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Foreign Direct Investment (FDI) Screening: Italy's "Golden Power" and the Geopolitics of Economic Protection

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Introduction

Foreign Direct Investment (FDI) screening is a core element of modern state sovereignty. In the world of globalization and multipolarity, a state's decision on what to protect reveals its own conception of power and sovereign priorities. The current "rush to legal weapons" also illustrates the dominance of geopolitical projects in the foreign capital arena. Thus, this dissertation investigates the evolution of Italy's FDI screening instrument, known as the "Golden power", as well as the terms of its "geopolitics of protection". It attempts a valid answer to several questions, including: how has Italy's Golden power developed since its institution in 2012 and in response to what pressures or trends? What does this reveal about the Italian state's evaluation of its sovereign interests? What is specific about the Golden power and what is rather inspired by international reference models? What does its practice suggest, in terms of extent of governmental interference or targeted economic sectors? How could such a screening instrument be enhanced at policy level and how is it likely to evolve in the medium-term?

Following a general introduction to the theme of FDI screening, a legislative, institutional and political overview of the Golden power is provided. Italy's device for screening foreign investments is also compared to the corresponding mechanisms of other advanced, industrialized nations, especially the United States. A quantitative evaluation also presents data on its actual practice. A comprehensive policy proposal to improve Italy's Golden power is presented at the end, and the possible prospects or future scenarios for its medium-term evolution are laid out. This dissertation's normative conclusion will be that, even as geopolitical competition continues fiercely, Italy's foreign investment screening should preserve a narrow focus. Italy's strategic approach should be institutionally and perceptually aimed at maintaining a "safe harbour" environment for foreign investors, without renouncing its national security concerns throughout.

More specifically, Chapter 1 provides an historical and theoretical introduction to the theme of foreign investment screening. Thus, it begins by focusing on the post-Cold War evolution of "security" and the advent of geo-economics, as both an analytical approach and a foreign policy practice. Then, it turns to the new role that intelligence agencies have come to play in this scenario. "Economic intelligence" is conceptualized as an instrument for the acquisition and management of information in geo-economic conflicts. A specific section is also devoted to Italy: it provides an analysis of its relevant legislation and general approach to economic intelligence, as well as an overview of the public and private actors concerned. The aim of this Chapter is to trace the historical roots of the current "rush to legal weapons" (i.e., FDI screening instruments) for the protection of strategic economic interests. By drawing extensively on the academic literature, this Chapter ends with a breakdown of Alessandro Aresu's "geopolitics of protection" concept.

Chapter 2 focuses on Italy's device for foreign investment screening, also known as the "Golden power". The underlying assumption is that, as a geo-legal instrument, the Golden power contributes to analysing how Italy portraits itself and defines its strategic interests. Thus, an extensive overview of relevant legislation is provided, from the institution of a "Golden share" in 1994 to the introduction of the Golden power in 2012, up until its latest reform during the COVID-19 pandemic. The regulatory evolution is traced in detail (in terms of economic sectors, governmental powers, types of foreign investors and so on) in order to emphasise and assess Italy's constant re-evaluation of its priorities. A separate section provides a general picture of the relevant administrative procedure and institutional actors. Crucially, a triple role is played by Italy's intelligence agencies. A final section

describes the terms of the ongoing (public and scientific) debate on the central trade-offs of foreign investment screening and the risk of a "neo-protectionist" use of Italy's Golden power.

Chapter 3 provides a cross-country analysis of instruments for FDI screening, in order to assess their differences and similarities vis-à-vis the Golden power and draw possible insights for Italy. A special focus is laid on the legislative history, procedural mechanics and "threat framework" of the Committee on Foreign Investment in the United States (CFIUS). Importantly, CFIUS's recent evolution raises interpretive questions which resonate with the academic and political debate on the Italian Golden power, especially concerning the relationship between foreign investment, national security and the economy. The German and French devices for foreign investment screening are also examined up close, so as to single out their most distinctive features. Particular attention is directed at the post-COVID-19 expansion of FDI review across the entire European Union, as well as the long-term trends underlying it. A final section provides a basic comparative assessment of the Italian, American, German and French mechanisms for foreign investment screening.

Chapter 4 presents a quantitative evaluation of available data on Italy's Golden power, mainly obtained from governmental reports to Parliament. Its underlying goal is to disentangle relevant trends and single out an "Italian way" to screening foreign investments. Thus, Chapter 4 addresses questions such as: How often does Italy exercise its Golden power over foreign investments? What form (e.g., veto or conditional consent) and economic sector (e.g., defence, energy or 5G technology networks) prevail in practice? Two case-studies of foreign investments which have been suspended by the Italian government are also provided. In addition to the governmental veto, both are very insightful for further reasons, which are examined throughout the text.

Finally, Chapter 5 presents a comprehensive policy proposal for Italy's Golden power. It also overviews the possible prospects or scenarios for its near future evolution. On the one hand, the goal of this Chapter's policy proposal, which is divided into three separate pillars, is to make Italy's Golden power more effective, by both streamlining the administrative procedure and entrenching a strict separation between national security and industrial policy goals. Thus, a new "threat framework" guiding Golden power actions is also provided, reflecting a narrower operational focus. On the other hand, the evolution of Italy's Golden power can be expected to adapt to a number of geopolitical, European and sector-specific trends. A more methodological description of possible medium-term scenarios is provided through an "alternative futures analysis", which ends up giving additional substance to the Chapter's policy proposal.

Finally, the Conclusion suggests several avenues for further research on foreign direct investment screening as a field of interest, as well as on Italy's Golden power specifically.

1. The geopolitics of economic protection

"If geo-economics stands for the global struggle between developed nations in the commercial field, then economic intelligence could be defined as the fundamental unit of the new global power-balance or more precisely as the least common denominator for future world governance" (Laris Gaiser)[1]

"Le propre de la puissance est de protéger" (Blaise Pascal[2]*)*

1.1. Multidimensional security in geo-economic competition

1.1.1. Economic globalization and the advent of "multifunctional security"

As a conventional date in contemporary history, the year 1989 sanctions the end of the Cold War era. This was a period marked by a peculiar "strategic ballet between Moscow and Washington, homeostatically guaranteeing world equilibria"[3]. The global bipolar system was intimately rigid, rules-based and stable. Its epilogue, however, was met by a proper "revolution"[4], exemplified by several transformations: the advent of multipolarity, associated with a new relevance of ethnic-national conflicts; extraordinary technological progress and lower communication and transportation costs; a stark increase in economic integration and competition. A crucial facet of this "revolution" was in fact the impressive acceleration of economic globalization and interdependence, mainly as a result of the lifting of territorial and tariff barriers. More specifically, the newfound relevance of economic matters stemmed from at least three inter-related developments[5]: (a) the erosion of powers previously administered by states (as their borders lost economic relevance, due to the de-territorialisation of wealth, and governments renounced most of their control over the economy, due to new liberalization rules and the reduction of barriers to trade and capital movements); (b) a fiercer competition on the international economic stage, heightened by the emergence of new (transnational and institutional-multilateral) economic actors; (c) a generally greater unpredictability at economic and political level, at least compared to the stability of Cold War times.
One of the most symptoms of this transformation was the overcoming of Raymond Vernon's "product-cycle theory", facilitated by the technical revolution in Information and Communication Technology (ICT). Indeed, Newly Industrializing Countries (NIC) are no longer destined to take possession of "mature" technology, but can develop their own independent cycle, supplying qualitatively competitive products. Given their generally low labour-cost and the "race to the bottom" in safety and environmental standards, NIC markets have also contributed to eroding developed countries' relative economic well-being. In conclusion, their rise "makes competition more

[1] Laris Gaiser, "L'intelligence economica per un nuovo ordine mondiale," *Sistema di Informazione per la Sicurezza della Repubblica* (2016): 5. ***In this dissertation all translations from Italian into English are mine.***
[2] Blaise Pascal, Pensées, Hachette (1950): 117.
[3] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).
[4] Ibid.
[5] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 7.

threatening, especially in terms of capital attraction"[6]. A fiercer competition, in turn, encourages states to increase their (economic) competitiveness, even within their own regional block.

Overall, evolutions such as "the end of the bipolar world, the German unification, the impressive economic growth of South-East Asia and the astonishing technological progress (…) in the information, communications and transportation sectors"[7] contributed to relocating inter-state competition from the strategic to the economic sphere. States' influence rapidly came to be measured by their economic and financial capabilities (rather than their military might), and commercial wars, "subtler than traditional ones"[8], gradually replaced military wars. Thus, this new context of globalization and multipolarity witnessed the advent of the so-called "strategic State, whose task is to maintain or increase its privileged position in the world"[9]. In other words, inter-state relations began to unfold based on new rules and frames, as "the strengthening of productivity and national competitiveness became a fundamentally important factor for the role that each State aims to play on the international stage"[10]. Information, rather than for its potential effect on the Cold War politico-military balance, came to be valued and pursued for its ability to "modify the outcomes of economic competition"[11].

In this unprecedented framework, competition is not much between individual internationalized firms, but rather between entire "country-systems". Importantly, the nature of this competition has itself significantly changed, moving from conquest of new productive markets to the ownership structure of enterprises: since firms now also pursue portfolio operations, new risks result from "hostile acquisitions, destabilizing financial schemes, attacks on the technological assets of national firms through industrial espionage, and so on"[12]. States are thus faced with new threats, especially targeting critical infrastructures, free competition, the operation of financial markets, employment or production levels and technological-scientific assets[13]. Even more, in the rush to protect or favour one's own economic interests, "the traditionally friendly or allied country can turn into a formidable competitor"[14]. This "economic-financial threat" generally stands out for its hybrid and composite nature. It is, in fact, a set of multiple and diversified threats, which are often individually negligible, but particularly insidious when added together. In sum, the main outcome of the "revolution" described so far is that "security is no longer a chiefly military concept, as in the bipolar world. It is now multidimensional and multifunctional"[15].

Indeed, the traditional concept of "national security" came to be seen as inadequate to capture the whole set of threats facing states in the current environment, which is often described as "volatile,

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[6] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).

[7] Ibid.

[8] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell'informazione nell'era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 10.

[9] Laris Gaiser, "L'intelligence economica per un nuovo ordine mondiale," *Sistema di Informazione per la Sicurezza della Repubblica* (2016): 4.

[10] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 7.

[11] Ibid., 14.

[12] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).

[13] *Sistema di Informazione per la Sicurezza della Repubblica*, "Glossario Intelligence. Il linguaggio degli Organismi informativi" (2019): 68.

[14] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 361.

[15] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).

uncertain, complex and ambiguous (VUCA)"[16]. Some of its formerly neglected dimensions found new vigour and meaning. So-called "economic security" was also significantly reshaped. While in Cold War times it mainly referred to security of the "state-apparatus", guaranteed by counterespionage protecting the military sector, it now generally implies the security of a whole "nation", that is, the well-being and living standards of its citizens.

This shift found realization in the early 1990s, as many states sought to inform a new concept of "economic security". This would have to function as the baseline for public intervention in the economic sector, that is, "a guide for government action, similarly to what the concept of national security had been in the past"[17]. While in 1970 the US had already equated intelligence operations in the economic field with diplomatic, military or technological intelligence (at declaratory level), a final and formal "recognition" took place in 1994 under Bill Clinton. The American "National Security Strategy (NSS) of Engagement and Enlargement" (July 1, 1994) was inspired by awareness that "while they [the Americans] were focused on protecting the Western world from the Soviet threat, a significant part of their allies was committed to stealing industrial and technological secrets at the US's expense"[18]. Thus, the US administration strived to "officialise" its support to American enterprises in global economic competition as a new government priority. The NSS was the first to state that a country, especially through its intelligence community, would track (political, economic, social and military) global developments "in order to adequately forecast dangers to democracy and to *U.S. economic well-being*"[19]. It was also specified in the clearest terms that the American state would "support U.S. trade negotiators and help level the economic playing field by identifying threats to U.S. companies from foreign intelligence services and unfair trading practices"[20]. Similarly, the British "Intelligence Services Act" (November 2, 1994) authorized the Secret Intelligence Service (SIS) and the General Communications Headquarters (GCHQ) to operate outside their homeland for three purposes: "(a) in the interests of national security (…); (b) *in the interests of the economic well-being of the United Kingdom*; (c) in support of the prevention or detection of serious crime"[21]. As a result, certain issues or events, while hardly identifiable as a threat to "national security" in its traditional meaning, became of interest for British intelligence given their purely economic implications.

In sum, both the US and the United Kingdom "introduced the notion of "economic well-being" as the reference point for economic security", thus "reducing the intervention threshold in the economic sector for intelligence agencies"[22]. An illustrative and exceptionally wide definition of "economic security" was given in 2000 by the Canadian Security Intelligence Service (CSIS). It refers to "the fulfilment of conditions necessary to encourage a long-term improvement of labour and capital productivity, and thus a high and growing standard of living for the citizens of the nation, including the protection of a fair, safe and dynamic economic environment, which should be able to deliver innovation, national and foreign investments and sustainable economic development"[23]. More

[16] Valentìn Martìnez Valero, "Economic Intelligence and National Security," in J. Martìnez Ramirez and Jerzy Biziewski (edited by), *A Shift in the Security Paradigm – Global Challenges: is Europe ready to meet them?*, Springer International (2020): 43.
[17] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 33.
[18] Ibid., 34.
[19] National Security Strategy (NSS) of Engagement and Enlargement (July 1, 1994): 14. Emphasis added.
[20] Ibid.
[21] Intelligence Services Act (November 2, 1994): 1-2. Emphasis added.
[22] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 36.
[23] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 36.

recently, the US National Security Strategy (NSS) for 2017 has reiterated the principle that "economic security is national security"[24].
In conclusion, the end of Cold War bipolarity and the impact of technological globalization, in addition to the 2007-2008 global financial crisis and the economic recession induced by the COVID-19 pandemic, have contributed to states' rediscovery of their role as "local garrisons of the globalized economy"[25]. Recently, China's employment of financial means as an instrument of power projection and Russia's management of energy policy as a foreign policy leverage have been cited as additional grounds for (re)considering the centrality of states in economic security. Several countries have come to see their role in international economic affairs and competition as an "essential tool for economic development and perhaps for their legitimacy as well"[26]. For similar reasons, it has been suggested that "political capitalism", rather than neo-liberalism, currently dominates the world of international relations[27].

1.1.2. The fabric of "Geo-economics"

States' new goal to protect and enhance their global economic position is pursued "through the creation of a favourable *geo-economic* framework"[28]. Indeed, the international scenario described so far is an integral part of the wider theoretical fabric of "geo-economics" (often set against the "geo-strategy" and "geo-politics" of Cold War times[29]). The term was coined in 1990 by US strategist Edward Luttwak in a seminal article[30]. Accordingly, inter-state conflict in the post-Cold War era would transform, as "the methods of commerce are displacing military methods – with disposable capital in lieu of firepower, civilian innovation in lieu of military-technical advancement, and market penetration in lieu of garrisons and bases"[31]. For Luttwak, as the conflicting nature of the post-Cold War international states-system remained unchanged and the relevance of military power waned in favour of economic one, "geo-economics" is "the best term I can think of to describe the admixture of the logic of conflict with the methods of commerce"[32].
Importantly, the term "geo-economics" is often misunderstood or misused in both public debate and academia. A shared definition is still lacking. Its differences from both "geopolitics" and International Political Economy (IPE), as well as the meaning of the prefix "geo-", are often left unclear, reinforcing a profound conceptual gap. In fact, one may come under the impression that geo-economics "is often used as a catchword that generates an audience for policy-oriented, semi-

[24] National Security Strategy (NSS) of Engagement and Enlargement (July 1, 1994): 17.
[25] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell'informazione nell'era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 63.
[26] Ibid.
[27] Alessandro Aresu, "Golden power e nuovo Iri. Come proteggere l'Italia," in *Il vincolo interno* (Limes, n. 4/2020): 300.
[28] Laris Gaiser, "L'intelligence economica per un nuovo ordine mondiale," *Sistema di Informazione per la Sicurezza della Repubblica* (2016): 4. Emphasis added.
[29] In a further definition, geo-economics has been indeed described as supplanting geo-politics "as the motivation for world events, switching from ideological conflicts to the quest for economic superiority and the assurance of a constant supply of necessary resources". Cited in Paul Kellogg, "The geo-economics of the new Great Game," *Contemporary Politics* 1, n. 9 (2003): 81.
[30] Edward N. Luttwak, "From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce," *The National Interest* n. 20 (1990): 17-23.
[31] Ibid., 18.
[32] Ibid., 19.

scientific outlets"[33]. As such, the following overview of theoretical contributions, geo-economic instruments and "geo-economics"' interaction with other IR schools is meant to frame the discipline as narrowly as possible.

Partly in response to Francis Fukuyama's influential argument on the "end of history", in 1993 Samuel P. Huntington suggested that "in a world in which military conflict between major states is unlikely, economic power will be increasingly important in determining the primacy or subordination of states"[34]. The underlying central idea of geo-economics is not much that military power is bound to disappear, but rather that "in the era of geo-economics military power no longer trumps economic power"[35] and "the ability to wield economic leverage forms an essential means of power politics in today's world"[36]. As one author puts it, "military force has lost its traditional function of regulating the hierarchy between States, thus of being a privileged instrument of geopolitics (…) while the role of being the main regulating parameter of the international order has been appropriated by the economy"[37]. In this sense, geo-economics embraces the realist view that economic interdependence, given its inherent asymmetry, generates unbalanced power relations: by exploiting them, "geo-economics provides a way for states to conduct power politics that does not refer to military means"[38].

In a narrower sense, *geo*-economics also suggests that "the economic bases of national power must have decisive geographical features"[39]. Pascal Lorot, Director of the French Review *Géoéconomie*, has provided his own conceptualization, stressing the cooperative nature (i.e., between state structures and private actors) of national geo-economic frameworks. According to Lorot, geo-economics "analyses economic strategies – notably commercial ones – decided upon by states in a political setting aimed at protecting their own economies or certain well-identified sectors of it, helping their national enterprises to acquire technology or capturing certain segments of the world market"[40]. These strategies can provide a state with "an element of power and international influence and help to reinforce its economic and social potential"[41]. In conclusion, these Luttwakian definitions stand out for their "state-centric and essentialist"[42] spirit.

In fact, the relationship between international economics, foreign policy and national security which geo-economics postulates is neither unprecedented nor surprising in historical terms. Suffice it to consider what Mark P. Thirlwell calls "the Age of Mercantilism" ("the intellectual roots of geo-economics"[43], roughly from the 16th to the 18th century) or "the first Age of Globalization" (19th century), which was also "an Age of Empire"[44]. Furthermore, in his "The Rise and Fall of the Great

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[33] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 4.
[34] Samuel Huntington, cited in ibid., 5.
[35] Ibid., 11.
[36] Soren Scholvin and Mikael Wigell, "Power politics by economic means: Geoeconomics as an analytical approach and foreign policy practice," *Comparative Strategy* 37. n. 1 (2018): 81.
[37] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).
[38] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 4.
[39] Ibid.
[40] Pascal Lorot, cited in Gyula Csurgay, "The Increasing Importance of Geoeconomics in Power Rivalries in the Twenty-First Century," *Geopolitics* 23, n. 1 (2018): 41.
[41] Pascal Lorot, cited in ibid., 41.
[42] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 6.
[43] Sanjaya Baru, "Geo-economics and Strategy," *Survival* 54, n. 3 (2012): 47.
[44] Mark P. Thirlwell, "The return of geo-economics: globalisation and national security," *Lowy Institute for International Policy* (September 2010): 5.

Powers" (1987), British historian Paul Kennedy suggests that, even before economic globalization, "all of the major shifts in the world's *military-power* balances have followed alterations in the *productive* balances"[45]. In the major wars between Great Powers, those which determined their rise or fall, "victory has always gone to the side with the greatest material resources"[46]. Even during the Cold War, economic tensions in the transatlantic bloc were simply overshadowed by the strategic need to ensure bloc unity; still, "economic means were considered as an effective instrument to weaken the Communist bloc"[47]. In short, the inter-connections between economic power and international security are not unknown to modern historians. However, today's exceptional reality, as incorporated by geo-economics, it that they "have become relatively more important compared to the recent past"[48].

Importantly, there also exist a significant number of "non-Luttwakian approaches to geo-economics"[49]. Suffice it to say that some treat geo-economics as a discipline narrowly investigating the influence of geographical or physical factors on economic outcomes; others view it as a product of the disruptive ascent of new economic and political powers (especially China) and strive to describe its impact on international relations; finally, approaches of Critical Geopolitics focus on geo-economics as a discursive practice, de-constructing the values and interested worldviews it reproduces.

In the early 1990s geo-economics was subject to heavy criticism, especially by economists. Raymond Vernon, for instance, suggested that the ascending geo-economists were actually disguised and "underemployed geo-politicians"[50]. Paul Krugman labelled the new competitiveness-focused approach a "dangerous obsession"[51]. Partly in response to these objections, Huntington argued that economists "are blind to the fact that economic activity is a source of power as well as well-being. It is indeed probably the most important source of power"[52]. However, having enjoyed a certain "appeal" during the first Clinton Administration, the (mostly Luttwakian) geo-economic approach partly faded into obscurity in the late 1990s. The rise of geo-economics in the US had been intimately associated to its concerns about the rise of Japan as an economic rival and the resulting need to reassert American primacy. Thus, as a result of both the perceived success of the 1990s "Washington Consensus" and Japan's "Lost Decade" after the 1991 property bubble, geo-economics lost part of its salience.

In the 21st century, however, it "rose again", partly in response to "the advent of what is widely assumed to be a new and credible challenger for the United States for the coveted number one spot"[53] (China). According to Thirlwell, geo-economics' return can in fact be attributed to several factors[54]: the so-called "Great Convergence", or the advent of a multipolar economic system in which China has come to play a new leading role; the "dark side of globalisation", especially in terms of illicit

[45] Sanjaya Baru, "Geo-economics and Strategy," *Survival* 54, n. 3 (2012): 48.
[46] Ibid.
[47] Gyula Csurgay, "The Increasing Importance of Geoeconomics in Power Rivalries in the Twenty-First Century," *Geopolitics* 23, n. 1 (2018): 40.
[48] Mark P. Thirlwell, "The return of geo-economics: globalisation and national security," *Lowy Institute for International Policy* (September 2010): 7.
[49] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 8.
[50] Raymond Vernon, cited in Mark P. Thirlwell, "The return of geo-economics: globalisation and national security," *Lowy Institute for International Policy* (September 2010): 8.
[51] Paul Krugman, cited in ibid.
[52] Samuel Huntington, cited in ibid., 9.
[53] Ibid., 11.
[54] Ibid., 11-36.

flows (drugs, arms, intellectual property, human beings and money), and the waning support for the "Pax Mercatoria" (commercial peace) project; the upsurge in "State Capitalism", defined as a "form of bureaucratically engineered capitalism"[55] including government-controlled Foreign Direct Investment (FDI); the "Age of Crises", or the world economy's proneness to financial crises with disruptive social and human consequences; and finally, the "Age of Scarcity", or the "return of long-running fears regarding resource scarcity"[56]. In 2011, US Secretary of State Hilary Clinton emphatically suggested that "the economic is strategic and the strategic is economic"; in this sense, "foreign and economic relations remain indivisible (…) at a time when power is more often (…) exercised in economic terms"[57].

Overall, most states have recently come to inform their own geo-economic "devices" in the 21st century. These are influenced by national specificities (in historical, geopolitical, economic and cultural factors) and often include tools such as "education and training, research and development, commercial strategy, economic diplomacy and economic intelligence"[58]. According to Sanjaya Baru, four long-term factors affect a country's geo-economic projection[59]: knowledge power (often altered by demographic trends), agrarian transformation (improving the productivity of land and natural resources), an urbanised and entrepreneurial middle class and, lasts, fiscal capacity. Geo-economic instruments, to be distinguished from those proper to political economy (e.g., fiscal and monetary policy), are often grouped in two main categories[60]:

- "high-tech colbertism", which seeks to enhance a productive system's competitiveness by focusing on its domestic traits. This implies addressing both its structural conditions (e.g., by promoting new institutional mechanisms, scientific research, infrastructures and capital attraction measures) and human capital trends (e.g., by investing in high-income skills and high-skills jobs). Two common policies of "high-tech colbertism" are the promotion of national geo-economic champions as well as a greater "internationalization" of firms;
- geo-economic war[61], which aims to exploit "grey areas" in global economic regulation in order to violate some of its principles. This is achieved through both decision-making and informational instruments (e.g., through non-tariff barriers supporting exports, technology controls or also strategic antiproliferation embargoes surreptitiously imposed to pursue national economic goals). In this sense, the relationship between economic war and politico-

[55] Ian Bremmer, cited in ibid., 37.
[56] Ibid., 34.
[57] Hilary Clinton (2011), cited in Soren Scholvin and Mikael Wigell, "Power politics by economic means: Geoeconomics as an analytical approach and foreign policy practice," *Comparative Strategy* 37. n. 1 (2018): 73.
[58] Gyula Csurgay, "The Increasing Importance of Geoeconomics in Power Rivalries in the Twenty-First Century," *Geopolitics* 23, n. 1 (2018): 43.
[59] Sanjaya Baru, "Geo-economics and Strategy," *Survival* 54, n. 3 (2012): 53-56.
[60] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).
[61] It should be recalled that geo-economic competition must be kept separate from the, albeit similar, (realist) notion of "economic war": "geo-economic strategy can surely resort to some measures employed by the latter (…), but generally speaking many of the most offensive weapons of economic war, such embargoes and boycotting, are not included in its arsenal" (Simone Pasquazzi, "Geo-economia, guerra economica e intelligence. Quadro teorico-concettuale e caso di studio," *Istituto Italiano di Studi Strategici "Niccolò Machiavelli"* (2014): 11). Economic war can in fact take several forms, including "financial speculations, currency wars, hostile takeover bids between private companies, unfair competition, (semi-)clandestine lobbying, dumping, industrial espionage" (Simone Pasquazzi, "Geo-economia, guerra economica e intelligence. Quadro teorico-concettuale e caso di studio," *Istituto Italiano di Studi Strategici "Niccolò Machiavelli"* (2014): 6), implying a level of "violence" unknown to geo-economic strategies. Moreover, geo-economic theory regards states and firms as its main actors, while the paradigm of economic war allows for a larger plethora of players, including, for instance, sovereign wealth funds and chambers of commerce.

strategic actions has been turned upside down by the end of the Cold War: today's scenario is marked by the "employment of politico-strategic instruments (stabilization, de-stabilization, interventions aimed at reducing political risk for one's own investments in an area of interest, etc.) in a subordinate, functional and even directly instrumental way to the implementation of geo-economic strategies"[62], rather than the opposite.

As also emphasized by Hilary Clinton in a 2011 speech, this brings to light the two dimensions of geo-economic projection: "first, how we harness the forces and use the tools of global economics to strengthen our diplomacy and presence abroad; and second, how we put that diplomacy and presence to work to strengthen our economy at home"[63].

In conclusion, geo-economics must be viewed as both an interpretive lens for today's international relations (analytical approach) and a range of possible actions for states to increase their competitiveness on international markets (foreign policy practice). In this second sense, "geo-economics" might be used as a synonym for "economic statecraft", for its referring to "the application of economic means of power by states so as to realise strategic objectives"[64]. As an analytical concept, on the other hand, it interacts quite mosaically with the main International Relations (IR) theories, but clearly resonates with IR realism the most[65]. First of all, geo-economics relates to realist theories in so far as it shares their view on the competitive nature of the international system, the primacy of states as geo-economic actors and the asymmetries inherent to economic interdependence. However, it has been suggested that narrowly-defined geo-economics also transcends IR realism, as it overlooks broader international economic issues or the inter-state distribution of power to focus on specific geographical spaces as "the objective of the application of economic power"[66]. Moreover, geo-economics may complement realism by adding powerful insights on economic power projection, which nowadays often trumps military engagement. Vis-à-vis IR liberalism, geo-economics incorporates the liberal argument that domestic power structures can be relevant for a country's external projection, therefore rejecting the determinism of certain realist schools. At the same time, the liberal *Pax Mercatoria* finds no space in the geo-economic universe: economic integration and trade have not pulverized power politics, rather "what we have been witnessing in the past few years is the simultaneous increase in interdependence and strategic competition, even conflict, albeit often pursued by means other than military"[67]. Overall, this theoretical overview suggests that current IR theories "insufficiently address certain vital aspects of what goes on in contemporary international relations"[68].

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[62] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).

[63] Cited in Soren Scholvin and Mikael Wigell, "Power politics by economic means: Geoeconomics as an analytical approach and foreign policy practice," *Comparative Strategy* 37. n. 1 (2018): 73.

[64] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 4.

[65] Soren Scholvin and Mikael Wigell, "Power politics by economic means: Geoeconomics as an analytical approach and foreign policy practice," *Comparative Strategy* 37. n. 1 (2018): 74.

[66] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 11.

[67] Ibid.

[68] Ibid.

1.2. “Economic intelligence”: a collective strategy

1.2.1. Definitions of “economic intelligence”

“Economic intelligence” is “one of the most important components of a successful geo-economic strategy”[69]. Its increasing relevance is linked to recent evolutions in terms of globalization of economic-productive processes, multipolarity and de-materialization of wealth and capital[70]. In its general definition, it studies "the “information cycle” which is necessary for companies and States to make correct development choices"[71]. In this context, the central role of intelligence agencies is "to provide "added value" to government decision-making process, strengthening the national comparative advantage"[72]. Economic intelligence is thus an “offshoot”[73] of public intelligence. However, it is not an exclusive operational domain of intelligence agencies; on the contrary, it requires stable and intense cooperation between these agencies and private economic actors. In its broadest definition, especially supported by French authors, economic intelligence even posits “the coincidence between the interests of firms, beyond those considered as “national champions”, and those of the community”[74].

After the end of the Cold War, the expansion of the concept of “security” induced a corresponding expansion of the functions and fields of intervention of intelligence agencies. These underwent, as some have suggested, their own “globalization”[75], that is, a restructuring of their objectives as well as required competences in almost all countries (first and foremost the United States). This might have come as a surprise to many, as it was widely held that “secret services” were doomed to be significantly downsized as a result of the “end of history”. On the contrary, intelligence agencies have come to perform a new role in the context of global (geo-)economic competition, being tasked with support and protection of the growth and stability of their national economies. More technically, the term “economic intelligence” was coined to refer to the “pursuit and elaboration of information aimed at protecting economic, financial, industrial and scientific interests”[76]. This activity concerns both the general “economic-financial threat” and the use of financial circuits for purposes of terrorism and WMD (Weapons of Mass Destruction) proliferation. According to the Italian “Intelligence Glossary”, states’ economic intelligence may also include "the pursuit and elaboration of information aimed at identifying new and/or better growth opportunities for their own economic-financial system"[77]. In

[69] Gyula Csurgay, “The Increasing Importance of Geoeconomics in Power Rivalries in the Twenty-First Century,” *Geopolitics* 23, n. 1 (2018): 44.
[70] Nicolò Pollari, “Ipotesi di lavoro per l’intelligence economica: strutture organizzative e moduli operativi,” *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001).
[71] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell’informazione nell’era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 21.
[72] Cunctator, “Intelligence economica e decisione politica,” *Istituto Italiano di Studi Strategici “Niccolò Machiavelli”* (2012): 5.
[73] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell’informazione nell’era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 13.
[74] Ibid., 25.
[75] Cunctator, “Intelligence economica e decisione politica,” *Istituto Italiano di Studi Strategici “Niccolò Machiavelli”* (2012): 7.
[76] *Sistema di Informazione per la Sicurezza della Repubblica*, “Glossario Intelligence. Il linguaggio degli Organismi informativi” (2019): 59.
[77] Ibid.

this sense, economic security becomes a "public good, which can be benefitted from by individual components of the national community"[78].

In fact, economic intelligence does not constitute an entirely new phenomenon. Traces of it can be found already at the time of the *Serenissima* Republic of Venice (since the 7th century). Venice was "the first geo-economic state system"[79] in international history: its comprehensive strategy for economic security and competitiveness involved public or diplomatic figures as well as private merchants in both economic counterespionage (protecting industrial and scientific secrets, such as glass blowing techniques in Murano) and espionage activities (aimed at useful information for commercial expansion). Before the end of the Cold War, moreover, competition between the United States and the USSR had already induced a more strategic role of economic information, even within the Western bloc. Some countries, including Japan and France, which enjoyed American security protection and thus freedom from the burden of high military spending, channelled their resources into the development of proto-economic intelligence strategies. As already suggested, the US gradually came to grasp this reality in the 1970s, as testified by their creation of the President's Foreign Intelligence Advisory Board (PSIAB). According to its first Director, Gerard Burke, "hereinafter economic intelligence would be considered as an element of national security"[80] equated with other intelligence "categories" (diplomatic, military, technological). But, again, today's economic information is no longer valued for its impact on the politico-military balance (as in Cold War times), but rather for its ability to alter the terms of international economic competition in the context of new geo-economic conflicts.

Importantly, in the words of a former intelligence officer, economic information is not "full of inherent informative value (as is the case for the patent of a war weapon, a secret of military strategy, an industrial formula), but is "spread" over a wider landscape of concomitant elements (market quotas; economic, financial and stock-exchange indicators; corporate balance sheets); in other words, the single data is non-significant of itself, unless contextualized within the relevant flow of information"[81]. Moreover, economic intelligence information "must always imply an economic benefit"[82]. It often pertains to one of the following six areas of interest [83]: (i) the technological competitiveness of the "firms-system"; (ii) the commercial competitiveness of national firms; (iii) the penetration of foreign interests in vital or strategic national sectors; (iv) critical geo-economic scenarios; (v) the controllability of instruments of economic policy; (vi) economic crimes in financial markets.

Theoretically, there exist at least three "schools of thought" on economic intelligence[84]. The French school, especially as represented by Christian Harbulot and Henry Martre in the early 1990s, regards "economic intelligence" as an activity (rather than a product). Moreover, this activity is to be based on open source information (Open Source INTelligence or OSINT) and practiced essentially by

[78] Nicolò Pollari, "Ipotesi di lavoro per l'intelligence economica: strutture organizzative e moduli operativi," *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001).
[79] Laris Gaiser, "Intelligence economica: una proposta per l'Italia," *Sicurezza, Terrorismo e Società* n. 2 (2015): 69.
[80] Gerard Burke, cited in Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 13.
[81] Nicolò Pollari, "Ipotesi di lavoro per l'intelligence economica: strutture organizzative e moduli operativi," *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001).
[82] Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 443.
[83] Nicolò Pollari, "Ipotesi di lavoro per l'intelligence economica: strutture organizzative e moduli operativi," *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001).
[84] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 14.

private companies. The role of security services as economic agents is thus ruled out. Economic intelligence activities must also meet legal-deontological requirements and obviously cannot include economic espionage. Philippe Clerc, however, has added nuances to the French approach, suggesting that a "country-system" should focus on designing a "national device of economic intelligence" involving public administrations as well as universities. Overall, the French school is often subject to the criticism that "it could be reductive to downgrade the entire economic intelligence phenomenon to investigation of open sources by firms"[85].

The Anglo-Saxon school, on the other hand, regards "economic intelligence" as a product (rather than a cycle or activity) and carves a central role for intelligence services. Economic intelligence is treated as a domain which pertains to both public and private actors, thus security agencies as well as firms. Moreover, by avoiding specifying information collection methods, the Anglo-Saxon school does not openly answer the question of whether illegal activities (mainly economic espionage) may be pursued for economic security goals. Even more, "part of the doctrine in the US is openly in favour of economic espionage"[86]. In any case, notwithstanding rhetorical declarations to the contrary, "instances of economic and industrial espionage are copious and have a great economic impact"[87]. Finally, within the Anglo-Saxon literature, the most comprehensive and illustrative definition of "economic intelligence" has been given by Samuel D. Porteous, former strategic analyst for the Canadian Security Intelligence Services (CSIS). Accordingly, economic intelligence refers to information which is either politically or commercially relevant and likely to increase the relative productivity or competitiveness of a state; it usually concerns the realms of technological data, government or financial information and commercial property[88].

Thirdly, the "Italian school" approximates the French one for its regard of "economic intelligence" as a process (rather than a product), but also the Anglo-Saxon one for its focus on intelligence services (rather than private enterprises). It also treats economic espionage as a legitimate activity. Indeed, it has been argued that the contrast "between intelligence analysts and governmental staff in economic institutions can be overcome if the added value provided by intelligence analysis is based on what comes to light from covert collection"[89]. In fact, the Italian school's focus on public intelligence is often so narrow that many have suggested that "the exclusion (…) of other economic actors, such as private firms, curbs the definition's substance"[90].

Crucially, substantive approaches to economic intelligence may depend on the "development stage" of a country's economy, or at least its long-term economic conditions. In other words, emerging economies generally focus on offensive projection, aimed at obtaining strategic or technological information and conquering new industrial markets. On the contrary, advanced economies mostly (and, some would add, culpably) tend to focus on protecting their human, technological and industrial capital, privileging a defensive posture[91]. The need for protection can be exacerbated by economic or

[85] Ibid., 18.
[86] Ibid., 19.
[87] Ibid., 20.
[88] Samuel Porteous, cited in Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 19.
[89] Cunctator, "Intelligence economica e decisione politica," *Istituto Italiano di Studi Strategici "Niccolò Machiavelli"* (2012): 6.
[90] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 20.
[91] See, for instance, Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 438.

financial crises, which render economic systems exceptionally more vulnerable to hostile operations or economic espionage.

Furthermore, economic intelligence should not be mixed with "business" or "competitive" intelligence, which pertain to a more strictly corporate sphere. More specifically, "business intelligence" is often assimilated to either economic intelligence or technological-commercial supervision (thus an instrument of economic intelligence). On the contrary, it should be strictly interpreted as the pursuit of information and data by firms in order to "identify and exploit leverages, in addition to neutralizing threats to the company's existence, development and profitability"[92]. In sum, "business intelligence" could be seen as a sub-domain of economic intelligence, one employed by firms so as to enhance their particular strategies and tactics. In this sense, it is seemingly undistinguishable from the "French approach" to economic intelligence. Even more narrowly, "competitive intelligence" can be equated to micro-economic intelligence, involving "detailed information at firm or contract level (…) which may help firms or companies to take advantage of a particular market"[93]. As such, one author conceives of "competitive intelligence" as a subset of economic intelligence "at the firm level" (there is also evidently a "government level")[94].

As a side note, albeit a crucial one, it must be emphasized that the nexus between cyber- and economic security is increasingly salient. The most innovative productive paradigms, based on digital data collection and analysis as well as new forms of "smart factories", are leading to an unprecedented digitalization of economic activities. In this sense, "cyber-space activities can be regarded as extremely advanced tools to conduct economic intelligence activities"[95], be it to gain control of critical infrastructures or appropriate technological know-how. Moreover, cyber infiltrations are likely to exacerbate the vulnerabilities of a country's economic system. Thus, they generally require an appropriate organizational response in terms of economic intelligence.

In conclusion, the goal of economic intelligence, understood as a key instrument of geo-economics, is to promote national comparative advantages in economic competition. This is achieved by pursuing and elaborating (open-source and secret) information through several (legal and illegal) means, in order to protect and promote one's own competitiveness. Intelligence agencies have come to play a central role in this endeavour, given their collection and analysis abilities. However, coordination with private firms remains a crucial element of any national device of economic intelligence. Indeed, as early as in 1995, the European Commission defined economic intelligence as "the coordinated research, processing and distribution for exploitation purposes of information useful to economic operators"[96], from governments down to individual firms. Thus, while information collection by intelligence agencies is crucial to the system, "it is the public and private, national and local economic actors that are part of it that must define the objectives of any request for information, and utilize that information to take strategic choices, be they aimed at an individual or collective benefit"[97]. A decisive factor for the success of economic intelligence is constituted by national culture, intended as

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[92] Stevan Dedijer, cited in Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 25.

[93] Duncan Campbell, cited in ibid.

[94] See Valentìn Martìnez Valero, "Economic Intelligence and National Security," in J. Martìnez Ramirez and Jerzy Biziewski (edited by), *A Shift in the Security Paradigm – Global Challenges: is Europe ready to meet them?*, Springer International (2020): 45.

[95] Laris Gaiser and Marco Arezzini, *Cyber spazio e intelligence economica*, Il Cerchio (2019): 57.

[96] European Commmission, Green Paper on Innovation (December 1995): 19. Available at: https://op.europa.eu/en/publication-detail/-/publication/1b7a8b40-c1e2-445e-a440-39c0fd530180/language-en

[97] Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 429.

"the sense which citizens have of themselves"[98]: as suggested by Evan H. Potter, "the greater is the presence of a widely shared national goal, the greater will be the willingness of the actors to "accept" the moral dilemmas posed by economic intelligence, that is to say, the greater will be the probability that the importance of the goal of greater competitiveness (in terms of employment, growth and living standards) will prevail over the difficulty of accepting the instruments needed to achieve it"[99]. Overall, economic intelligence stands out as "a collective strategy, a complex approach, striving for an appropriate strategy to manage the challenges of globalization's latter phase"[100].

1.2.2. Economic functions of intelligence agencies: a source of market distortions?

In a description offered by a former Director General of the Italian Department of Information Security (DIS), intelligence agencies operate in the economic field on three levels of increasing complexity. First of all, they provide information and analysis to decision-makers, in order to safeguard security chains, pursue illegal conducts, as well as identify foreign investments motivated by a "willingness to plunder or impoverish our knowledge wealth and technological know-how"[101]. A second level refers to defensive measures, including active ones, against clandestine activities targeting industrial secrets and/or intellectual property. Finally, a third level of intervention is exemplified by intelligence activities which, based on domestic and global scenarios, aim at "strengthening the structural conditions"[102] of a country's competitiveness.
For a broader overview of the potential activities of intelligence agencies in the economic field, one could defer to Mauro Morbidelli[103], whose conceptualization also incorporates Samuel Porteous' arguments[104]. As a first activity, economic counterespionage aims at protecting a country's economic system from hostile information operations (especially by foreign intelligence agencies or firms), which could undermine its productive capabilities or the international projection of national firms. Counterespionage must be distinguished from the flow of (economic) information towards government decision-makers. In turn, this flow can take the following forms:

- simple monitoring of macroeconomic trends (in order to increase awareness of the international economic conjuncture and act accordingly in defensive and offensive terms);
- specific support to government representatives in negotiating tables (in order mostly to uncover other parties' position, e.g., their "fall-back position" or the personal traits of their negotiators);

[98] Evan H. Potter, cited in Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 73.
[99] Cunctator, "Intelligence economica e decisione politica," *Istituto Italiano di Studi Strategici "Niccolò Machiavelli"* (2012): 5.
[100] Laris Gaiser, "L'intelligence economica per un nuovo ordine mondiale," *Sistema di Informazione per la Sicurezza della Repubblica* (2016): 2.
[101] Alessandro Pansa, "Il sistema di informazione per la tutela degli interessi economici nazionali," *Dipartimento Informazioni per la Sicurezza* (2017): 10.
[102] Ibid., 12.
[103] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 1-88.
[104] Samuel Porteous, cited in Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 422-423.

