on Satispay S.p.A. to allow the purchase of a minority stake in the company by Tencent Cloud B.V., Square Inc., Telecom Italia Ventures S.r.l., and Lightstone Fund S.A. In the same year, Coatue Growth Fund V LP notified the purchase of a 1.6% minority interest in Satispay as part of a capital increase and the adherence to a shareholders' agreement already in place among certain Satispay shareholders. The envisaged transaction, this time, was cleared. Later again in 2021, Coatue Growth Fund V LP, Greyhound Capital Partners II LP, and Satispay S.p.A. jointly notified the subscription of a semi-equity instrument (SFP) issued by

Satispay, along with a capital increase aimed at converting these instruments into shares. Once again, the transaction was cleared.

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