



•ALERT•

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Golden Power and judicial review

On April 13, 2022, the Regional Administrative Court ("TAR") of Lazio (Rome) published decision no. 4488, regarding the exercise by the Italian Government of the special governmental power to veto, under certain circumstances, a corporate acquisition transaction (so-called **Golden Power**).

This is a rare event: notwithstanding that, in Italy, the Government's exercise of the Golden Power is unquestionably subject to judicial review (unlike in other countries), to date there have been only two reasoned judgments of the TAR on that subject (in addition to the Telecom-Vivendi case, which, however, had a unique procedural and factual development).

THE CASE

The transaction at issue concerned the acquisition by Syngenta Crop Protection AG of the entire share capital and voting rights – and, consequently, of the exclusive control – of Verisem B.V., a group operating in the **vegetable seeds industry**, and its Italian subsidiaries: Suba Seeds Company S.p.A., Royal Seeds S.r.l., HortuSì S.r.l., Verisem Distribution S.r.l. and Franchi Sementi S.p.A.

Suba Seeds Company S.p.A., in particular, operates in the field of mechanics and innovative technologies for agriculture, with significant innovative capacity in the field of **mechanisation of agricultural crops**. The actual owner of Syngenta – a circumstance that was not disputed and which is set out in the decision of the TAR – is the **Chinese Government**.

In October 2021, the Italian Government exercised its veto on the sale of the Italian companies of the Verisem Group to Syngenta AG by applying the Golden Power rules (D.L. 21/2012 e DPCM n. 179/2020), which allow the government to exercise veto power in relation to transactions in the sectors of, among the others, **food safety, processing of data** (including personal data) and **access to sensitive information**, and **critical technologies** (such as artificial intelligence and robotics).



THE PRINCIPLES AFFIRMED BY THE TAR

A first point of interest is that a third-party, B.F. S.p.A., participated in the TAR proceedings by way of intervention *ad opponendum* (i.e. in support of the Government), claiming that, should the legitimacy of the contested measure be confirmed, it would have the right to acquire the Verisem Group. This circumstance was deemed sufficient by the TAR to consider the intervention admissible.

That said, the principles expressed by the TAR can be summarised as follows:

- the veto power of the Italian Government under the Golden Power regime does not need to be preceded (as it generally happens in other cases) by the so-called notice of rejection (i.e. preavviso di rigetto) under Article 10 bis of Law 241/1990, since "the notification constitutes a mandatory obligation for the company, functional to the exercise of control powers due to the State"; the notification, in essence, constitutes for the company only an "act (due) with informative content" that produces "the initiation of a special procedure, actionable by the administration also ex officio";
- the exercise of the Golden Power, by limiting the European principles of freedom of establishment and free movement of capital, must be justified by the pursuit of the legislative purpose of allowing state intervention if the corporate transaction could hinder the interests of defence and national security, having regard to the impact on assets of strategic importance. For this reason,

it is excluded that the exercise of the Golden Power may concern transactions other than those provided for by law or assets not identified as strategic:

- in the preliminary phase of the Golden Power procedure, the task of the Government's coordination group is to collect the information for technical valuation (with the participation of the administrations involved, supported by the Department of Public Safety, as well as of the parties concerned);
- the Council of Ministers is not bound by the proposals made in the preliminary investigation phase and is not required to provide additional reasoning for making a decision different from the one proposed;
- without undermining the need for a rigorous preliminary investigation for the purposes of verifying the presence of strategic assets and operations referable to those identified by the law, **the following decision of the State** to exercise or not to exercise the special powers under the **Golden Power** rules, through the imposition of prescriptions, conditions or opposing the transaction **is characterized by a very broad discretionary power**, due to the nature of the interests protected pertaining to national security. Therefore, the assessments underlying the decision of the Government to proceed with the exercise of the special powers constitute a **choice of high administration**, as such **reviewable by the administrative court only within the limits of the existence of manifest illogicality of the decisions taken**.

Syngenta AG's claim against the Government opposition (under the Golden Power rules) to the acquisition by Syngenta of the Italian subsidiaries of the Verisem group, was dismissed.

THE PRECEDENT CASE LAW

Previously, the TAR of Lazio (Rome) already had the opportunity to rule on the exercise by the Italian Government of the Golden Power, in July 2020, with judgment no. 8742.

In said case, Reti Telematiche Italiane S.p.A., a company operating in the telecommunications sector, through the exercise by the Italian Government of Golden Power, was subject to specific requirements and conditions and was also sanctioned for late notification of the relevant transaction.

On that occasion, the TAR upheld the company's appeal

and annulled the government's measure on the basis of a mere procedural error: the preliminary investigation carried out by the Administration was flawed because, in relation to the verification of the existence of the objective assumption of the "strategic nature" of the assets available to Reti Telematiche Italiane S.p.A., it was based on an opinion of AgCom (Autorità per le Garanzie nelle Comunicazioni) issued by a body lacking the authority to adopt it.

CONCLUSIONS

With the recent and exorbitant increase in Italy of transactions notified for the purposes of the Golden Power assessment, both in their quantity – an increase due to the more stringent regulations introduced in the Covid era and destined to remain beyond this emergency – and in their incisiveness, it is reasonable to expect, in the future, an increase of cases submitted to the review of the administrative judge: TAR and Council of State.

However, the administrative judge has already raised the threshold for the possibility of reviewing such decisions due to their nature and rationale, as acts of high administration in which the Government enjoys a very broad discretion. In this perspective, the correct - and not always easy - assessment of the transaction, to evaluate whether or not it actually falls within the field of application of the Golden Power rules, assumes fundamental importance.

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