- monitoring of the implementation of international agreements (usually through clandestine methods, as foreign governments could deliberately but covertly disrespect commercial treaties in order to obtain financial advantages);
- surveillance of unfair commercial practices and other "sharp practices" (corruption, sabotage and "unfair trade", whether practiced by foreign states or firms)
- "special activities" aimed at influencing the economic policies and public opinion of other countries (usually in order to weaken foreign firms and favour national ones, directly interfering in other states' internal affairs).

In turn, this support to governmental authorities must be separated from support by intelligence agencies to private economic operators. This, according to critics, can amount to "a private use of a public structure"[105]. In practice, it could entail:

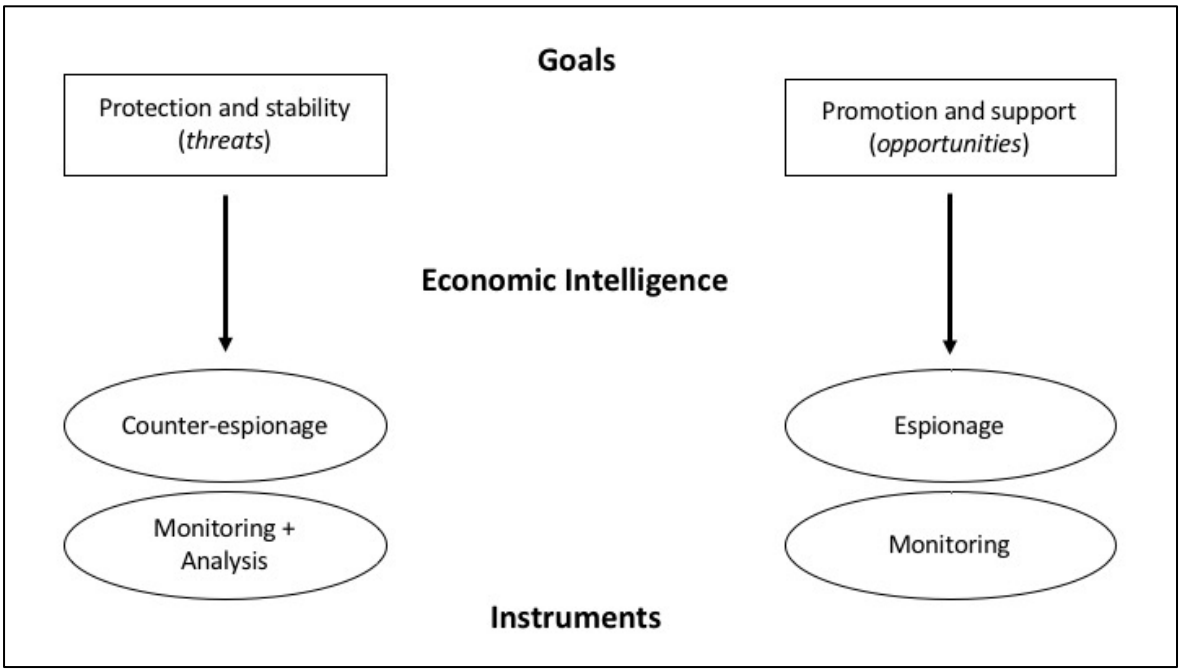
- supply of unclassified information (such as economic and demographic data to facilitate decision-making or information on foreign government officials);
- specific support in negotiating tables (which controversially implies that intelligence officers could pursue illegal activities in order to promote private interests);
- monitoring of commercial agreements with foreign companies;
- economic espionage in favour of "national champions" (undoubtedly the most controversial item on the list).

These functions outlined by Mauro Morbidelli are not necessarily performed by all intelligence services. Still, they provide a useful picture of the extent and complexity of potential "economic intelligence" activities.

The graphic reproduction in the next page illustrates how former Director of the Italian Military Intelligence and Security Service (SISMI), Nicolò Pollari, conceptualizes the goals and instruments of economic intelligence. Moreover, according to a wider definition found in the literature, the field of economic action of intelligence agencies should concern "macro- and micro-economic policies, technological development, protection of national industrial and technological assets, defence of critical infrastructures and maintenance of the country-system's image. These should be particularly relevant: technological supervision; protection of patent ownership; activism against reverse engineering and counterfeiting; identification of barriers – tariff- and non-tariff-based ones - to market entries which disadvantage our companies; the industrial and commercial priorities of foreign States; fight against unfair competition practiced to the detriment of our companies, activating all the political power of the State in their support; (...) economic intelligence must extend to industrial espionage, recognition of risks and opportunities, both defensive and offensive uses of communication"[106].

[105] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 45.
[106] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell'informazione nell'era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 10.

Figure 1. Goals and instruments of economic intelligence



(Source: Nicolò Pollari, "Ipotesi di lavoro per l'intelligence economica: strutture organizzative e moduli operativi," *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001). The original figure is in Italian. This translated reproduction maintains the original's structure)

In light of the potential activities listed so far, the role of intelligence agencies (more generally states[107]) in the economic field is subject to heavy criticism by economists, especially neo-classical ones in the United States. This was also the case for early geo-economics. In this context, two criticisms are common: the transmission of information by public institutions to private actors is seen as (i) a form of public subsidy, favouring unproductivity of the system, or (ii) an attempt by states to carve out space for a new "industrial policy", regaining control over markets. In this second sense, economic intelligence itself is regarded as a "form of neo-mercantilism" or "an instrument through which a government promotes centralizing policies in favour of producers, to the detriment of individuals and consumers"[108]. A reply to these criticism has been provided by Italian scholar Carlo Jean. Rather than promoting mercantilism or protectionism, weakening the positive impact of interdependence, "Luttwakian geo-economics (…) strives to seize all opportunities afforded by globalization, getting as large as possible a portion of global wealth"[109].

In addition to observations by neo-classical economists, other criticisms concern: the missing "ideological participation of intelligence officers to the new goals"[110] of economic intelligence; the negative impact on foreign policy of economic intelligence activities, which can directed at diplomatic or military allies; finally, the "incompatibility between intelligence and business

[107] It should be recalled that "questions about the use of intelligence agencies to collect economic information are in large measure surrogates for a more fundamental debate over government's role in directing a country's economic future". *See* Abram Shulsky, cited in Jeffrey Owen Herzog, "Using Economic Intelligence to Achieve Regional Security Objectives," *International Journal of Intelligence and Counterintelligence* 21, n. 2 (2008): 303.
[108] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 32.
[109] Carlo Jean, cited in ibid., 32-33.
[110] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 49.

activity"[111], as the former could compromise its sources, methodologies etc., by disseminating information to the latter.
In conclusion, the composite nature of "economic intelligence" greatly distinguishes it from the military or strategic intelligence of Cold War times. Simply put, the latter generally concerned well-defined risks. Economic intelligence, on the contrary, "processes uncertainty, has a much wider and more differentiated field of action, an extensive range of public and private actors for information collection and analysis, and several users"[112]. This, as a Spanish intelligence analyst puts it, "makes intelligence activity in support of the nations' business fabric a critical component of national security"[113].

1.2.3. Three pioneers: the United States, France and Japan

The economic intelligence systems of three pioneering countries can provide additional powerful insights. As already suggested, the 1994 National Security Strategy (NSS) was the first to assert that US national security was inseparable from the promotion and defence of the country's economic well-being. In the early 1990s, many observed that precisely "the lack of an offensive economic intelligence system had prevented the US from predicting the end of the Cold War and the collapse of the USSR"[114]. Accordingly, the promotion of US economic prosperity was now to be pursued through support (especially by the intelligence community) to the private sector, "the engine of economic growth"[115]. This new doctrine was based on three fundamental principles[116]: (i) economic intelligence is crucial in order to promote the understanding of economic trends by government decision-makers; (ii) economic espionage must support private firms and negotiators involved in financial, economic and commercial tables; (iii) the intelligence community is entrusted with the identification of threats, including "sharp practices" and corruption, to American firms and institutions, and it should also define possible counter-measures or retaliations.
The very first expression of this new strategic "mission" was Executive Order 12835 (January 25, 1993) establishing the National Economic Council (NEC). The NEC can be viewed as "the milestone of the US's strategic vision in the economic field"[117]. Its main functions are:

- to coordinate the economic policy-making process with respect to domestic and international economic issues;
- to coordinate economic policy advice to the President;
- to ensure that economic policy decisions and programs are consistent with the President's stated goals, and to ensure that those goals are being effectively pursued;

[111] Ibid., 50.
[112] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell'informazione nell'era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 53.
[113] Valentìn Martìnez Valero, "Economic Intelligence and National Security," in J. Martìnez Ramirez and Jerzy Biziewski (edited by), *A Shift in the Security Paradigm – Global Challenges: is Europe ready to meet them?*, Springer International (2020): 47.
[114] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 417.
[115] National Security Strategy (NSS) of Engagement and Enlargement (July 1, 1994): 15.
[116] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 417.
[117] Ibid., 418.

- to monitor implementation of the President's economic policy agenda[118].

The NEC is part of the US President's Executive Office and is composed by: the US President (serving as Chairman), the Vice President, the Secretary of State, the National Security Adviser, the Assistant to the President for Economic Policy, the Secretary of the Treasury, the Assistant to the President for Domestic Policy and a plethora of other relevant Secretaries, Administrators and Representatives[119]; moreover, members of American intelligence agencies in charge of espionage and counterespionage (respectively, the Central Intelligence Agency or CIA and the Federal Bureau of Investigation or FBI) attend meetings of the National Economic Council.

As suggested by Carlo Jean and Paolo Savona, in striving to preserve the consistency of American economic projection, the NEC "takes care of all issues related to economic security"[120]. It does so with a pro-active stance, as reflected by its inter-governmental structure. Importantly, the National Economic Council is resorted to by other organs of US public administration whenever OSINT-based analysis is inadequate to achieve pre-determined objectives. Thus, the NEC has come to "represent the coordination point between intelligence agencies and presidential economic policy, at both macro and micro level"[121]. It also acts in *liaison* with the National Security Council (NSC) for matters of economic and industrial counterespionage[122]. In fact, the role of the National Security Council within the NEC has been recently strengthened, in order to "favour a symbiosis between classic and economic intelligence activities"[123].

In 1993, in addition to the NEC, the United States established the Advocacy Center, mostly in order to promote American exports. The Advocacy Center is known as the "Economic War Room" and is part of the Department of Commerce. Its three main functions are:

- to monitor global industrial markets (twelve markets are selected every year to receive special attention);
- to support American firms in international negotiations (on average around 100 per year, selected based on their economic weight), for instance, by providing funds or sectorial and geopolitical advice;
- to identify relevant opportunities for international orders, especially in the aerospace, infrastructures and energy sectors[124].

Importantly, any relevant information which the Advocacy Center comes across is transmitted to both the National Economic Council (NEC) and the National Security Council (NSC).

Thirdly, completing the "grand design" initiated with establishment of the NEC and the Advocacy Center in 1993, the Economic Espionage Act (EEA) was approved in 1996. Its adoption is often seen as a reaction to the statistical fact, confirmed by the FBI, that economic espionage and "sharp

[118] Executive Order 12835 (January 25, 1993)

[119] Specifically, the Secretaries of Agriculture, Commerce, Labor, Housing and Urban Development, Transportation, Energy; the Administrator of the Environmental Protection Agency; the Chair of the Council of Economic Advisers; the Director of the Office of Management and Budget; the United States Trade Representative; the Assistant to the President for Science and Technology Policy; such other officials of executive departments and agencies as the President may, from time to time, designate.

[120] Carlo Jean and Paolo Savona, cited in Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 419.

[121] Ibid., 420.

[122] Ibid.

[123] Ibid.

[124] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 59.

practices" cost the US industry "dozens of billions of dollars annually"[125]. The extremely severe EEA extended the punitive legislation previously applying to Cold War "strategic technologies" to economic technologies and activities as well. Its first two sections address "economic espionage" and "the theft of industrial secrets". The US, however, has also been repeatedly accused of engaging in economic espionage and pursuing "unfair" competition. In fact, "the margin which separates (legal) actions in defence of national interests and (illicit) industrial espionage initiatives in favour of national companies"[126] remains extremely blurred.

Finally, at the more specific level of intelligence agencies, the FBI has launched a programme named "Awareness of National Security Issue and Response" (ANSIR). The 56 ANSIR regional coordination centres are used to transmit information on economic and competitive risks to more than 250.000 firms[127]. Moreover, the directors of these regional centres, that is, FBI employees, are also automatically members of the American Society for Industrial Security. The FBI also functions as a "connection point between other intelligence services (…) and private firms"[128], as the CIA and the National Security Agency (NSA) are not legally allowed to disseminate information to private companies. However, the CIA itself is known to have initiated a "nonofficial cover" (NOC) programme, "aimed at placing undercover agents in American firms abroad"[129]. Finally, the Office of the National Counterintelligence Executive (NACIX), which replaced the National Counterintelligence Center (NACIC) in 2000, is responsible for coordination and communication to firms for matters of economic counterespionage. It also offers executive courses in economic security risk for business managers.

In conclusion, the American model stands out for its systemic and integrative nature. It constitutes "a reference model for any economic intelligence apparatus seeking to defend national interests"[130]. Importantly, in addition to government institutions or intelligence agencies, the US also benefits from "the world's wider market of private business intelligence"[131]. What the US achieved in the 1990s is therefore a strategic mitigation of the "asymmetry and decentralization of a system with a broad business intelligence market, naturally oriented towards private goals more than collective interests"[132].

As already suggested, the French model of economic intelligence is based on a particularly rooted cooperation between the state and the private sector. The need for this cooperation was emphasised by head of the former *Commisariat Général du Plan*[133], Henry Martre, in a famous 1994 Report (*Intelligence économique et stratégie des enterprises*). This called on individual firms, universities

[125] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 421-422.
[126] Ibid. 424.
[127] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 64.
[128] Ibid.
[129] Ibid., 65.
[130] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 427.
[131] Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 438.
[132] Simone Pasquazzi, "Economic intelligence: historical evolution and current trends," in V. Ilari – G. Della Torre (eds.), "Economic Warfare", *Società Italiana di Storia Militare* (2017): 7.
[133] In 2006 the former *Commisariat Général du Plan* headed by Henry Martre was replaced by the *Centre d'Analyse Stratégique* and again in 2013 by the *Commisariat Général a la Stratégie et à la Prospective*.

and research centres "to take an interest in economic intelligence, its diffusion and awareness-raising on the issues of public-private collaboration for the promotion of collective economic interests"[134]. Specifically, French economic intelligence is focused on the promotion of *pôles de compétitivité*, that is, commercially-competitive clusters in which firms, research institutes and public institutions come to share relevant information; the goal of this sharing is to "realize technological and industrial innovation and gain mutual competitive advantages"[135].

In fact, public-private synergy in French economic projection has been aided by at least three nationally specific factors. First of all, the French state has been traditionally present in the shareholding of firms in strategic sectors, whether fully or partially. Secondly, developing an autarchic (nuclear and conventional) war industry since the 1950s favoured an early and harmonious partnership between the French state and the private sector, in terms of both financing and commissions. Last but not least, the French system of *Grandes écoles*, especially the *École Nationale d'Administration* (ENA), provides collective training for future elites expected to head the public as well as private sector.

Thus, in 1995, on Henry Martre's suggestion, France instituted the Committee for Competitiveness and Economic Security (*Comité pour la Competitivité et la Securité Economique* or CCSE), whose functions are modelled around those of the US National Economic Council. It was originally headed by the Prime Minister, but this role has been recently delegated to the Ministers of the Economy and Finance; moreover, CCSE membership includes a "high representative for economic intelligence", in addition to seven representatives of the industrial, financial and research sectors. The *Comité*'s main function is to advise the Prime Minister on issues of competitiveness and economic security[136]. Furthermore, the CCSE's secretariat is known as *Secrètariat Général de la Défense Nationale* (SDGN). It has no independent collection capabilities, but is "vital for analysis and dissemination of economic data transmitted by intelligence services"[137]. A third relevant institution, working closely with the SDGN, is the *Agence pour la Diffusion de l'Information Technologique* (ADIT), also established in 1995. The ADIT is responsible for communication between public institutions and private actors; it is the "collection and dissemination point of intelligence, business, diplomatic and ministerial information, in addition to information coming from French Regional Chambers of Commerce"[138]. In sum, in spite of a theoretical focus on private firms as economic intelligence actors, France's institutional architecture stands out for its centralized and centralizing nature, which is often the object of loud criticism. Importantly, Christian Harbulot is the major French scholar of economic security, war and intelligence, researching on these matters since the 1980s, and was also personal advisor to Henry Martre in the 1990s. In 1997 Harbulot and General Jean Pichot-Duclot, former director of the French Directorate of Military Intelligence's training centre, founded the School of

[134] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 398.

[135] Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 439.

[136] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 70.

[137] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 399.

[138] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 70.

Economic War (*École de guerre économique* or EGE), where "econometric foundations are taught in conjunction with military and technical diversion and subversion tactics"[139].
Finally, at the level of intelligence agencies, "Service 7" of the *Direction Générale de la Sécurite Extérieure* (DGSE) is widely known for its economic espionage activities[140]; it has also engaged in "influence operations" in favour of French firms. Moreover, since 2011 the DGSE has been hiring analysts with a specifically economic background[141]. Secondly, the *Direction de la Surveillance du Territorire* (DST) is the French intelligence agency entrusted with economic counterespionage and protection of national scientific and industrial assets. The role of French security services in economic intelligence is relatively entrenched, but is also often criticized in media and political debates. Criticisms of their (illegal) activities in favour of private firms, however, are mostly linked to the wider "image" of French intelligence services, rather than to economic or ideological beliefs as in the US. This generally results in "economic espionage" and "economic intelligence" being seen as separate activities, "the former based on illegality and immorality, the latter on rules and ethics"[142].
In conclusion, it is widely acknowledged that France's international expansionism "feeds off economic intelligence, the active role of case officers and in particular the belief that intelligence must be at the service of private firms engaged in competition on global markets, sometimes turning into unfair competition"[143].

Finally, Japan has been described as the first country to make information "a collective good, relying on synergies in terms technological, industrial and commercial strategies, as part of an offensively-oriented economic intelligence system"[144]. Some trace the development of Japanese economic intelligence back to the Meiji dynasty of the 19th century, when Japan started to approach purely economic matters in a warly manner[145]. It was after the Second World War (WWII), however, when Japan was forced to renounce military and imperial ambitions, that available resources were channelled into the development of a genuine economic intelligence device. Even culturally, economic growth came to be seen by the population as the only possible source of collective "revenge". Japanese culture itself conceives of information as a collective good ("a service which shows trust between partners"[146]), resulting in a unity of purposes between the state, firms and their employees. Overall, Japan's geo-economic orientation after WWII was influenced by several cultural, historical and geopolitical factors, also including "the relatively small size of Japanese territory, combined with high population density, the lack of natural resources, a consensus-based society, in

[139] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 400.
[140] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 72.
[141] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 401.
[142] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 73.
[143] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 400.
[144] Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 438.
[145] See Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 73-4.
[146] Ibid., 75.

which authority, discipline and collectivism are important values"[147]. Japan was also a member of the "infamous" group of countries, including France, Israel and Germany, which the US accused of taking advantage of America's Cold War "distraction" to enrich their own (industrial and technological) assets through economic espionage. In fact, the model promoted in Japan since the 1950s was one of "economic diplomacy based on exploitation of Western knowledge resources"[148]. Henry Martre has singled out several aspects of Japan's unique approach, including:

- integration with the strategies of both Japanese multinationals and foreign countries in which these have commercial interests;
- selective dissemination of information;
- a quintessentially long-term strategy[149].

In fact, the most peculiar aspect of the Japanese model is the partial irrelevance of intelligence agencies: the Cabinet Research Office (Japan's information service) is at best "the summit of a structure formed by private or para-governmental agencies, involved in economic intelligence activities since the 1950s"[150]. Three of these agencies are particularly central to Japan's economic intelligence:

- the Ministry of International Trade and Industry (MITI). The MITI was founded in 1949 by former members of the Japanese imperial secret services. It is responsible for collection, analysis and dissemination of relevant open-source information. In 1962 the Institute for Industrial Protection (IIP) was also founded inside the MITI. Overall, the Ministry functions as "the "referee" of planned economic management" or "the coordination organ between the public and private sectors in terms of strategic information engineering"[151];
- the Japan External Trade Organization (JETRO), which was established in 1958 by the MITI and replaced the Overseas Trade Promotion Association. As one scholar puts it, the JETRO "formally promotes Japanese products abroad, but is known for his nature of economic intelligence organization, acting as operational arm of the MITI"[152]. Financially as well as in decision-making, the JETRO is a public-private institution: it responds to the MITI as well as to the private firms making up the Organization. It is entrusted with collection and processing of information, both open-source and secret, which it receives from a widespread network of (diplomatic and private) sources and then transmits to the MITI and private companies. The JETRO has numerous national offices as well as foreign branches and specialized centres. It is active in more than 80 foreign states and 30 Japanese regions[153];
- the Japan Business Federation or *Keidanren*, working closely with both the MITI and the Ministry of Defence. It gathers all major Japanese industrial groups as well as small and medium-sized enterprises. The *Keidanren* carries out two main economic intelligence

[147] Gyula Csurgay, "The Increasing Importance of Geoeconomics in Power Rivalries in the Twenty-First Century," *Geopolitics* 23, n. 1 (2018): 43.
[148] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 76.
[149] Henry Martre, cited in Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 438.
[150] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 76.
[151] Ibid., 77.
[152] Ibid., 78.
[153] Simone Pasquazzi, "Economic intelligence: historical evolution and current trends," in V. Ilari – G. Della Torre (eds.), "Economic Warfare", *Società Italiana di Storia Militare* (2017): 8.

functions: providing collective advice on economic policy to the Japanese government and "promoting international commerce and information collection"[154].

Overall, the MITI stands out as the "pivot" of Japan's economic intelligence system, coordinating interactions between the JETRO, the *Keidanren* and several government agencies. In addition, information flowing from banks, universities and intermediate bodies facilitates a constant re-evaluation of national interests and commercial needs. Thus, the Japanese model is based on "a synergic network, in which institutional bodies specializing in legal and illegal collection of information cooperate with companies, banks and universities[155].

In conclusion, Japan's economic intelligence device can be conceptualized as based on "cooperation between three poles"[156]: ministerial (in which several commissions gather state institutions, businesses and universities), professional (in which *ad hoc* associations promote informal information exchange) and scientific (in which researchers are invited to present their work before technical committees, favouring collective development of technological assets). As one author powerfully suggests, regardless of its successes or failures, "no other country devotes a similar apparatus to economic development"[157].

1.3. Italy's national (r)evolution: the protection of economic interests after Law 124/2007

1.3.1. "Economic, scientific and industrial interests" after 2007

In 2017 the Director General of the Italian Department of Information Security (DIS) provided a description of globalization's de-stabilizing effects on Italy's geopolitical, cyber and economic-financial conditions. Regarding the first two dimensions, the systemic challenge for Italy is represented by instability in the "enlarged Mediterranean area" (mainly due to the spread of Jihadi terrorism) and cyber-security threats. At the economic level, finally, "antagonistic and competing actors or centres of interest aim for the weakest links of our assets, while the structural interdependence of markets can quickly multiply the contagion effect of recessive dynamics"[158].

While countries such as the United States and France were quick to realize the geo-economic nature of changes in the post-Cold War international system, this recognition process was slower in Italy. It was Law 124/2007 that sanctioned "the inclusion of the economic-industrial realm, that is, a mainly private realm, within the sphere of its national interest"[159].

Indeed, Law 124/2007 comprehensively reformed Italy's intelligence community, in order to adapt it to the security needs of the post-Cold War scenario. It was partly designed by two technical committees set up in the 1990s, on the initiative of former President of the Italian Republic Francesco Cossiga. These were known as *Commissione Ortona* and *Commissione Jucci* and, although their mandate envisaged the adoption of some form of "economic intelligence", they generally gave a

[154] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 78.
[155] Simone Pasquazzi, "Economic intelligence: historical evolution and current trends," in V. Ilari – G. Della Torre (eds.), "Economic Warfare", *Società Italiana di Storia Militare* (2017): 8.
[156] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 79.
[157] Ibid.
[158] Alessandro Pansa, "Il sistema di informazione per la tutela degli interessi economici nazionali," *Dipartimento Informazioni per la Sicurezza* (2017): 5.
[159] Adriano Soi, "Intelligence economica e interessi nazionali nella più recente esperienza italiana," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 535.

restrictive interpretation of the economic responsibilities of security services[160]. Indeed, a thorny issue they were faced with was how to encourage economic activism by intelligence agencies without creating conflicts of competence with Italy's Government and the wider Public Administration. These potential conflicts were eventually resolved in Law 124/2007.

Law 124/2007 did not, in fact, establish a specific institution for economic intelligence matters, as is the case for the American National Economic Council (NEC) or the French *Comité pour la Competitivité et la Securité Economique* (CCSE). Instead, Article 6 and Article 7 assigned economic tasks to the two intelligence agencies newly established by Law 124/2007 itself:

- the External Intelligence and Security Agency (AISE) was entrusted with "information activities, which take place outside national borders, aimed at protecting political, military, *economic, scientific and industrial interests*"[161].
- the Internal Information and Security Agency (AISI) was attributed the same competence, only for "information activities which take place within national borders"[162].

The AISE and the AISI replaced Italy's external and internal agencies of the Cold War era, that is, the Military Intelligence and Security Service (SISMI) and the Intelligence and Democratic Security Service (SISDE). These dated back to a 1970s reform (Law 801/1977) and formally depended, respectively, on the Ministry of Defence and the Ministry of the Interior. They were also operationally focused on terrorism and internal subversion. Moreover, Law 124/2007 integrated the AISE and the AISI into a wider "Information System for the Security of the Republic", which is placed under the direction and politico-administrative responsibility of Italy's Prime Minister. In addition to the Prime Minister, the AISE and the AISI, this system includes: a "delegated authority", that is, a minister without portfolio or an undersecretary who can be appointed by the Prime Minister to perform some of their tasks (art. 3); the Department of Information Security (DIS), which coordinates and reviews information activities of the AISE and the AISI (art. 4); lastly, the Inter-ministerial Committee for the Security of the Republic (CISR), whose membership includes the Prime Minister (Head), the Director General of the DIS (Secretary), the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Defence, the Minister of Justice, the Minister of Economy and Finance and the Minister of Economic Development (art. 5). The CISR is an exceptionally important institution: in light of the actual threats or risks facing Italy in a particular point in time, it defines the specific content of the (economic, scientific and industrial) interests referred to in Articles 6 and 7 of Law 124/2007. That is, it defines the concrete tasks that intelligence agencies must perform in all areas, including the economic field, in terms of information collection and analysis. In this sense, the CISR could be seen as Italy's "national security cabinet"[163].

In general, Law 124/2007 views Italy's national economic interest as the need to "defend and support our growth, competitiveness and financial stability"[164]. Thus, it recognizes the role of intelligence agencies in boosting as well as protecting Italy's economy in global competition. In fact, "the notion of economic security – thus that of economic intelligence as well – was focused on defensive

[160] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 360.
[161] Article 6 of Law 124/2007. Emphasis added.
[162] Article 7 of Law 124/2007.
[163] Adriano Soi, "Intelligence economica e interessi nazionali nella più recente esperienza italiana," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 544.
[164] Alessandro Pansa, "Il sistema di informazione per la tutela degli interessi economici nazionali," *Dipartimento Informazioni per la Sicurezza* (2017): 9.

aspects"[165] before 2007; it implied no more than industrial counterespionage for the protection of "strategic" firms of the defence sector. On the contrary, although a certain activism by Italian intelligence agencies in the economic field had been observed in the 1990s (following a structural reorganization of the SISMI), Law 124/2007 formally included "private" interests into their operational domain. In this sense, it also encourages Italy's agencies to structure new cooperation channels vis-à-vis the private (economic, but also scientific and cultural) sector. Indeed, one commentator has noted that "among the most significant improvements brought by L. 124/2007, there must be the translation of the "participatory" security concept (…) into the realm of national security and its further translation into "participatory" intelligence, while also giving the DIS the task of promoting the dissemination of a "security culture", which is also an intelligence culture, by interacting with external entities"[166].

Moreover, Law 124/2007 "opened the door to the "national interest" as a normative value, as the foundation of essential public decisions"[167]. This is generally regarded as particularly significant, given that ideas of national interests or security had been long omitted in Italian history (possibly as a result of its tormented unification process and its status as a US Cold War satellite hosting Europe's largest communist party). A pre-Law 124/2007 exception to this *status quo* could be found in a decision of the Italian Constitutional Court. Sentence n. 86 of 1977 suggested that Italy's "supreme interest" was linked to its territorial integrity, independence and survival. However, it also implicitly referred to a concept of "State-community" (rather than "State-system", which concerns governmental organization) including public as well as private subjects. In this sense, the Court's sentence has been viewed as providing a "vision of the future (…) which starting from the 1980s would lead to the progressive expansion of the national security notion"[168], including its new economic and financial dimension.

Importantly, since 2009 intelligence activities in the economic field have become a focal element of Annual Relations to Parliament by the Department of Information Security (DIS). While these activities had been previously included under headers such as "Protection of the country-system"[169] or "Threats to the country-system"[170], for the first time in 2018 they were addressed in an *ad hoc* 15-page-long section entitled "Economic-financial security"[171]. Overall, two "economic intelligence" objectives are seen as priority by the Inter-ministerial Committee for the Security of the Republic (CISR)[172]; these can be also inferred from a content-analysis of the latest Relations to Parliament. In addition to the wider goal of energy security, they are:

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[165] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 367.

[166] Ibid., 375.

[167] Adriano Soi, "Intelligence economica e interessi nazionali nella più recente esperienza italiana," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 525.

[168] Ibid., 532-533.

[169] Annual Report to Parliament by the Department of Information Security (2016). Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/relazione-al-parlamento-2016.html

[170] Annual Report to Parliament by the Department of Information Security (2017). Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/presentata-la-relazione-al-parlamento-2017.html

[171] Sub-paragraphs: the protection of strategic assets; energy supplies; the banking and financial system; illegal economies and organized crime's business. Annual Report to Parliament by the Department of Information Security (2018). Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/relazione-al-parlamento-2018.html

[172] Alessandro Pansa, "Il sistema di informazione per la tutela degli interessi economici nazionali," *Dipartimento Informazioni per la Sicurezza* (2017): 13-15.

- protection of the credit-financial system's stability, especially from techno-finance risks, clandestine banking channels and the hostile strategies of foreign financial operators (such as sovereign funds);
- defence of Italy's strategic industrial assets and technological excellence from foreign interests, especially in "strategic" sectors as identified by the Italian mechanism for screening foreign direct investments (known as the "Golden power"). This usually refers to investments "having extra-economic goals or aiming to plunder target-firms, especially of technologies and brands, and then delocalizing production outside the country's borders"[173]. Moreover, the DIS's special attention goes to "subjects which are publicly controlled, whether directly or indirectly"[174]. Finally, hostile foreign actors are often "suspected of acting in coordination with their respective intelligence agencies"[175].

Finally, additional risks result from the increasing trend in industrial espionage, general threats to critical infrastructures and cyber-threats (a "common thread linking all risks and problems"[176]). The impact of these exogenous factors on national economic security is "even more insidious in the face of structural (…) or congenital vulnerabilities"[177], such as Italy's huge public debt, the North-South historical gap or the territorial presence of "mafias".

1.3.2. Italy's approach to economic intelligence

The Italian "Intelligence Glossary" emphasizes that "national security" is a notion with "a strongly dynamic characterization (…): an example of this is the strategic relevance acquired by concepts of economic-financial security"[178]. As already suggested, in fact, there exists an "Italian approach" to economic intelligence. An emblematic definition given by an Italian scholar treats economic intelligence as the "component of information services' activities (…) which concerns the economy in a broad sense, understood as the material basis of national power: production and flows of goods and products, technological know-how and its transfer, capital movements and corporate acquisitions"; this should translate "into defence and protection of its productive apparatus and support for its expansion abroad"[179]. This marks a substantial difference the French approach, which regards private firms as the primary actors in economic intelligence. However, in light of doctrinal criticisms, an Italian scholar of economic intelligence has recently called for the "need to abandon sectorial approaches to this phenomenon, narrowly referring to strategies by either states or companies"[180]. The two, that is, must be blended, approximating the Anglo-Saxon paradigm in requiring intense cooperation between public intelligence and private firms. Moreover, the Italian

[173] Annual Report to Parliament by the Department of Information Security (2018): 62. Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/relazione-al-parlamento-2018.html
[174] Ibid., 64.
[175] Annual Report to Parliament by the Department of Information Security (2017): 86. Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/presentata-la-relazione-al-parlamento-2017.html
[176] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 411.
[177] Annual Report to Parliament by the Department of Information Security (2018): 61. Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/relazione-al-parlamento-2018.html
[178] *Sistema di Informazione per la Sicurezza della Repubblica*, "Glossario Intelligence. Il linguaggio degli Organismi informativi" (2019): 90-91.
[179] Alessandro Corneli, cited in Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 20.
[180] Ibid., 21.

approach generally and openly allows for economic espionage at theoretical level: "economic intelligence operationally unfolds through both a defensive phase (preventing others from obtaining information and/or data) and an offensive one (attempting to violate others' domains); in other words, economic counterespionage and espionage"[181].

Concerning intelligence agencies, it has been observed that "in countries such as France and Italy, the extension of their operative sphere to markets and companies is not generally well-received"[182]. For France, this scepticism has induced a dominant view of economic intelligence as a domain of private actors. For Italy, however, since cooperation between firms and intelligence agencies is poorly entrenched or structured according to most accounts, scepticism could prove an even more significant cultural obstacle, contributing to slowing the process. Indeed, Law 124/2007 emphasizes the need for a new public "security culture", which is seen as instrumental to the development of a powerful synergy between the public and private sector.

In addition to cultural trends, the traits of a country's economic intelligence are shaped by the peculiarities of its economic-industrial fabric. In the case of Italy, this usually refers to the proverbial "dwarfism" of its firms, that is, the proliferation of small and medium-sized enterprises (SMEs). Indeed, Italy has been recently faced with "the continuing interest on the part of foreign players for its national production sector, especially SMEs, affected by a prolonged state of crisis"[183]. Given this perceived, permanent attack on its industrial excellence, Italy's current approach to economic and financial intelligence, notwithstanding theoretical openness to economic espionage, stands out as fundamentally "defensive"[184].

Overall, two Italian authors have recently pointed out that "economic intelligence cannot have static or defensive orientations, but needs to be dynamic, interdisciplinary"[185]. Italy's lack of dynamism, in turn, is usually attributed to a lack of political direction and thus of a coherent strategic national vision. Overall, as a former Head of Institutional Communication for the Department of Information Security (DIS) puts it, "we are late, as we got off late and after other countries did, without a cultural background to refer to"[186].

In conclusion, in 2013 Italian Prime Minister Mario Monti, also former European Commissioner for Competition, emphasized that "security and economic development make up an inseparable pair: this results in the particularly urgent need to adjust our Services' action to new scenarios"[187]. He also suggested that "the strongly competitive context in which globalization places the economic-productive systems of all developed countries, assigns growing space and importance (…) to "economic intelligence""[188]. This is exceptionally vital for Italy, a country whose economic success is directly dependent upon its knowledge assets and technical capabilities. In this sense, its need for

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[181] Umberto Fava, cited in ibid.

[182] Ibid., 53.

[183] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 387.

[184] Simone Pasquazzi, "Geo-economia, guerra economica e intelligence. Quadro teorico-concettuale e caso di studio," *Istituto Italiano di Studi Strategici "Niccolò Machiavelli"* (2014): 18.

[185] Carlo Jean and Paolo Savona, cited in Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 363.

[186] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 366.

[187] Ibid., 361.

[188] Ibid., 362.

protection "is not protectionism, but rather the basis for open and effective competition, for the success of our country"[189].

1.3.3. Actors and reform proposals

The primary "economic intelligence" actors within Italy's agencies are the Departments and Central Offices of the DIS, the AISE and the AISI[190]. A 2013 report by the Italian Parliamentary Committee for the Security of the Republic (COPASIR) suggests that:

- the AISE should support Italian firms abroad, especially concerning safety of their installations, their investment strategies and prevention from threats of any type;
- the AISI should focus on counterespionage in favour of Italian firms and their technological and industrial assets, as well as on prevention of domestic tax frauds and money laundering;
- finally, a permanent structure for information exchange between the two Agencies and private firms should be established within the Department of Information Security (DIS)[191].

Moreover, the Central Office for Secrecy (UCSe) of the DIS is entrusted with the release of qualifications for industrial as well as personal safety. Intelligence officers also take part in meetings of the Inter-ministerial Coordination Group for the screening of foreign investments (the so-called "Golden power"). Finally, as already pointed out, the CISR (whose Secretary is the Head of the DIS) is responsible for defining the specific content of the (economic, scientific and industrial) interests referred to in Articles 6 and 7 of Law 124/2007. This results in clear directives, guiding intelligence activities in the economic field at both defensive and offensive level.

A description of what an intelligence structure devoted to "economic intelligence" could look like was provided by former Director of the Italian Military Intelligence and Security Service (SISMI), Nicolò Pollari (during a 2001 international seminar on "National security and the economy: goals of a modern intelligence service")[192]. It suggests that an optimal way to organize economic intelligence activities is to conceptualize three different layers:

- a central Direction (*DIREZIONE*), which should be responsible for planning information activities and disseminating the resulting analyses to decision-makers;
- Analysis Departments (*Uffici Analisi*), both internal and external, organized based on either themes or geographical areas; these departments should practice open-source as well secret information analysis;
- external "sensing cells" (*cellule "antenna"*), that is, operatives or human sources for information collection;
- finally, a Liaison Office (*Ufficio di Collegamento*) should be responsible for coordinating the three levels.

Concerning the inclusion of private firms into Italy's economic intelligence, a crucial distinction has to be made. On the one hand, there already exist channels of communication and information

[189] Ibid.

[190] Gabriele Mancini and Mario Caligiuri, "Covid-19, Golden Power e Fondo Sovrano: considerazioni e proposte per l'Intelligence Economica italiana," *Società Italiana di Intelligence* (2020): 16.

[191] Italian Parliamentary Committee for the Security of the Republic (COPASIR), cited in Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 370-371.

[192] Nicolò Pollari, "Ipotesi di lavoro per l'intelligence economica: strutture organizzative e moduli operativi," *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001).

exchange between intelligence agencies and the "corporate security" departments of large Italian firms (the so-called "national champions"). These internationalized enterprises are accustomed, as well as financially equipped, to interact with intelligence agencies, both national and foreign ones. Some suggest, however, that these contacts are excessively dependent on "episodic, almost personal"[193] relations, and thus should be more structurally or institutionally developed. Still, their existence is widely attested. On the other hand, the integration of small and medium-sized enterprises (SMEs), representing the core of Italian productivity, is far less advanced. In fact, these firms "operate nationally, are less familiar with intelligence concepts and more reluctant to share information"[194]. Importantly, the overall outcome of this state of affairs is that, "if economic intelligence should adapt and conform to the peculiarities of each country, exactly those peculiarities are what is being less protected in Italy"[195]. For a similar reason, the Department of Information Security has been recently promoting new initiatives aimed at encouraging technical and "cultural" cooperation between intelligence agencies and private enterprises. One such project is ASSET, a roadshow launched in 2019 in order to raise firms' awareness on issues of cyber- and economic security.

In conclusion, several proposals have been formulated so as to formalize a stronger and more transparent relationship between security services and private firms, including:

- the creation of an "Economic Intelligence Nucleus" at the Prime Minister's Office, with direct involvement of the Chambers of Commerce, Regions and Prefectures; moreover, establishing this specific institution would find normative support in the Italian Constitution[196];
- the establishment of an "Economic Intelligence Agency" inside the Department of Information Security (DIS), responsible for achieving the long-term objectives of a new "National Plan for Economic Security"[197];
- the implementation of a "Defence of Small and Medium Companies" project, based on OSINT (Open Source INTelligence) and AI (Artificial Intelligence) techniques[198];
- the reorganization of the Central Office for Secrecy (UCSe) as an institutional filter between intelligence agencies and private business.

1.4. The "geopolitics of protection" and the global rush to screening Foreign Direct Investment (FDI)

This Chapter has suggested that economic intelligence provides a key resource in geo-economic competition and is an "instrument for the acquisition and management of information in geo-economic conflicts"[199]. As a crucial aspect of this "economic intelligence" endeavour, a state's defence of essential economic interests is increasingly achieved through its so-called "special

[193] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 373.

[194] Francesco Farina, "Intelligence economica tra accademia e realtà," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 446.

[195] Ibid., 447.

[196] Laris Gaiser, "Intelligence economica: una proposta per l'Italia," *Sicurezza, Terrorismo e Società* n. 2 (2015): 72-85.

[197] Gabriele Mancini and Mario Caligiuri, "Covid-19, Golden Power e Fondo Sovrano: considerazioni e proposte per l'Intelligence Economica italiana," *Società Italiana di Intelligence* (2020): 12-17.

[198] Massimo Franchi, "L'intelligence economica ed il modello Defence of Small and Medium Companies: il ruolo degli incentivi nell'implementazione del modello," *Capitale Intellettuale* (December 2012): 33-35.

[199] Luca Arnaudo, "A l'economie comme a la guerre. Note su golden power, concorrenza e geo-economia," *Mercato Concorrenza Regole* n. 3 (December 2017): 447.

powers", known as the "Golden power" in Italy. That is, through norms regulating a state's right to impose conditions upon or block a Foreign Direct Investment (FDI), based on its potential impact on public interests. Alessandro Aresu has recently coined the expression "geopolitics of protection" to refer to "the instruments by which states (…) develop and favour mechanisms for the screening of investments"[200]. By developing these mechanisms, they come to define the terms of their (geo-economic) relationship to economic markets and also reveal the (geo-political) implications of their politico-legal instruments. According to Aresu, three macro-trends have increased the relevance of this "geopolitics of protection".

First, the ambiguous return of the State. In this sense, geo-economics is marked by a central "paradox": "states seek to attract foreign investments and promote their own competitiveness, but also want to regain room for control and decision-making"[201]. Thus, on the one hand, the death or upcoming irrelevance of the nation-state, as foretold by many in the 1990s, has not materialized. In fact, in the aftermath of the 2007-2008 global financial crisis, the state-market relationship has been partly rebalanced in favour of the former. On the other hand, this has generally produced forms of hybrid or mixed capitalism: sovereign funds, national promotional banks and other new actors are making the "return" of the state "not a one-way street, but an ambiguous trend, even in terms of rules"[202]. Overall, contemporary states take part in a sort of "permanent negotiation"[203] with other states as well as powerful economic entities, seeking to impose their own vision and priorities.

Secondly, the rise of China as a scientific-technological power and net exporter of capital. Since the early 1980s, China has been committed to "re-emerging" and closing the technological gap with the rest of the world. Investments in Research & Development (R&D) or in Artificial Intelligence (AI), as well as a new focus on "technological transfers and the relationship between research and the modernization of the defence industry"[204]. are contributing to China's scientific ascent. Moreover, after the global financial crisis of 2007-2008, China has "moved from being the main source of Foreign Direct Investment (FDI) to operating as a net capital exporter at global level"[205]. This transformation has been linked to a new activism by the Chinese Communist Party (CCP), responding to an intimately geopolitical project. Overall, Chinese investments can be rarely seen as "neutral" and often pursue, in addition to or rather than economic value, a political objective.

Thirdly, the evolution of the concept of "infrastructures" as a consequence of digital transformations. According to Aresu, "the increase in the geopolitical relevance of investments is strictly connected to the technological discontinuity which is affecting infrastructures"[206]. In a sense, this discontinuity has created a sort of global digital infrastructure, incorporating traditional industrial facilities, new critical assets and digital supply chains. Thus, Aresu's main argument is that "the Internet of things transforms certain previously non-existent infrastructures into "critical" ones and, by increasing the links between the civil and military sectors, it also extends the boundaries of so-called "national security""[207].

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[200] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 7.
[201] Ibid., 10-11.
[202] Ibid., 10.
[203] Ibid., 11.
[204] Ibid., 11-12.
[205] Ibid., 12.
[206] Ibid., 14.
[207] Ibid., 18.

In sum, these three macro-trends are contributing to an evolution of geo-economics, which increasingly "responds to geopolitical projects, and therefore sets up offensive and defensive strategies, which depend on a state's influence and on its ability to generate, disseminate and defend standards"[208]. Thus, in this new context of technological transformation and permanent negotiation, the political concept of "protection" has assumed increasing importance. It is a foundation of modern sovereignty, "contributing to establishing the boundaries of power"[209]. More than three centuries ago, Thomas Hobbes' Leviathan described the relationship between protection, legitimacy and sovereignty as an existential one: a state is in fact "sovereign" as long as it is able to protect its citizens, earning their support and legitimacy. As Aresu puts it, "a political form is such because it provides protection, and is a body because it singles out the parts to protect. The decision on what to protect is a crucial element of sovereignty"[210]. In modern times, according to Aresu's conceptualization, this notion of "protection" mainly refers to sovereign states' decision to protect certain sectors of the national economy from external threats, that is, sectors which they regard as particularly "strategic" for their development and legitimacy.

Indeed, most of the literature conceptualizes foreign investments in sensitive sectors of a country's economy and their effects on commercial or technological competitiveness as a significant threat. One author, for instance, treats "the ability of foreign multi-nationals or competitors to takeover firms, often in strategic sectors"[211] as one four types of "attacks on a country-system" (in addition to financial attacks, information warfare and attacks on critical infrastructures). More generally, one of the primary objectives of economic intelligence should be to limit "the penetration of foreign interests in vital or strategic national sectors, especially concerning mass acquisitions of shares by poorly identifiable subjects (…) or their direct entry into national markets for credit and commercial distribution"[212]. Moreover, foreign investments usually have an impact on all dimensions of international politico-economic relations, especially as conceptualized by Susan Strange: security, production, finance and knowledge[213]. Importantly, "the traditional parameters of investment policies are currently questioned"[214] as well: in addition to formal acquisitions or "controlling" investments, changes in firms' business orientation or minority investments can also impact a state's interests, insofar as they can lead to *de facto* control or anyway undesired influence.

In sum, legal mechanisms for screening Foreign Direct Investment, such as Italy's "Golden power", "are examples of a rush to legal weapons (…) in order to protect strategic economic interests, restricting the contendibility of firms"[215]. In the framework of theories about geo-economics, connectivity wars and legal conflicts, scholars are also conceptualizing new forms of "lawfare", involving "the strategic use of law as an offensive or defensive instrument"[216]. Overall, this rush towards national FDI screening systems is explained by two primary factors: "on the one hand, the

[208] Ibid., 19.
[209] Ibid., 20.
[210] Ibid., 22.
[211] Domenico Vecchiarino, "Intelligence Economica e Sistema Paese," *CESTUDEC* (Centro studi strategici Carlo de Cristoforis, 2017).
[212] Nicolò Pollari, "Ipotesi di lavoro per l'intelligence economica: strutture organizzative e moduli operativi," *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001).
[213] Luca Arnaudo, "A l'economie comme a la guerre. Note su golden power, concorrenza e geo-economia," *Mercato Concorrenza Regole* n. 3 (December 2017): 449.
[214] Stefania Bariatti, "Current trends in foreign direct investment: open issues on national screening systems," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 41.
[215] Luca Arnaudo, "A l'economie comme a la guerre. Note su golden power, concorrenza e geo-economia," *Mercato Concorrenza Regole* n. 3 (December 2017): 436.
[216] Ibid., 446.

weakening of traditional financial, industrial and social structures; on the other, China's increasingly ambitious economic and geo-political expansionist policy"[217], leading to a "weaponization" of investments. In fact, a first wave of regulatory measures in favour of "cross-sectoral notifications, reviews and screening mechanisms"[218] took place in the 1990s, in response to the activism of opaque sovereign wealth funds from oil-exporting countries. Then, in the early 21st century and especially in the aftermath of the global financial crisis (2007-2008), several countries either reinforced their foreign investment screening system or created one from scratch. According to a 2018 report by the Organization for Economic Co-operation and Development (OECD), countries with a defined policy for FDI screening account for "above 50% of the global inward FDI flows"[219].

National mechanisms for screening foreign direct investment usually share the following basic elements or procedures: governments, whether a Ministry or an inter-agency institution, are empowered by legislation to review foreign investments in national firms of specific sectors, for instance, in defence, energy, communications, healthcare, transports or critical technologies; foreign investors are usually required to notify governments of their investments *ex ante*; importantly, if an investment is found to threaten the state's public interests, a government can usually either impose certain conditions (which investors are bound to respect if they wish to complete the transaction) or prevent the investment from taking place by exercising its veto power.

While there remain cross-national differences in terms of regulatory development and financial means, the extensive reforms of FDI screening recently taking place in numerous countries also share several common features:

- the range of economic sectors on which foreign investment screening applies has been generally enlarged;
- the threshold over which notification of transactions becomes mandatory for foreign investors (whether a specific percentage or a simpler distinction between controlling and non-controlling investments) has been usually lowered;
- the time length of administrative procedures has been extended, giving governments more time to gather information and take a decision;
- finally, the list of strategic "public interests" justifying government interference with foreign direct investments has also been extended in several countries.

Moreover, most FDI screening mechanisms, whether formally or informally, envisage the participation of national intelligence agencies. In Italy's case, for instance, the 2012 Annual Report to Parliament by the Department of Information Security points out that: "the intelligence agencies' attention has been mainly directed at the nature of single investments, in order to appreciate whether they are motivated by merely speculative goals or rather by strategies aiming for theft of know-how or the technological emptying of firms, with depressive effects on the productive system and its employment levels"[220].

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[217] Giulio Napolitano, "Foreign direct investment screening: open questions and future challenges," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 9.

[218] Stefania Bariatti, "Current trends in foreign direct investment: open issues on national screening systems," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 39.

[219] Ibid., 50.

[220] Annual Report to Parliament by the Department of Information Security (2012), cited in Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 388.

In conclusion, investment decisions by foreign operators take place in an increasingly complex and often unpredictable legal or economic environment. The balance between the interests of states and those of potential foreign investors could be "in favour of the former, since there are no public international rules that impose upon any country the duty to allow investments into their territory"[221]. While there exist limits in international customary law on the "treatment" of foreign investments (post-admission), multilateral conventions and Bilateral Investment Treaties (BTIs) usually contain "security exceptions" to their free-market provisions.

However, a crucial point is that, even in the context of this new rush to screening FDI globally, foreign investment attraction remains a policy goal for all countries and a powerful driver of economic growth. Throughout the second half of the 20th century, most developed economies have promoted a favourable environment to FDI, for instance, through lower entry conditions, simplified administrative procedures or special economic zones[222]. Therefore, in today's "geopolitics of protection", foreign investment attraction and screening should be seen as concomitant, rather than conflicting, objectives. Finding a balance between the two is the true policy challenge of modern sovereign states.

[221] Stefania Bariatti, "Current trends in foreign direct investment: open issues on national screening systems," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 43.

[222] Christopher Mann, "The global rush toward foreign direct investment screening: lessons from the United States," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 16.

2. Italy's screening of foreign direct investment: the "Golden power"

"Now more than ever it can be perceived that the bearer of sovereignty is the State (rather than Europe or the global or technical supra-national context); in crisis situations this character does not retreat, but rather strengthens and defines itself. Sovereignty, in fact, "works" by displaying its natural external character, that is, by tracing and setting borders (intended as limits to its own direct responsibilities or – the debate on the "Golden power" is illuminating here – as barriers to foreign ambitions). Those borders, moreover, are not needed to "block" trends or reclaim nationalism, but to protect citizens and their lives" (Fabrizio Fracchia, March 2020)[223]

2.1. FDI screening in Italy: a regulatory overview

Political capitalism posits "judgement of the economy based on national security, and its conceptual and operative extension, by means of geo-legal instruments"[224]. In this context, as already suggested, "geo-legal instruments" mainly refer to a state's willingness or ability to screen Foreign Direct Investment (FDI).

The Italian government's current FDI screening mechanism or "special powers" are commonly known as the "Golden power". This is a legal instrument for the protection of Italy's economic, financial, industrial and scientific interests. It is a "broad and indeterminate power"[225], exercised in the form of veto or conditional consent to transactions/corporate resolutions/equity interest acquisitions concerning Italian firms performing "strategic activities" or holding "strategic assets" in specific sectors (such as defence, energy, transport, communications, 5G technology and others). Its only limit is a "finalistic" one: the Golden power must be viewed as having one "proper function, that is, to ensure that economic freedoms do not unfold in contrast with fundamental public interests"[226]. Thus, its employment in order to pursue industrial policy goals is not foreseen by the legislative discipline. Whether this actually takes place in practice, as will be emphasised, is a source of political and scientific debate.

FDI screening is especially important for Italy, which stands out as "deficient from the point of view of capital availability but rich in terms of technologies and quality brands, which (…) are highly attractive to competitive firms"[227]. By way of example, is has been observed that international geo-economic actors have an interest in specific sectors of the Italian economy[228]: Eastern European investors are particularly interested in gas and oil products distribution; Asian ones are keen on gaining influence on Italy's manufacturing sector as well on communications and logistics infrastructure; Chinese investors often pursue a double strategy, that is, "buying equity participations

[223] Fabrizio Fracchia, cited in Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 139-140.
[224] Alessandro Aresu, cited in ibid., 162.
[225] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.
[226] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 162-163.
[227] Adriano Soi, "Intelligence economica e interessi nazionali nella più recente esperienza italiana," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 546.
[228] Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 407.

at reduced prices and using Italy to disseminate the idea of "a digital society with Chinese characteristics""[229]; finally, Arab sovereign wealth funds seem to insist on the tourism and real estate sectors, they investors seek to gain control of networks and infrastructures.
Overall, a state's FDI screening mechanism can be viewed as one of the main expressions of its sovereignty and conception of power. Thus, the Golden power contributes to analysing "the ways in which Italy portraits itself and makes a "constant and profound evaluation" of its priorities"[230].

2.1.1. Italy's "Golden share" (1994-2012) and rulings by the European Court of Justice

A so-called "Golden share" was introduced in 1994 as a form of *ex ante* protection of public interests. Its primary aim was to compensate for the loss of state control in the context of new privatizations of public services. Indeed, while FDI screening in the US was originally conceptualized as a useful instrument in the search for a balance between market openness and national security, special powers in Europe initially responded to "the need for the state to maintain decision-making powers on certain economic aspects of national interest"[231]. Thus, by virtue of a clause inserted by law within the statute of certain public companies, the Italian state maintained powers of approval, veto and appointment after their privatization. This "Golden share" was originally a British legal instrument (firstly applied to the British Airport Authority in 1987), but also known for its French variant (*action spécifique*, as codified in 1986).
More specifically, Article 2 of Law Decree 332/1994 empowered the Italian government to select, through Presidential Decrees and from a list of firms which were (directly or indirectly) controlled by the state and active in defence, transport, communications, energy and other public services, those firms which it considered instrumental to its "economic and industrial policy goals". Article 2 allowed the government to insert a specific clause within the statute of these firms. This, notwithstanding their possible privatization, recognised the government a range of "special powers": (i) the power to approve of shareholding acquisitions; (ii) the power to approve of the conclusion of shareholders' agreements; (iii) the power to veto the adoption of certain corporate resolutions of particular relevance; (iv) the power to appoint an administrator or auditor[232]. In the 1990s, these provisions allowed the Italian government to remove companies such as Eni S.p.A, Telecom Italia S.p.a., Enel S.p.A. or Finmeccanica S.p.a. from the logic of the free-market and the rules of corporate law. The Golden share also "allowed the state to prevent unwelcome takeovers (for instance, by foreign operators), avoid the adoption of corporate resolutions which could jeopardise public interests and, more generally, exercise some control over company management"[233]. Differently from the British or French institute, however, Italy's Golden share was not linked to the state's conservation of (residual and symbolic) shareholding in the structure of privatized companies. In this sense, "the use of the [British] term "Golden share" could to some extent be regarded as inappropriate"[234].

[229] Alessandro Aresu, "Golden power e nuovo Iri. Come proteggere l'Italia," in *Il vincolo interno* (Limes, n. 4/2020): 301.
[230] Alessandro Aresu, "Golden power e interesse nazionale: tra geodiritto e geotecnologia," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 117.
[231] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 71.
[232] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 124.
[233] Ibid.
[234] Ibid., 125.

In the early 2000s, the European Court of Justice (ECJ) first claimed that the Italian Golden share discipline was contrary to European law. Judgement of the Court of 23 May 2000 (Commission of the European Communities vs Italian Republic)[235] and Judgement of the Court of 26 March 2009 (Commission of the European Communities vs Italian Republic)[236] expressed the Court's opinion that Italy's legislation violated the "freedom of establishment" and "free movement of capital" principles enshrined in European treaties. This was so due to the "indeterminacy of the premises for the exercise of special powers, the excessive discretion afforded to the Italian state and failure to respect the proportionality principle"[237]. In-between the Court's two sentences, the Italian government attempted, albeit unsuccessfully, to reform its discipline (mainly through amendments contained in Law 350/2003) in order to satisfy the ECJ's requests.

It must be emphasised that the ECJ issued very similar Judgements concerning the special powers regimes introduced by other EU Member States, with the sole exception of Belgium. This suggests two observations. First, the ECJ was not *a priori* averse to the adoption of Golden share instruments. However, as these restrict certain foundational freedoms of the European common market, the Court insisted that they must satisfy strict conditions, including "general interest" motivations, objectivity, publicity and stability of the relevant criteria and, finally, respect for the proportionality and non-discrimination principles. The Belgian Golden share achieved these conditions. Secondly, the ECJ and the European Commission also insisted on preventing any waiver to European freedoms (establishment and movement of capital) which was based on purely economic grounds. On the contrary, most European states were designing their special powers exactly in order to maintain control over industrial and economic interests. This was possibly a form of "economic patriotism"[238]. In fact, Italy's Golden share can be seen as part of a "wider set of provisions aimed at pursuing, more or less surreptitiously, industrial policy goals"[239]. This included, for instance:

- the so-called "poison pill", deterring hostile takeovers by making them more expensive (Law 266/2005);
- newly-created independent regulatory agencies, especially in the energy and communications sectors (Law 481/1995);
- the new role of *Cassa Depositi e Prestiti* (CDP), Italy's national promotional bank. Indeed, the *Cassa* was entitled to purchase shares in strategic Italian firms, on the condition that these presented adequate profitability prospects and could be seen as of national interest due to their: belonging to strategic sectors; employment levels; size of revenues; overall relevance for the productive system (Law Decree 34/2011). This reform transformed CDP into "a holding company buying shares for industrial policy purposes"[240].

In conclusion, Italy was encouraged by the ECJ to introduce clearer rules, allowing investors to judge *ex ante* the probability of a government intervention. Following the opening of a new infringement procedure (2009/2255), Italy eventually reformed its regulatory *corpus* on special powers.

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[235] Case C-58/99, "Privatisation of public undertakings – Grant of special powers".

[236] Case C-326/07, "Failure of a Member State to fulfil obligations – Articles 43 EC and 56 EC – Articles of association of privatised undertakings – Criteria for the exercise of certain special powers held by the State".

[237] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 125.

[238] Ibid., 125-126.

[239] Ibid., 126.

[240] Aurora Donato, "Il ruolo di holding di Cassa depositi e prestiti S.p.A.: profili giuridici attuali della gestione di partecipazioni come strumento di politica industriale," *Analisi Giuridica dell'Economia* n. 2 (December 2015): 380. doi: 10.1433/81852

2.1.2. From "share" to "power": Law Decree 21/2012, the "irresistible ascent" (2017-2019) and the EU Regulation

Table 1. Evolution of Italy's Golden power discipline (2012-2021)

Law Decrees	Content
Law Decree n. 21/2012	Institution of the "Golden power": "special powers" on corporate assets in the defence and national security sectors (Article 1) and for assets of strategic relevance in the energy, transport and communications sectors (Article 2)
Law Decree n. 148/2017	Extension of Italy's special powers, as they are applied for energy, transport and communications (Article 2 of Law Decree n. 21/2012), to "high-tech" sectors
Law Decree n. 22/2019 ("Brexit Decree")	Introduction into Law Decree n. 21/2012 of Article 1-bis, regulating the exercise of special powers for broadband electronic telecommunication networks based on 5G technology
(Law Decree n. 64/2019)[241]	(Amendments to Law Decree n. 21/2012)
Law Decree n. 105/2019	Extension of the operational scope of special powers, in coordination with EU Regulation 2019/452 "establishing a framework for the screening of foreign direct investments into the Union"
Law Decree n. 23/2020 ("Liquidity Decree")	Urgent norms on special powers (especially Articles 15, 16 and 17) – additional sectors, partial equalisation of EU-based and non-EU-based foreign investors, new thresholds for the obligation to notify, *ex officio* procedure, extension of powers attributed to the Italian Companies and Exchanges Commission (CONSOB)

(Source: Author's elaboration)

[241] Law Decree n. 64/2019 was not eventually converted into law.

The transition to a new "Golden power" was sanctioned by Law Decree 21/2012 (first applied in 2014). Italy's special powers are no longer linked to the previous or current (partial) public control of companies, but can be activated based on firms' belonging to specific, pre-determined sectors. Law Decree 21/2012 recognizes the Italian government the power to oppose the acquisition of shareholding by foreign parties, veto company resolutions and impose specific conditions and prescriptions: (i) concerning firms operating in the defence and national security sectors, "upon an effective threat to the serious detriment of the fundamental national defence and security interests" (Article 1); (ii) with regards to the "strategic assets" of firms operating in the energy, communications and transport sectors, in the event of "an exceptional situation of effective threat to the serious detriment of the public interests concerning the security and operation of the networks and systems, as well as the continuity of supply" (Article 2). Article 1 applies to any investment, both controlling and non-controlling (as defined by the Italian Civil Code), and extends to foreign buyers based in EU Member States and even to Italian ones, except for the Italian state, national public entities or state-controlled entities. Article 2 only applies to controlling investments and foreign buyers based outside the EU (i.e., a natural or legal person not having its legal or habitual residence, registered office, central administration or principal place of business in a member state of the EU or the European Economic Area, or not established therein[242]). Importantly, Law Decree 21/2012 delegated to secondary legislation the identification of both "strategic activities" in the defence and national security sector and "strategic assets" in the energy, communications and transport sectors.

Under the two articles, foreign investors are subject to an obligation to notify a relevant transaction. If the foreign investor is EU-based, this only applies to investments into an Italian firm of the defence and national security sector. This notification obligation, however, also applies to Italian firms adopting internal corporate resolutions resulting in: mergers, demergers, assets disposals, transfer abroad of the company's seat, amendments to the corporate purpose, winding-up, amendments to statutory provisions. More specifically, if the Italian firm holds a "strategic asset" in the energy, transport or communications sector, the obligation applies when its corporate resolutions could to modify the ownership, control and availability of these assets or change their intended purpose. In sum, while the Golden power discipline is concerned with both shareholding acquisitions by foreign entities, that is, a foreign direct investment, and internal corporate resolutions, this Chapter's focus will be on the former. Under Law 21/2012, the foreign investor's notification must be submitted within 10 days of the "signing" of the acquisition agreement: awaiting the government's decision, the agreement is suspended.

Once the notification is received, the Italian government must determine whether the foreign investment (or corporate resolution) constitutes "an effective threat to the serious detriment of the fundamental national defence and security interests" (Article 1) or, for the energy, transport and communications sectors, "an exceptional situation of effective threat to the serious detriment of the public interests concerning the security and operation of the networks and systems, as well as the continuity of supply" (Article 2). Crucially, these are the "public interests" which could be threatened by a foreign investment and are worthy of sovereign protection[243]. If the government views these

[242] DLA Piper, "Multi-jurisdiction guide for screening of foreign investments," August 2019: 58.

[243] More specifically, according to law firm DLA Piper, the Italian government assesses:

- "whether the economic, financial, technical and organizational capacity of the investor, as well as the proposed business plan, is likely to guarantee the regular prosecution of the company's activities, the security and continuity of supplies and the proper and timely execution of the existing contractual obligations;

interests as in fact potentially compromised by a foreign investment, it can exercise two types of powers:

- "prescriptive powers", which were unknown to the previous Golden share discipline: the government can impose specific conditions on a foreign investor, including, for instance, an obligation to maintain the acquired strategic assets on Italian soil or to restrict access to certain information or, finally, to seek governmental approval for pivotal figures of corporate organization;
- "oppositional powers": the government can veto a shareholding acquisition by a foreign investor, although these powers are to be exercised exceptionally, that is, when prescriptive ones are insufficient to guarantee public interests.

Moreover, if the notification concerns a corporate resolution of an Italian firm, the government's "pre-emptive powers" allow it to veto the adoption of this resolution or similar acts and operations of corporate assemblies and administrative organs. In any case, under Law Decree 21/2012, the government must take a decision within 15 days of the notification[244] (this time length can be prolonged if the government issues a request for additional information to either parties to the transaction or third parties).

Furthermore, Law 21/2012 "de-ministerialized" the exercise of Italy's special powers, transferring them from the Ministry of Economy and Finance to the Prime Minister. Indeed, the government's final decisions on foreign investments are formally taken by the Prime Minister, through a "Decree of the President of the Council of Ministers" (DPCM) and following deliberation of the Council of Ministers. Moreover, no public hearings are foreseen and a mechanism of "no objection" (*silenzio assenso*) is in place: if the government remains "silent" and does not take a decision within 15 days of the notification, the transaction is regarded as "authorized".

However, the eventuality that foreign investors or Italian firms do not fulfil their notification obligations, and thus a relevant foreign investment or corporate resolution is not screened by the government, is explicitly foreseen by Law Decree 21/2012. In these cases, sanctions can be imposed. On the one hand, if the failure to notify concerned a shareholding acquisition by a foreign investor, its voting rights are suspended, and corporate resolutions adopted in the meanwhile are considered void. Moreover, the government can decide to veto the acquisition *a posteriori*. In this case, the foreign investor is obliged to re-sell its shares within 1 year. On the other hand, if the failure to notify concerned an internal corporate act or operation, these are considered void and the firm can be ordered by the government to restore the *status quo*. Finally, in both cases (shareholding acquisition by a foreign investor and internal corporate act), the government can impose, respectively on the foreign entity and the Italian firm, "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"[245]. According

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- whether the future corporate structure is likely to ensure: (i) the safeguarding of the national defence and security system; (ii) the security of information relating to military defence; (iii) the international interests of the state; (iv) the protection of the national territory, of critical strategic infrastructures and the national borders; (v) the safeguarding and operation of networks and facilities;
- the existence of potential links between the investor and third countries that do not recognize democracy and the rule of law, do not observe international law or have adopted dangerous behaviors towards the international community, maintain relationships with criminal or terrorist organizations".

See DLA Piper, "Multi-jurisdiction guide for screening of foreign investments," August 2019: 63.

[244] Extended to 45 days in 2019.

[245] White & Case LLP, "Italian Golden Power Law: 5 Years Old and Beginning to Speak," *Publications* (1 February 2018): 2.

to Law Decree 21/2012, this provision is only valid for breaches of the obligation to notify in relation to the energy, transport and communications sectors. However, when the Italian government imposes monetary sanctions in response to a failure to notify, foreign or Italian firms can challenge this decisions before the Regional Administrative Court (*Tribunale Amministrativo Regionale* or TAR) of Lazio. The administrative judicial review of Golden power decisions is placed in the realm of Italian "exclusive jurisdiction" (*giurisdizione esclusiva*). Thus, the Regional Administrative Court of Lazio is entitled to obtain information concerning "the sanctioning process in its entirety, articulated in the inspection of facts, their systemization into a violation hypothesis (…), as well as the formal administrative stages of the evaluation"[246].

Overall, in compliance with the ECJ's observations, Law Decree 21/2012:

- reduced indeterminacy in the grounds for the exercise of special powers, identifying the public interests which must be threatened by a foreign investment;
- introduced gradualism and proportionality, by differentiating between conditions or prescriptions and vetoes;
- finally, partially limited government discretion by allowing for administrative judicial review.

At the same time, the Law Decree also produced a "paradoxical effect, that is, a sensible extension of the subjective sphere of state intervention, in addition to possible application uncertainties resulting from the removal of those "indisputable formal indicators" represented by the statutory clauses regulating special powers"[247]. In fact, some have suggested that Italy's special powers, even after the Golden power's introduction in 2012, can be easily bent to goals of industrial policy. This, however, is exactly the central element which Italy had been required by European institutions to eliminate.

In conclusion, Law Decree 21/2012 was followed by two secondary decrees. These specified, respectively, the nature of the "assets of strategic relevance" in the energy, transport and communications sectors (Decree of the President of the Republic 85/2014)[248] and the nature of the "activities of strategic relevance" for the defence and national security system (Decree of the President of the Council of Ministers 108/2014)[249]. Again, if a transaction between an Italian firm

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[246] Alessandro Triscornia, "Golden power: un difficile connubio tra alta amministrazione e diritto societario," *Rivista delle società* (2019): 790.

[247] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 127.

[248] Decree of the President of the Republic 85/2014 identifies the following "assets of strategic relevance":
- for the energy sector, the energy networks of national interest and the related conventional assets, including: a) the national network for the transport of natural gas and the related compression stations and dispatching centres, as well as gas storage facilities; b) infrastructures for the supply of natural gas and electricity, including onshore and offshore LNG re-gasification plants; c) the national network for the transport of electricity and the related control and dispatching plants; d) management activities related to the use of the networks and infrastructures referred to in letters a), b) and c);
- for the transport sector, the main networks and facilities of national interest (also guaranteeing the main trans-European connections) and the related conventional assets, including: a) ports of national interest; b) airports of national interests; c) the national railway network of relevance to trans-European networks;
- finally, for the communications sector, the dedicated networks (including those for voice, data and video connectivity, security, control and management relating to networks for access to communications at a fixed location), the telecoms network publicly accessible to end-users in connection with metropolitan networks, service routers and long-distance networks, telecoms facilities used to provide access to end-users to services covered by universal service obligations and to broadband and ultra-broadband services, as well as the related conventional assets.

[249] Decree of the President of the Council of Ministers 108/2014 identifies the "activities of strategic relevance" for the defence and national security system with the study, research, design, development, production, integration and life cycle support, including the related supply chains, of several systems or materials, of competence of the Ministry of Defence, the Ministry of the Interior or both. These systems and materials include, for instance, systems for Command, Control, Computers and Information (C4I) and advanced weapons systems integrated in C4I networks (Article 1, competence of the Ministry of Defence); systems and sensors for observation (both optical and radar), surveillance and control of

and a foreign party[250] or an internal corporate act of an Italian firm involves these strategic assets or activities (*see the footnotes*), a notification obligation is contracted. The government is then responsible for ascertaining whether Italy's public interests are in fact threatened and, if so, which powers (prescriptive, pre-emptive or opposing) are the most suitable to the circumstances. Overall, as two years were needed to adopt secondary legislation and initiate the application of the new instrument (2014), in some sense the Golden power "kicked off quietly"[251].

Following its establishment in 2012, the Golden power's scope was gradually enlarged on multiple occasions, starting from 2017. In the meanwhile, from 2012 to 2017, it was exercised by the Italian government mostly in relation to:

- changes in corporate governance or internal policies likely to threaten public interests;
- (partial or total) transfer of headquarters and/or manufacturing activities outside Italian territory;
- transfers of know-how outside the national borders and for the benefit of a foreign purchaser, especially concerning energy, transport and communications infrastructures[252].

In 2017 Law Decree 148/2017 sanctioned the extension of Italy's Golden power, as exercised in the energy, transport and communications sectors under Law 21/2012, to "high-tech sectors". These included mainly "critical infrastructures" (data storage and management or financial infrastructures) and "critical technologies" (Artificial Intelligence, robotics, semiconductors, technologies with potential dual-use applications, network security, space and nuclear technology), in addition to the security of critical inputs supply and the access to or ability to control sensitive information. The Law Decree also delegated the identification of "strategic assets" in the high-tech sectors to secondary legislation. However, this was not subsequently adopted.

In addition, Law Decree 148/2017 amended the sanctions regime of the Golden power discipline. In the event of a failure to notify, the Italian government is allowed to inflict "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"[253] also for firms of the defence and national security sector.

Finally, it has been suggested that Law Decree 148/2017 was partly inspired by the TIM-Vivendi case, concerning a French investor's takeover of Italy's telecommunications giant. This politico-economic affair enjoyed significant media coverage and brought the Golden power, previously unknown to the general public, to the centre of national attention. To some extent, this was paradoxical, as "the discipline enjoyed sudden fame (…) in relation to a French, therefore European, investment in what should be the internal free market of electronic communications"[254].

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territory, to be used for the protection of public order, security, public rescue and civil defence (Article 2, competence of the Ministry of the Interior); CBRN (Chemical, Biological, Radiological, Nuclear) protection and detection systems (Article 3, competence of both the Ministry of Defence and the Ministry of the Interior).

[250] At the time, this referred to non-EU-based investors only for the energy, transport and communications sectors.

[251] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

[252] White & Case LLP, "Italian Golden Power Law: 5 Years Old and Beginning to Speak," *Publications* (1 February 2018): 2.

[253] White & Case LLP, "Italian Golden Power Law: 5 Years Old and Beginning to Speak," *Publications* (1 February 2018): 2.

[254] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

About 2 years later, Regulation (EU) 2019/452 of the European Parliament and of the Council "establishing a framework for the screening of foreign direct investments into the Union" was approved (March 2019). It entered into force in October 2020. Like all European Regulations, it is entirely binding and directly applicable in all Member States. Moreover, the original request for European institutions to set up a common screening framework had come from France, Germany (following the acquisition of German robotics company Kuka by the Chinese Midea) and Italy itself[255] in 2017. Generally speaking, the EU Regulation calls for new forms of control of non-EU investments at EU level, on grounds of "security or public order" (Article 3) and concerning a wide range of economic sectors (Article 4). Accordingly, this is achieved based on a new cooperation mechanism between the Member States and the European Commission. Overall, the Regulation does not institute a "European Golden power" or oblige Member States to create FDI screening mechanisms. The authority on final decisions on screening foreign investments rests with the Member States as a significant prerogative of their sovereignty.

However, the Regulation marks a breakthrough in the European institutions' approach to FDI screening, especially if compared to ECJ's judgements in the 1990s and early 2000s. Indeed, it has been suggested that "fears linked to the acquisition of strategic assets by foreign investors and, especially, by sovereign funds or companies directly or indirectly controlled by third states, and thus not perpetually moved by a purely economic logic, have led European institutions, also as a result of pressure by some of its Member States, to review their well-established approach of a basically unconditional opening to foreign investments"[256]. Thus, changing trends in investment and geopolitical dynamics, in addition to technological disruption, an increasingly blurred line between military and civil, and the global rush to screening investments, help account for the new EU initiative[257]. Importantly, the Regulation also presents the first ever formal definition of what "screening" actually implies, that is, "any procedure to assess, investigate, authorize, condition, prohibit or even unwind foreign direct investment"[258].

The following are the Regulation's most important articles and core elements:

- Article 2 points out that the Regulation concerns foreign investments coming from outside the European Union and is not applicable to portfolio investments. In other words, it applies to investments "aiming to establish or to maintain lasting and direct links between the foreign [non-EU] investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity";
- Article 3 describes the minimum requirements for Member States to meet in the exercise or establishment of their screening mechanisms. Thus, "the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules" must be specified in clear terms. The Article's first paragraph also points out that the screening should be conducted "on grounds of security or public order";
- Article 4 lists "factors that may be taken into consideration" during the screening of a foreign investment, in terms of both economic sectors and evaluation criteria. Concerning economic sectors,

[255] Marcella Panucci, "Golden power. Cornice europea e nuovi paradigmi di concorrenza," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 127.
[256] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 130.
[257] Carlo Pettinato, "The new EU regulation on foreign direct investment screening: rationale and main elements," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 57-58.
[258] Ibid., 59.

Member States and the European Commission are encouraged to review the potential (security and public order) effects on the following sectors or assets:

- *(a)* critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- *(b)* critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- *(c)* supply of critical inputs, including energy or raw materials, as well as food security;
- *(d)* access to sensitive information, including personal data, or the ability to control such information;
- *(e)* the freedom and pluralism of the media.

Concerning the criteria to refer to when determining if a foreign investment affects public order or security, Member States and the Commission should consider:

- *a)* whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;
- *b)* whether a foreign investor has already been involved in activities affecting security or public order in a Member State;
- *c)* whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

- finally, Article 6 to 16 describe the nature of the new cooperation mechanism between Member States, and between them and the European Commission. Accordingly, every Member State is required to notify the other Member States as well as the Commission (specifically, its Special Unit of the Directorate General Trade-Investment) of any foreign direct investment in its territory that is undergoing scrutiny (Article 6). This notification should include information on the ownership structure of the foreign investor (including information on the ultimate investor and capital participation), the approximate value of the investment, and its funding and source (Article 9). In response to this notification, the other Member States can provide "comments" if they consider that the foreign investment could affect their own security and public order (or, in addition, if they have relevant information in relation to that investment). The European Commission, on the other hand, where it considers that the foreign investment is likely to affect security or public order in more than one Member State (or, again, if it has relevant information in relation to it), can issue an "opinion", specifically addressed to the state reviewing the given investment. According to Article 8, the Commission can also issue an opinion if it considers that a foreign investment in one Member State is likely to affect projects or programmes of Union interest (implying a significant share of Union funding or regarding critical infrastructures, technologies and inputs) on grounds of security and public order. Importantly, opinions issued by the Commission are not binding: the Commission is not attributed any direct control power by the Regulation[259]. However, Member States must "take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is

[259] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 133.

not followed" (Article 8). Thus, according to some commentators, these formally nonbinding opinions are certainly not "soft law"[260]. Moreover, Article 11 mandates the establishment of "contact points" at both Member State and Commission level for implementing the Regulation. Finally, Article 5 requires Member States to submit an annual report (by March 31) on foreign investments taking place in their territory and the application of their screening mechanism; the Commission is also required to present an annual report to the Parliament and to the Council on the implementation of the Regulation.

Overall, the cooperation mechanism established by the EU Regulation forms the "heart of the discipline"[261]. On the one hand, it addresses several interdependence problems proper to the European common market, as a foreign investment is generally likely to have cross-country effects, encouraging circumvention practices. On the other, the cooperation mechanism is instrumental in "reducing the risk that geopolitical decisions are taken in isolation"[262] by individual Member States. However, according to some observers, the Regulation is marked by at least one serious weakness: some Member States do not have a national screening mechanism and the Regulation does not oblige them to establish one[263]. As a consequence, European cooperation on FDI screening is destined to be limited and only partially effective.

In fact, the debate on the Regulation remains lively, as it can be interpreted in several, often opposing ways: at the most general level, "on the one hand, it can be regarded as a simple correction to a wider programme which remains firmly anchored to liberalization and integration of markets; on the other, it can be viewed as one of the first, most organic attempts to assert a new European sovereignty in the global economic arena, to be articulated in a potentially protectionist sense"[264]. Concerning this "second" interpretation, for instance, some authors have suggested that "the Union has substantially realized a common protection umbrella, anticipating some sort of European sovereignty in relation to FDI"[265]. As such, the EU could be recovering an eminently political role in the wider context of increased regional protection. This conceptualization is probably not far from Emmanuel Macron's *Europe qui protége*[266].

However, the general consensus seems to be that "the fundamental principles which have informed investment screening, as they have been engraved by the Court of Justice's jurisprudence during its protracted dispute with Member States over national Golden shares, have not been subverted"[267]. Even if no longer "unconditionally"[268], the EU legal framework remains fundamentally open to foreign investments. Indeed, the screening established by the Regulation "remains finalistically

[260] Giovanni Pitruzzella, "Foreign direct investment screening in the EU," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 66.

[261] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 133.

[262] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 551.

[263] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 133.

[264] Giulio Napolitano, cited in Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 145.

[265] Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 414.

[266] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 23-26.

[267] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 144.

[268] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 5.

bound to the protection of public interests which have an essentially extra-economic nature"[269]. The main goal of the Regulation might have been to increase legal certainty over foreign investment screening in the common European space, especially in view of the "excessively decentralized and fragmented nature of national control mechanisms, marked by gaps and asymmetries in their design and practice"[270]. In fact, by increasing legal certainty, procedural transparency and judicial review of screening decisions, the Regulation may be "a prerequisite for defending the EU's current openness against a protectionist backlash and an increasing politicization of individual FDI transactions"[271].
However, in terms of impact on national screening instruments, the general effect of the Regulation "will be probably a race to the top, as legislators will be led to extend the sectors and investments under screening and to take into account criteria (such as other governments' involvement in foreign investments) which had been previously ignored at national level"[272]. This extension of sectors and investments, in turn, could be balanced by a partial reduction in states' discretion due to the cooperation mechanism. Overall, the EU could be viewed as floating "halfway between Member States' interest not to surrender "additional" national sovereignty, protection of its freedom of movement and establishment, and the need to assert itself on the international stage"[273]. Interestingly, Italy has recently expressed doubts on the Regulation, suggesting that it may endanger national sovereignty by forcing the sharing of confidential information[274].

After the extension of the Golden power "shield" to "high-tech sectors" in 2017 (but lacking secondary legislation) and the EU Regulation of March 2019, Law Decree 22/2019, known as the "Brexit Decree", enlarged the scope of Italy's Golden power to "broadband electronic telecommunication networks based on 5G technology". In the context of increasing technological competition between the US and China, this extension was inspired by "fears for national security linked to the use of technologies provided by non-European operators for the realization of new 5G infrastructures"[275].
Law Decree 22/2019 directly amended Law Decree 21/2012 by adding Article 1-bis. Accordingly, a company stipulating contracts or agreements for the acquisition of goods and services relating to the design, construction, maintenance and management of networks for broadband electronic telecommunication services based on 5G technology, or acquiring high-tech components functional to the realization or management of these networks, must submit a notification if these contracts are agreed with non-EU subjects[276]. By adding Article 1-bis, the Italian legislator included 5G technology networks into the defence and national security sector, rather than the communications one (Article

[269] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 134.
[270] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 551.
[271] Giovanni Pitruzzella, "Foreign direct investment screening in the EU," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 69.
[272] Giulio Napolitano, cited in Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 132.
[273] Paolo Messa, "Oltre il golden power. Il modello americano e il dibattito in Europa," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 147-148.
[274] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 101.
[275] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 135.
[276] See: https://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-att-goldenpower/9296 (website of the Italian Government)

2). The outcome of this choice has been to make the premises for a Golden power exercise less restrictive, that is, dependent on the existence of "*an effective threat to the serious detriment* of the fundamental national defence and security interests" (Article 1) rather than an "*exceptional situation of effective threat to the serious detriment* of the public interests concerning the security and operation of the networks and systems, as well as the continuity of supply" (Article 2)[277]. Moreover, the inclusion of 5G technology networks as part of the scope of Italy's Golden power is not perfectly logical from a formal standpoint: while the Golden power has traditionally allowed the Italian government to block or condition *foreign acquisitions* of Italian assets, it serves the (opposite) purpose of blocking or conditioning *Italian acquisitions* of foreign goods or services in the 5G sector. Importantly, the Golden power's extension sanctioned by the "Brexit Decree" is also particularly innovative: while "there had always been a very close connection between public interests and the "fate" of companies, these new special powers [applied to 5G technology networks] find their legitimation in a type of interest that is unrelated, so to speak, to the company *per se*, which turns into a mere instrument for its protection"[278].

Less than two months after the conversion into law of the "Brexit Decree", Law Decree 64/2019 was approved but eventually not converted into legislation, due to both "a willingness to move forward with the introduction of a more organic draft law on national cyber security"[279] and a government crisis in August 2019. However, its content was almost identically reproduced by Law Decree 105/2019, which established Italy's "perimeter of cyber national security" (*perimetro di sicurezza nazionale cibernetica*). Indeed, this Law Decree: identified the public as well as private subjects which fall within the scope of this "perimeter" and must respect its legislative provisions; points out the procedures they must follow in the event of a cyber incident; specifies the security measures which these subjects must take as a consequence of their "membership" into the perimeter; regulates their procurement of ICT goods, systems and services; sets out the procedures which either the Presidency of the Council or the Ministry of Economic Development may follow in order to ascertain violations and inflict sanctions. However, Law Decree 105/2019 also contains provisions which are extremely relevant to the Golden power discipline. In fact, it regulates the relationship between cyber national security and the "Brexit Decree" on 5G technology networks.
More specifically, Article 3 points out that all obligations imposed by the Law Decree, except for those concerning procurement of ICT goods, systems and services, apply to subjects of the "cyber national security perimeter" notwithstanding other obligations they could contract under the Golden power discipline. This suggests that procurement activities are regulated by the Golden power discipline "in any case". However, Article 3 also points out that Italy's special powers on 5G technology networks, if the transaction involves a subject of the "cyber national security perimeter", will be exercised by the perimeter's "evaluation centres". These are the National Certification and Evaluation Centre (CVNC) of the Ministry of Economic Development and the Defence Evaluation Centre (Ce.Va. Difesa) of the Ministry of Defence. Finally, Article 3 also stipulates that "evaluation centres" can modify or integrate conditions or prescriptions imposed on a contract through the Golden power discipline within 60 days of the given decision; that is, they are allowed to "intervene on

[277] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 136.
[278] Ibid., 137.
[279] Ibid., 139.

already authorized operations and even impose the replacement of relevant devices or products "if necessary to deal with the ascertained vulnerabilities""[280].

Most importantly, Article 4-bis reproduces the content of Law Decree 64/2019, reinforcing Italy's special powers, and partially incorporates the EU Regulation. First of all, Article 4-bis extends the (maximum) length of the Golden power's administrative procedure from 15 to 45 days. This triples the amount of time available to Italy's government for information collection and decision-making on foreign investments. Moreover, if the European Commission or EU Member States provide their opinions or comments on a foreign investment, this time length *can* be further extended. Secondly, under Article 4-bis, Italy's "contact point" as envisaged by the EU Regulation has been set up within the Presidency of the Council. Thirdly, Article 4-bis reproduces the section of the EU Regulation concerning the criteria to refer to when determining if a foreign investment affects public order or security; thus, Italy's government also considers:

- *a)* whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;
- *b)* whether a foreign investor has already been involved in activities affecting security or public order in a Member State.

Fourthly, Article 4-bis delegates to Presidential Decrees the identification of new "strategic goods and assets" in the economic sectors listed by Article 4 of the EU Regulation. In other words, Italy "took advantage of the possibility, afforded by the new European discipline, to extend the scope of application of its special powers"[281]. However, Article 4-bis also establishes a "transitory discipline": pending the Presidential Decrees specifying "strategic goods and assets", foreign investors are required to notify any acquisition giving them control over firms owning the following assets or goods referred to in the EU Regulation:

- *(a)* critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- *(b)* critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies.

Finally, Article 4-bis of Law Decree 105/2019 also addresses Italy's special powers on 5G technology networks. Indeed, it contributes to "autonomously regulating procedural aspects, making the discipline [on 5G technology networks] in fact self-sufficient"[282]. Accordingly, relevant transactions must be notified within 10 days of the agreement, while Golden power decisions must be taken within 30 days of the notification. Moreover, proportionality is improved, by pointing out that a veto is allowed only insofar as the imposition of conditions or prescriptions is insufficient to protect public interests.

[280] Ibid., 142.
[281] Ibid., 143.
[282] Ibid., 144.

Overall, the regulatory evolution of the Golden power discipline from 2017 to 2019 was described as an "irresistible ascent"[283]. It is generally seen as the outcome of two factors: "on the one hand, the rapid technological transformation and the related emergence of new types of threats, on the other, the perceived need to protect more effectively certain strategic assets from hostile investments which might undermine essential public interests"[284]. Moreover, according to some scholars, through Law Decree 21/2012 the Italian state had assumed the role of a "regulator", dismissing its previous one as "entrepreneur". Others oppose this view, claiming that evaluations of a political and highly administrative nature, which can be solely issued by executive power, have not been eliminated[285]. If previously an "entrepreneur" and then a "regulator" of foreign investments, however, the Golden power's evolution since 2017 has given the Italian state the new role of a "strategist"[286] or "customs officer"[287]. In this sense, Italy's authorities should have "the ability to conduct a strategic analysis of geo-economic and geo-political affairs, based on complex technical tests and evaluations"[288].

2.1.3. The "Liquidity Decree" (2020): a new Golden power for the pandemic era

The economic crisis caused by the COVID-19 pandemic has produced the deepest recession since the Great Depression[289]. In Italy specifically, the prolonged interruption of industrial activities has resulted in a collapse of domestic as well as foreign demand, a further loss in productivity and greater risks for socio-economic stability. Thus, the "Great Lockdown"[290] has generated an "inevitable competitive weakening of all economic activities"[291] on national territory. Importantly, this devaluation of Italian industrial assets has increased their vulnerability to foreign interests. Other countries have been incentivized to take advantage of low market values through their multinationals, in order to enhance their position in global industries. Overall, Italy's ""pocket-sized" multinationals, that is, firms that are unknown to most but represent Italian entrepreneurship in the fields of artificial intelligence, robotics, packaging, machine tools, defence and biotechnology"[292] have been particularly exposed to foreign penetration. This exposure, moreover, is likely not to be extinguished by a return to post-pandemic economic life. In fact, it is reasonable to foresee a future context of permanent instability in which foreign activities threaten the Italian economy "at a distance from the emergency's clamour, but now laying the basis for future interventions"[293].
For similar reasons, a few weeks after the outburst of the COVID-19 pandemic and in the context of extreme financial volatility, Italy's Parliamentary Committee for the Security of the Republic

[283] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.
[284] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 146.
[285] Alessandro Triscornia, cited in ibid., 146.
[286] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 9.
[287] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.
[288] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 9.
[289] Mario Caligiuri (edited by), "Post Covid-19. Analisi di intelligence e proposte di policy 2020-2021," *Società Italiana di Intelligence* (2020): 18.
[290] Definition by the International Monetary Fund (IMF), cited in ibid.
[291] Ibid., 25.
[292] Ibid.
[293] Ibid., 42.

(COPASIR) urged the Italian government to "identify and implement the best possible resources and responses (…) to defend Italy's national interests relating to the financial and industrial firms that are strategic to the country"[294] (March 25, 2020). On the same day, a Communication by the European Commission called on Member States to:

- "make full use already now of its FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs and other critical sectors as envisaged in the EU legal framework;
- for those Member States that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to set up a full-fledged screening mechanism and in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs"[295].

Thus, the Commission called for both the adoption of new FDI screening instruments and the consolidation of existing ones by EU Member States. Moreover, in March 2020 the EU Regulation on screening foreign investments had not yet entered into force. In fact, the Commission's Communication seemed to "aim to accelerate, also considering the ongoing emergency, the realization of the common framework for the screening of investments set up by the Regulation, in order to provide adequate and immediate protection to fundamental interests"[296]. The Commission also pointed out additional overriding reasons of general interest which, in addition to public order and security, could be invoked by Member States during their screening of foreign investments. These "should not be *purely* economic"[297], but can include public health, threats to financial stability and "protecting consumers, preserving the financial equilibrium of the social security system, achieving social policy objectives which could possibly be relevant in emergency situations"[298]. Thus, the Commission seemed to be "encouraging Member States to take full advantage of every instrument made available by the European legal system"[299]. This change in approach by EU institutions cannot be separated from the impact of the COVID-19 pandemic. Moreover, it could correspond to a new vision "characterized by awareness that, due to the changing geo-political and geo-economic scenario and the proliferation of threats relating to foreign capital flows (…), a greater attention should be devoted to protection of essential public interests and every possible defensive instrument must be set up"[300].

Law Decree 23/2020, also known as the "Liquidity Decree", was approved on April 8, 2020. Its comprehensive reform of Italy's Golden power was partly a reaction to the simultaneous suggestions

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[294] See: https://formiche.net/2020/03/golden-power-cloud-autorita-delegata-copasir/.

[295] C/2020/1981, Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) 2020/C 99 I/01. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020XC0326%2803%29

[296] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 142.

[297] C/2020/1981, Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) 2020/C 99 I/01. Emphasis added.

[298] Ibid.

[299] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 143.

[300] Ibid., 144-145.

of the COPASIR and the European Commission. Importantly, its Articles 15, 16 and 17 "affect each of the pillars on which the Golden power discipline is based"[301]. Importantly, some provisions of Law Decree 23/2020 have an explicitly temporary nature, as they are linked to the ongoing pandemic emergency.

First of all, Article 15 extends the scope of subjective application of the Golden power. Indeed, it amends Article 4-bis of Law Decree 105/2019. This had established a "transitory discipline", whereby foreign investors were required to notify any acquisition giving them control over Italian firms managing assets and goods corresponding to letters *a)* and *b)* of the EU Regulation (Article 4, paragraph 1). Thus, Article 15 extends this "transitory discipline" to acquisitions of Italian firms managing assets and goods corresponding to letters *c), d)* and *e)* of the EU Regulation. Overall, all sectors referred to in the Regulation are now included:

- *(a)* critical infrastructure, whether physical or virtual, including energy, transport, water, health (comprising, in accordance to Law 23/2020, production, import and wholesale distribution of medical, surgical and individual protection devices), communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure (comprising, in accordance to Law 23/2020, the credit and insurance sectors), and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
- *(b)* critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
- *(c)* supply of critical inputs, including energy or raw materials, as well as food security;
- *(d)* access to sensitive information, including personal data, or the ability to control such information;
- *(e)* the freedom and pluralism of the media.

Article 15 contains two additional provisions, initially with default validity set for December 31, 2020. However, this validity was extended a first time to June 30, 2021 by Law Decree 137/2020 (approved on October 28, 2020, and known as "Decreto Ristori") and a second time to December 31, 2021 by Law Decree 56/2021 (approved on April 30, 2021, and known as "Decreto Proroghe"). According to a first provision, resolutions, acts or operations by firms owning assets or goods in sectors referred to in the European Regulation, provided they affect the ownership, control or availability of said assets or change their destination, will have to be notified based on the regime applicable to the energy, transport and communications sectors (Article 2 of Law Decree 21/2012). Secondly, until December 31, 2021, transactions falling under Article 2 of Law Decree 21/2012, therefore concerning energy, transport, communications, and other sectors listed by Article 4 of the European Regulation, will have to be notified even if the investor is based in an EU Member State. In other words, the screening regime applying to the defence and national security sector has been extended to all other sectors in the discipline. This extension has been "justified based on its limited application in time and its close correlation to the current emergency phase, and thus, in short, its exceptional character"[302]. However, some suggest that "the current circumstances do not allow us to exclude a further extension in time" of these provisions, possibly compromising their "compatibility

[301] Chiomenti, "Il rafforzamento del Golden Power nell'emergenza sanitaria ed economica: guida alle modifiche normative" (April 2020): 3.

[302] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 154.

with the EU legal system"[303]. Moreover, this equalisation of EU-based and non-EU-based investors implies that, when reviewing foreign investments by the former, the Italian government can also take account of their (direct or indirect) "public control". It will also ascertain "the adequacy of the person who purchases control to guarantee the supply of goods/services offered by the target"[304].

Finally, Article 15 has introduced significant changes for non-EU investors as well. Indeed, an additional temporary provision has lowered the threshold above which non-EU buyers contract a notification obligation. In other words, until December 31, 2021, non-EU investors are required to notify investments which "attribute a share of voting rights or capital equal to at least 10%" and whose total value "is equal to or greater than 1 million euros"[305]. Over and above the 10% threshold, these investors are subject to successive notification obligations upon reaching 15%, 20%, 25% and 50% of voting rights or capital. Importantly, this provision aims to encourage a more extensive monitoring over small and medium-sized enterprises (SMEs) as well enterprises with broad-based shareholding. In sum, the traditional distinction between intra-EU and extra-EU investors has been eliminated by the Liquidity Decree only partially.

Secondly, Article 16 allows the Italian government to initiate a Golden power procedure *ex officio*, in the ascertained event of a failure to notify. Before this provision was introduced, if an economic operator failed to notify its transaction or resolution, the resulting acts would be considered void and administrative sanctions could be imposed. In general terms, the new *ex officio* procedure has a "remedial function"[306], that is, is not properly an "alternative" to the ordinary one, as the existence of a (failed) obligation to notify must be ascertained. Importantly, the possibility for *ex officio* exercise of the Golden power implies "the establishment of economic intelligence mechanisms, in light of those already present in other countries"[307]. Finally, Article 16 authorizes the Inter-ministerial Coordination Group for the exercise of the Golden power to "request public administrations, public or private entities, companies or other third parties to provide information and exhibit documents"[308]. In order to promote a more informed evaluation of individual cases, the Presidency of the Council can also initiate protocols or conventions with research institutes[309].

Thirdly, Article 17 does not directly address the Golden power discipline, but is relevant for the "strict correlation"[310] between Italy's foreign investment screening and the transparency requirements for shareholding acquisitions contained in Article 120 of the Consolidated Law on Finance. Indeed, Article 17 amends these requirements by introducing two significant changes. On the one hand, it entitles the Italian Companies and Exchange Commission (CONSOB) to require investors, based on the need for investor protection as well as for efficiency and transparency of corporate control and capital markets, to communicate their participations in firms with broad-based shareholding below the ordinary thresholds of 3% and 5%. On the other hand, the CONSOB is also entitled to require

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[303] Ibid., 155.

[304] Luciano Vasques, "Golden Power. Alcune note a margine della disciplina emergenziale del controllo governativo sulle acquisizioni in Italia," *Mercato Concorrenza Regole* (Fascicolo 1, Il Mulino – Rivistaweb, April 2020): 126.

[305] Chiomenti, "Il rafforzamento del Golden Power nell'emergenza sanitaria ed economica: guida alle modifiche normative" (April 2020): 5.

[306] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 156.

[307] Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 416.

[308] Chiomenti, "Il rafforzamento del Golden Power nell'emergenza sanitaria ed economica: guida alle modifiche normative" (April 2020): 6.

[309] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 156.

[310] Ibid., 157.

investors, for the same reasons, to produce a "declaration of intents" if their acquisition of participations in a firm with broad-based shareholding is equal or greater than 5% (rather than 10%) of the firm's share capital. Finally, Article 17 contains a particularly controversial provision suggesting that Italy's Golden power can be exercised on firms of the agri-food sector and the steel industry "for the additional goal of protecting employment levels and productivity on national soil". This provision's validity, however, was not extended and expired on December 31, 2020. However, it remains controversial as well as unclear, especially given its regulatory collocation. As one author points out, this provisions seems to lend Italy's special powers "to the pursuit of different objectives from those informing their exercise so far, seemingly relating to social and industrial policy goals"[311]. Overall, the pandemic economic crisis could provide a third factor, in addition to increased geo-economic competition and the advent of new digital technology, accounting for the deepening and widening of Italy's foreign investment screening in recent years.

Finally, Decrees of the President of the Council n. 179 and 180 of December 2020 integrated the Golden power discipline by defining, respectively, "goods and assets of national interest in the sectors referred to by Article 4, paragraph 1, of the EU Regulation 2019/452"[312] and "assets of strategic relevance in the energy, transport and communications sectors"[313]. This was generally well-received by the academic as well as wider public, as the two Decrees improve the overall legal certainty of the Golden power discipline. From the point of view of investors, it is now relatively easier to foresee whether a specific transaction could be subject to an obligation to notify: whenever it involves an asset or good listed in the two Decrees, the Italian government can exercise its legal right to screen the foreign investment.

[311] Ibid., 159.

[312] Specifically, Decree n. 179 specifies the "goods and assets of national interest" in the energy (Article 3), water (Article 4) and health sectors (Article 5), in the treatment, storage, access and control of sensitive data and information (Article 6), in the electoral infrastructures sector (Article 7), in the financial (including the credit and insurance segments) and financial market infrastructures sectors (Article 8), in the artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnologies and biotechnologies sectors (Article 9), in the non-military aerospatial infrastructures and technologies sector (Article 10), in the agrifood and supply of productive factors sectors (Article 11), for dual-use products (Article 12) and for freedom and pluralism of the media (Article 13).

[313] Decree n. 180 added the following "assets of strategic relevance" to those identified by Decree of the President of the Republic 85/2014:

- for the energy sector, fundamental properties related to the use of the networks and infrastructures referred to in Decree of the President of the Republic 85/2014;
- for the transport sector, national spaceports, interports of national relevance and road and motorway networks of national interest.

Table 2. Decrees for the identification of "strategic assets, activities or goods" in sectors covered by the Golden power discipline (2012-2021)

Decrees	Content
Decree of the President of the Republic n. 85/2014	Regulation for the identification of assets of strategic relevance in the energy, transport and communications sectors
Decree of the President of the Council of Ministers n. 108/2014	Regulation for the identification of activities of strategic relevance for the defence and national security system
Decree of the President of the Council of Ministers n. 179/2020	Regulation for the identification of goods and assets of national interest in the sectors referred to by Article 4, paragraph 1, of the EU Regulation 2019/452 of the Parliament and of the Council (March 19, 2019)
Decree of the President of the Council of Ministers n. 180/2020	Regulation for the identification of assets of strategic relevance in the energy, transport and communications sectors

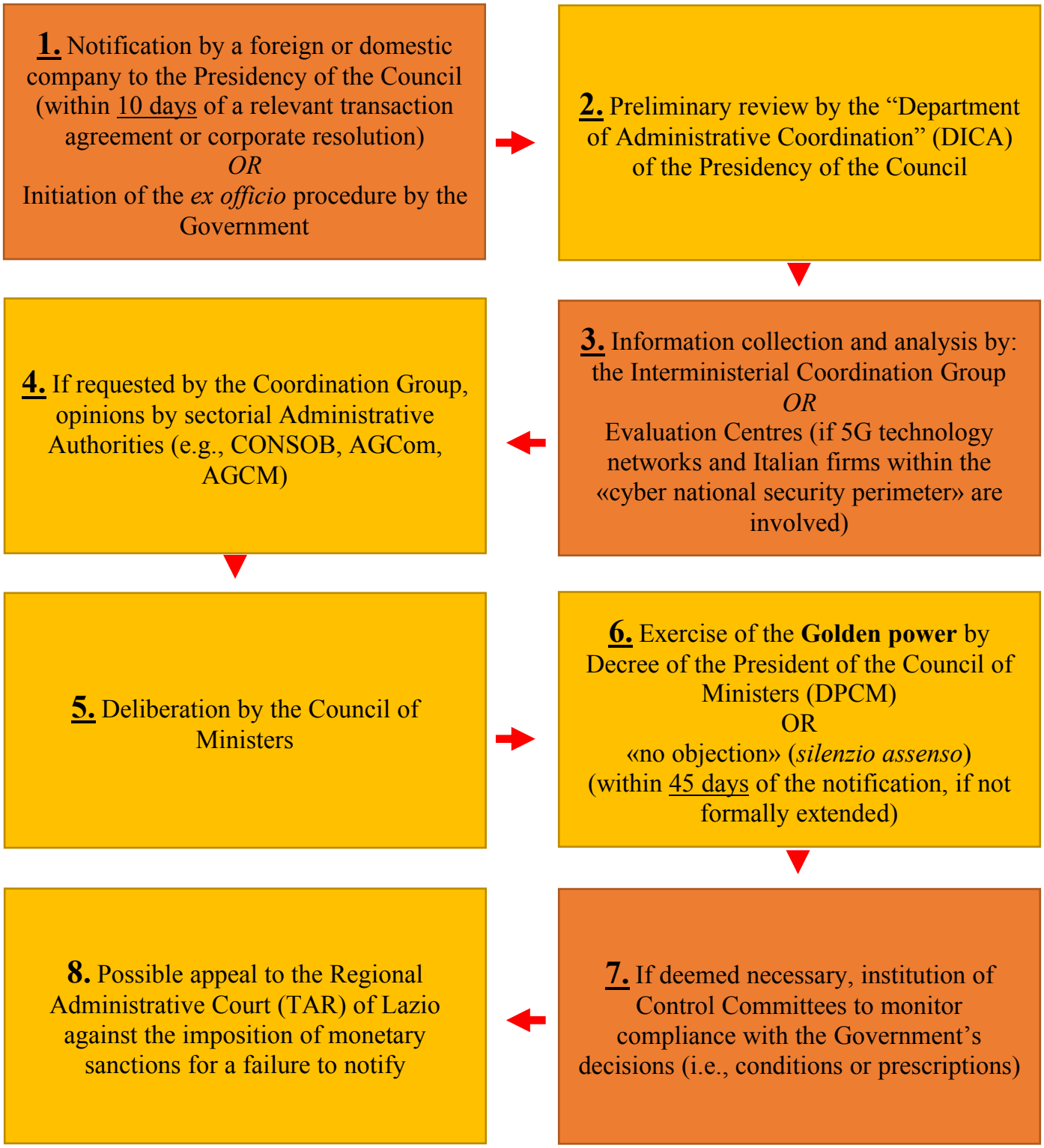
(Source: Author's elaboration)

In conclusion, the Liquidity Decree provides "a plastic representation of the current historical turning point"[314]. A country's special powers are particularly illustrative of its sovereign priorities and self-conception, as they are exercised through "a chameleonic power, whose means of expression vary based on adaptation to certain ends"[315]. Thus, the Liquidity Decree allows two important observations. First, the core of what the Italian state feels it needs to protect has been significantly expanded. More generally, the reform signals a powerful "return of the state", whose control as well as technical apparatus have been significantly strengthened during the emergency context. In this sense, any investor caring for the success of their initiative, "in addition to negotiating with their contractual counterparts, will have to start a dialogue with public authorities"[316]. If the state has been partially "brought back", however, the milestones of the ECJ's approach to EU Member States' special powers remain influential. The proportionality principle guides Golden power actions, which should not obstruct to the pursuit of "an adequate balance between the need to protect the fundamental freedoms set forth by the European Treaties and the protection of the fundamental interests of a single Member State"[317]

[314] Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 405.
[315] Ibid., 410.
[316] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 550.
[317] Roberto Chieppa, "Conclusioni," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 184.

2.2. Administrative procedure, institutions and the triple role of intelligence agencies

Figure 2. Stages of the administrative procedure of Italy's Golden power
(Stages coloured in orange envisage a direct role for Italy's intelligence agencies)



(Source: Author's elaboration)

In administrative and institutional terms, the Golden power review process is regulated by two Decrees of the President of the Republic (respectively, n. 35/2014 for the defence and national security sector and n. 86/2014 for the energy, transport and communications sectors). This process is centred around an Inter-ministerial Coordination Group, set up within the Presidency of the Council, but also involves "control committees", intelligence agencies, sectorial administrative authorities and administrative courts.

After notification (to be submitted within 10 days of a transaction agreement), "a preliminary activity [is] carried out by the administrative structure of the Presidency of the Council"[318]. More specifically, this refers to an office of its Department of Administrative Coordination (DICA), which also provides general technical support during the entire review process. Information collection and evaluation concerning the given transaction, on the other hand, is performed by the Inter-ministerial Coordination Group, set up within the Presidency of the Council in accordance to Article 3 of the Presidential Decree of August 6, 2014. This Group gathers representatives of the Presidency of the Council and delegates of the same Ministries composing the Inter-ministerial Committee for the Security of the Republic (CISR), that is, the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Defence, the Ministry of Justice, the Ministry of Economy and Finance and the Ministry of Economic Development (in addition to any other Ministry interested by a specific transaction). Its meetings are chaired by the Secretary General or the Vice-Secretary General of the Presidency. Moreover, intelligence officers of the DIS, AISE and AISI informally take part in meetings of the Coordination Group. In practice, on a case-by-case basis, a single Ministry is tasked with information collection and analysis and required to submit a "report" to be discussed by the Coordination Group, "together with a draft of the related Prime Ministerial Decree"[319]. Within 45 days of the notification, which can be extended by 10 or 20 days at most (if additional information is requested from parties to a transaction or third parties), a final decision has to be taken. This is issued in the form of a Decree of the President of the Council of Ministers (DPCM), following a deliberation of the Council of Ministers on the conclusions reached by the Coordination Group. Thus, Golden power decisions are formally taken by Italy's Prime Minister or President of the Council. Importantly, a permanent connection between Italy's administrative structure and the Council of Ministers "is guaranteed by the trust relationship between members of the Coordination Group and the political leadership"[320]. In conclusion, decisions on foreign investment screening should be regarded as the "fruit of the crasis between technique, discretion and politics"[321]. The nature of these decisions is also formally peculiar: they are administrative, but taken by the highest political organ, "which is often unaware of such administrative nature and this can lead to the temptation to make purely political evaluations"[322].

It can be inferred from this overview that the Coordination Group's exercise of powers is not entirely autonomous, as its decisions have to be confirmed by a Decree of the President of the Council.

[318] Luigi Fiorentino, "Verso una cultura del golden power," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 25.
[319] DLA Piper, "Multi-jurisdiction guide for screening of foreign investments," August 2019: 60.
[320] Luigi Fiorentino, "Verso una cultura del golden power," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 36.
[321] Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 413.
[322] Roberto Chieppa, "Conclusioni," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 184.

Moreover, the Group lacks "its own bureaucratic, stable and specialised apparatus"[323] and its activities are based on coordination of multiple centres of power, mainly Italian Ministries. In this sense, the Inter-ministerial Coordination Group operates very differently from the American Committee on Foreign Investments in the United States (CFIUS). Law Decree 105/2019 provides for the only exception to exercise of Italy's Golden power by the Prime Minister. It stipulates that, if a transaction involves subjects of the "cyber national security perimeter" (as defined by the Decree itself), Italy's special powers concerning 5G technology networks are exercised by the perimeter's "evaluation centres". These are the National Certification and Evaluation Centre (CVNC) of the Ministry of Economic Development or the Defence Evaluation Centre (Ce.Va. Difesa) of the Ministry of Defence.

Moreover, by adding Article 2-bis to Law Decree 21/2012, Law Decree 105/2019 sanctions the possibility for Italy's government to promote several forms of collaboration between the Inter-ministerial Coordination Group and sectorial administrative Authorities, including the Bank of Italy, the Italian Companies and Exchange Commission (CONSOB), the Authority for Communications Guarantees (AGCom), the Italian Competition Authority (AGCM), the Institute for the Supervision of Insurance (IVASS), Italy's supervisory committee on pension funds (COVIP), and Italy's regulatory authorities for energy, networks and the environment, and for transports (respectively ARERA and ART). Thus, during the review procedure the Coordination Group can request similar institutions to issue their own opinion on a specific transaction.

When the Italian government exercises its Golden power in the form of conditional assent (for instance, imposing on the foreign investor an obligation not to transfer technological assets abroad), a Control Committee (*Comitato di Monitoraggio*) can also be instituted, in order to monitor as well as deter any violation of the government's conditions. Usually concerning very "sensitive" transactions, such as the TIM-Vivendi affair, these committees supervise foreign investors' compliance with the conditions or prescriptions imposed upon them, which are inherently *sine die*. In the event of a violation, financial penalties can be imposed.

Finally, as already pointed out, when Golden power decisions impose monetary sanctions in response to a failure to notify, foreign as well as Italian firms can challenge them before the Regional Administrative Court (*Tribunale Amministrativo Regionale* or TAR) of Lazio. Importantly, review by the TAR "does not extend to the substance of the matter, but is limited to the legitimacy of the government's decision"[324]. Thus, judicial review of Golden power exercises, which are in fact decisions of "high administration", is responsible for "checking the decision's compatibility with the principle of fair exercise of discretionary power, in reference to its procedural legitimacy, reasonableness, coherence and proportionality"[325]. Moreover, a decision by the TAR of Lazio can be appealed against before the Council of State (*Consiglio di Stato*) within 3 months of the sentence. However, it is often argued that the indeterminacy of the public interests protected through the Golden power makes the effectiveness of this legal remedy significantly limited. The proverbial "timings of Italian justice" also affect foreign investors' confidence that they will receive urgent or immediate protection. In other words, knowing that challenges to a governmental decision usually take years to run their course, a foreign investor could decide to simply "give up" and move its planned investment

[323] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 12.
[324] DLA Piper, "Multi-jurisdiction guide for screening of foreign investments," August 2019: 63.
[325] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 13.

elsewhere[326]. In fact, to this day, the TAR of Lazio has annulled a Golden power decision only once. More specifically, in July 2020 it annulled two decrees by the Presidency of the Council (of June and August 2018) imposing conditions on a transaction involving *Reti Telematiche Italiane S.p.A*. and inflicting a monetary sanction for its failure to notify. According to the TAR, the annulment was required by the presence of a procedural irregularity: the opinion issued by the Italian Authority for Communications Guarantees (AGCom), based on which Italy's government had exercised the Golden power, had been issued by its Secretary General (lacking this competence), rather than its Council.

In conclusion, the regulatory evolution of the Golden power discipline poses significant problems of "structural adequacy"[327]: especially as recently amended, it "calls on the variously competent structures (the Presidency of the Council, the Coordination Group, the Evaluation Centres, the Department of Information Security, just to name a few) to perform several tasks, in most cases in a very short time, requiring a very high level of technical knowledge"[328].

As already suggested, national intelligence agencies participate to Italy's FDI screening. This participation is also the most visible manifestation of the new trend in "economic intelligence" and the unprecedented role which intelligence agencies have come to play in the protection of their country's economic, industrial and scientific interests. Importantly, the contribution of the Department of Information Security (DIS), the External Intelligence and Security Agency (AISE) and the Internal Information and Security Agency (AISI) to the Golden power discipline takes three different forms.

First of all, Italy's intelligence agencies provide the relevant institutions with information concerning the nature of the notified investments, the economic entities involved, their financial capabilities and intentions. As already recalled, according to the 2012 Annual Report to Parliament by the Department of Information Security (DIS), "the intelligence agencies' attention has been mainly directed at the nature of single investments, in order to appreciate whether they are motivated by merely speculative goals or rather by strategies aiming for theft of know-how or the technological emptying of firms, with depressive effects on the productive system and its employment levels"[329]. In general terms, the task of intelligence agencies is to facilitate informed and timely decision-making by political authorities, providing them with adequate information and analysis. The final intelligence "product" transmitted to decision-makers results from an information merger, which is often based on data obtained from covert collection as well as "predictive" analysis methodologies. The information provided by Italy's intelligence agencies for the purpose of foreign investment screening is also usually enriched by contextual, general and sector-specific information. Moreover, the DIS, the AISE and the AISI can help the government to "spot" transactions which have not been properly notified, facilitating an *ex officio* initiation of the Golden power procedure.

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[326] Filippo Modulo, "Gli strumenti di compliance e di tutela degli investitori stranieri in Italia: problematiche applicative," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 173-174.

[327] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 11.

[328] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 147.

[329] Annual Report to Parliament by the Department of Information Security (2012), cited in Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 388.

Secondly, officers of the DIS, the AISE and the AISI take part in the Golden power administrative procedure, attending meetings of the Inter-ministerial Coordination Group. In fact, ministerial skills within the Coordination Group have become partially inadequate and it is therefore "natural that [the Group] foresees an increasingly larger role for the Services"[330]. Their participation is not actually provided for by the legislation, but has rapidly entrenched itself in practice. Intelligence officers are also usually designated as members of Control Committees.

Thirdly, officers of the DIS have gradually developed a specialized competence in the area of FDI screening. On the one hand, the DIS has been promoting international debate on the theme of foreign investment screening. On the other, it has contributed to revising the 2019 EU Regulation and translating it into Italian legislation. In fact, concerning the latest Golden power reform introduced by the Liquidity Decree, the 2020 Report to Parliament by the DIS suggests that intelligence agencies have been active "at the level of regulatory updates as well"[331].

To sum up, a former Director General of the DIS summarises the contribution of intelligence agencies to Italy's Golden power as having "a triple role: information provision, participation to the procedural implementation stages of the current legislation, and participation to the debate, even international, on the evolutionary profiles of the relevant legal devices"[332].

In conclusion, following the 2020 Liquidity Decree, the number of transactions subject to government review has significantly increased[333]. In this sense, this regulatory reform does not only signal a "return of the state" in the planning and protection of economic development, but also implies a deeper "structuring of intelligence activities in this sector"[334]. Thus, it seems reasonable to expect that the role of intelligence agencies in the protection of national economic interests will increase. If more transactions will need to be reviewed, Italy's agencies will have to meet the government's growing information needs, in both quantitative and qualitative terms (in this case, requiring specialized knowledge of new economic sectors). Moreover, the possibility for the Italian government to initiate the Golden power procedure *ex officio* is a prelude to a greater commitment by Italy's intelligence agencies to the monitoring of economic and financial dynamics.

2.3. The terms of the debate: protecting public interests or deterring foreign investments?

This Chapter suggests that the economic life of contemporary states is marked by the inevitable "double movement of attracting and screening"[335] foreign direct investments. Thus, states pursue a

[330] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 388.

[331] Annual Report to Parliament by the Department of Information Security (2020): 11. Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/relazione-2020-sulla-politica-dellinformazione-per-la-sicurezza.html

[332] Alessandro Pansa, "Sintesi intervento del 20 novembre 2018 in materia di poteri speciali," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 103.

[333] Annual Report to Parliament by the Department of Information Security (2020): 48. Available at: https://www.sicurezzanazionale.gov.it/sisr.nsf/relazione-annuale/relazione-2020-sulla-politica-dellinformazione-per-la-sicurezza.html

[334] Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 418.

[335] Alessandro Aresu, "Golden power e interesse nazionale: tra geodiritto e geotecnologia," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 118.

subtle balance between their commitment to protect strategic public interests and the need not to discourage foreign capital investments. The core of the (public and scientific) debate is whether "the extension of the terms for the exercise of special powers, coupled with the enlargement of the scope of government intervention in recent legislative developments, is likely to result in a stronger compression of the economic freedom of market operators"[336]. In the view of certain critics, indeed, these evolutions are likely to encourage a "neo-protectionist" use of FDI screening, based on the pursuit of industrial policy goals. This would hurt Italy's export-oriented economy, discouraging much-needed foreign investments. Moreover, it would violate the Golden power's finalistic limit as an instrument with one "proper function, that is, to ensure that economic freedoms do not unfold in contrast with fundamental public interests"[337].

In this context, the exercise of the Golden power must be viewed as truly "effective" when it neutralizes threats to fundamental public interests without simultaneously compromising attractiveness to foreign investments. In this sense, it must be based on a principle of "*exceptional* nature of defence instruments"[338] and a clearly defined hierarchy of interests, incorporating the idea that if anything is "strategic", nothing really is. As also underlined by Italian jurist Natalino Irti, "National security is an essential boundary. I cannot set it without telling what is outside"[339]. Thus, "telling what is outside" contributes to defining a state's sovereign identity, provides an effective guideline for action and increases legal certainty as well as economic attractiveness in the eyes of foreign investors. Moreover, any potential conflict between the two goals of, on the one hand, protecting public interests and, on the other, maintaining the economic system's general attractiveness can be resolved by "awareness that national strategic interests actually tend to coincide with long-term economic ones"[340]. At institutional level, the Parliamentary Committee for the Security of the Republic (COPASIR) has recently reiterated the importance of Italy's Golden power one of two major tools to protect national interests in the current emergency context (in addition to a greater involvement of the *Cassa Depositi e Prestiti* in government strategies)[341].

Political and media debates on the Italian Golden power, however, are tainted by "a basic misunderstanding, that is to say, that special powers can be invoked (and thus exercised) whenever a foreign investment questions the national character of an enterprise which is regarded (for various reasons) as strategic"[342]. In fact, those fearing a neo-protectionist "bending" of the Golden power may have a point, insofar as both formal and practical features of its application risk contradicting the instrument's expected "exceptional" nature[343].

On the one hand, Article 17 of the Liquidity Decree temporarily allowed the Italian government to exercise its Golden power on firms of the agri-food sector and the steel industry "for the additional

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[336] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 147.

[337] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 162-163.

[338] Marcella Panucci, "Golden power. Cornice europea e nuovi paradigmi di concorrenza," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 128. Emphasis added.

[339] Alessandro Aresu, "Golden power e interesse nazionale: tra geodiritto e geotecnologia," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 119.

[340] Bruno Valensise, "Discussion paper," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 111.

[341] Parliamentary Committee for the Security of the Republic (COPASIR), "Relazione del 5 novembre 2020 sulla tutela degli *asset* strategici nazionali nei settori bancario e assicurativo": 9-11.

[342] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 160.

[343] Ibid., 160-162.

goal of protecting employment levels and productivity on national soil". Although this provision's validity expired on December 31, 2020, and Article 17 was addressed to only two economic sectors, it seemed to encourage the use of foreign investment screening for social and industrial policy goals. While previous amendments had generally extended the Golden power's scope of application or adjusted its administrative procedure, this provision concerned the underlying goals or ends of FDI screening. As one scholar puts it, future developments will tell whether such an innovation "was dictated by the exceptional circumstances of the pandemic emergency or, on the contrary, constitutes the prelude to a future extension, one which is neither temporary nor circumscribed to a few sectors, of the range of interests to be protected through the special powers"[344]. If this is the case, its non-extension beyond December 31, 2020, suggests a degree of rebalancing or restraint by Italian authorities.

On the other hand, the "inherent indeterminacy of concepts such as national security"[345] and the gradual extension of the Golden power's scope of application allow Italy to have a significant control over economic markets. However, this implies the risk that a legal instrument conceived of as to be "exceptionally" put to practice becomes a powerful tool in the context of dirigistic, interventionist or protectionist government policies.

A legal scholar has even suggested that the innovations introduced by the Liquidity Decree are likely to produce incompatibilities with both European Law (especially "freedom of establishment" under Article 49 of the TFEU) and the Italian Constitution (especially Articles 41 and 117). This would result from the scope and indeterminacy of powers attributed to Italy's government, as well as from the fact that "the "cost" (…) is entirely borne by firms involved in a transaction, which are called upon to take account of the public interest identified by the government in its review"[346].

However, notwithstanding formal and practical uncertainties as well as reservations by the legal doctrine, use of the Golden power by the government has been quite "moderate"[347] so far. A leading scholar attributes this to two main factors. On the one hand, the relatively short length of the administrative procedure prevents public authorities from developing an interference strategy. On the other hand, the "human factor", that is, the professional origin of the people heading the Coordination Group, has been particularly important: the Group's two most renowned directors have been former secretaries of the Italian Competition Authority (AGCM), thus "able to apply the "antitrust" culture (…) to a discipline otherwise easily employable for protectionist ends"[348]. At the time of this scholar's writing, however, the length of the administrative procedure was set at 15 days,

[344] Ibid., 161.
[345] Ibid.
[346] Luciano Vasques, "Golden Power. Alcune note a margine della disciplina emergenziale del controllo governativo sulle acquisizioni in Italia," *Mercato Concorrenza Regole* (Fascicolo 1, Il Mulino – Rivistaweb, April 2020): 131.
[347] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 550; Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 419.
[348] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 550. Moreover, it can be added that, in terms of interaction with other legal frameworks, the relationship between merger control and the Golden power instrument is often harshly debated. However, there seems to be general consensus that these two forms of control over investments are neither contradictory nor alternative, but rather run parallel to each other. Very delicate cases could materialize when a decision for the exercise of the Golden power has anti-competition effects or when a subsequent decision by the antitrust authority (e.g., an imposition of conditions) causes a transaction, which had been previously authorized under the Golden power discipline, to be notified for screening for a second time. Other than that, whenever an operation is blocked based on either the merger control or the Golden power discipline, no conflict results, as the operation will simply not be carried out. See Roberto Chieppa, "Conclusioni," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 188-189.

which have been recently extended to 45 days (2019). Thus, it seems that the only bulwark against a "neo-protectionist" use of the Golden power is provided by the cultural sensitivity of frontline decision-makers and Italian institutions. Still, quantitative data also confirm the relative "exceptionality" of Golden power exercise. As someone put it in evocative language, FDI screening should be "just like a bouncer at a dance club entrance screening patrons"[349].

Overall, while "Golden shares" were born as a "safety net" for states in the context of privatization of public services, today's Golden power stands out an "instrument of external supervision, which is able to influence corporate assets and the operativity of all firms in strategic sectors, whenever essential public interests are threatened"[350]. This transition has significantly altered the balance between public and business interests, and the relationship between the regulatory powers of states and the legitimate expectations of investors is often described as a "difficult coexistence"[351]. According to one commentator, in Italy foreign investors can be affected by three factors likely to impact their activities: (i) uncertainty in the implementation of the Golden power discipline, (ii) the increasing complexity of Italian institutions' security evaluations and (iii) the partial ineffectiveness (especially for "time" reasons) of the available judicial remedy[352]. However, this state of the art would not be exceptional or specific to Italy. Indeed, under international law the right to admission of a foreign investment (which, in turn, implies the right to challenge its violations by resorting to international arbitration) is severely restricted. It is limited to the very rare cases in which a multilateral or bilateral investment treaty does not provide a self-judging national security clause, allowing the receiving state full discretion in screening foreign investments on grounds of national security.

In conclusion, a frequent or "immoderate" use of the Golden power could be detrimental to Italian interests as well as a significant sign of systemic weakness. If the activities of private firms were frequently interfered with by public intervention through foreign investment screening, this would also suggest that proper synergy is lacking between the state, including its intelligence agencies, and national private agents. FDI screening should be viewed and employed as an "exceptional" defensive instrument, based on a definite hierarchy of interests to protect.

[349] DLA Piper, "Multi-jurisdiction guide for screening of foreign investments," August 2019: 3.

[350] Andrea Sacco Ginevri, "Golden powers e funzionamento delle imprese strategiche," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, il Mulino (2020): 158.

[351] Giacomo Aiello, "Il legittimo affidamento dell'investitore e i poteri regolatori dello Stato: una difficile convivenza," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 161.

[352] Filippo Modulo, "Gli strumenti di compliance e di tutela degli investitori stranieri in Italia: problematiche applicative," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 174.

3. National tools for foreign investment screening: a comparative assessment

"No one can be said to have a vested right to carry on foreign commerce with the United States" (US Supreme Court, Board of Trustees v. United States, 1933)

"Germany is not for sale. We do not sell our silverware" (Peter Altmaier, Minister for Economic Affairs and Energy of Germany, 2020)

"In today's political climate, it is becoming increasingly apparent that a liberal economic regime, while it confers bounties upon populations and other nonstate actors, generates costs that are deemed unacceptable by states. In driving home this reality, the passage of FIRRMA might be remembered as a watershed moment for geoeconomic great power competition in the twenty-first century" (Uday Khanapurkar, 2020)[353]

3.1. The Committee on Foreign Investment in the United States (CFIUS)

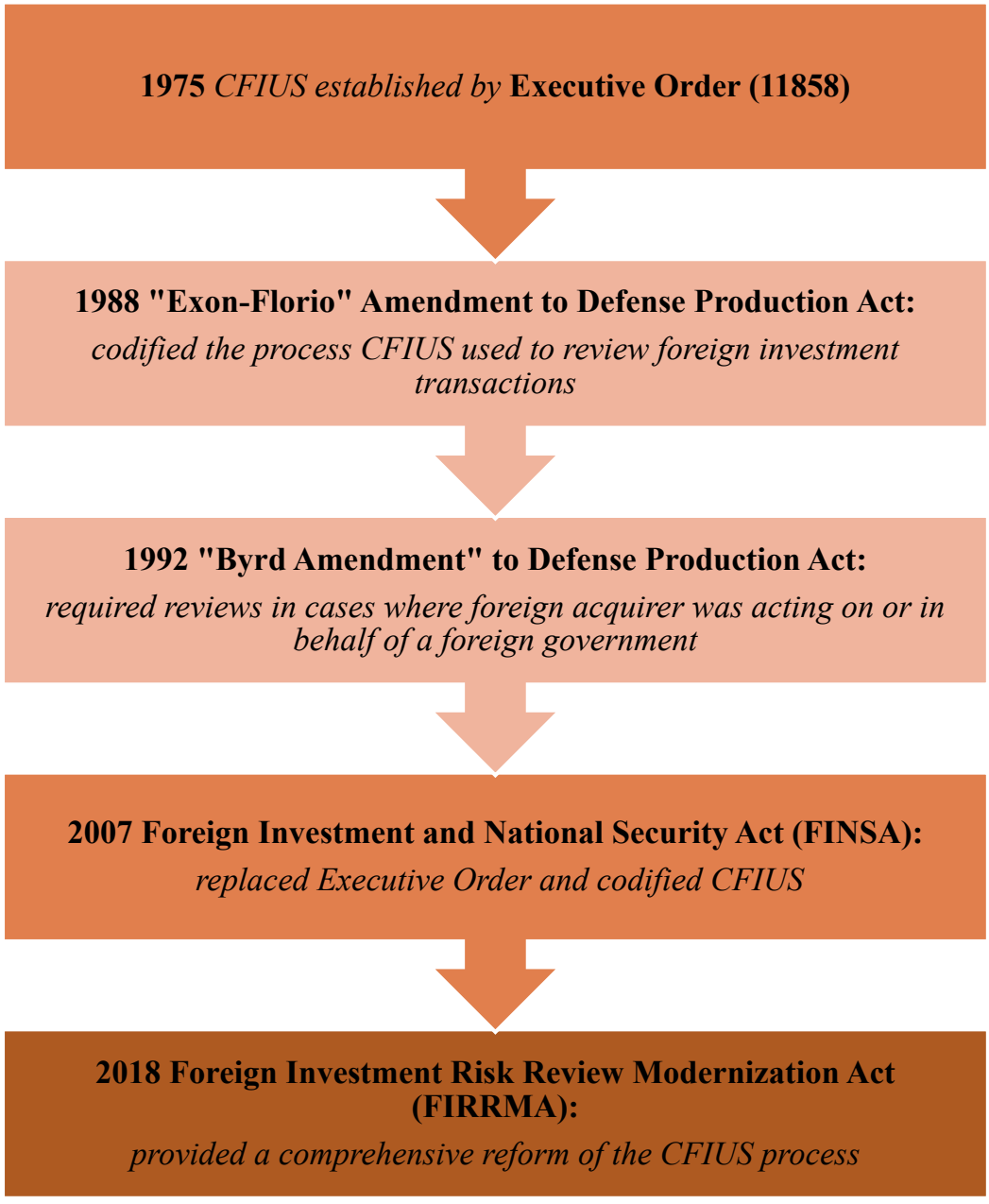
Chapter 3 provides a cross-country analysis of tools for foreign investment screening, in order to assess differences and similarities vis-à-vis the Italian Golden power and draw possible insights for Italy. In this first section, the pioneeristic American model for FDI screening will be analysed in detail, especially in terms of the legislative evolution and procedural mechanics of the Committee on Foreign Investment in the United States (CFIUS). The second section will draw attention to foreign investment review in Germany and France. Rather than providing a comprehensive analysis of both mechanisms, their distinctive features will be singled out, with a view to a short comparison with Italy's Golden power in a final section.

Since 1975, albeit with different intensity overtime, inward foreign investment on American enterprises has been overviewed by the Committee on Foreign Investment in the United States or CFIUS. Going through the legislative and procedural history of this institution provides two powerful insights. On the one hand, it sheds light on the gradual sophistication of FDI screening in the world's largest recipient of foreign investments. The US has generally managed to maintain significant attractiveness to outside investors while protecting its national security interests. On the other, CFIUS's evolution has "tended to mirror the geopolitical and geoeconomic threat perceptions of the United States[354]". Concerning today's CFIUS, some provocatively suggest that its acronym should more explicitly stand for "Chinese Foreign Investment in the United States"[355], linking the Committee's recent evolution to the widespread belief that "China has sought to "weaponize" investment as part of a strategy to leapfrog the US's advantages in technology"[356]. Thus, the specific way in which this perceived threat has been legislatively "received" in CFIUS's framework provides a benchmark for comparison with other national foreign investment screening mechanisms.

[353] Uday Khanapurkar, "CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China," *Journal of Current Chinese Affairs* 48, n. 2 (2020): 235.
[354] Ibid., 234.
[355] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 60.
[356] Christopher Mann, "The global rush toward foreign direct investment screening: lessons from the United States," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 18.

3.1.1. CFIUS's legislative history

Figure 3. CFIUS's legislative history (1975-2021)



(Source: James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 6)

CFIUS was created in 1975 by Executive Order 11858, under US President Gerald Ford. A widely shared interpretation of its establishment sees early CFIUS as the outcome of an interbranch compromise between Congress's protectionist, anti-OPEC (Organization of the Petroleum Exporting Countries) ambitions and the Executive's internationalist commitment to free-trade. In this view, the creation of CFIUS served as a "tranquillizer" for Congress and its aversion to "petro-dollar" investments after 1973, and Executive Order 11858 was meant to "dissuade Congress from enacting

new restrictions"[357] on FDI. The Ford Administration resorted to an Executive Order, thus preventing Congressional legislation, due to both "fear that any action might be interpreted by foreigners as restrictive and might induce retaliatory actions, and a Republican belief in limited government"[358]. In fact, in 1975 CFIUS was established merely as a "reporting and monitoring committee"[359]. It had no power to inhibit foreign investments and was inactive from 1975 to 1985, meeting no more than 10 times. Overall, Executive Order 11858 implied a "conservative, measured approach to monitoring foreign investment flows"[360], leading CFIUS to operate "in relative obscurity"[361].

Formally, the Committee retained "the primary continuing responsibility within the executive branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment". Based on the Executive Order, CFIUS was an inter-agency institution, chaired by a representative of the Secretary of the Treasury and composed of representatives designated by each of the following: the Secretary of State, the Secretary of Défense, the Secretary of Commerce, the Assistant to the President for Economic Affairs and the Executive Director of the Council on International Economic Policy. Specifically, the CFIUS was directed to: (i) arrange for the preparation of analyses of trends and significant developments in foreign investments in the United States; (ii) provide guidance on arrangements with foreign governments for advanced consultations on prospective major foreign governmental investment in the United States; (iii) review investment in the United States which, in the judgement of the Committee, might have major implications for US national interests; (iv) consider proposals for new legislation or regulations relating to foreign investment as may appear necessary.

In sum, CFIUS was deprived of any formal powers, with "a voice on policy issues, but (…) largely silent"[362]. One scholar suggests that its establishment in 1975 can also be viewed as the outcome of a struggle between "proponents and opponents of neoliberalism"[363], with the former eventually prevailing. From this perspective, the Executive's creation of CFIUS "was not so much to expand the president's power as an end itself as it was to defend and extend a certain brand of capitalism based on neo-liberal ideas"[364]. This goal was also achieved through the language of the Order, which was "vague enough to give CFIUS the appearance of some strength while at the same time furnishing it with the flexibility to be weak"[365]. In fact, no US formal screening of foreign investments would be in place before 1988.

In the late 1980s, however, fears for Japan's global ascent and America's decline as the economic-financial hegemon inspired a first reform of CFIUS. In particular, the 1986 attempted purchase of Fairchild Semiconductor Co, the main supplier of computer chips to America's armed forces, by the Japanese Fujitsu Ltd. raised serious concerns in Congress as well as within the ranks of the

[357] US Treasury Department memorandum, cited in James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 4.
[358] Pastor 1980, cited by Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 863.
[359] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 643.
[360] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1483.
[361] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 4.
[362] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1484.
[363] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 861.
[364] Ibid., 869.
[365] Ibid.

Department of Défense (DoD). The DoD eventually prevented the acquisition. Indeed, throughout the 1980s most foreign investment reviews were initiated at the request of the DoD[366] and were "usually resolved by the withdrawal of the foreign acquirer, or the negotiation of changes to the proposed transaction that allayed the Committee's concerns"[367].

In 1988 Congress approved the Omnibus Trade and Competitiveness Act. This, in turn, contained the so-called "Exon-Florio Amendment" to the Défense Production Act of 1950 (entitling the Executive to decide on "acquisition approvals of military contractors"[368]). Importantly, the Exon-Florio amendment gave the US President the power to "suspend or prohibit" "mergers, acquisitions or takeovers" which could lead to foreign control of "any person engaged in interstate commerce in the United States". Foreign control, whether direct or indirect, was intended functionally as "the ability to exercise certain powers over important matters affecting an entity". The President's power to prohibit foreign investments was subject to two conditions: first, the existence of "credible evidence" that foreign control might threaten to impair US national security and, second, the lack of other provisions of law providing "adequate and appropriate authority for the President to protect the national security". This legal standard has been maintained by subsequent reforms.

Importantly, by Executive Order 12661 of 1988, US President Ronald Reagan delegated his new powers to CFIUS, although the Committee was not directly mentioned by the Exon-Florio amendment. This transformed CFIUS "from an administrative body with limited authority to review and analyse data on foreign investment, to an important component of US foreign investment policy with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be suspended or blocked"[369]. Today's CFIUS was born here: again, a previously "reporting" body was turned into "a strategic gatekeeper with power to review, investigate, and make recommendations regarding foreign investment into the United States"[370]. Overall, the Committee's mandate was restricted, but its formal powers were remarkably extended. Before 1988, in fact, a foreign acquisition or takeover of a US firm could be blocked only by reference to antitrust rules, financial market and securities regulation, environmental governance or national emergency provisions, but not on grounds of national security.

Throughout the discussions leading to approval of the amendment, the Reagan Administration insisted that Congress revised the original language of the Exon-Florio provision. This originally envisaged a review of foreign investments based on "national security and essential commerce", showing Congress's ambivalence on "whether the security protected by CFIUS review was to be understood narrowly, in strictly defence-related terms, or more broadly, to include more economic threats"[371]. The second "half" of the sentence ("essential commerce") was eventually removed, thus "emphasizing that, as much as possible, the commercial nature of investment transactions should be

[366] *See* James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 6.
[367] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 662.
[368] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 91.
[369] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 7-8.
[370] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 665.
[371] Ibid., 664.

free from political considerations"[372]. This outcome was described as "a compromise between neoliberals and militarists (…) at the expense of the very developmentalists most responsible for producing the original legislative vision"[373].
Finally, regulations implementing the amendment (1991) provided for a voluntary notification system, whereby foreign investors could confidentially and voluntarily notify a transaction to the Committee. In the absence of a notification, however, the Committee was allowed to initiate the review process *ex officio* and possibly reverse the investment *ex post*, provided the transaction was "covered" by CFIUS jurisdiction. Clearly, this extensive power of CFIUS led foreign investors to generally comply with the voluntary notification provision. According to the 1991 regulations, a notification by foreign investors would trigger a 30-day initial "review", followed, if deemed necessary, by an additional 45-day "investigation" of the transaction. Upon conclusion of the "investigation" stage, CFIUS would make a recommendation to the US President and a Presidential decision to block or suspend the foreign investment would be expected within 15 days.

In 1993 a further amendment, known as the "Byrd Amendment" to the National Défense Authorization Act for Fiscal Year 1993, required CFIUS to review any transaction in which the foreign buyer was "controlled by or acting on behalf of a foreign government". However, this provision was interpreted differently by Congress and CFIUS. This would become apparent in the controversial 2006 Dubai Port World (or DPW, a port operator owned by the United Arab Emirates) case. According to Congress, the "Byrd Amendment" compelled CFIUS to initiate a full 45-day investigation whenever an investor was owned by a foreign government. According to CFIUS, on the contrary, a full investigation was discretionary and dependent on the Committee's ascertaining that the given transaction in fact affected American national security. Finally, the "Byrd amendment" entitled CFIUS to consider the "potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security".

The CFIUS discipline was later comprehensively reformed by the 2007 Foreign Investment and National Security Act (FINSA). This was in fact "the first intervention codifying CFIUS"[374] and replaced Executive Order 11858. FINSA should be framed within the "post-9/11 context of renewed attention to themes of national security and defence"[375] and was adopted after the 2006 DPW case. Indeed, DPW's takeover of several terminals in six US ports was authorized by CFIUS based on the foreign company's commitment to a number of conditions agreed upon with the Department of Homeland Security. However, a large bipartisan group of US Congressmen, harshly critical of CFIUS's decision, approved an *ad hoc* legislative provision on port licenses, which eventually forced DPW to re-sell its American assets. Thus, CFIUS's authorization was forcibly reversed by Congress, leading to a far-reaching public debate on the need to reform the Committee. This debate resulted in FINSA, whose focus was actually "less on the power and jurisdiction of CFIUS and more on the body's perceived lack of transparency and other procedural flaws"[376].

[372] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 8.
[373] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 871.
[374] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 32.
[375] Ibid.
[376] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1490.

The following are the main regulatory changes introduced by FINSA:

- First of all, it gave statutory authority to CFIUS and singled out three factors for consideration during the Committee's review. Indeed, CFIUS was formally mandated to determine whether (1) a transaction threatens to impair national security, (2) the foreign entity is controlled by a foreign government or (3) a transaction would result in the control of any critical infrastructure by or on behalf of any foreign person that could impair national security. Thus, the Committee's review of foreign investments "moved beyond the narrow defence-related orientation of its first three decades (…) by increasing the factors to be considered, and adding "critical infrastructure" and a number of more economic considerations"[377].
- Secondly, FINSA set out the procedure for CFIUS review, dividing it into three separate stages: "review", "investigation" and Presidential determination. Again, FINSA sanctioned the compulsoriness of a CFIUS review for transactions involving a foreign government-controlled operator. Moreover, it formally introduced the possibility of negotiating "mitigation agreements" during the investigation stage, that is, agreements between the Committee and foreign buyers aiming to remove the national security risks of a transaction. These agreements usually make the exercise of a Presidential veto unnecessary. Moreover, their introduction helps preventing foreign firms from simply abandoning a transaction whenever the Committee raises concerns. Finally, CFIUS is entitled to monitor as well as enforce compliance with mitigation agreements, and to withdraw its approval of a transaction upon discovery that a party "submitted false or misleading material information" or "omitted material information".
- Thirdly, it sanctioned the presence of the Director of National Intelligence (DNI), the Secretary of Energy and the Secretary of Labor as non-voting *ex officio* member of CFIUS. More specifically, the National Intelligence Council (NIC) was afforded 20 days to provide a national security analysis of the threats posed by a transaction, so that "CFIUS could act based on input from the US intelligence community"[378]. Moreover, FINSA formalised the US President's power to appoint any further CFIUS member based on the specificities of individual transactions. More generally, FINSA also made CFIUS membership permanent: as of 2007, the Committee included, in addition to the new *ex officio* members, nine Cabinet members, namely the Secretaries of State, the Treasury, Defense, Homeland Security, Commerce, and Energy, the Attorney General, the US Trade Representative and the Director of the Office of Science and Technology Policy. In practice, the Treasury Department co-chairs in each case, with additional CFIUS members appointed on a case-by-case basis.
- Finally, FINSA instituted an annual report to Congress on CFIUS's activities. In this sense, FINSA "altered the CFIUS process in order to enable greater oversight by Congress and increased transparency"[379]. The Committee is also obliged to provide confidential briefings on specific transactions, provided a decision has already been taken, upon request of certain Congressmen.

[377] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 671.
[378] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1491.
[379] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 5.

Overall, FINSA "adjusted the *terms* of the neoliberal-militarist compromise, but not its underlying premise"[380]. That is, it left America's general attitude towards foreign investment, as set out in President Reagan's Statement on International Investment Policy (September 9, 1983), unchanged: "an open international investment system responding to market forces provides the best and most efficient mechanism to promote global economic development (…) the United States accords foreign investors the same fair, equitable and non-discriminatory treatment it believes all governments should accord foreign direct investment under international law"[381]. Nonetheless, the number of filings by private investors and transactions reviewed by CFIUS increased exponentially after 2007. On multiple occasions, technology-related transactions especially "were withdrawn or abandoned when it became clear that CFIUS approval would not be forthcoming"[382].

Finally, CFIUS's latest comprehensive reform dates back to 2018, when the Foreign Investment Risk Review Modernization Act (FIRRMA) was approved with bipartisan support. It provided for a "comprehensive revision of the CFIUS process"[383]. This revision, as all other amendments to the CFIUS discipline, has been inspired by global geo-political and geo-economic developments. As already suggested, the Committee "follows the crisis-driven development of most economic regulators"[384]. Perhaps narrowly, FIRRMA has been described as part of "a wide range of offensive instruments at commercial level"[385] meant to counteract Chinese expansionism or "techno-nationalism"[386]. However, a convergence of more general factors has in fact contributed to this historic turning point in CFIUS history, including: the Committee's increasing caseload following the 2008 global financial crisis; new trends in foreign investment, in reference to complex fund structures and increased sovereign direction; jurisdictional gaps concerning joint ventures and noncontrolling investments (left uncovered by CFIUS jurisdiction); developments in digital dual-use technology and especially in the use of Data, creating unprecedented vulnerabilities; and finally China's new plans for technological leadership in strategic high-tech sectors ("Made in China 2025")[387].

The following are the main regulatory changes introduced by FIRRMA:

- First of all, it expanded the scope of sectors or transactions covered by CFIUS review, by including (i) the acquisition of minority or noncontrolling (yet non-passive) quotas in firms managing critical technologies and infrastructures[388] or collecting sensitive data on American

[380] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 862.
[381] Reagan 1983, cited in Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1481.
[382] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 673.
[383] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 11.
[384] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 90.
[385] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 58.
[386] Ibid., 63.
[387] *See* Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1492-1499.
[388] Based on the Patriot Act of 2001, "critical industries" are "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters". Furthermore, according to the Homeland Security Act of 2002, "critical infrastructure" refers to "publicly or privately controlled resources

citizens and (ii) certain real estate transactions, that is, those involving buildings located in proximity to US military bases or sensitive government facilities[389]. Moreover, "any change in foreign investor rights regarding a US business (…) and any transaction or arrangement designed to evade CFIUS regulation"[390] are incorporated. This enlarged CFIUS jurisdiction is the core of the FIRRMA reform. In addition, continuing an earlier trend set forth by FINSA in 2007, FIRRMA "expanded the definition of "critical technologies" to include new categories of "emerging and foundational technologies" that are essential to US national security"[391]. It also instructed new forms of export control for these technologies. Overall, according to an American scholar, "national security" as construed by FIRRMA should be "defined to include those issues relating to "homeland security", including its application to critical infrastructure and critical technologies"[392].

- Secondly, FIRRMA added new factors which the US President might consider in determining whether a foreign investment impairs American national security. These include, for instance, (i) "the potential effects of the cumulative control of, or pattern of recent transactions involving, any one type of critical infrastructure, energy asset, critical material, or critical technology by a foreign government or person" and (ii) "the extent to which a transaction is likely to expose personally identifiable information, genetic information, or other sensitive data of US citizens to access by a foreign government or person that may exploit that information to threaten national security"[393]. Some suggest that these factors for consideration "incorporate economic considerations into the CFIUS process in a way that was specifically rejected when the original Exon-Florio amendment was adopted and refocuses CFIUS's reviews and investigations on considering the broader rubric of economic security"[394]. However, there seems to be no legal or academic consensus on this point. In fact, others contend that "the legislation maintains CFIUS's historical, sole focus on national security"[395].
- Thirdly, it introduced a new declaration process ("light filing"). This predates a formal notification and is essentially its "executive summary". Adding "declarations" served two primary objectives, that is, to "(1) alert CFIUS of proposed or pending transactions potentially within its jurisdiction and (2) allow for the fast-tracking of routine, low risk reviews"[396]. Importantly, this declaration process has been made mandatory for cases involving a foreign person in which a foreign government owns a substantial interest (also indirectly) and for transactions concerning a US business associated with critical technology. Thus, FIRMMA

essential to the minimal operations of the economy and government", leading to the identification of 17 specific sectors. *See* James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 26-28. .

[389] Final regulations implementing these two provisions ((i) and (ii)) were issued by the Department of the Treasury in February 2020.

[390] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 11.

[391] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 680.

[392] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 23.

[393] Ibid., 15.

[394] Ibid., 30-31.

[395] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1522.

[396] Ibid., 1506.

requires "short-form filings for state-owned enterprises and investment funds as well as for any foreigners making non-passive investments in critical technology companies"[397].

- Fourthly, FIRRMA increased the time length available to CFIUS for its national security review and investigation, as well as for the DNI's national security analysis. The review period was extended from 30 to 45 days, in order to "prevent transactions from being pushed into the 45-day investigation phase simply because CFIUS staff could not clear the transaction during the review period"[398]. Moreover, a national security investigation can be extended for additional 15 days (bringing the total to 60 days) in "extraordinary" circumstances. Finally, while refraining from altering the Committee's membership, FIRRMA also provided for the new position of "Assistant Secretary for Investment Security" at the Treasury Department, responsible for "overseeing the day-to-day CFIUS process on a full-time basis"[399].
- As a fifth regulatory change, it introduced special treatment for investments coming from "countries of special concern". This refers to countries "with a demonstrated and declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US leadership in areas related to national security". Thus, CFIUS is allowed to discriminate among investors based on their nationality.
- Finally, FIRRMA mandates the CFIUS chairperson, that is, the Treasury Secretary, to "establish a formal process for exchanging information with governments of countries that are allies or partners of the United States"[400].

In sum, "CFIUS's importance continues to expand"[401], and the number of transactions reviewed by the Committee will certainly increase post-FIRRMA, as was the case after FINSA in 2007.

As already pointed out, many have linked FIRRMA's approval to the perceived need to prevent Chinese firms "from exploiting the US open capital markets to facilitate tech transfer"[402]. More specifically, three provisions of FIRRMA have been viewed as targeting Chinese entities in protection of US security:

- (1) the "countries of special concern" clause. While this provision does not directly mention China, "Chinese investors will, *de facto*, be accorded the most attention"[403]. In addition, China is the only country to be singled out in FIRRMA as requiring an *ad hoc* report by the Secretary of Commerce. This report will investigate, amongst other things, "the extent to which the pattern of investments originating from the People's Republic of China (PRC) is in consonance with a state-driven industrial policy such as the Made in China 2025"[404];
- (2) FIRRMA's provision assigning a special importance to transactions that are "likely to exacerbate or create new cybersecurity vulnerabilities or likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities". This has been interpreted as primarily targeting Chinese illegal technology

[397] Ibid., 1507.
[398] Ibid., 1508.
[399] Ibid., 1511.
[400] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 25.
[401] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 698.
[402] Uday Khanapurkar, "CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China," *Journal of Current Chinese Affairs* 48, n. 2 (2020): 227.
[403] Ibid., 228.
[404] Ibid.

transfers, as "Chinese entities have been linked to 90% of all espionage activities in the United States"[405]. Moreover, under FIRRMA joint ventures in critical technologies or infrastructures will be reviewed by CFIUS;

- (3) finally, FIRRMA's requirement that CFIUS improves information exchange on foreign investments with America's allies, also with a view to harmonising FDI screening regimes (in the West). This could reveal a wider strategic design to "prop up a global financial regime intolerant to Chinese acquisitions of technology"[406].

In conclusion, one of FIRRMA's potentially long-term effects could be to unleash a selective decoupling between the United States and China in high-tech segments of the global economy[407]. As early as in 2019, indeed, several Chinese digital companies were reported to be "retreating" in the face of CFIUS's new powers[408].

3.1.2. CFIUS review: informal and formal stages, and the Committee's threat framework

As already emphasized while examining the 2007 Foreign Investment and National Security Act (FINSA), the procedure for CFIUS review of foreign investments is divided into three formal stages: "review", "investigation" and Presidential determination. These can be preceded by an informal pre-notification phase and/or by a voluntary "light filing" procedure.

During the informal pre-notification phase, foreign investors are allowed to approach CFIUS in order to discuss the national security issues potentially raised by a transaction. This results in an "unofficial review by individual CFIUS members prior to the formal filing with CFIUS"[409]. This stage is particularly advantageous for both the Committee and foreign investors. The former is allowed more time to examine the transaction and negotiate possible adjustments. Once a notification is filed, on the contrary, the time constraints of the formal CFIUS process start to apply. Foreign investors, on the other hand, are allowed "additional time to work out any national security concerns privately with individual CFIUS members"[410]. Moreover, they can avoid the "stigma" of being publicly labelled as a potential national security threat: if CFIUS informally raises serious concerns, indeed, the transaction can be easily abandoned. It is no secret that for some firms "public knowledge of a CFIUS investigation has had a negative effect on the value of the firm's stock price"[411].

The 2018 Foreign Investment Risk Review Modernization Act (FIRRMA) introduced a "light filing" procedure, based on short-form declarations (usually no more than 5 pages). In order to fast-track low risk investments and avoid overloading the Committee, firms are indeed "permitted to file a declaration with CFIUS and could receive an expedited review process"[412]. In any case, if CFIUS deems it necessary, foreign investors can be required to file a long-form notification or, otherwise, the Committee may unilaterally initiate the procedure. "Light" declarations remain generally

[405] Geller 2018, cited in Ibid.
[406] Ibid.
[407] Ibid., 234.
[408] Hanemann et al. 2019, cited in Ibid., 229.
[409] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 15.
[410] Ibid.
[411] Ibid.
[412] Ibid., 16.

voluntary, but have been made mandatory for specific types of transaction, that is, those involving a foreign person in which a foreign government owns a substantial interest or a US business associated with critical technology. Thus, CFIUS can be promptly alerted of particularly sensitive transactions within the scope of its jurisdiction.

The first formal stage of the CFIUS process is known as "national security review" and can last up to 45 days. It begins whenever the Committee decides so *ex officio* or a foreign investor voluntarily files a notification.

Based on Treasury Regulations, a notification should include, amongst others, information on the terms of the transaction, as well as on the activities performed by the American business (with a special emphasis on its possible contracts with the US government). Foreign investors generally have a marked interest in filing a voluntary notification. Indeed, if CFIUS determines that a notified investment does not threaten US national security, the transaction is allowed to take place and saved from further or future scrutiny (unless the notification was based on false data or omitted relevant information). Otherwise, CFIUS maintains "indefinitely the authority to review transactions of firms that do not voluntarily notify CFIUS of an investment transaction"[413].

During the national security review stage, CFIUS ascertains whether the merger, acquisition or takeover falls within the scope of "covered transactions". If so, it also determines whether the foreign investment threatens to impair US national security. For this determination CFIUS usually employs a "risk-based analysis", which focuses on the threat, vulnerabilities and consequences to national security relating to the transaction. Thus, CFIUS considers three issues: "1. What is the threat posed by the foreign investment in terms of intent and capabilities? 2. What aspects of the business activity pose vulnerabilities to national security? 3. What are the national security consequences if the vulnerabilities are exploited?"[414].

In practice, the Committee chairman delegates a lead agency to head the "case" and the foreign investor is usually required to provide additional information on the transaction. During the national security review, a "national security analysis" is also carried out by the Director of National Intelligence (DNI) and must be completed within 30 days of the formal notification. Moreover, the DNI is specifically required to "seek and incorporate the views of "all affected appropriate" intelligence agencies"[415]. Finally, parties to a transaction can withdraw and resubmit a formal notification at any point of the review, restarting the 45-day deadline.

If the Committee's members unanimously determine that no threats to US national security are posed by the transaction or that these can be adequately resolved, the "national security review", as well as the entire CFIUS process, is ended. This, in fact, is the case for most notified foreign investments. Otherwise, the review stage could suggest that: "(i) the transaction threatens to impair the national security of the United States and the threat has not been mitigated; (ii) the transaction is a foreign government-controlled transaction; (iii) the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person (…); (iv) the lead agency recommends, and the Committee concurs, that an investigation must be undertaken". In these cases, CFIUS enters the second formal stage of its process, known as "national security investigation".

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[413] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 12.
[414] Ibid., 10.
[415] Ibid., 21.

A "national security investigation" can last up to 45 days or, for "extraordinary" transactions as defined by relevant Regulations, 60 days. At this stage of the CFIUS process, the Committee and foreign investors can seek "mitigation agreements" in order to allay the national security risks implied by the transaction. Indeed, CFIUS is entitled by law to "negotiate, impose or enforce any agreement or condition with the parties to a transaction in order to mitigate any threat to US national security"[416]. Importantly, similar negotiations between the Committee and foreign investors occasionally and informally took place even before their statutory entrenchment under the 2007 Foreign Investment and National Security Act (FINSA), especially during the pre-notification stage of the CFIUS process. However, they were considered to have "an uncertain basis in statute, and had not been tested in court"[417]. Mitigation agreements can include provisions which, for instance, exclude certain branches of a US business from the transaction, restrict access by certain individuals to confidential information held by the American target firm, or institute corporate security committees overviewing business operations[418]. Following a mitigation agreement, CFIUS usually monitors the parties' compliance with its terms.

According to FINSA, if CFIUS determines that "there are no unresolved national security concerns", the Committee's process is closed. Importantly, CFIUS must communicate authorization of the investment to Congress in written form. Otherwise – if (i) the Committee believes that the investment should not be authorized, (ii) no unanimous decision could be reached on suspending the investment, or (iii) CFIUS believes that the President should take a decision – the Committee submits a recommendation to the US President.

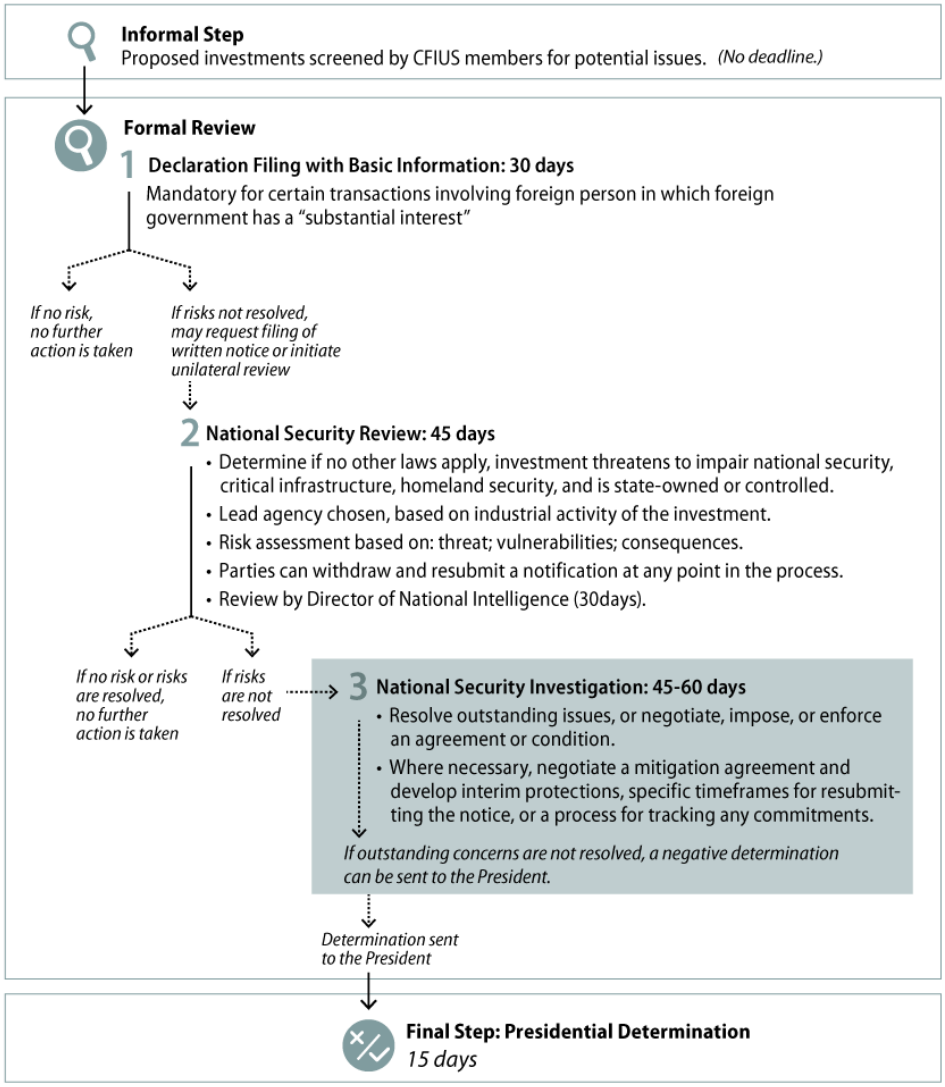
In the final formal stage of the CFIUS process, the US President is called upon to take a decision within 15 days of receiving the Committee's recommendation. Provided that no alternative provisions of law are adequate for the President to protect US national security, the foreign investment can be suspended or prohibited. Formally, the President enjoys unlimited authority to take "such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States"[419]. Importantly, he or she is not compelled to follow the CFIUS's recommendation.

As established by the 2007 Foreign Investment and National Security Act (FINSA), Presidential determinations on foreign investments "shall not be subject to judicial review". Thus, they cannot be appealed against. However, as pointed out in Ralls v. the Committee on Foreign Investment in the United States (2014), judicial review does apply to "the process by which the disposition of a transaction is determined (…) to ensure that the constitutional rights of the parties involved are upheld"[420]. In other words, in order to ensure their own right to due process, parties to a transaction can access all unclassified information and documents throughout the CFIUS process. Moreover, they have a "right to reply" before the President makes a final determination. Finally, the 2018 Foreign Investment Risk Review Modernization Act (FIRRMA) specifies that challenges to the Committee's decisions can only be brought before the US Court of Appeals for the DC Circuit. In practice, however, "companies have little hope of challenging the substantive determination of CFIUS and the

[416] Ibid.
[417] Ibid., 32.
[418] Andrea Guaccero, "*Compliance* e tutela degli investimenti esteri diretti. Spunti di comparazione tra Stati Uniti ed Europa," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 147.
[419] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 22.
[420] Ibid.

President"[421]. The entire CFIUS process is also covered by strict confidentiality requirements, "except as may be relevant to any administrative or judicial action or proceeding"[422].

Figure 4. Steps of a CFIUS Foreign Investment National Security Review



(Source: James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 14)

Importantly, Congressional oversight over CFIUS reviews has been gradually extended, especially by FINSA and FIRRMA. Indeed, the Committee is required to annually provide Congress with a classified report on its activities[423] as well as a shorter publicly available summary. Certain members

[421] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 683.
[422] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 32.
[423] This report includes "a list of all concluded reviews and investigations, information on the nature of the business activities of the parties involved in an investment transaction, information about the status of the review or investigation, and information on any transactions that were withdrawn from the process, any roll call votes by the Committee, any extension of time for any investigation, and any presidential decision or action". *See* James K. Jackson, "The Committee

of Congress are allowed to request a CFIUS's briefing on transactions for which a decision has been taken. In fact, a Treasury official has recently suggested that "CFIUS now notifies and provides briefings to the Congressional Committees of jurisdiction on every case for which action has concluded under the Exon-Florio amendment"[424]. Finally, whenever CFIUS makes a recommendation to the US President suggesting that he or she prohibit a transaction, the Committee must also notify Congress and, on its request, submit a classified report giving reasons for the recommendation.

Interestingly, an American legal scholar has suggested that CFIUS is best understood as a "Congressional notification service"[425] and could serve as a paradigm for Congress's role in shaping US national security policy. Accordingly, "it is Congress, and not the executive branch, that sets the parameters of what national security permits with regard to foreign direct investment"[426]. In this interpretation, despite having established the Committee without Congressional participation, the Executive's role has gradually become a passive one. Congressional oversight of CFIUS, on the contrary, has transformed into a powerful instrument of influence on matters of national security. Thus, by both amending the CFIUS statute on several occasions (increasing its own monitoring powers and the Committee's reporting duties) and reversing CFIUS decisions in order to bring them in line with its own policy preferences (as for the 2006 Dubai Ports World case), Congress has managed to turn CFIUS into a "particularly strong version of a police patrol regime"[427]. Put differently, "an outfit that in many ways serves and is closely supervised by the legislature"[428]. As a main outcome of this process, it is Congress, rather than CFIUS, which foreign investors should fear, as Congress "sits in review of CFIUS and objects most strenuously – and at least as frequently and effectively as the Committee itself – to the consummation of foreign investments"[429].

In practice, a Presidential determination has blocked or suspended a transaction for just 5 times since 1975 (3 times between 2016 and 2018)[430]. Some have spoken of a "mildness of CFIUS review"[431]. However, the number of transactions blocked by a US President should be taken as "deceptive"[432]. Indeed, there is general awareness that, in the words of the Treasury Department itself, "blocking a transaction is a crude tool and serves no purpose when more subtle remedies are available"[433]. These remedies are essentially of two types. On the one hand, the so-called "quiet prohibition" instrument refers to when CFIUS deters the foreign investor from going through the entire review process based on the almost certainty of a prohibition. On the other, "mitigation agreements" entail conditions upon a transaction which can be viewed as a "tax (…) in exchange for its [the Committee's] approval of

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on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 33-34.

[424] Treasury Assistant Secretary Clay Lowery, cited in David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 98.

[425] Ibid., 81.

[426] Ibid. 88.

[427] Ibid., 101.

[428] Ibid.

[429] Ibid., 125.

[430] *See* James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 21.

[431] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 121.

[432] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 661.

[433] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 106.

an acquisition"[434]. In fact, the frequent employment of mitigation agreements has turned the CFIUS process into a "quasi-legalistic administrative"[435] one, which, almost like a prosecutor's office, is populated by "a savvy bar of practitioners who can cajole and negotiate with the prosecutors"[436]. Thus, the CFIUS review process has gradually "lawyered up"[437], reinforcing the preference for resorting to negotiations between the Committee and foreign investors.

Finally, as of 2017 (thus before the 2018 Foreign Investment Risk Review Modernization Act) empirical evidence points to the Committee's use of a "three-threat framework", ensuring a strict focus on national security issues. In Theodore H. Moran's interpretation, transactions posing national security threats to US interests can be rigorously singled out on a case-by-case basis. This, in turn, would imply that "the overwhelming bulk of foreign acquisitions can be welcomed without hesitation"[438]. According to Moran, CFIUS is largely concerned with three types of national security threats: (I) leakage of sensitive technology; (II) denial or manipulation of access to a critical input; (III) penetration, surveillance and sabotage, including surveillance via proximity to US military bases or defence installations[439].

Threat I refers to the possibility that a foreign company or government takes possession of US sensitive technology, and resells it or deploys it in a way which directly harms US interests. Evaluating this type of threat requires CFIUS to determine (i) the extent of the damage that could result from the given technology being employed against US interests and (ii) whether that same technology is easily available on international markets.

Threat II refers to the eventuality that a foreign company, possibly under instruction of its national government, restricts the supply or provision of a critical input which was acquired from a US business. Examining this second type of threat requires CFIUS to determine (i) how "critical" the input or product actually is (where "critical" is defined as "the cost of delay or doing without"[440]) and (ii) whether that same input is easily switched or bought on international markets.

Finally, Threat III concerns the possibility that a foreign company or government takes possession of sensitive US systems or critical infrastructures, gaining the ability to monitor and infect them. Evaluating this type of threat requires CFIUS to determine whether, upon penetration, those same systems or infrastructures are readily available from other providers. In addition, Threat III also refers to the eventuality that a foreign company comes to own a building or property which is located near a US military installation, therefore allowing for military surveillance.

In sum, Theodore H. Moran, who served as Associate to the US National Intelligence Council (NIC) dealing with the CFIUS process from 2007 to 2013, suggests that: "… *only if* the US firm to be acquired controls access to a critical good or service that does not have substitutes in the international market, *or if* the US firm to be acquired gives over a sensitive semi-unique technology that could be deployed at great cost against US interests, *or if* the target US firm could be used for penetration or surveillance in ways damaging to the United States without the ability of US users to switch to other

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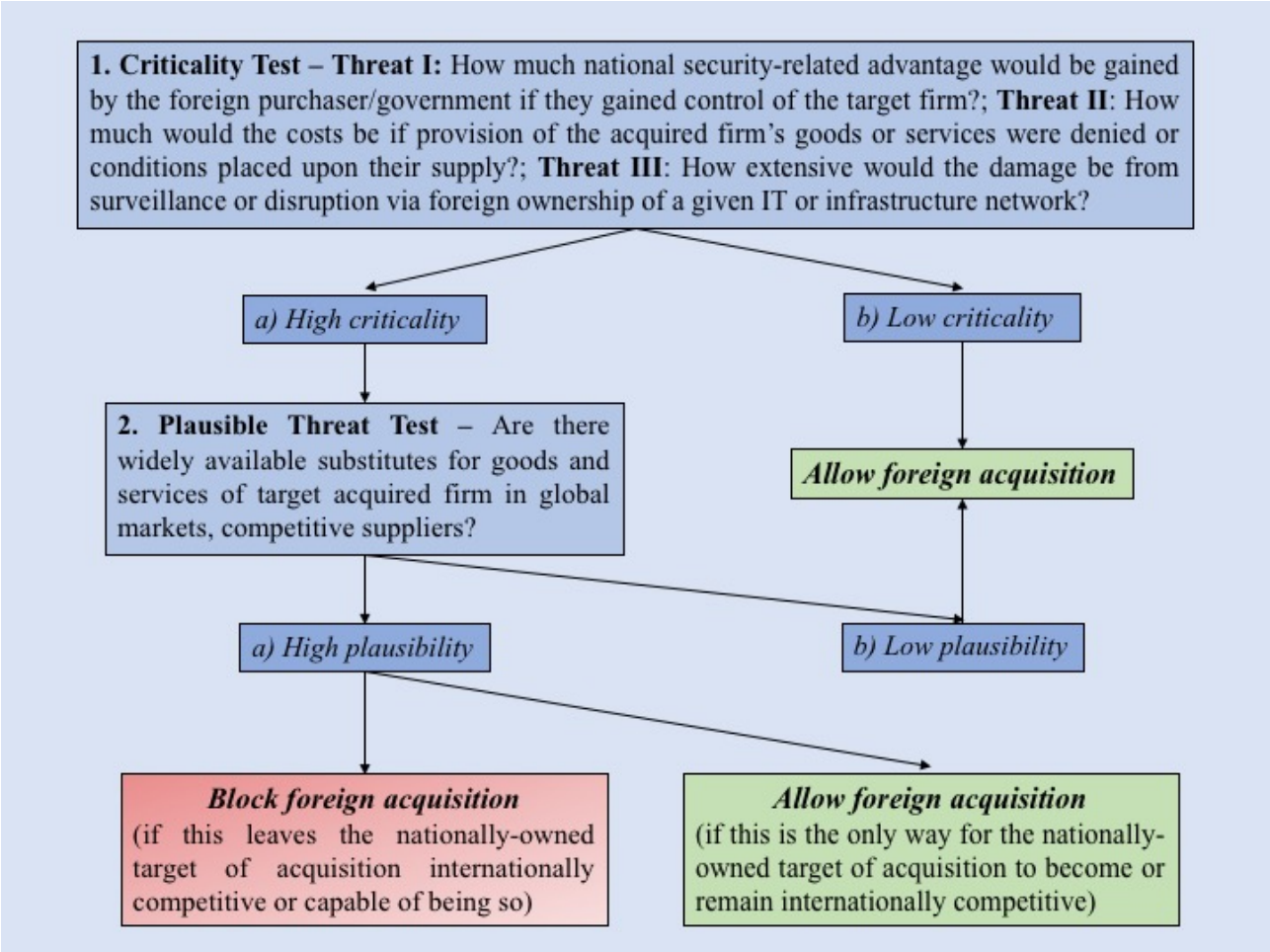
[434] Ibid., 108.
[435] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 875.
[436] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 107.
[437] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 875.
[438] Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 10.
[439] Ibid., 5-10.
[440] Ibid., 5.

more secure alternatives, *or if* (as a special case of Threat III) the target US firm has properties close to US military installations so as to allow surveillance, might a credible threat to national security be present"[441].

Figure 5. Three-threat framework for CFIUS review of individual transactions (2017)



(Source: Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 18)

As already suggested, this framework would allow the US to protect its legitimate national security interests while maintaining the economic benefits of openness to foreign investment[442].

3.1.3. Interpretation: old and new issues for contemporary America

CFIUS's recent evolution, especially following FIRRMA (2018), has reinvigorated a debate on foreign investment which has marked the Committee's life since its outset. Importantly, this debate raises interpretive questions which resonate with Italy's academic and political debate on the Golden

[441] Ibid., 6.
[442] Data from 2013 show that "12 percent of all productivity gains by firms in the US economy over more than two decades can be traced to spillovers from foreign investors". *See* Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 3.

power, especially concerning the relationship between foreign investment, national security and the economy. In other words, current discussions about the Committee on Foreign Investment in the United States seem to "mirror previous debates over a working set of parameters that establish a functional definition of the national economic security implications of foreign direct investment and expose differing assessments of the economic impact of foreign investment on the US economy, and differing political and philosophical convictions"[443].

Some American observers or politicians have traditionally supported the view that "the CFIUS review process should have a more robust economic component, possibly even to the extent of an industrial policy-type approach that uses the CFIUS national security review process to protect and promote certain industrial sectors in the economy"[444]. However, it is usually recognised that CFIUS has historically managed to maintain a strict focus on national security issues and its reviews have grown pretty "rigorous and predictable"[445]. Recent theorizations about CFIUS as a case of neo-liberal state-building also point to the Committee's ability to "historically resist pressure to interpret its legislative mandate broadly"[446]. According to this interpretation, the main building block of neo-liberal state-building in relation to CFIUS has been the gradual transferral of authority from politicized arenas, such as Congress, to a quasi-judicial body like the Committee. The outcome of this process is powerfully exemplified by the Committee's "contested location in the Treasury Department, its relative insulation from "politicized" Congressional oversight, and its filtering out of voices outside a privileged group of insiders with access to CFIUS's quasi-judicial routines"[447]. Although Congressional oversight over CFIUS has been recently extended, the practice of CFIUS decisions and their monitoring by Congress could suggest that the two institutions share a similar concept of national security. In fact, they seem to concur that "national security can best be implemented in institutions staffed by American citizens, with access rights given to American law enforcement and intelligence agencies. Although it is undoubtedly related to protectionist sentiments, Congress appears to believe (…) that national security requires the domestic sourcing of some industrial goods and the domestic ownership of some natural resource extractors. Défense contractors, raw material providers, and high-technology industries…"[448].

Thus, the current interpretive controversy mainly concerns whether the 2018 Foreign Investment Risk Review Modernization Act (FIRRMA) is contributing to broadening CFIUS' mandate "beyond the original narrow focus on the national security implications of individual investment transactions, to a more comprehensive assessment"[449]. In this sense, it could be the case that national security will no longer provide "the *only* justification for interference in market decisions"[450], and unprecedented uncertainty could result from "CFIUS's own expansive understanding of what constitute US

[443] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 39.
[444] Ibid., 1.
[445] Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 1.
[446] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 860.
[447] Ibid., 876.
[448] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 131.
[449] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 39.
[450] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 860.

businesses and its authority over foreign investors"[451]. Moreover, FIRRMA could provide several tools "to ensure US dominance of particular technologies, or to prevent foreign firms from acquiring particular US technologies"[452]. This, according to critics, approximates a form of industrial policy and could promote protectionism.

Furthermore, those suggesting that the Foreign Investment Risk Review Modernization Act (FIRRMA) has transformed the CFIUS process also point to pre-FIRRMA indicators of the trend. For instance, the early 2018 Broadcom/Qualcomm case[453] is often mentioned as illustrating CFIUS's own expansion of the "borders" of national security. In a letter dated March 5, 2018, which would be followed by a Presidential veto a few days later, CFIUS suggested that: "reduction in Qualcomm's long-term technological competitiveness and influence in standard setting would significantly impact US national security. This is in large part because a weakening of Qualcomm's position would leave an opening for China to expand its influence on the 5G standard-setting process"[454]. On the one hand, the President's veto was not imposed on a contract or agreement, but rather on a meeting of Qualcomm's board of members, in view of a "proxy fight" with Singapore-based Broadcom seen as potentially impairing US security interests. On the other, the Committee seemed to vastly interpret the concept of "risk to national security", by relating it to a reduction in Qualcomm's Research & Development (R&D) budget which would have affected the US's ability to influence technological standard-setting. In sum, the 2018 Broadcom/Qualcomm case would point to a significant degree of politicization of the CFIUS process.

Importantly, however, FIRRMA has not accommodated the entire range of CFIUS reforms proposed during its discussion, which in fact powerfully challenged the Committee's traditional focus on national security. Thus, CFIUS continues to review foreign investments on a case-by-case basis, rather than precluding acquisitions by firms of specific countries across entire economic sectors. Moreover, it does not screen investments by State-Owned Enterprise (SOE) from a "fair competition" perspective, but solely in reference to the national security threats they could pose. Finally, CFIUS does not demand reciprocal treatment of American businesses before clearing a transaction. Overall, as emphasized by Heath Tarbert (former Under Secretary of the Treasury for International Affairs), "while FIRRMA does expand CFIUS's jurisdictional scope to permit it to review certain types of non-controlling direct investment, the legislation maintains CFIUS's historical, sole focus on national security"[455]. This focus, which "respects the role of free markets in driving commercial decisions"[456], excludes trade and non-defence factors for CFIUS's consideration and serves the central purpose of maintaining the US's open-door policy to inward investment. As the Committee remains relatively insulated from political pressure, a future impetus to reverse CFIUS's focus could possibly result from "bureaucratic shifts in opinion as to what is considered important for US national interests"[457].

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[451] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 694.

[452] Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 12.

[453] For a detailed description of the case, *see* Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 650-660.

[454] Department of Treasury Letter of March 5, 2018, cited in Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 55.

[455] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1522.

[456] Ibid., 1521.

[457] Edwin Feulner, "CFIUS and a Role for American Leadership," in Tim Wenniges – Walter Lohman (eds.), *Chinese FDI in the EU and the US. Simple Rules for Turbulent Times* (Singapore: Palgrave Macmillan: 2019): 26.

In conclusion, FIRRMA presents several challenges to the future functioning of CFIUS[458]. A first one concerns the Committee's ability to coordinate with the new exports control regime of the US Department of Commerce, especially relating to emerging and foundational technologies. Secondly, CFIUS will have to address the growing vulnerabilities produced by the "Big Data revolution" and enhance its cooperation with America's international allies. Finally, the Committee should focus on preventing low risk investments from being deterred by its expanded jurisdiction. In this sense, "the last thing FIRRMA was intended to do was to gum up the works for foreign investments posing little or no national security risk"[459].

3.2. Foreign direct investment screening in Germany and France

Lessons for Italy's Golden power could also be drawn from a short overview of Germany's and France's FDI screening systems, aiming to single out their distinctive features. Both countries, which are also core EU Member States, have recently displayed a "strong tendency (…) towards a stricter approach regarding the screening of foreign investment and the legal implications thereof"[460]. Indeed, the wider European context has been significantly transformed by the adoption of the 2019 EU Regulation on the screening of foreign direct investments, which was in fact inspired by a request from Germany, France and Italy. Moreover, the EU Regulation's adoption precedes the COVID-19 pandemic, and by the time it has entered into force on October 11, 2020, "the European landscape has thoroughly changed, including vis-à-vis the issuance of emergency regulations and the like, casting into laws and measures geared towards protecting key sectors (…) that have traditionally resided outside the paradigms of FDI-oriented concerns"[461].

3.2.1. Germany and its "gentle Leviathan"

Before turning to Germany's foreign investment screening mechanism, a few words can be spent on its "economic intelligence". Since the times of Otto von Bismarck, Germany's economic system has been guided by a "principle of strategic unity between its various decision-making centres: firms, banks, insurance companies, Landers and the State"[462]. This includes German intelligence agencies, which started to boost their activities in the economic field as early as in the 1960s (as part of Willy Brandt's *Ostpolitik*). "Strategic unity" demands the existence of communication channels between the various actors, as well as a deep-rooted sense of national cohesion. Overall, Germany continues to thrive on cooperation between its intelligence agencies and private firms. For instance, German corporation Siemens is known to have provided national intelligence agencies with up-to-date technology[463], reinforcing their ability to "hack" and access foreign databases. Moreover, German economic intelligence benefits from a "consolidated market for open source economic information,

[458] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1511-1524.
[459] Ibid., 1523.
[460] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 79.
[461] Concurrences, "Foreign direct investment sceening in Europe: a comparative perspective on differences and commonalities within Europe," *Concurrences (Competition Law Review)* n. 4 (2020): 268-269.
[462] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 82.
[463] *See* Ibid.

based on the resources of both public administrations and private offices"[464]. These resources are employed to pursue the goals typical of "a militarist State operating in the economic field"[465]. In conclusion, Germany's economic projection is marked by an offensive attitude, as has recently been the case in both Central Europe and Asia[466].

This offensive attitude, however, has not precluded Germany's efforts to define its own (defensive) mechanism for screening inward investments. Generally speaking, Germany continues to provide "the most attractive business location in continental Europe"[467]. However, its screening of foreign investments has been significantly strengthened in recent years, in response to takeovers of important German companies by foreign investors as well as to the effects of the COVID-19 shock. The legal basis of Germany's FDI screening regime is found in the German Foreign Trade and Payments Act (AWG) and Foreign Trade and Payments Ordinance (AWV). The two Acts empower the Federal Ministry for Economic Affairs and Energy (BMWi) to review investments by foreign entities. In terms of scope for review, two different regimes apply: one for "cross-sectoral investments" (Section 55 et seq. of the AWV) and one for "sector-specific investments" (Section 60 et seq- of the AWV). This section treats these two regimes separately and their overview refers to pre-COVID 19 times. A separate paragraph will delve into Germany's reform of foreign investment screening during the global pandemic.

Concerning the "cross-sectoral" regime, "the Ministry's right to review and restrict does not require the target company to belong to a certain economic sector"[468]. In fact, the Federal Ministry for Economic Affairs and Energy's powers encompass all sectors of the German economy.

Under this regime, the BMWi is recognised the authority to block or impose conditions upon (i) acquisitions of domestic companies and (ii) acquisitions of shareholdings in these companies. The former refers to acquisitions of "an entire enterprise, meaning no less than 100% of the shares of that particular enterprise"[469], while the latter refers to investments above a threshold of 25% of the voting rights in the domestic company (whether directly or indirectly). However, the 25% threshold was brought down to 10% by a December 2018 amendment to the AWV for firms involved with critical infrastructures or specific security-related services. Accordingly, critical infrastructures include, amongst others, telecommunications, energy, information technology, transport and traffic, health, water, nutrition, finance and insurance. "Security-related services", on the other hand, could refer to cloud computing or media services, telematic infrastructure, the development and modification of software for the industry-specific operation of critical infrastructures[470].

Importantly, this cross-sectoral regime applies to non-EU and non-EFTA (European Free Trade Association) investors. A European investor could come to be encompassed only if a non-European entity holds at least 10% or 25% of the direct or indirect share of its voting rights, or there is evidence that a circumvention or abusive approach has been sought to avoid review. In general, "only the

[464] Ibid.
[465] Ibid.
[466] *See* Ibid., 83.
[467] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 80.
[468] Ibid., 84.
[469] Ibid., 86.
[470] Ibid., 87. Importantly, the compatibility of this lowered threshold with European law has been a source of controversy since the amendment's approval.

parent company is relevant for the determination of nationality"[471]. Thus, in order to prevent circumvention, also "direct and indirect acquisitions by foreign investors, e.g., through an intermediary, are caught by German FDI screening"[472].

Under the cross-sectoral regime, the Ministry's authority to block or impose conditions upon a transaction can be exercised if "indispensable in order to guarantee public order or security in the Federal Republic of Germany"[473]. "Public order" and "public security" are usually interpreted in accordance to EU law. Thus, they concern "the core area of statehood and thus the safeguarding of Germany both internally and externally (…) general economic, labour market or financial interests of the state do not fall under the concept"[474].

In procedural terms, a notification obligation for investments covered by the cross-sectoral regime only applies if the German target company is involved with critical infrastructures. However, notifications are strongly recommended. If a voluntary notification is not filed, the BMWi could initiate an *ex officio* procedure and possibly unwind the investment within the following 5 years. Otherwise, upon receiving information about a transaction via notification, the German Ministry has the power to initiate a review procedure within 3 months. It usually requires the investors to submit additional documentation. Once complete information has been obtained from the parties to a transaction, the BMWi must decide whether to clear, block or impose conditions ("in the form of administrative orders"[475]) within a period of 4 months. The Ministry is also "legally obliged to involve the other ministries concerned in the concrete case within the framework of their responsibilities"[476]. In sum, the overall screening procedure, from notification of the transaction to the German Ministry's final decision, could last up to 7 months. Importantly, "the legal transaction underlying the foreign investment remains valid"[477] during the BMWi's review. Moreover, the German Ministry's final decisions are kept confidential and are not available to the general public. If blocking or imposing conditions upon a transaction, the BMWi must also seek the consent of the entire federal government. Finally, before taking a final decision, it must give the foreign investor the right to be heard and to reply to the Ministry's concerns.

Finally, judicial review of a BMWi's decision is significantly limited. It is available within 1 month of the decision and has been scarcely employed in practice. Generally speaking, German judicial review focuses on the question of "whether the fundamental freedoms of the EU, the constitutional principle of equal treatment, fundamental rights and the principle of proportionality have been observed"[478]. The right to appeal is also constitutionally guaranteed. However, administrative practice has shown that "foreign investment control restrictions are commonly agreed on in public law

[471] Ibid., 85.
[472] Debevoise & Plimpton, "Foreign Direct Investment Rules in Selected European Countries – An Overview," *Debevoise in Depth* (Updated on June 16, 2020): 6.
[473] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 82.
[474] Ibid., 91.
[475] DLA Piper, "Multi-jurisdiction guide for screening of foreign investments," August 2019: 53.
[476] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 93.
[477] Ibid., 95.
[478] Ibid., 94.

contracts with the BMWi which has the effect of considerably reducing the relevance of judicial review in this area of governmental activity"[479].
Finally, the cross-sectoral regime envisages the possibility that foreign investors earn a "certificate of non-objection". According to this procedure, "in order to obtain legal certainty at an early stage, the foreign investor is entitled to apply for a legally binding clearance certificate from the Ministry prior to the acquisition"[480]. If the BMWi does not initiate a formal review within 2 months of receiving the application, the certificate is deemed granted. This can provide individual transactions with future "screening immunity".

Concerning the "sector-specific" regime, the BMWi's review powers apply to "each foreign acquisition, without limitation to non-EU/EFTA foreigners, in areas that are particularly sensitive in terms of security, inter alia military weapons and equipment, as well as crypto technology"[481]. For this regime to apply, the foreign investor must acquire a German company, or direct/indirect shareholdings in it, belonging to specific economic sectors. These include "manufacturers and developers of war weapons and other key military technologies, especially designed engines and gearboxes for military tracked armoured vehicles, and products with IT security features that are used for processing classified government information"[482]. However, a threshold of 10% of the voting rights must be overcome by the foreign investment in order to trigger the Ministry's screening. This is equal to the threshold for foreign investments in critical infrastructures within the cross-sectoral regime.
As already suggested, the sector-specific regime includes EU or EFTA-based investors. These could be legal or natural persons. Thus, "the subjects of investment review are not only actual acquisition transactions but also pure foreign financial investments"[483].
Under the sector-specific regime, the BMWi's review does not aim to protect German "public order and security", but rather determines whether the "essential security interests of Germany" are threatened by a transaction. This suggests that the German state strives to maintain "direct legal access to the German defence industry and access to companies that produce crypto technology for encoding sensitive government information"[484]. In practice, the BMWi has followed the general standard that foreign investments "shall not negatively affect the government right of disposition of core abilities of the German defence industry"[485].
In procedural terms, the requirements for cross-sectoral review also apply to this regime. The only exception concerns in-depth review time, which is reduced from 4 to 3 months (upon receiving complete information by the parties to a transaction). Moreover, under the sector-specific regime, "the legal transaction on which the acquisition is based shall remain pending and ineffective (subject to resolutory condition)"[486] during the BMWi's review. Finally, the German Ministry initiate reviews or imposes prohibitions over sector-specific investments in agreement with the Federal Foreign

[479] Jacob von Andreae, "Challenges in a new reality: German foreign investment control in times of change," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 80.
[480] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 94.
[481] Ibid., 97.
[482] Ibid., 96.
[483] Ibid., 97.
[484] Ibid.
[485] Ibid., 98.
[486] Ibid.

Office and the Federal Ministry of Defence (in addition to the Federal Ministry of the Interior under particular circumstances).

Overall, Germany's "screening net" is extremely wide, as "any transaction concluding with the purchase of 25% of the voting rights of a German company can be subjected to an investment review, regardless of which industrial field it can be ascribed to, so long as public order or security in Germany is affected"[487]. This inclusive regime is the outcome of several AWV amendments of 2017-2018 resulting mainly from "fears of Chinese acquisitions of German market and technology leaders as well as Chinese investments in German critical infrastructures"[488]. Public outrage in response to a number of transactions, including the Kuka and Aixtron cases, was also significant. Moreover, "substantial legislative amendments (…) have been accompanied by a tightened administrative practice of the BMWi"[489]. In fact, the number of ministerial requests for information and in-depth reviews of FDI has exponentially increased in recent years. The full length of review periods is now often fully exploited, and in 2018 the German Ministry prohibited a transaction for the first time (Leifeld case)[490]. Finally, notifications to the BMWi have increased from 78 in 2018 to 106 in 2019[491] and 159 in 2020[492].
In conclusion, in early 2020 several observers predicted that Germany's FDI screening regime would be subject to a further tightening in the near future[493], as a result of the effects of the EU Regulation (expanding the scope of investment review and extending procedural timings) and BMWi's head Peter Altmaier's "National Industry Strategy 2030" (which "emphasized the role of foreign investment control in Germany's industry policy"[494]).

Following the outbreak of the COVID-19 pandemic in Europe (March 2020), German FDI screening has been addressed by three *ad hoc* legislative reforms, which have significantly amended and expanded its scope.
In fact, another relevant legislative provision was adopted by the German Parliament on June 18, 2020, but had been presented by the BMWi in January 2020. The Ministry's goal was to "further tighten its grip on non-European investors"[495]. This reform, which consisted of amendments to the Foreign Trade and Payments Act (AWV), introduced two major innovations. On the one hand, investments concerning critical infrastructures, similarly to transactions in the defence and encryption technologies sector (sector-specific regime), were subject to a suspensory effect. This implies that "the acquisition of a German business by a non-European investor cannot be consummated without

[487] Debevoise & Plimpton, "Foreign Direct Investment Rules in Selected European Countries – An Overview," *Debevoise in Depth* (Updated on June 16, 2020): 6.
[488] Jacob von Andreae, "Challenges in a new reality: German foreign investment control in times of change," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 77.
[489] Ibid., 78.
[490] For details on the Leifeld case, *see* Ibid.
[491] Debevoise & Plimpton, "Foreign Direct Investment Rules in Selected European Countries – An Overview," *Debevoise in Depth* (Updated on June 16, 2020): 5.
[492] Covington Competition, "Significant Revamp of German FDI Regime – German Government Presents New Rules on FDI Screening," *The Covington View* (January 28, 2021).
[493] Jacob von Andreae, "Challenges in a new reality: German foreign investment control in times of change," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020).
[494] Ibid., 80.
[495] Allen & Overy, "Foreign Direct Investment Screening in Germany – most recent developments. What foreign investors need to consider," *Publications* (June 19, 2020): 2.

clearance from the Ministry"[496]. On the other hand, disclosing security-relevant information prior to the BMWi's clearance, a practice known as "gun jumping"[497], was made a criminal offence. Moreover, the time length available to the German Ministry was reconsidered, sanctioning a 2-month period for the BMWi to initiate reviews upon receipt of a notification. If a review is in fact initiated, the German Ministry has to take a decision within 4 months, which might be extended to 8 under specific circumstances. This applies regardless of the specific screening regime concerned by a transaction.

However, a first reform of German FDI screening directly triggered by the COVID-19 outbreak was the "15th Amendment" to the Foreign Trade and Payments Ordinance. This was adopted by the Federal Government on June 3, 2020. Importantly, the 15th amendment sanctioned the inclusion of healthcare activities within the range of Germany's critical infrastructures. These can include "producers of personal protective equipment, essential therapeutics, in vitro diagnostics in the field of infectious diseases and medical devices for infectious diseases"[498]. Secondly, the amendment specified that, during its review, the German Ministry is allowed to take into consideration one additional factor, in line with the EU Regulation: "whether the purchaser is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding"[499]. Thirdly, the 15th amendment pointed out that asset deals, in addition to acquisitions of shares, fall within the scope of the Ministry's review[500].

The second legislative reform triggered by the effects of the COVID-19 pandemic in Germany was the "16th Amendment" to the Foreign Trade and Payments Ordinance, of October 29, 2020. This amendment was adopted as part of Germany's effort to implement the 2019 EU Regulation on the screening of foreign investments (which had entered into force on October 11, 2020). Two major innovations were introduced by the 16th amendment. On the one hand, the grounds for the German Ministry's review were expanded. They now include the "public order or security of a fellow EU member state as well as effects on projects or programs of EU interest"[501]. On the other, the standard for prohibitions or impositions of conditions by the BMWi was "tightened from "*endangering*" to "*likely to affect*" the public order or security"[502]. Overall, the legal literature has interpreted this second provision as giving the BMWi "more discretion and room to manoeuvre as it no longer has to determine an "actual serious threat" (…) but now could prohibit a transaction in order to prevent an impairment that has not yet materialized but that is likely to occur as a result of the contemplated FDI"[503].

Finally, the 17th Amendment to the Foreign Trade and Payments Ordinance entered into force at the beginning of May 2021. It marks "the third fundamental revision of the German FDI regime since April 2020"[504]. Moreover, it was mostly inspired by "the aim of reflecting in national law the categories of critical technologies and activities mentioned in Art. 4 (1) of the EU Screening Regulation"[505]. Indeed, this reform incorporated a new range of (16) tech-related sectors into the list

[496] Ibid., 3.
[497] Ibid., 1.
[498] Ibid.
[499] Ibid.
[500] Gibson Dunn, "Update on German Foreign Investment Control: New EU Cooperation Mechanism & Overview of Recent Changes," November 11, 2020: 2.
[501] Ibid.
[502] Ibid., 1. My italics.
[503] Ibid.
[504] Gibson Dunn, "Germany Further Strengthens Foreign Direct Investment (FDI) Regime," May 13, 2021.
[505] Ibid.

of German industries subject to cross-sectoral review, including, amongst others, "satellite systems, artificial intelligence, robots, autonomous driving/unmanned aircrafts, quantum mechanics, and critical raw materials"[506]. Furthermore, the threshold triggering the Ministry's review for these new sectors was set "at 20% or more" of the voting rights of the target company. If this threshold is passed, the (non-EU/EFTA) investor is required to notify its investment. Importantly, "the amendment contains quite detailed descriptions of concrete technologies and products instead of listing whole industries"[507]. This significantly improves legal certainty. One author has in fact commented that "Germany tries to balance (at least to a certain extent) national security interests against an open and investor-friendly environment"[508]. Nonetheless, notifications and reviews of foreign investments are likely to increase to a great extent in the near future.

3.2.2. France: distinctive traits

For an extensive overview of French economic intelligence see sections 1.2.1. and 1.2.3. in Chapter 1. Suffice it here to recall France's historical ability to pursue public-private synergy in economic projection. In terms of foreign investment screening, the legal basis for France's FDI review is found in the Monetary and Financial Code (*code monétaire et financier* or MFC). In fact, the French mechanism for investment review stands out for its ancient origins, dating back to a 1966 law on foreign financial relations (Law n. 66-1008). This could suggest a deep-rooted, traditional distrust of foreign investments; on the contrary, "there is a strong ideology of *laisser-faire* among our [the French] top civil service"[509].

As in Germany, the government authority competent for screening foreign investments is a Ministry, that is, the Ministry of the Economy and Finance. Its original review scope was quite limited, but was significantly extended since 2014 (following the same year's controversial merger of the energy branch of the French "Alstom" and General Electric). It was further strengthened in 2018, especially concerning digital technologies, and 2019, when the so-called "PACTE" law and a decree/ministerial order of December 31, 2019, were approved. Finally, France's screening mechanism was reformed again in "pandemic times". As in the previous section on Germany, a separate paragraph will be devoted to French reforms specifically triggered by the COVID-19 shock.

To begin with, the French mechanism is based on a distinction between investments for which a simple declaration is sufficient (i.e., investments in "non-sensitive sectors") and transactions for which a prior authorization by the French Ministry is required (i.e., those targeting French firms in "extra-sensitive" and "sensitive" sectors). This distinction was implemented following a 2000 sentence by the Court of Justice of the European Union (CJEU), in "*Association Eglise de scientology de Paris* and Scientology International Reserves Trust v The Prime Minister". The Court ruled that France's previous mechanism for screening foreign investments defined "material investments" too broadly or vaguely[510]. Thus, it was incompatible with European law (especially its free movement of capital provisions). Importantly, today's "extra-sensitive" sectors include French businesses involved

[506] Ibid.
[507] Dentons, "Major reform of Foreign Direct Investment rules in Germany, " April 30, 2021.
[508] Ibid.
[509] Thomas Perroud, "The screening on foreign direct investment in France," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 71.
[510] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 101.

in, amongst others, cryptology, management of defence secret information, production of weaponry and other restricted materials, data hosting, cyber-security, artificial intelligence, semiconductors, and the integrity, safety and supply of essential facilities and equipment (water, energy resources, transport and electronic communication networks, public health protection). "Sensitive" sectors, on the contrary, refer to, amongst others, the gambling industry, private security services, businesses managing dual civil and military technology or providing goods/services relating to the security of information technology[511]. All other segments of the French economy fall within the scope of "non-sensitive" sectors.

However, the decisive factor for the applicability and scope of French FDI screening is "the respective category of "foreign investor" in each individual case"[512]. Thus, the French mechanism singles out three types of foreign investors: (i) EU investors (i.e., "a national of an EU member state or an EFTA state or a legal entity that has its registered office in an EU member state or a French national residing in another EU member state"[513]), (ii) non-EU investors and (iii) "foreign-controlled French investors" (FCFI) (referring to entities whose registered office is in France, but are in fact controlled by an EU or non-EU investor). In terms of authorization requirements, provided that "the Ministry's approval constitutes a condition precedent to the relevant transaction"[514], France's screening device stipulates that:

- if the investor qualifies as an EU investor, a prior authorization by the French Ministry of the Economy and Finance is only required for: (1) direct or indirect acquisitions of control of French businesses operating in "extra-sensitive" sectors; (2) acquisitions of all or part of a branch of activity of French businesses operating in "sensitive" and "extra-sensitive" sectors;
- if the investor qualifies as a non-EU investor, a prior authorization by the French Ministry of the Economy and Finance is required, for "sensitive" and "extra-sensitive" sectors alike, provided that the given transaction is one of the following: (1) direct or indirect acquisition of control of a French business; (2) acquisition of all or part of a branch of activity of a French business; (3) acquisitions of more than 25% of equity or voting rights in a French business;
- finally, if the investor qualifies as a foreign-controlled French investor, a prior authorization by the French Ministry of the Economy and Finance is only required for acquisitions of all or part of a branch of activity of French business operating in "extra-sensitive" sectors.

In short, France's screening regime stands out as exceptionally strict for non-EU investors and partially relaxed for FCFIs, which "enjoy much more freedom"[515]. Investors based in the European Union stand in-between.

In procedural terms, foreign investors are required to submit an authorization request to the French Ministry before the transaction is completed. A standstill obligation applies, meaning that "the transaction may not close during the review period"[516]. Thereafter, the French Ministry will reply within 30 days, communicating whether (i) an authorization is not required, (ii) the investment does not warrant further review and is therefore cleared or (iii) the Ministry needs additional time to determine whether a prohibition or conditional assent is necessary to protect French interests. If the third option applies, the French Ministry has to issue its decision within 45 days. In this case, however,

[511] For a comprehensive list, *see* Ibid., 102-103.
[512] Ibid., 103.
[513] Ibid.
[514] Ibid., 104.
[515] Ibid., 106.
[516] Debevoise & Plimpton, "Foreign Direct Investment Rules in Selected European Countries – An Overview," *Debevoise in Depth* (Updated on June 16, 2020): 19.

as opposed to Italy's mechanism of *silenzio assenso*, "failure to respond by the Ministry within these timeframes (…) results in the request being deemed rejected"[517]. This same principle applies to the so-called "fast-track" option, whereby foreign investors are allowed to "submit a request to the French Ministry to ascertain whether or not the planned investment will require prior government approval"[518]. Again, if the French Ministry fails to respond within 60 days, the request is deemed rejected.

During its screening of foreign direct investments, the French Ministry of the Economy and Finance undertakes to "secure national interests, meaning in particular public policy, public security and national defence"[519]. Given this vague definition, the Ministry is known to enjoy a large extent of discretion. Moreover, as in Germany and Italy, the French Ministry's determinations can result in either an outright prohibition of the investment or, if this is deemed sufficient, an imposition of specific conditions. In the former case, however, the Ministry "is under statutory obligation to provide the foreign investor with reasons explaining such denial"[520]. Nonetheless, prohibitions are relatively rare, as the Ministry has a "long tradition of negotiating with foreign investors"[521].

Finally, decisions by the Ministry are subject to "full judicial review by the administrative judge"[522]. Upon appeal by a foreign investor, French administrative courts can go as far as annulling a Ministry's prohibition on an investment or modifying its content. However, as one scholar recently suggested, "there are also very few cases. The topic [of foreign investment screening] is indeed marked by secrecy, and it is difficult to control the degree of capture"[523].

Following the outbreak of the COVID-19 pandemic, France's mechanism for reviewing foreign investment has been reformed and generally strengthened, "building on the significant development of its FDI screening framework in 2018 and 2019"[524]. In fact, a decree and ministerial order of December 31, 2019, had introduced very significant innovations. Most importantly, it "(i) expanded the list of "sensitive activities", (ii) refined the concept of foreign investors/investments for both European and non-European investors, and (iii) clarified the role of the French Ministry of Economy by introducing a two-step review process for qualifying investments"[525].

In 2020 two reforms of French FDI screening were specifically triggered by the COVID-19 pandemic. On the one hand, a ministry order of April 27, 2020, permanently expanded the list of so-called "sensitive" sectors by including "research and development activities relating to biotechnologies". This provision was essentially intended to "provide complete protection over the

[517] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 107.
[518] Ibid.
[519] Ibid., 99.
[520] Ibid., 109.
[521] Thomas Perroud, "The screening on foreign direct investment in France," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 74.
[522] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 111.
[523] Thomas Perroud, "The screening on foreign direct investment in France," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 72.
[524] White & Case LLP, "New expansion of foreign direct investments control regime in France and the impact on French biotech companies," *White & Case Technology Newsflash* (July 30, 2020).
[525] Ibid.

French health sector against hostile acquisition in the COVID-19 pandemic global context"[526]. On the other, a ministry order of July 22, 2020, has temporarily lowered the threshold triggering review for French listed companies targeted by non-EU or EFTA investors. This threshold was brought down from 25% to 10% of the voting rights. Moreover, the review procedure for this type of investment will be a "fast-track" one, whereby the investor is allowed to "notify the transaction to the MEF [the French Ministry] in order to be exempted from prior authorization"[527]. Importantly, this provision's underlying goal was to "prevent hostile or opportunistic acquisitions in the context of the financial crises caused by the COVID-19 pandemic situation"[528]. It was initially supposed to apply until December 31, 2020, but, given ongoing financial volatility, its validity was extended for 1 additional year (until December 31, 2021). In conclusion, critics have pointed to these two reforms' "broad wording and absence of legal definition"[529], suggesting they can be expected to result in an upsurge of reviewed investments.

3.3. A short assessment: insights for Italy's Golden power

This third section provides a short comparison between Italy's Golden power and foreign investment screening in the US, Germany and France. This could help to shed light on the distinctive features of Italy's Golden power as well as possibly its weaknesses.

Comparing Italy and the US on foreign investment control is particularly useful, as the American model is known to have "inspired the Italian Golden power in a certain sense"[530]. In general terms, the American model is often praised for "the historicity of its institutions and the constant updating of its legislation"[531], as well as "the diffusion, in both academic and industrial circles, of a strong security culture"[532]. Importantly, since the Exon-Florio Amendment, foreign investment screening in the United States has presented the traits of a "safe harbour" system. This makes it "significantly distant from the automatisms"[533] of Italy's Golden power. Indeed, notifications in the US are usually voluntary and the 2018 Foreign Investment Risk Review Modernization Act (FIRRMA) allows for a "light filing" procedure, in order to accelerate CFIUS review. Moreover, "mitigation agreements" can be formally negotiated between the Committee on Foreign Investment in the United States and foreign investors. This marks an important difference "from the unilateral governmental power to impose specific obligations upon the investor"[534] which is proper to Italy's Golden power. In fact, mitigation agreements are a product of negotiations and their rationale "assumes the substantial positivity of foreign investments for the US economy"[535]. On the contrary, the Italian government's

[526] Dentons, "New French Foreign Investments Screening Scheme," September 18, 2020.
[527] Winston & Strawn LLP. "Foreign Direct Investments in France." July 23, 2020.
[528] Dentons, "New French Foreign Investments Screening Scheme," September 18, 2020.
[529] White & Case LLP, "New expansion of foreign direct investments control regime in France and the impact on French biotech companies," *White & Case Technology Newsflash* (July 30, 2020).
[530] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 10.
[531] Paolo Messa, "Oltre il golden power. Il modello americano e il dibattito in Europa," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 147.
[532] Ibid., 152.
[533] Andrea Guaccero, "*Compliance* e tutela degli investimenti esteri diretti. Spunti di comparazione tra Stati Uniti ed Europa," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 145.
[534] Ibid., 147.
[535] Ibid.

imposition of conditions or prescriptions under the Golden power results from "actual authoritative powers"[536]. However, one recent innovation introduced by the 2007 Foreign Investment and National Security Act (FINSA) contributes to bringing the American and Italian mechanisms for FDI screening significantly closer. Thus, CFIUS is now under a legal obligation to initiate a national security review for cases involving a foreign government-controlled entity. This "clause for the automatic activation of review"[537] approximates the "authoritative" functioning of Italy's Golden power.

Moreover, the US model for foreign investment review also stands out for two characteristic elements: CFIUS's ability for independent decision-making, reinforced by the presence of a specialized bureaucratic structure serving the Committee, and the incontestability of Presidential decisions on foreign investments. While FDI screening in Italy is also carried out by an inter-departmental committee (the Inter-ministerial Coordination Group), it differs from the US on both features. Firstly, the Italian Coordination Group does not possess autonomous powers. CFIUS is entitled to clear a review by negotiating "mitigation agreements", which make resort to a Presidential decision unnecessary. On the contrary, even when the Coordination Group determines that no grounds exist for exercising the Golden power, a deliberation of the Italian Council of Ministers must sanction this conclusion. Moreover, Italy's Coordination Group has been described as "lacking its own permanent and specialized bureaucratic apparatus"[538]. As its own name suggests, it rather coordinates the several contributions offered by its ministerial members. Secondly, the possibility for judicial review of Golden power decisions contrasts with the features of American foreign investment screening. Recently, the Ralls case (2014) "remarked upon the substantial, judicial incontestability of Presidential decisions"[539] in the US.

Importantly, judicial review of foreign investment screening decisions is an element joining several European countries, including Germany and France. As in these two EU countries, Italian decisions on foreign investments can be appealed against before an administrative judge. However, they also continue to be based on a significant margin of discretionality. FDI screening is in fact "disciplined by rules subjecting it to concepts (…) which are much more indeterminate than those governing other sectors (e.g., the antitrust sector), and must therefore be exercised by making assessments which are the product of not only technical but also administrative discretionality, in its classical meaning, concerning the overriding interests of the State"[540]. The decisive factor, therefore, is "the intensity with which the administrative judge imbues his determinations"[541]. Overall, the overriding administrative discretionality of Italian government's decisions on FDI screening does not prevent *in toto* their judicial review (as is the case for the United States). However, it limits this review to "the decision's compatibility with the appropriate exercise of discretionary power, in terms of procedural legitimacy, reasonableness, consistency and adequacy"[542].

Finally, the latest CFIUS reforms have been read into the wider framework of a new US-China commercial conflict. This is a conflict which "hits everything, from artificial intelligence to network

[536] Ibid., 149.
[537] Ibid., 146.
[538] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 12.
[539] Ibid., 11.
[540] Ibid., 13.
[541] Ibid.
[542] Ibid.

equipment, and the "chip war" is its main battlefield"[543]. In this context, CFIUS could be one of several US instruments of economic war, including sanctions, export controls and institutions such as the Bureau of Industry and Security (BIS) of the Department of Commerce. Thus, while the extension of Italy's Golden power to high-tech sectors (2017) and 5G technology networks (2019) was a significant development, compared to CFIUS Italy's foreign investment screening may need to be "updated in light of technological disruption, which has radically altered the definition of the strategic assets which need to be defended"[544]. Several observers, for instance, have argued in favour of the introduction of "black" and "white" lists of foreign countries deserving, respectively, a stricter or lighter control on their outward investments.
Finally, a threat framework similar to the one theorized by Theodore H. Moran for the US (see *Table 6*) might provide a useful benchmark for all EU countries, including Italy. Moran's "decision tree" could undoubtedly serve Italy, "just as it has served the United States, to promote an appropriate balance between openness to foreign investment and concerns about national security"[545].

Before moving to a comparison with Germany and France, particular attention should be devoted to the post-COVID-19 expansion of foreign investment screening across the entire EU. As outlined throughout this dissertation, mechanisms for FDI review have been powerfully strengthened in Italy, Germany and France alike, pointing to a wider regional trend. This development, in turn, suggests two questions. Firstly, whether this trend is mainly the result of the COVID-19 shock. Secondly, whether it is likely to be reversed in the future.
Available data suggest that more than half of Organization for Economic Cooperation and Development members (OECD, 37 countries) have a foreign investment screening mechanism in place since 2018[546]. This marks a significant increase over the previous decade. The OECD itself has described this evolution as follows: "Beyond the quantitative change associated with the greater number of mechanisms in this area, qualitative changes have significantly transformed policy practice in many advanced economies in the past five years. Most mechanisms now allow for intervention in a much broader section of the economy. Combined with the lowering of trigger thresholds, a much larger number of transactions are now potentially subject to scrutiny. Rules have become more detailed and sophisticated and are geared towards routine applications. Implementation practice has also changed in many countries, with more confident and frequent use of the instruments. Greater depth of regulation and transparency about policy practice are further indicators of a transformational change that has emerged over the past decade in many countries, deepening markedly from 2016 onwards"[547]. In sum, foreign investment screening is "on the rise" since at least 2016 and particularly since 2018. Importantly, while 26 OECD national governments approved changes to their FDI screening mechanism following the outbreak of COVID-19, the global pandemic must in fact be viewed as a factor which "further *accelerated* policy-making"[548]. In other words, it was a reinforcing element, acting upon earlier developments. Two longer-term trends in the global economy can be

[543] Paolo Messa, "Oltre il golden power. Il modello americano e il dibattito in Europa," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 146.
[544] Ibid., 153.
[545] Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 17.
[546] Simon J. Evenett, "What Caused The Resurgence in FDI Screening?" *SUERF (The European Money and Finance Forum) Policy Note* 240 (May 2021): 5.
[547] OECD 2020, cited in Ibid., 5-6.
[548] OECD 2020, cited in Ibid. Emphasis added.

viewed as explaining the resurgence in foreign investment screening, which COVID-19 mainly accelerated: "(i) the spread of general-purpose digital technologies and associated business models, as well as (ii) the growing rivalry between China and the United States"[549]. Concerning the second question above, this also suggests that few of the changes recently introduced by European governments, including in Italy, Germany and France, "are likely to be reversed [after the COVID-19 pandemic]; a permanent shift in the treatment of foreign investors is underway"[550].

In fact, some critics have suggested that "some countries are using foreign investment screening to protect wider economic and social concerns triggered by COVID-19"[551]. Thus, the pandemic shock could have provided policy-makers with additional arguments in favour of stricter FDI review, allowing them to present "a lot of old wine (well-known rationales for FDI screening) (…) in new bottles"[552].

Turning to the foreign investment screening mechanisms of Germany and France, several differences and similarities vis-à-vis Italy's Golden power can be spotted. Firstly, foreign investment review in both countries is carried out by a Ministry rather than a high level inter-departmental Committee, which is the case for both Italy and the US. Secondly, the German regime for "cross-sectoral investments" is fairly original and substantially different from Italy's Golden power. Moreover, except for transactions in critical infrastructures, it entails no notification obligation or suspensory condition on foreign investments. Concerning Germany specifically, the overall picture is one of a wider, albeit somehow lighter, net cast over foreign investments. The BMWi can be described as a gentle Leviathan: it enjoys very extensive powers, but places fewer burdens on foreign investors. It is also reticent to exercise its powers unless absolutely necessary, as shown by its practice. The German Ministry is also allowed a significantly longer time for decisions on foreign investments, ranging from 6 to 10 months under exceptional circumstances. Thirdly, foreign investors in Germany and France are allowed to apply for, respectively, a certificate of non-objection or a "fast-track procedure". This can formally grant the transaction a sort of "immunity" from future review. On the contrary, Italy lacks a similar mechanism and privileges informal communication. Concerning France specifically, while the ancient origins of its screening mechanism and the singling out of "foreign-controlled French investors" are peculiar traits, it is structurally more similar to the Italian Golden power. However, two major differences can be spotted. On the one hand, the Italian mechanism of "no objection" or *silenzio assenso* is explicitly dismissed by the French doctrine. Thus, failure by the French Ministry to respond to an authorization request is interpreted as a rejection, not as silent acceptance. On the other, judicial review in Italy is limited to examination of the procedural legitimacy of the Coordination Group's decision. In France, on the contrary, it can go as far as reversing the discretionary content of a Ministry's decision.

In conclusion, Italy's Golden power discipline, when compared to the US, German and French "recipes" for FDI screening, sticks out for the following features:

- it gives foreign investment review powers to an inter-ministerial Committee (like the inter-agency CFIUS), rather than to an individual Ministry (as in Germany and France or in the previous "Golden share" regime);

[549] Ibid., 3.
[550] Ibid., 1.
[551] Baker McKenzie, cited in Ibid., 10.
[552] Ibid., 7.

- it lacks a specialized bureaucratic structure supporting the activities of the Coordination Group, which is often forced to rely heavily on intelligence agencies and is also formally incapable of independent decision-making;
- it seems to lack the type of "safe harbour" orientation inspiring America's CFIUS: conditions over foreign investments, for instance, are authoritatively imposed rather than negotiated or agreed upon in order to "mitigate" national security threats;
- it lacks a mechanism similar to American "light filing", German "certificates of non-objection" or the French "fast-track" procedure, allowing the Coordination Group to formally and rapidly dismiss low risk investments;
- finally, it guarantees judicial review of decisions on foreign investments by an administrative judge (as opposed to the incontestability of US presidential determinations); however, this review is limited to ensuring the appropriate exercise of discretionary power in terms of procedural legitimacy and reasonableness and, differently from the French model, does not impact on the specific content of decisions.

4. Italy's Golden power in practice: quantitative trends and case-studies

4.1. A quantitative evaluation: an "Italian way" to screening FDI?

Based on Article 3-bis of Law Decree 21/2012, the Italian President of the Council of Ministers is required to present an annual report to Parliament concerning the government's Golden power activities. The cadence of this requirement has been partially respected in practice. In fact, 4 reports have been transmitted to the Italian Parliament so far[553]. As Italy's Golden power was first applied in 2014, these cover governmental activities going (1) from October 3, 2014, to June 30, 2016; (2) from July 1, 2016, to December 31, 2018; (3) from January 1, 2019, to December 31, 2019; and (4) from January 1, 2020, to December 31, 2020. While the first report was presented by the Italian Minister for Parliamentary Relations, the latter three bear the signature of Italy's Undersecretary of State to the Presidency of the Council of Ministers.

The four governmental reports are particularly insightful as they include sections describing regulatory changes as well as details on the specific transactions on which the Golden power was exercised. They also incorporate statistics regarding the number of notifications by foreign or Italian firms received in a given time period and the economic sectors concerned. Moreover, the 2020 annual report to Parliament by the Department of Information Security (DIS)[554], concerning Italy's "Security intelligence policy", includes references to Italy's Golden power as well as additional data on its implementation.

Thus, the following Chapter seeks to contribute to the scientific debate on Italy's Golden power by collecting and aggregating data from these reports, and gaining a full picture of Italy's Golden power practice from the discipline's first application in 2014 to 2020. Overall, it could be possible to disentangle some trends and detect an "Italian way" to reviewing foreign investments: how often does Italy exercise its Golden power (compared to the number of notifications received), in what form (vetoes or conditions and prescriptions) and in which sectors more than others (for instance, 5G technology networks or energy firms)? Finally, incorporating data for 2020 could help to shed light on the impact of the COVID-19 pandemic on Italy's screening of foreign investments.

The first table (*Table 3.*) provides data on the number of foreign investments or internal corporate resolutions notified to the Italian Presidency of the Council from 2014 to 2019. It also indicates the annual notification percentage, computed over the 2014-2019 total, as well as the percentage variation from one year to the other.

[553] Find the relevant links at the end of this dissertation (Bibliography section).

[554] Sistema di Informazione per la Sicurezza della Repubblica (Presidenza del Consiglio dei Ministri), "Relazione al Parlamento sulla politica dell'informazione per la sicurezza," *Year 2020*.

Table 3. Notifications received by the Italian Presidency of the Council from 2014 to 2019

YEAR	Notifications received	Percentage (of the total)	Percentage variation
2014[555]	8	4%	/
2015	18	9%	/
2016	14	7%	-22%
2017	30	15%	+114%
2018	46	23%	+53%
2019	83	42%	+80%
Total	**199**	**100%**	**/**

(Source: Author's elaboration)

Table 3. illustrates the constant increase (except for 2016) in transactions notified by foreign investors or national firms to Italian authorities. As suggested in Chapter 2, this escalation is primarily linked to the gradual expansion of the range of economic sectors included by the Golden power discipline (its "irresistible ascent"[556] in 2017-2019). In particular, 2017 stands out for showing the greatest percentage increase from the previous year, and is widely known to have made the Golden power "notorious" to Italy's general public, especially relating to the controversial TIM-Vivendi affair. However, the bulk of notifications was received by the Presidency in 2019 (42% of the total).

The following table and figure (*Table 4. and Figure 6.*) incorporate data for 2020 and point to an extraordinary increase in notifications received. This evolution is mainly accounted for by the global pandemic emergency and the exceptional regulatory changes set forth by the 2020 Liquidity Decree. In 2020 notifications more than quadrupled from 2019 and the percentage variation stands at +266%. Finally, aggregating data for 2019 and 2020 leads to the conclusion that 78.5% of all notifications received by the Italian Presidency of the Council refer to this two-year period.

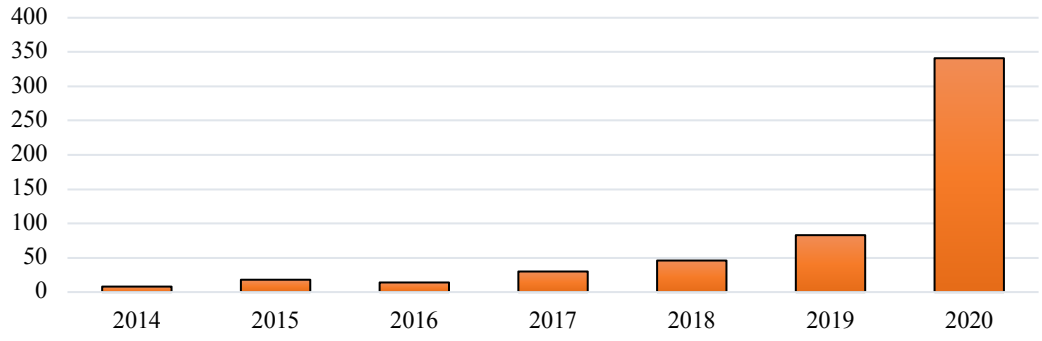
[555] Data for 2014 have been computed starting from October 3. As statistics for the whole year are not available, computing the percentage variation would be unfeasible (this applies to all other figures or tables in this section).
[556] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

Table 4. Notifications received by the Italian Presidency of the Council from 2014 to 2020

YEAR	Notifications received	Percentage (of the total)	Percentage variation
2014	8	1.5%	/
2015	18	3.5%	+125%
2016	14	2.5%	-22%
2017	30	5.5%	+114%
2018	46	8.5%	+53%
2019	83	15.5%	+80%
2020	341	63%	+266%
Total	**540**	**100%**	/

(Source: Author's elaboration)

Figure 6. Notifications received by the Italian Presidency of the Council from 2014 to 2020



(Source: Author's elaboration)

Transactions notified by foreign investors or national firms can be subdivided based on the economic sector to which the (Italian) target firm belongs. As Article 1-bis of Law Decree 21/2012 applying to 5G technology networks was introduced in 2019, it makes sense to provide some statistics for the 2014-2018 period (*Table 5. and 6.*) and add 2019 separately (*Table 7. and Figure 7.*). This allows to highlight the impact of the 2019 regulatory change as well.

From 2014 to 2018 Italy's Golden power could be exercised in reference to either Article 1 of Law Decree 21/2012, for firms performing "strategic activities" in the defence and national security sector, or Article 2 of Law Decree 21/2012, for firms holding strategic assets in the energy, transport and communications sector.

Table 5. Notifications received by the Italian Presidency of the Council from 2014 to 2018, by economic sector

ECONOMIC SECTOR	Notifications received	Percentage (of the total)
Defence and national security (art. 1)	64	55%
Energy, transport and communications (art. 2)	52	45%
Total	**116**	**100%**

(Source: Author's elaboration)

Table 6. Notifications received by the Italian Presidency of the Council from 2014 to 2018, by economic sector within art. 2 of Law Decree 21/2012

ECONOMIC SECTOR (Article 2)	Notifications received	Percentage (of the total)
Energy	13	25%
Transport	8	15.5%
Communications	31	59.5%
Total	**52**	**100%**

(Source: Author's elaboration)

The data suggest that the majority of transactions reviewed by Italy's Coordination Group in 2014-2018 concerned Italian firms of the defence and national security sector (55%). Within the energy, transport and communications segment of Article 2, the communications sector largely prevailed (59.5%). Energy firms (25%) and the transport industry (15.5%) followed at significant distance.
Adding the year 2019, when 5G technology networks were included as a new sector for application of Italy's Golden power, the picture is slightly changed (*Table 7. and Figure 7.*). Specifically, 17%

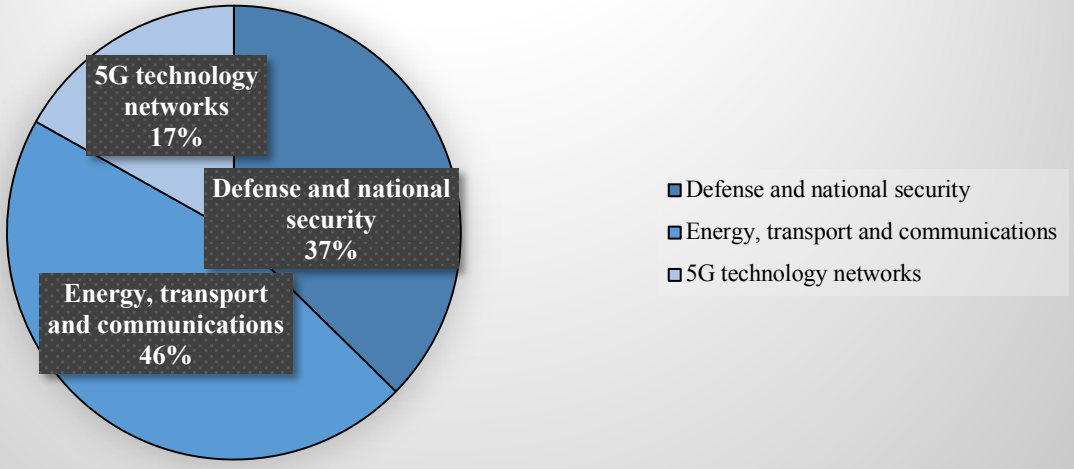
of notifications submitted in 2019 regarded these networks. This is arguably a significant number, considering that 2019 was a "pilot year" for the entire 5G sector. Concerning Articles 1 and 2 of Law Decree 21/2012, the equilibrium was reversed in 2019: the energy, transport and communications sector accounted for 46% of notifications received, compared 37% for defence and national security firms. In sum, given the prevalence of communications-related transactions within the Article 2 "subset" (*Table 6.*) and the prompt implementation of the new provision on 5G technology networks (*Table 7. and Figure 7.*), technology-related transactions arguably took centre stage in 2019.

Table 7. Notifications received by the Italian Presidency of the Council in 2019, by economic sector

ECONOMIC SECTOR	**Notifications** received	**Percentage (of the total)**
Defence and national security (art. 1)	31	37%
Energy, transport and communications (art. 2)	38	46%
5G technology networks (art. 1-bis)	14	17%
Total	**83**	**100%**

(Source: Author's elaboration)

Figure 7. Notifications received by the Italian Presidency of the Council in 2019, by economic sector



(Source: Author's elaboration)

The four governmental reports to Parliament also provide information concerning the specific "type of decision" taken for each notified transaction. Indeed, upon notification of a foreign investment and following the administrative procedure outlined in section 2.2., the Italian government can:
- exercise its veto power, blocking the transaction and forcing the foreign investor to step back ("Veto");
- impose prescriptions or conditions upon the foreign investment, then usually instituting *ad hoc* committees to monitor compliance with them ("Imposition of prescriptions or conditions");
- decide not to exercise its Golden power, implying that no legal justification for restricting the foreign investment was found to exist ("Non-exercise");
- rule that, even if the transaction has been notified[557], it does not fall within the legal boundaries of the Golden power discipline, for instance, in terms of covered economic sectors or acquisition thresholds ("Non-covered operation");
- judge that a "simplified procedure" for intra-group operations applies (for cases in which the notification concerned an internal corporate resolution rather than a foreign investment) or that the notification was incomplete or irregular, thus demanding the foreign investor to submit a new one ("Others").

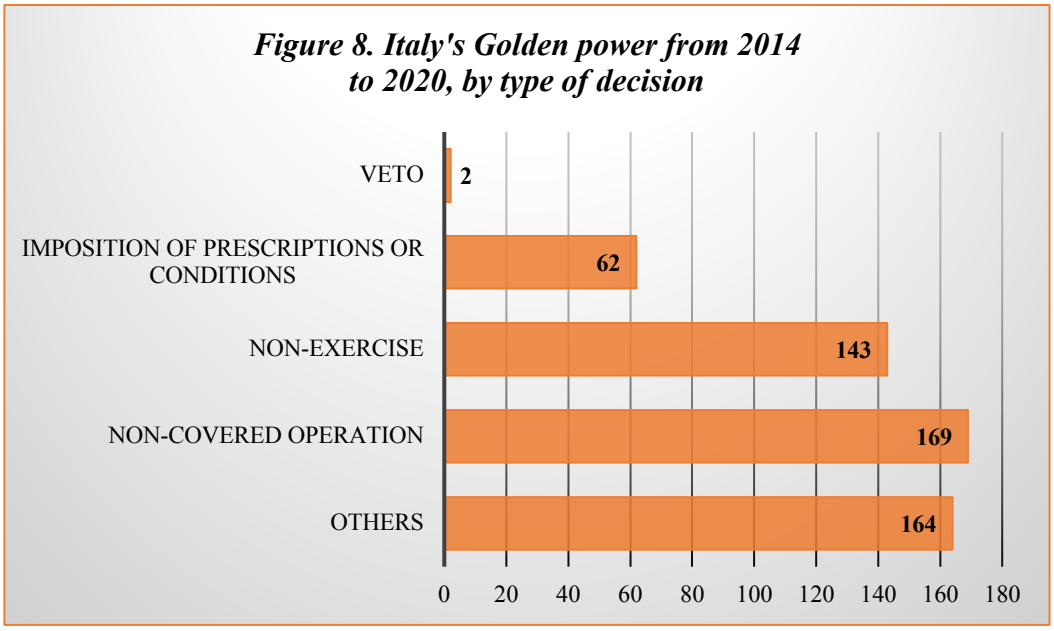
Table 8. presents data on the number of times that each of these "types of decision" was taken from 2014 to 2020, as well as the percentage thereof.

Table 8. Italy's Golden power from 2014 to 2020, by type of decision

GOLDEN POWER: TYPES OF DECISION	Notifications received	Percentage (of the total)
Veto	2	0.3%
Imposition of prescriptions or conditions	62	11.5%
Non-exercise	143	26.5%
Non-covered operation	169	31.3%
Others	164	30.4%
Total	**540**	**100%**

(Source: Author's elaboration)

[557] In fact, in a field where legal certainty is not always ensured, hesitant investors could still opt for a notification in order to avoid being subject to future governmental "interference".



(Source: Author's elaboration)

The data suggest that, from 2014 to 2020 and out of 540 transactions notified, the Italian government's veto power has been exercised twice, that is, 0.3% of times. In fact, while Italy's mechanism for screening foreign investments has been significantly strengthened from a regulatory viewpoint, its actual implementation by Italian authorities seems to display a degree of caution or moderation. The following table (*Table 9.*) illustrates "where", in terms of Italy's economic sectors, the government has exercised its veto power:

Table 9. Vetoes imposed by the Italian government from 2014 to 2020, by sector

ARTICLES OF LAW DECREE 21/2012	Vetoes
Defence and national security (art. 1)	1
Energy, transport and telecommunications (art. 2)	0
5G technology networks (art. 1-bis)	1
Total	**2**

(Source: Author's elaboration)

More specifically, between 2014 and 2020 the Italian government's veto was imposed: (i) on the acquisition by a French investor of "Next AST Srl", an Italian firm of the defence and national security sector (Article 1 of Law Decree 21/2012) (see section 4.2. for a more detailed analysis); (ii)

on a 5G technology supply contract between Italian firm "Fastweb S.p.A." and the Chinese Huawei (Article 1-bis of Law Decree 21/2012). Importantly, the number of vetoes imposed by the Italian government on foreign investments has grown to 3 in March 2021 (see section 4.3.).

Given the relative scarcity of governmental vetoes, the imposition of prescriptions or conditions can be regarded as the main intervening instrument employed by the Italian government during its screening of foreign investments. As recalled in Chapter 2, these conditions can include, amongst others, the exclusion of a certain branch of the Italian target firm from the transaction, prohibitions on intellectual property transfers and limitations on access to sensitive information. As illustrated by *Table 8.*, prescriptions or conditions were imposed on foreign investments on 62 occasions out of 540 notified transactions (11.5% of the total). In other words, almost 9 out of 10 notified transactions were authorised by the Italian government without imposing conditions (or vetoes), reinforcing the argument about the government's caution or self-restraint.

However, the following table (*Table 10.*) suggests that this "type of decision" is "on the rise". Impositions of prescriptions or conditions in the year 2020 amount to around 60% of the total since 2014, marking a percentage variation of +185% compared to 2019. In fact, the percentage increase from 2018 to 2019 stood at an even higher 225%. If this figure increases in 2021 as well, a trend towards an escalating use of conditions over foreign investments could be easily detected.

Table 10. Impositions of prescriptions or conditions by the Italian government from 2014 to 2020

YEAR	Impositions of prescriptions or conditions	Percentage (of the total)	Percentage variation
2014	0	0%	/
2015	0	0%	/
2016	4	6.5%	/
2017	4	6.5%	0%
2018	4	6.5%	0%
2019	13	21%	+225%
2020	37	59.5%	+185%
Total	**62**	**100%**	/

(Source: Author's elaboration)

In addition, *Table 11.* indicates that prescriptions or conditions are imposed by the Italian government concerning certain national economic sectors relatively more than others. Indeed, this "type of decision" is overwhelmingly prevalent in 5G technology-related cases (47% of the total or 29 transactions). Conditions have also been imposed on several transactions involving Italian firms of the defence sector (38.5% of the total or 24 transactions). However, data for the defence sector go back to 2014, while 5G technology networks are included by the Italian Golden power discipline only since 2019. In fact, taking 2019 and 2020 alone, prescriptions or conditions have been imposed on Article 1-bis transactions (5G technology networks) in 58% of cases.

Table 11. Impositions of prescriptions or conditions by the Italian government from 2014 to 2020, by sector

ARTICLES OF LAW DECREE 21/2012	Impositions of prescriptions or conditions	Percentage (of the total)
Defence and national security (art. 1)	24	38.5%
Energy, transport and telecommunications (art. 2)	9	14.5%
5G technology networks (art. 1-bis)	29	47%
Total	**62**	**100%**

(Source: Author's elaboration)

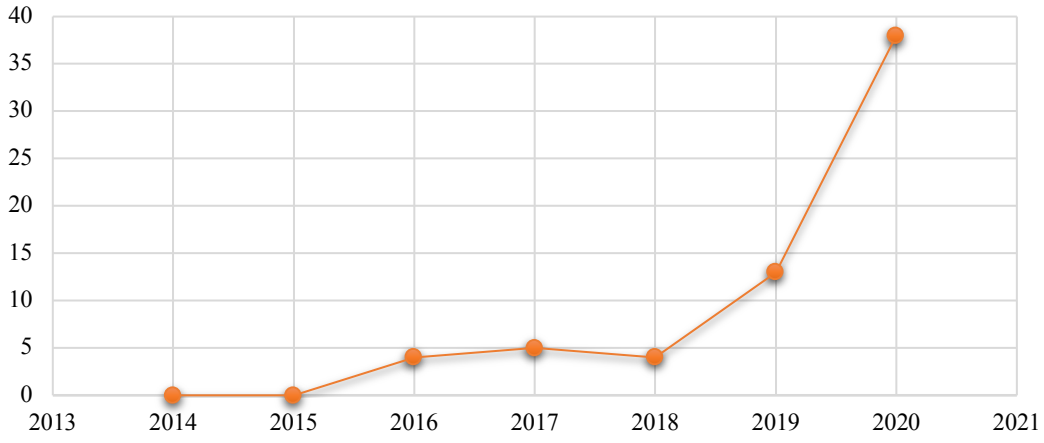
This section has suggested that the Italian Presidency of the Council received the overwhelming majority of notifications (78.5%) in 2019-2020. Given this exceptional increase in the number of transactions notified, do the data suggest a corresponding escalation in Golden power exercise, that is, in the imposition of vetoes or conditions over foreign investments? The answer is in fact affirmative: the following table and figure (*Table 12. and Figure 9.*) indicate that 80% of impositions of vetoes or conditions since 2014 have taken place in that same two-year period (2019-2020). This suggests that the regulatory extension of Italy's FDI screening in 2019-2020 has resulted in a corresponding strengthening at implementation level. Thus, as more economic sectors are included and the thresholds for notification are lowered, a growing number of foreign investments is notified and, in parallel, the Italian government is increasingly willing to exercise its Golden power.

Table 12. Vetoes and impositions of prescriptions or conditions by the Italian government, from 2014 to 2020

YEAR	Vetoes and impositions of prescriptions or conditions	Percentage (of the total)	Percentage variation
2014	0	0%	/
2015	0	0%	/
2016	4	6%	/
2017	5	8%	+25%
2018	4	6%	-20%
2019	13	20.5%	+225%
2020	38	59.5%	+190%
Total	**64**	**100%**	/

(Source: Author's elaboration)

Figure 9. Vetoes and impositions of prescriptions or conditions by the Italian government, from 2014 to 2020



(Source: Author's elaboration)

Moreover, while 2020 data for this quantitative evaluation were taken from the annual DIS report on "Security intelligence policy", the report to Parliament by Italy's Undersecretary of State to the Presidency of the Council of Ministers, concerning Golden power activities in 2020 specifically,

provides additional insights. Importantly, it also sheds light on the effects of the Liquidity Decree (Law Decree 23/2020) on Italy's review of foreign investments. First of all, it indicates that the exceptional increase in transactions notified in 2020 was especially marked starting from April of the same year, that is, in conjunction with Law Decree 23/2020's entry into force. Secondly, while the Liquidity Decree sanctioned the partial equalisation of EU-based and non-EU-based foreign investors, only 10% of notifications received in 2020 in fact concerned intra-European transactions. Thus, non-EU foreign investments remain the bulk of transactions screened by the Inter-ministerial Coordination Group. Finally, the data indicate that an overwhelming majority (83%) of notifications received in 2020 concerned transactions under Article 2 of Law Decree 21/2012 (including, since April 2020, the economic sectors referred to by Article 4 of the EU Regulation), but Italy's Golden power was exercised on only 9 of them, compared, for instance, to 18 transactions under Article 1-bis concerning 5G technology networks.

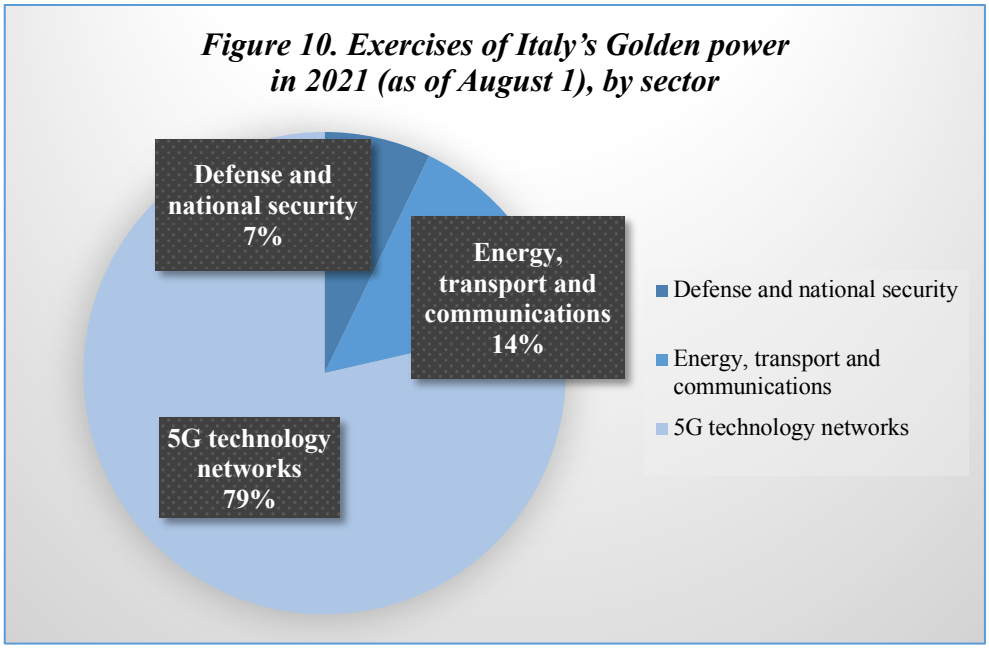
Finally, a few data for 2021 can be retrieved from the Italian Senate's website, where excerpts of Italy's Golden power activations are periodically made available, The following table (*Table 13.*) illustrates Italy's exercise of its Golden power as of August 1, 2021.

Table 13. Exercises of Italy's Golden power in 2021 (as of August 1), by type

GOLDEN POWER: TYPE OF "ACTIVATION" as of August 1, 2021	Transactions	Percentage (of the total)
Veto	1	7%
Imposition of prescriptions or conditions	13	93%
Total	**14**	**100%**

(Source: Author's elaboration)

The average of Golden power's activations in 2021 is 2 per month. If this pace was maintained for the entire year, a total of 24 Golden power exercises for 2021 would mark a significant reduction from 2020. However, the most interesting observation concerns the outstanding prevalence of Art. 1-bis cases, concerning 5G technology networks, that is, 11 out of 14 activations or 79% (see *Figure 10.*).



(Source: Author's elaboration)

In conclusion, a number of trends can be disentangled from this quantitative evaluation. These can be viewed as contributing to an "Italian way" to screening foreign investments. However, the Golden power discipline is also relatively "young", having been instituted in 2012 and firstly applied in 2014. Thus, the following trends should be taken as strictly short-term and liable to be reversed in the space of a few years.

First of all, the data indicate that the number of transactions reviewed by the Inter-ministerial Coordination Group has gradually, but outstandingly increased since 2014. This increase is particularly remarkable for the 2019-2020 period, in conjunction with two of the most important Golden power reforms as well as the COVID-19 pandemic.

Secondly, the 2019 legislative inclusion of 5G technology networks as part of the economic sectors covered by the Golden power discipline has proven exceptionally relevant in practice, in terms of both notifications received and Golden power applications. The traditional prevalence of investments or resolutions concerning Italian firms of the defence and national security sector has been rebalanced. This implies that more technical, sophisticated or technology-related competences will be required to ensure an adequate review of foreign investments into Italy's economy.

Thirdly, applications or exercises of Italy's Golden power refer to instances in which the government opts for imposing either a veto or conditions upon a foreign investment. The data suggest that, while vetoes over foreign investments are comparatively rare, the Italian government is increasingly willing to impose prescriptions or conditions as its main intervening instrument. Importantly, this especially applies to transactions concerning Italy's 5G technology networks. In fact, an *ad hoc* Control Committee was instituted in 2019 in order to monitor compliance with conditions and prescriptions concerning all present and future transactions in the 5G sector

Finally, this quantitative evaluation indicates that exercises of Italy's Golden power in fact concern a small percentage of total reviewed transactions. It could be objected that this is not the absolute best measure of the Italian government's attitude towards interfering with foreign investments. As also illustrated by CFIUS practice, in some cases it might be sufficient to (publicly or privately) threaten the use of a restriction for the foreign investor to step back. Moreover, informal agreements could be reached, whereby no documental trace is left for scholars to examine. Still, the available data suggest

that the several scholarly descriptions emphasizing the Italian government's cautious attitude towards its Golden power make a powerful point.
In sum, both formally (as outlined in Chapter 2) and in practice (as emphasized by this section), Italy's Golden power has considerably developed in recent years, especially since 2019. Thus, will 2021 mark a further watershed moment for Italy's review of foreign direct investments? Will the post-COVID 19 scenario look painfully different for foreign entities willing to invest in Italian firms? Similar questions are addressed in Chapter 5. In the meanwhile, the following sections are devoted to the detailed analysis of two case-studies of Golden power application. Each of these has been chosen for several specific reasons, which will be accounted for throughout the text.

4.2. Case-study: NEXT Ingegneria dei sistemi S.p.A. (2017)

The first case-study to be examined regards Italian firm of the defence sector "NEXT Ingegneria dei sistemi S.p.A." (hereinafter "NEXT"). In November 2017, based on Article 1 of Law Decree 21/2012, the Italian government exercised its veto power for the first time since 2012, concerning the planned acquisition of a branch of NEXT by a subsidiary of the French "Altran Group". As already suggested, this was one of the only two occasions from 2012 to 2020 in which Italy's Golden power was exercised in the form of a veto over a foreign investment. Importantly, three decisions concerning NEXT were actually taken by the Italian President of the Council of Ministers in less than 8 months, from October 2017 to June 2018. In fact, a few months after the veto power was exercised on the French acquirer, the Italian government authorized the acquisition of NEXT (in its entirety) by a consortium of Italian investors.
NEXT Ingegneria dei sistemi S.p.A. was founded in 1999 as a Rome-based electronics and information firm. It gradually specialized in the supply of subsystems, services and products of Information Technology for a range of different sectors, including defence, space, transport and communications. It came to be known particularly for its production of management software for ballistic missiles and air traffic control[558], and Italian partially state-owned defence contractor Leonardo S.p.A. stood out as its main client[559]. As of 2017 NEXT's production was valued at 15 million euros, with a net profit of 153,000 euros[560]. The Italian firm relied on a few more than 200 employees (mainly engineers and computer scientists) and its headquarters were located in the Italian capital, with additional branches in Naples, Avezzano and Amsterdam. In addition to Leonardo S.p.A. (especially its former Finmeccanica-Selex branch), NEXT's main clients included MBDA (the largest European consortium producing missiles and other defence technology, co-owned by Leonardo, the French "Airbus" and the British "BAE Systems"), the Italian "ENAV S.p.A." (especially for airport traffic management)[561], the Canadian "Bombardier Transportation" and the French "Thales Alenia Space". Examples of products and services supplied by NEXT before 2017 included the radar systems for Hong Kong airport, radars used for naval traffic control in Yemen and Turkey by Finmeccanica-Selex and on-board software for M-346 jet trainers. Moreover, in the early 2010s NEXT was rumoured to suffer from structural financial problems, which would lead the Italian firm to seek external funds and investors on the international market.

[558] Paolo Baroni, "Aziende strategiche e high-tech nel mirino degli 007 stranieri," *La Stampa* (February 21, 2018).
[559] Gianni Dragoni, "Sicurezza, dopo il no ai francesi Next spa passa a Defence Tech, " *Il Sole 24 Ore* (October 11, 2018).
[560] Ibid.
[561] Paolo Baroni, "Aziende strategiche e high-tech nel mirino degli 007 stranieri," *La Stampa* (February 21, 2018).

Eventually, a would-be acquirer was found in "Altran Group", a French multinational specializing in Engineering and Research & Development services (ER&D). Altran is renowned internationally for its comprehensive consulting activities, from ideation to industrialization of products and services in sectors such as aerospace, defence, communications, automotive, energy and finance. It was founded and listed in 1987. Its subsidiary Altran Italia S.p.A. was founded in 1996 and, as of 2017, it owned branches in as many as 15 Italian cities, including Rome, Milan, Naples, Florence and Turin[562]. The Group's yearly revenue stood at 2.9 billion euros, counting 45.000 employees in more than 30 countries[563].

As already suggested, between 2017 and 2018 the Italian Presidency of the Council received three notifications regarding NEXT's activities. The first notification concerned the transfer of one of NEXT's branches (known as "production of software and complex systems") to a newly-formed NewCo, renamed "Next AST s.r.l.". This intra-firm operation was clearly functional to the acquisition of the NewCo by a foreign investor. In fact, Altran Italia S.p.A. had announced its plan to acquire a branch of NEXT as early as in July 2017. Upon receiving this first notification, Italian authorities made it clear that any subsequent foreign acquisition would have to be reported in a further notification. The intra-firm operation, in itself, could not be seen as posing "an effective threat to the serious detriment of the fundamental national defence and security interests" (Article 1 of Law Decree 21/2012). Thus, a Decree of the President of the Council of Ministers of October 25, 2017, authorized the establishment of "Next AST s.r.l." based on a "simplified procedure".

In parallel, Altran Italia S.p.A. had in fact notified its preliminary agreement for the acquisition of the entire social capital of Next AST s.r.l. Upon receiving this second notification, the Italian government ruled that the activities of NEXT's new branch "included contractual relations of a confidential and strategic nature for the defence and national security system"[564]. According to journalistic sources, this referred to contracts with the Ministry of Defence as well as Italy's intelligence agencies[565]. Put simply, if the transaction was allowed, the foreign acquirer could gain access to sensitive information. Therefore, having obtained "additional information and integrative elements"[566] from the parties involved, a Decree of the President of the Council of Ministers of November 2, 2017 (only 8 days after the previous decision) opted for blocking the transaction. According to the decree's wording, "the protection of Italian defence and national security essential interests could not be preserved through the imposition of specific prescriptions or conditions"[567]. Thus, the French acquirer was forced to step back from its investment.

Finally, in 2018 a consortium of Italian investors, which had merged into "Defence Tech Holding s.r.l.", notified its preliminary contract for the acquisition of 100% of the social capital of NEXT

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[562] *See* also the following link: https://www.cesop.it/project/altran-italia/.

[563] *See* also Ibid.

[564] Senate of the Republic XVIII Legislature (Doc- LXV n. 1), "Relazione al Parlamento in materia di esercizio dei poteri speciali" ("Relazione concernente l'attività svolta sulla base dei 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"), *updated to December 31, 2018 and illustrated by Italy's Undersecretary of State to the Presidency of the Council of Ministers*: 11.

[565] Celestina Dominelli and Carmine Fotina, "Tim, sorveglianza del governo sulla rete," *Il Sole 24 Ore* (November 3, 2017).

[566] Senate of the Republic XVIII Legislature (Doc- LXV n. 1), "Relazione al Parlamento in materia di esercizio dei poteri speciali" ("Relazione concernente l'attività svolta sulla base dei 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"), *updated to December 31, 2018 and illustrated by Italy's Undersecretary of State to the Presidency of the Council of Ministers*: 11.

[567] *See* also the following link: https://it.linkedin.com/pulse/next-altran-e-la-golden-power-sabina-tagliavini.

Ingegneria dei sistemi S.p.A. (thus also including Next AST s.r.l). It must be recalled that, for firms of the defence and national security sector under Article 1 of Law Decree 21/2012, Italian investors are also required to notify their planned investments. Following a hearing of both parties before the Coordination Group, on June 7, 2018, the Italian government decided to impose specific conditions and prescriptions on both the target firm and the acquirer (including its subsidiaries Donexit s.r.l. and Fo.ra.mil – Forniture Rappresentanze Militari s.r.l.). Compliance with these conditions, which are confidential in their content, was subject to constant monitoring by Italian authorities.

Table 14. Decrees of the President of the Council of Ministers (DPCM) concerning NEXT Ingegneria dei sistemi S.p.A. (2017-2018)

Decree of the President of the Council of Ministers (DPCM)	Content
DPCM of October 25, 2017	Authorization on the transfer of the "production of software and complex systems" branch of NEXT Ingegneria dei sistemi s.p.a. to a New-Co, entirely owned by NEXT itself and renamed "Next AST s.r.l."
DPCM of November 2, 2017	Imposition of a veto on the acquisition of the entire social capital of Next AST s.r.l. by Altran Italia s.p.a. (subsidiary of Altran Group)
DPCM of June 7, 2018	Imposition of specific conditions and prescriptions, subject to constant monitoring, concerning the acquisition of the entire social capital of NEXT Ingegneria dei sistemi S.p.A. by Defence Tech Holding s.r.l.

(Source: Author's elaboration)

Today NEXT remains a core branch of "Defence Tech Holding s.r.l.". Defence Tech is often described as having created a hyperspecialized group of Italian firms producing software for national defence and security, as well as cutting-edge technology for the cybersecurity sector[568]. Moreover, NEXT has been recently involved in two innovative projects, respectively concerning sustainable offshore decommissioning of energy assets (INSURE) and virtual and augmented reality for art fruition (Vadus). Altran Group was also recently acquired by Capgemini, a global leader in digital transformation, for approximately 3.5 billion euros and merged into "Capgemini Engineering".
In conclusion, the NEXT Ingegneria dei sistemi S.p.A. case (2017) is particularly insightful as it provides the first instance in which the Italian government formally prevented a foreign investment

[568] Gianni Dragoni, "Sicurezza, dopo il no ai francesi Next spa passa a Defence Tech, " *Il Sole 24 Ore* (October 11, 2018).

from taking place through its Golden power. Thus, Italy's first governmental veto on an FDI was imposed three years after the Golden power's first application (2014). Moreover, as the case concerns an Italian firm of the defence sector, it confirms the traditional importance of this industrial segment during the initial years of Italy's FDI screening. Importantly, the NEXT case has been picked for two additional reasons. First of all, NEXT provides the quintessential example of a medium-sized Italian firm endowed with exceptional (defence) technology, which is sought after by foreign market competitors. Secondly, it has been suggested that the 2017 governmental decision should be viewed as linked to wider industrial and geopolitical relations, especially concerning Italy-France interactions in the defence sector. It did come as a surprise to many that Italy's first veto on a foreign investment was targeted at an EU-based firm.

4.3. Case-study: LPE S.p.A. (2021)

A second illustrative case-study concerns Italian semiconductors producer LPE S.p.A. As a medium-sized Italian firm based in Baranzate (a municipality in the Metropolitan City of Milan), LPE S.p.A. has been described as "an Italian stronghold in the high-tech sector, decisive for the supply chains of several huge industries as well as for developments in military security"[569]. More specifically, LPE is known for its production of "wafers" used to finalize arsenic-manufactured chips[570]. It designs epitaxial reactors which "allow a first chemical and thermal treatment for silicon, making it ready for chip manufacturing"[571]. LPE was founded in 1972 as a markedly family-run firm (by the "three Preti brothers", all graduated from the Polytechnic University of Milan) and supplied its first epitaxial reactors to Sgs (*Società generale semiconduttori*). Thereafter, the firm, which was in fact born as simply PE, was merged with Liotecnica, a company specializing in the production of freeze dryers for the pharmaceutical industry. Today LPE has around 50 employees and full year profits for 2019 were slightly below 7 million euros[572]. Italo-French semiconductors multinational STMicroelectronics NV (or STM) stands out as one of its main clients. However, 60% of LPE's production is directed at the Chinese market, and the Italian firm owns holdings in Ascatron AB and Kiselkarbid AB (both Sweden-based) as well as in several British companies[573].

In more general terms, LPE S.p.A. is part of a wider cluster of Italian firms which have recently acquired increasing importance in the global chip market. In fact, the chips industry is "a hymn to globalisation"[574] and the technical complexity of these products magnifies the need to rely on highly specialized centres, widely disseminated across borders. The wider international scenario is marked by the current high-tech competition between the United States and China, focused particularly on the so-called "chip war". Indeed, computer chips can be viewed as the "brains" of any future cybernated world and thus "the foundations of the digital economy and national security"[575]. They are crucial components of any Artificial Intelligence or fifth-generation wireless (5G) project. In this industrial context, Italy has come to "play an active role (…) and hosts several highly specialized

[569] Il Sole 24 Ore, "Golden power, primo veto sui cinesi," April 9, 2021.
[570] Francesco Bechis, "Stop shopping cinese. Così Draghi e Giorgetti difendono i microchip," *Formiche.net* (April 9, 2021).
[571] Alberto Brambilla and Daniele Lepido, "China Targeted Milan Semiconductor Firm Before Draghi's Veto, " *Bloomberg* (April 9, 2021).
[572] Ibid.
[573] Ibid.
[574] The Economist, "Chip wars: China, America and silicon supremacy," December 1, 2018.
[575] The Economist, "Chip wars: China, America and silicon supremacy," December 1, 2018.

entities, which have integrated into semiconductors productive chains in different ways"[576]: in addition to LPE and its epitaxial reactors, these entities include Meridionale Impianti S.p.A. (clean rooms), Sapio Group (technical gases), Spea S.p.A. (automatic machines for chip testing), Memc Electronic Materials S.p.A. (silicon wafers) and Technoprobe S.p.A. (probe cards)[577].

Importantly, the chips industry has been heavily affected by the COVID-19 shock. Computer chips are used for the production of electronic goods and services, as well as cars. Thus, the pandemic economic crisis has favoured two simultaneous, but inverse developments: on the one hand, the automobile market initially came to a halt due to the Global Lockdown, reducing demand for chips and damaging semiconductors supply chains; on the other, demand for chips suddenly boomed in relation to the production of computers and electronic devices, as a result of the upsurge in smart working and digital activities. Today, however, as the automobile market recovers, the digital economy shows no sign of decline. In sum, demand for chips from both the automobile and electronic industries is increasingly difficult to satisfy. Supply has also considerably slowed down.

As a consequence, most countries are currently working to expand their production of semiconductors and chips. The dual-use possibilities of this technology further increase its relevance. The current US administration, for instance, has allocated around 50 billion dollars to increase semiconductors production in the United States[578]. According to the World Semiconductor Trade Statistics, sales of semiconductors are expected to increase by 10.9%[579] in 2021. Moreover, recent data suggest that Asia's share of the global chips market (especially Taiwan, South Korea, Japan and China) stands at 69.9%, followed by the US (21%) and the European Union (8.8%)[580]. China is also the world's largest acquirer of semiconductors and the chip industry is currently described as the one "where America's industrial leadership and China's superpower ambitions clash most directly"[581]. For these reasons, the crisis of this sector is also favouring a "rush by Western states to defend it from Asian shopping, especially China"[582]. Some authors are in fact theorizing a new "silicon geopolitics", based on a "new world order of semiconductors"[583].

In this context, on March 31, 2021, the Italian government decided to block the acquisition of 70% of LPE's social capital by a Chinese investor, "Shenzen investment holdings co". Shenzen had notified its bid in late December 2020. According to the government's relevant decree[584], the national security risk posed by this transaction related to three factors: (i) LPE's use of elements, such as silicon carbide and gallium nitride, which "are available to a few competitors"[585]; (ii) a clause of the shareholder agreement implying that the Chinese investor would formally become LPE's main client and allowing Shenzen, "as the majority shareholder, to determine LPE strategy"[586] (reducing the firm's supply to other Italian or European companies); (iii) the potential dual use of LPE's

[576] Valerio Maccari, "Il made in Italy dei chip. Eccellenze di nicchia in un mercato globale," *Affari & Finanza* (June 28, 2021).
[577] Ibid.
[578] Pietro Saccò, "Si aggrava la crisi mondiale dei chip. Manager convocati alla Casa Bianca," *Avvenire* (April 11, 2021).
[579] Ibid.
[580] Ibid.
[581] The Economist, "Chip wars: China, America and silicon supremacy," December 1, 2018.
[582] Francesco Bechis, "Stop shopping cinese. Così Draghi e Giorgetti difendono i microchip," *Formiche.net* (April 9, 2021).
[583] Filippo Santelli, "Roma-Tokyo, l'alleanza dei microchip," *La Repubblica* (April 13, 2021).
[584] Publicly unavailable, but "seen and authenticated" by Bloomberg. See Alberto Brambilla and Daniele Lepido, "China Targeted Milan Semiconductor Firm Before Draghi's Veto, " *Bloomberg* (April 9, 2021).
[585] Ibid.
[586] Ibid.

technology, as its reactors "find application in military field"[587]. Based on Article 2 of Law Decree 21/2012 (recently incorporating the economic sectors referred to by Article 4 of the 2019 EU Regulation, including semiconductors), the Italian government's decree judged that the terms of the transaction were "unsuitable to assure security and continuity of supply"[588]. Italy's Prime Minister, in explaining his veto over LPE's takeover bid in a press conference, emphasized that "shortage of semiconductors led many automotive companies to slow down production last year, so that became a strategic sector"[589].

In addition, the LPE case sheds light over the functioning of the new European framework for the screening of foreign investments (see section 2.1.2.). In fact, Italy's veto was partly encouraged by the concerns raised by other EU Member States (particularly Sweden and the Netherlands) as well as by a European Commission's opinion, suggesting that the transaction was likely to "undermine the security of more than one Member State"[590]. Moreover, the case has been viewed as highly relevant in the context of the new "silicon geopolitics". However, the President and Chief Executive Officer (CEO) of LPE have formally complained with Italian authorities about the "expropriation nature" of the government's decision[591]. According to them, the contended transaction was intended to increase LPE's attractivity to Chinese buyers, also protecting the firm's patents and intellectual property from potential theft. In this perspective, whether justified on national security grounds, the government's veto has powerfully interfered with LPE's commercial strategy.

To sum up, the case of LPE S.p.A. provides the third veto ever imposed upon a foreign investment through the government's Golden power. After the 2017 blocking of Next AST s.r.l.'s acquisition by the Altran Group, the government's second veto was imposed in October 2020 under Article 1-bis of Law Decree 21/2012, concerning a 5G technology supply contract. Thus, the overall picture suggests that 5G networks and emerging technologies, including chips and semiconductors, are rapidly acquiring national security importance. Foreign investment screening mechanisms around the globe, including in Italy, are proving highly receptive to these developments. Secondly, the Italian government's veto on the partial takeover of LPE is also the first imposed on a Chinese investor. The LPE S.p.A. case also offers insights into the future implications of the EU Regulation on the screening of foreign investments (which entered into force in October 2020). Indeed, the Italian government was provided with comments and opinions by both individual Member States and the European Commission, raising their own concerns about the transaction. Such opinions, while not binding, can be expected to influence national decision-making in the future, at least to some extent. Finally, LPE executive management's reaction to the government's decision is useful to highlight the most controversial aspect of FDI screening. Assuming that Shenzen's partial takeover of LPE S.p.A. was part of a wider strategy of the Italian firm to increase its attractiveness to Chinese clients and limit intellectual property thefts[592], the central question could be formulated as follows: is a state's desire to protect its national security allowed to trump the economic interests of national private firms? How does one separate strictly "national security" issues from industrial policy objectives, which could violate the rights of private enterprises? Chapter 5 will attempt an answer to similar questions by presenting normative policy proposals for Italy's Golden power.

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[587] Ibid.
[588] Ibid.
[589] Ibid.
[590] Milano Finanza, "Timori Ue nel veto su Lpe," April 10, 2021.
[591] Ferruccio De Bortoli, "Golden power, la Lpe e la difesa del made in Italy (non solo dai cinesi)," *L'Economia del Corriere della Sera* (April 19, 2021).
[592] See Ibid.

5. The future of Italy's Golden power: policy proposals and scenarios

"The strengthening of the security and protection of national strategic assets, combined with a favourable regulatory environment for investments, can be regarded as an effective instrument of attractiveness for foreign investors" (Italian Government, 2020)[593]

5.1. The Golden power's past and present

Until now, this dissertation has described the regulatory evolution and practice of Italy's Golden power since its institution in 2012. In fact, established in response to the ECJ's quashing of the previous Golden share, the Golden power is a relatively young "creature", now living less than 10 years. The legislative doctrine has been updated several times, generally enlarging the scope of economic sectors subject to foreign investment control or amending firms' notification duties and governmental powers. The most impactful of these reforms have been the "Brexit Decree" on 5G technology networks in 2019 (when Italy's "perimeter of cyber national security" was also established by a separate law) and the "Liquidity Decree" in 2020 (which was followed by the entry into force of the EU Regulation on screening foreign investments at the end of the same year). Over time, the administrative organization of Italy's Golden power has also been subject to change. In 2012 Italian authorities opted for delegation of foreign investment control powers to an inter-ministerial committee, that is, the Coordination Group, uniting representatives of the Presidency of the Council and ministerial delegates. Nonetheless, the role of Italy's intelligence agencies, albeit informally, has entrenched itself as part and parcel of the Golden power's administrative process. This is mostly due to the increasingly sophisticated competences that foreign investment screening demands, in terms of information collection and analysis. Moreover, this dissertation has highlighted the several differences and similarities between Italy's device for screening foreign investments and other countries' corresponding mechanisms. Finally, a short quantitative evaluation has investigated how the Golden power's specific traits and regulatory evolution have been translated into governmental practice. A partially surprising finding has been that the overwhelming majority of foreign investments was in fact authorized, while only a minority was imposed conditions upon and only three transactions were blocked.

This "past and present" of Italy's Golden power emphasizes the need to address two further questions or issues. First, what could Italy do better in terms of screening foreign investments? Given other national experiences or data from quantitative practice, which policy proposals make the most sense? Secondly, what short- to medium-term future developments could be envisaged, domestically or internationally, affecting Italy's FDI screening? What factors, variables or events can be expected to impact Italy's Golden power at legislative, practical and sectorial level, and how might they do so?

In sum, this Chapter will be devoted to both presenting normative policy proposals for Italy's Golden power (section 5.2.) and examining its possible prospects or future scenarios (section 5.3.).

[593] "Report to Parliament" on Golden power activities for the year 2020 (Senate of the Republic, Doc- LXV n. 3): 3.

5.2. A comprehensive reform proposal for Italy's FDI screening

As already pointed out in Chapter 2, media and political debates about the Golden power ignore what is perhaps the central trade-off underlying foreign investment screening, that is, between protection of national strategic interests and the economic attractiveness of domestic markets. Chapter 2 also suggested that states' behaviour is guided by the double need to screen as well as attract inward investments, finding a delicate balance. This is exceptionally important for Italy, given its peculiar industrial fabric. Indeed, the structural features of Italy's productive context inflate the importance of foreign capital and newer business structures for small-sized and family-run businesses, which are often export-oriented and increasingly seek investments in technology to grow and compete at international level. Thus, Italy's FDI screening should promote protection of public interests without detriment to foreign investments as such. As already emphasized, this implies that the Golden power should be conceived of as having an exceptional nature, and its exercise should be based on a clearly defined hierarchy of interests. Otherwise, the view of certain critics could materialize: the indeterminacy of national security concepts and a vague identification of interests could favour a "neo-protectionist" use of foreign investment screening, based on the pursuit of general industrial (and social) policy goals. This would considerably reduce legal certainty as well as the international attractiveness of domestic markets.

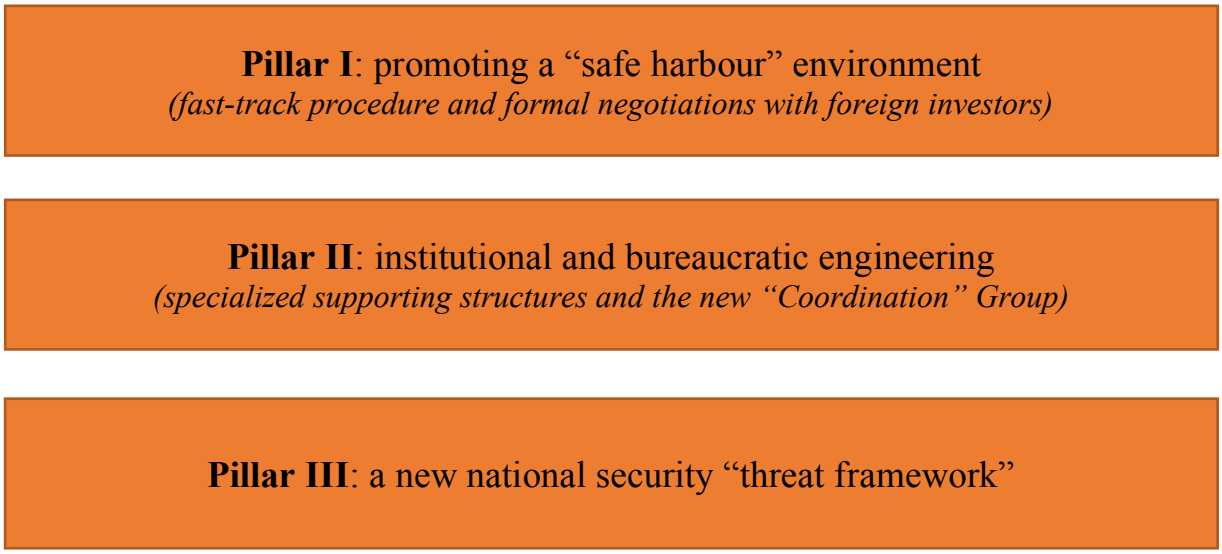
In sum, the (normative) starting point for this Chapter's policy proposals is that the risk of a "neo-protectionist" use of Italy's Golden power is in fact real and must be fought. Put bluntly, Italy's productive fabric would be at stake if foreign operators were dissuaded from investing in Italian firms. Thus, the goal should be to make Italy's Golden power more effective in two overlapping senses. On the one hand, by streamlining the administrative procedure, thus ensuring adequate material and informational resources to conduct a proper investigation for each transaction. On the other, by entrenching a clear separation between industrial policy goals and national security issues, which are in fact likely to threaten public interests. A more precise definition of what "national security" might imply is provided below, while industrial policy is taken to refer to the "concept that the state seeks to influence the supply side of the economy (…) Industrial policies involve explicit state support for "national champion" firms and/or specific sectors"[594]. Accordingly, this Chapter's intuition is that the best way to turn the Golden power into a more effective instrument is to "take the best" of the American model (especially in terms of procedural dynamics), while maintaining the core features of European screening mechanisms and some current specificities of Italian FDI review.

In fact, several features of Italy's Golden power deserve to be preserved. First of all, administrative judicial review, which is limited to issues of procedural legitimacy, provides a form of legal comfort to foreign investors, while also leaving the discretionality of Golden power decisions untouched. Secondly, establishment of an inter-departmental committee (rather than delegation to an individual Ministry) resonates positively with the inter-disciplinary nature and "high politics" status of FDI screening decisions. Thirdly, the institution of an obligation to notify for foreign investors has provided a powerful deterrent and increased certainty of the national legal framework. Moreover, the short length of the administrative procedure (that is, the short time for review afforded to Italy's Coordination Group) prevents public authorities from developing an interference strategy. Finally, the "no objection" or *silenzio assenso* mechanism is a commendable aspect of the general effort to

[594] Mark Thatcher, "From old to new industrial policy via economic regulation," *Rivista della Regolazione dei Mercati* n. 2 (2014): 10.

streamline procedures. In sum, these typically European (especially in reference to judicial review) or Italian features of the Golden power should be preserved or strengthened.
On the other hand, Chapter 3's comparison with foreign investment screening in Germany, France and particularly the United States suggests that much room for reform is in fact present. Thus, this Chapter presents a comprehensive policy reform, divided into three pillars.

Figure 11. A comprehensive reform of Italy's Golden power: three pillars



(Source: Author's elaboration)

Pillar I: promoting a "safe harbour" environment. First of all, the "safe harbour" orientation of Italy's Golden power, assuming the positivity of foreign investments, could be improved. Rather than fearing a governmental "sword of Damocles" which could fall on their head at any time, bending to political pressures or industrial goals, foreign investors should be confident that Italy generally welcomes FDI, unless this threatens its national security on a case-by-case basis. This sort of perceptual goal can be achieved by two concrete amendments to the legislative discipline.
One is the introduction of a fast-track procedure, akin to the "light filing" mechanism in the US or the French "fast-track option". Similar mechanisms generally precede the notification stage. They allow foreign investors to formally approach governmental authorities to ascertain whether their investment needs to be notified or is likely to threaten the state's security interests. Therefore, low-risk investments can be rapidly authorized. Introducing a similar provision in Italy would allow to lighten the caseload of the Coordination Group and generally increase legal certainty, enhancing the confidence of foreign investors.
A second amendment could concern the establishment of a procedure similar to CFIUS's "mitigation agreements", that is, a *formal* negotiation stage between Italy's authorities and foreign investors. The outcome of this procedure could be a legal (even if confidential) document or contract, and conditions on foreign investments would be negotiated rather than authoritatively imposed. Importantly, Italian authorities would retain the "upper hand" in these negotiations: absent a consensual agreement, a veto could still be imposed, thus blocking the investment and eliminating the national security risk. The underlying assumption of a similar amendment is that negotiating conditions and, when this fails, blocking transactions is more effective (that is, is best seen by foreign investors and results in safer

foreign investments) than simply imposing conditions, forcing investors to either accept or desist. In sum, introducing a formal negotiation stage would increase investors' confidence as well as legal certainty, without affecting governmental sovereign powers.
Overall, Pillar I of this Chapter's Golden power reform aims to increase general favourableness to inward investments, at both perceptual and practical level, but with no substantial detriment to governmental review powers.

Pillar II: institutional and bureaucratic engineering. Secondly, the institutional apparatus surrounding Italy's Coordination Group could be powerfully enhanced. A specialized, permanent bureaucratic structure is needed to support Golden power decisions, ensuring appropriate material and informational resources for each transaction.
Chapter 2 pointed out that, as of now, a preliminary review of notified foreign investments is carried out by the Department of Administrative Coordination (DICA) of the Presidency of the Council. Thereafter, information collection and analysis on individual transactions are entrusted with the Coordination Group. The Group is set up within the Presidency of the Council and is composed of both representatives of the Presidency and ministerial delegates. Usually, individual Ministries take care of collection and analysis on behalf of the Group and propose a draft of the related Prime Ministerial Decree. However, the entire administrative procedure also relies heavily on intelligence agencies and their information activities. Moreover, the quantitative trends set forth in Chapter 4 suggest that the competences required for screening FDI are increasingly technical, sophisticated and technology-related. A single transaction could also require examination on different thematic or sectorial grounds. A bureaucratic re-organization of the Golden power apparatus is needed to address these issues.
Rather than separating the preliminary review and information collection/analysis stages, this could be both entrusted with the Coordination Group, which would thus need to be institutionally strengthened. In order to create a wider bureaucratic structure supporting the Group, different specialized offices could be established within it. These could be based on thematic or sectorial expertise: for instance, an office for collection and analysis in cases involving 5G-technology networks and other "high-tech sectors"; a second one for defence-related transactions; a third office for energy, communications and transport cases; a residual one for other transactions. Specialists and experts could be employed for each sector through "open competition", also involving new graduates with up-to-date skills. Moreover, experienced bureaucrats, representatives of the Presidency and lawyers could act as liaison officers between the different cells. Importantly, this institutional reform would imply reducing the role of Ministries to some extent. Ministerial delegates would no longer perform collection and analysis, but would "limit" themselves to discussion of the reports of specialized offices. *Ad hoc* conventions or agreements could also favour a more structural cooperation between the Coordination Group and intelligence agencies as well as independent authorities, either allowing their permanent presence within the new bureaucratic structure (for instance, as members of specialized offices) or institutionalizing channels for information exchange on a case-by-case basis. The wider goal should be to build a stronger inter-institutional network.
In sum, a similar bureaucratic re-organization would ensure an in-depth review of all notified transactions, based on appropriate resources and the specialized expertise of analysts, without depoliticizing the process throughout. The nature of Golden power decisions as a mixture of technique, politics and discretion would be maintained, if not enhanced.

By way of example, a foreign investment concerning, e.g., an Italian cybersecurity firm, would be examined by the relevant specialized office within the Coordination Group. This stage would ideally include contribution by members of Italy's intelligence agencies and independent authorities. The office's report would then be discussed by representatives of the Presidency of the Council and ministerial delegates in a formal meeting. Following a deliberation by the Council of Ministers on the Group's conclusions, a final decision would still be issued in the form of a Decree of the President of the Council of Ministers (DPCM).

Put together with a new power to engage in formal negotiations with foreign investors (see *Pillar I*), the Group's new institutional autonomy and ability for independent analysis would amount to a significant transformation. Clearly, the *Coordination* Group would no longer be concerned only with what its name suggests. However, this Chapter's intuition is that this development would be a positive one. A new (Coordination) Group, endowed with its own bureaucratic structure and the ability to formally negotiate with foreign investors, would serve the double goal underlying these policy proposals: ensuring efficiency and appropriate resources for reviewing each transaction, while also reducing barriers and institutional deterrence to foreign investments. Importantly, politics would not be cut loose: the Group is set up within the Presidency of the Council, Ministries retain their decision-making role (while delegating collection and analysis of information to specialized offices) and decisions are formally taken by Italy's Prime Minister. While increasing efficiency and streamlining procedures, this maintains the central, perhaps necessary, ambiguity of Italy's Golden power decisions: they are administrative in nature, but formally taken by the highest political authority.

Finally, taking the argument for the Group's autonomy one step further and contributing to thinner procedures, the Group could also be allowed to "clear" transactions without deliberation of the Council of Ministers. If no threat is judged to endanger Italian public interests, entitling the Group to formally close a procedure with no additional administrative passage would save significant time and material resources.

Pillar III: a new national security "threat framework". Finally, if the goal of separating national security and market dynamics is worth pursuing, a new "threat framework" must guide Golden power actions, reflecting a narrower focus. The following threat framework is modelled around Theodore Moran's one for the US (see section 3.1.2.). In fact, Moran's basic intuition can be applied to the Golden power's discipline with a few modifications.

The current legal framework entitles the Italian government to block or impose conditions upon foreign investments in the following sectors and under the following conditions:

- (i) for the national security and defence sector, as well as for broadband electronic telecommunication networks based on 5G technology, in case of "effective threat to the serious detriment of the fundamental national defence and security interests";
- (ii) for the energy, communications and transport sectors, as well as critical infrastructures and technologies ("high-tech sectors") and other sectors referred to by the 2019 EU Regulation (including access to sensitive information and personal data), in case of "exceptional situation of effective threat to the serious detriment of the public interests concerning the security and operation of the networks and systems, as well as the continuity of supply".

Given this initial framework and Theodore Moran's conceptualization, a foreign investment is likely to threaten Italy's public interests or *national security* whenever it concerns:

- (1) an Italian firm (or a branch thereof) operating *a sensitive technology, input or asset which could be subsequently employed by a foreign acquirer to the detriment of Italian interests*. This could refer to firms of the defence and national security sector (for instance, supplying cutting-edge technology to the Italian military) or operating so-called "critical technologies", including robotics, technologies with potential dual-use applications and space or nuclear technology.
- (2) an Italian firm (or a branch thereof) operating *assets or inputs which could allow a foreign acquirer to perform surveillance activities or control sensitive information to the detriment of Italian interests*. This could concern 5G technology-based telecommunication networks, the wider communications sector (especially service providers), critical infrastructures (for instance, data storage and management firms) and critical technologies (particularly firms involved in artificial intelligence and network security activities). Moreover, these critical assets could include Italian energy and transport networks or infrastructures whose management by a foreign operator would threaten confidential information as well as allow undetected infiltration.
- (3) an Italian firm (or a branch thereof) operating *a critical input, asset or product which requires significant specialization and is not widely available in global markets*. This could refer to Italian firms of the energy sector (especially those operating assets in very limited supply) and, above all, high-tech firms operating "critical technologies", such as semiconductors, robotics and artificial intelligence.

Figure 12. A new national security "threat framework": 3 types of investments in Italian firms which threaten national security and may demand Golden power protection

(Source: Author's re-elaboration, based on Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 5-10)

Finally, in addition to the eventuality that a foreign investor has been involved in activities threatening Italian public interests in the past, the most important additional factor for consideration is public control of the foreign investor, e.g., by a government or army of a foreign state, whether through direct ownership or significant funding. Following Alessandro Aresu's framework, public control of a foreign investor generally increases the probability that the investment is geopolitically motivated, thus requiring sovereign protection. Of course, any Golden power determination should be based on identification of the national interests at risk, but also on careful analysis of the nature and intentions of the foreign investor.
In conclusion, the above threat framework suggests that only if a foreign investment classifies as (1), (2) or (3), Italian authorities should review the transaction and determine whether imposing a veto or conditions is an appropriate measure to alleviate the national security threat. Public control of the foreign investor should also be taken into due consideration. On the contrary, all other foreign investments should be judged as posing no significant national security risk. If industrial policy must not be allowed to interfere, these investments should be generally authorized.

Taken together, *Pillars I, II and III* of this Chapter's comprehensive policy proposal would result in a significant reform of Italy's screening device. The Golden power would transform into a partially renewed instrument, displaying thinner procedures, functioning through a more autonomous institution and employing a narrower focus on national security threats. This would allow Italy to pursue the goal of maintaining attractiveness to foreign investments and fostering economic growth. Still, specifically European and Italian features would be maintained.
Moreover, a legal scholar has recently suggested that the Golden power discipline should be re-organized into a single text, avoiding overlapping and cross-references[595]. If a comprehensive reform of the type proposed by this dissertation was to be pursued, this would in fact provide an opportunity for a similar systemisation.
Finally, several trends highlighted by the quantitative evaluation in Chapter 4 would support this Chapter's policy proposals. First of all, the outstanding increase in foreign investments notified in recent years underlies the general need to fine-tune Italy's Golden power and to periodically review its functioning. Moreover, the advent of emerging technologies-related cases, including 5G networks and semi-conductors, emphasises the importance of more technical and sophisticated competences (that is, of the individuals who screen foreign direct investments in practice). Finally, the government's preference for imposing conditions rather than vetoes supports the usefulness of introducing a formal negotiation stage between investors and Italian authorities, allowing the latter to pursue more intermediate and consensual measures.

5.3. Looking ahead: future expectations and alternative scenarios

Finally, a number of general expectations can be formulated concerning the future practice of Italy's Golden power. These are mainly suggested by current developments at geopolitical, European and technological level.
First of all, as emphasized in Chapter 3, the year 2020 has coincided with a transnational consolidation of foreign investment screening mechanisms, usually as a reaction to the COVID-19 shock. However,

[595] Luciano Vasques, "Golden Power. Alcune note a margine della disciplina emergenziale del controllo governativo sulle acquisizioni in Italia," *Mercato Concorrenza Regole* (Fascicolo 1, Il Mulino – Rivistaweb, April 2020): 136.

as the main factors underlying this development are in fact long-term and were only "accelerated" by the pandemic (see section 3.3.), a post-COVID-19 reversal of the trend towards stricter FDI control in Italy and elsewhere is unlikely. What one might expect is a fine-tuning at best, with a re-formulation of the most extensive provisions (such as the partial equalization of EU and non-EU foreign investors sanctioned by the 2020 Liquidity Decree), but no comprehensive turnaround.

Secondly, the new cooperation mechanism established at EU level (which entered into force in October 2020) will increasingly affect the Golden power's functioning, especially as these two levels of governance develop increasing familiarity with each other. The LPE S.p.A. case described in Chapter 4 corroborates the expectation that a growing number of screening procedures will be interested by other EU Member States' or European Commission's concerns and opinions. From a national perspective, this also implies that Italy will gain confidence in conveying its own opinions about foreign direct investments in other Member States, thus ensuring a wider protection of its security interests.

Thirdly, at the more specific level of Golden power review, this dissertation suggests two main expectations. On the one hand, technology-related investments will constitute a growing fraction of cases reviewed, as the national security relevance of developments in the field of 5G networks, Artificial Intelligence and others will probably continue to escalate. Thus, 5G networks and "high-tech" sectors (including critical technologies and infrastructures) can be expected to prevail at statistical level over more traditional sectors for foreign investment review, including defence, energy, transport and communications. This expectation is supported by recent data (see section 4.1.) and will require enhanced coordination with specialised institutional actors and the cyber-security legislative *corpus*. On the other hand, the proportion of foreign investments on which conditions or prescriptions are imposed is likely to increase. Indeed, Chapter 4 suggests that this "type of exercise" is mostly employed for technology-related transactions. Importantly, the proportion of investments on which vetoes are imposed can be expected to increase as well, albeit to a minor extent. This possible trend is suggested by empirical evidence that 2 out of 3 vetoes exercised by Italy's government since 2014 have been imposed in 2020-2021 and in technology-related transactions. Thus, it is plausible that the often praised "self-restraint" of Italian authorities could evolve into a more active stance.

Finally, sector-specific developments will also impact Italy's foreign investment screening. Progress in global renewable energy supply (energy), automation and electrification of cars (transport) and new generation weapons (defence) is likely to affect the rules and rationale of Italy's Golden power. As new threats emerge, defensive mechanisms have to adapt as well. Thus, a further expectation is that the Golden power will be adapted to new sectorial trends through *ad hoc* amendments in the medium- to long-term. By way of example, one could anticipate that;

- in the energy field, as the global focus shifts from traditional to renewable energy sources (at least in relative terms), whose supply is dependent upon entirely different production processes, networks and distribution of power, a sector-specific intervention will be required to update the Golden power discipline;
- with regard to transports, non-military vehicles are currently excluded from the legal boundaries of Italy's Golden power; however, the increasing electrification of cars and new production processes (often based on modern energy sources) are likely to expose the entire sector to new security threats as well as political claims on the need to provide protection[596];

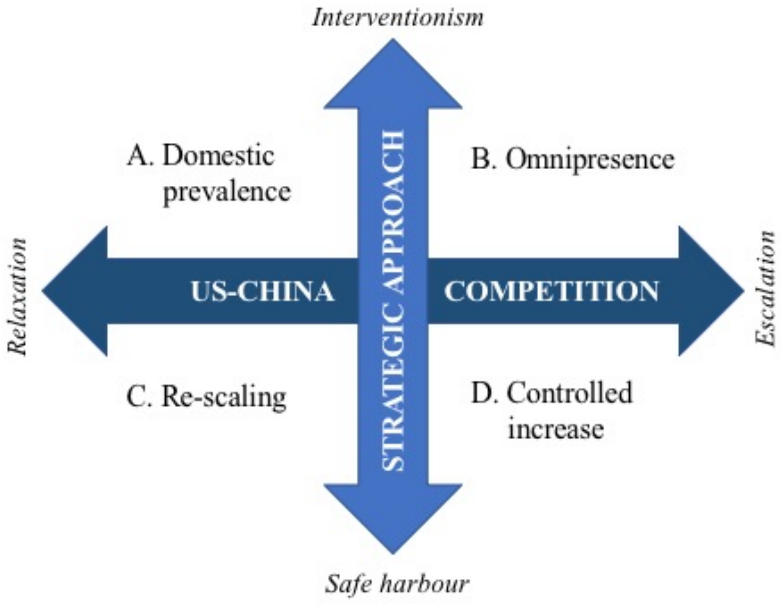
[596] See, for instance, the case of Iveco S.p.A.'s attempted acquisition by the Chinese FAW Corportation Group (2021).

similar pressures could result in the inclusion of new transport-related assets (i.e., non-military ones) as part of the Golden power's scope.

Importantly, a state's rules for foreign investment screening reflect its strategic priorities and reveal its conceptualization of sovereign powers. However, they also offer a powerful observational point to monitor wider global developments, shifts in power distribution or geopolitical competition and sector-specific evolutions, to which these rules are constantly adapting.

A more methodological description of the possible prospects of Italy's Golden power is provided through an "alternative futures analysis". This structured analytic technique (SAT) relies on the identification of two critical factors to build a matrix, whose "four resulting quadrants provide the basis for characterizing alternative future worlds"[597]. The two variables are selected based on their relevance to the short- to medium-term evolution of the Golden power (5 years). Following Evenett (see section 3.3.), this Chapter takes the first critical and uncertain factor for the evolution of Italy's FDI screening to be geopolitical and technological competition between the United States and China ("US-China competition"). This variable has two endpoints: "Relaxation" and "Escalation". The Italian authorities' use of the Golden power ("strategic approach") provides the second critical factor. This variable has two endpoints, suggesting different goals in Italy's approach to its foreign investment control powers: "Interventionism" (reflecting a concern for domestic industrial policy goals) and "Safe harbour approach" (implying a narrower focus on national security threats, of the type proposed in section 5.2.). By converting the two factors into axes and crossing them, a futures matrix is obtained.

Figure 13. The impact of (i) geopolitical competition and (ii) Italy's underlying approach to foreign direct investment screening, on the Golden power: four alternative futures



(Source: Author's elaboration)

[597] US Government, "A Tradecraft Primer: Structured Analytic Techniques for Improving Intelligence Analysis" (2009): 36.

Four alternative futures, or scenarios, result from the above matrix. Their labels refer to the expected evolution of Italy's Golden power.

In the "domestic prevalence" scenario (A), the geopolitical relevance of foreign investments is reduced by a relaxation in US-China relations. At the same time, the Golden power is strategically approached by Italian authorities as an instrument for primarily domestic aims, especially in terms of industrial and social policy. Thus, the main explanatory variables for individual Golden power decisions become domestic or industrial rather than geopolitical or national security-based. Space is opened for political, bureaucratic and interest group pressures, while Italian markets' attractiveness and safety for foreign investors is partially reduced.

In the "omnipresence" scenario (B), US-China international competition increases exponentially, inflating the geopolitical relevance of foreign investments. At the same time, as in scenario A, a "neo-protectionist" or hyper-interventionist use of the Golden power prevails. Overall, this results in a significant escalation in the use of foreign investment control through the Golden power. As a growing number of transactions are reviewed, Italy's government also pursues domestic goals of industrial policy, considerably increasing the "investment risk" for foreign entities.

In the "re-scaling" scenario (C), US-China competition enters a period of geopolitical truce or relaxation. At the same time, FDI screening is approached by Italian authorities following a strictly defined hierarchy of "strategic" interests or threat framework. Overall, as governmental institutions employ a stricter focus on national security threats, risks to public interests are also reduced by a newly stable international context. Thus, the current "rush to legal weapons" across the globe is partially halted. Foreign investment screening through the Golden power is substantially re-scaled.

Finally, in the "controlled increase" scenario (D), US-China international tensions continue to escalate. However, the safe harbour or selective approach to Italy's Golden power described in scenario C prevails over industrial incentives. Overall, the current trend towards increase in the geopolitical salience of FDI screening continues, but Italy's strategic approach "controls" for it by maintaining a strict focus on national security threats. In other words, the Golden power is not re-scaled but also does not compromise the economic benefits Italy receives from foreign capital investments.

In conclusion, the two critical variables considered ("US-China competition" and Italy's "strategic approach") are in turn influenced by additional factors, including the effects of the COVID-19 pandemic. In fact, the COVID-19 shock can be expected to both exacerbate geopolitical competition and favour an industrial policy-based approach to the Golden power in a context of economic crisis. This Chapter's interpretation is therefore that scenario B ("omnipresence") is the most likely for the short- to medium-term evolution of Italy's Golden power. However, this scenario implies a central risk, which has been laid out at the outset of this Chapter: again, Italy's productive fabric would be at stake if foreign operators were discouraged from investing in Italian firms.

This reinforces the case for the policy proposals of the previous section. In sum, the best policy for Italy would be to ensure that its strategic approach is institutionally and perceptually geared towards maintaining a "safe harbour" environment for foreign investors, without renouncing its national security concerns throughout. Even as geopolitical competition continues fiercely, Italy's foreign investment screening should preserve a narrow focus. Thus, it should control the risks for its own omnipresence, veering towards scenario D ("controlled increase"). The international attractiveness of Italian firms would be maintained.

A final caveat is required. This Chapter's analysis, from policy proposals to future scenarios, applies to the Golden power as a defensive instrument. In terms of Italy's offensive geo-economic projection, it is a matter of debate whether security and industrial policy should be as much separated as this dissertation suggests. In fact, the optimal policy could be to combine an offensive external projection of the "country-system" (even if this is likely to induce retaliation) with a narrow defensive posture, focused on protection from national security threats while maintain attractiveness to inward investments. Arguably, this double strategy could allow Italy to rip the most benefits from globalization, which is in fact the ultimate aim of "economic intelligence": careful defence with no detriment to international attractiveness, on the one hand, and offensive exploitation of others' economic or industrial weaknesses, on the other.

Conclusion

In the post-Cold War international system, "security" has transformed into a multidimensional and multifunctional concept. Governments are now committed to protecting and promoting their global competitive position, and their ability to exploit economic leverage for strategic objectives has become an essential part of power politics. Thus, "economic intelligence" has also gained exceptional importance as an instrument for the acquisition and management of information in "geo-economic" competition. In this context, a powerful instrument for states to *defend* their essential interests is provided by norms regulating their right to impose vetoes or conditions over Foreign Direct Investment (FDI). In fact, geo-economics increasingly "responds to geopolitical projects, and thus sets up offensive and defensive strategies, which depend on a state's influence and its ability to generate, disseminate and defend standards"[598]. This "geopolitics of protection" has resulted in a "rush to legal weapons" for foreign investment screening, including Italy's Golden power.

The Introduction listed several questions about Italy's Golden power which this dissertation attempts to answer. In terms of the Golden power's regulatory evolution in response to trends and pressures, this has been described as an "irresistible ascent"[599] and is mainly a result of rapid technological transformation and increased geopolitical competition. Thus, the Italian state might have recently transformed into a "strategist"[600] or "customs officer"[601]. Moreover, the latest Golden power reform adopted during the COVID-19 pandemic (the so-called "Liquidity Decree") suggests that the "core" of what Italy is committed to protecting has been significantly expanded. While posing problems of "structural adequacy"[602] for Italian institutions, the Golden power's regulatory evolution also implies increased intelligence activity in this sector.

However, a widespread misunderstanding in current media and political debates is that the Golden power should be employed whenever the national character of a (strategic) Italian firm is questioned by a market transaction. Similar misconceptions, in addition to some formal and practical features of the Golden power discipline, give substance to fears for a "neo-protectionist" use of this instrument. Nonetheless, the government's approach to its powers has been relatively cautious and moderate so far, primarily owing to an entrenched "antitrust" culture. More generally, it has been suggested that Golden power exercise should be based on a principle of "*exceptional* nature of defence instruments"[603] and a clearly defined hierarchy of interests, incorporating the idea that if anything is "strategic", nothing really is.

Similar issues of interpretation, especially concerning the relationship between foreign investment, national security and the economy, have been raised by the recent evolution of the Committee on Foreign Investment in the United States (CFIUS). This dissertation has found that, compared to the

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[598] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 19.

[599] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

[600] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 9.

[601] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

[602] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 11.

[603] Marcella Panucci, "Golden power. Cornice europea e nuovi paradigmi di concorrenza," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 128. Emphasis added.

American reference model, Italy's Golden power stands out for lacking a "safe harbour" orientation for foreign investors and a specialized bureaucratic structure supporting its screening activities. It also lacks a "light" mechanism to dismiss low risk investments, similar to France's "fast-track" procedure. However, compared to German and French foreign investment screening, Italy's Golden power is peculiar in giving review powers to an inter-ministerial Committee rather than a single Ministry. Moreover, judicial review of Golden power decisions is limited to ensuring the appropriate exercise of discretionary power, in terms of procedural legitimacy and reasonableness. Thus, it does not impact on the content of individual decisions.

Fourthly, the Golden power's quantitative practice suggests that the number of both (i) reviewed foreign investments and (ii) transactions specifically concerning 5G technology networks, has recently increased at an outstanding pace. Moreover, the Italian government is statistically more willing to impose prescriptions/conditions than vetoes over foreign investments. Importantly, however, exercises of the Golden power amount to a small percentage of the total of reviewed transactions, suggesting some extent of moderation by Italian institutions. The two case-studies in Chapter 4 confirm these quantitative trends and provide additional insights, especially concerning the impact of the 2019 EU Regulation and the controversial national security-industrial policy conundrum.

Based on this dissertation's findings in comparative (Chapter 3) and quantitative terms (Chapter 4), the Golden power instrument could be made more effective by both streamlining the administrative procedure and entrenching a clear separation between national security issues and industrial policy goals. This would preserve Italy's attractiveness to foreign investors as well as "protect" the government's moderation in its exercise of powers. Thus, Chapter 5's normative policy proposal is based on three pillars: promoting a "safe harbour" environment (I), institutional and bureaucratic engineering (II) and a new national security "threat-framework" (III). The vital point is that states must be committed to finding a balance in their "double movement of attracting and screening"[604] foreign direct investments.

Furthermore, Italy's Golden power is likely to be affected by several geopolitical, European and sector-specific trends in the near future. In the short- to medium-term, the pandemic shock can in fact be expected to both exacerbate geopolitical competition and favour an industrial policy-based approach to the Golden power in a context of economic crisis. On the contrary, again, this dissertation normatively suggests that Italy's best policy would be to maintain a narrow "screening focus", based on national security threats and a "safe harbour" approach.

Finally, this dissertation highlights several avenues for future research on foreign investment screening. Generally speaking, the academic literature on FDI screening is rendered partially incomplete by a lack of general theorizing and systematic comparative work. Indeed, it is mostly focused on in-depth investigations of national screening instruments, particularly in powerful industrialized countries such as the United States. More general theoretical work concerning the history, trends, concepts and rationale of FDI screening is particularly needed. Comparative analyses should also examine the similarities and differences between national and/or regional trends in foreign investment review and the causes thereof. Concerning Italy specifically, the academic literature should abandon its narrow focus on the legal nature and terms of the Golden power. In fact, geopolitical, security studies or IR-based analyses, while able to provide powerful complementary

[604] Alessandro Aresu, "Golden power e interesse nazionale: tra geodiritto e geotecnologia," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 118.

insights, are surprisingly scarce. Finally, a specific topic for future research has been suggested in Chapter 5. The Golden power's nature as a *defensive* instrument prevents this dissertation from moving its policy proposals and conclusions to the general level of Italy's geoeconomic strategy. In other words, separation between national security and industrial policy at defensive level is not automatically transferred at offensive one. Should Italy's wider strategy pursue careful defence with no detriment to international attractiveness, on the one hand, but offensive exploitation of foreign countries' economic or industrial weaknesses, on the other? In addition to proposing their own views or theories on Italy's Golden power, scholars should examine similar questions as well.

In sum, investigating a state's Foreign Direct Investment (FDI) screening allows to dive into its sovereign priorities and conceptualization of power, which chameleonically adapt over time. It also provides a powerful observational point to monitor trends in geopolitical competition and power distribution, the effects of global shocks and sector-specific developments. Thus, this dissertation also aims to arouse a new interest in Foreign Direct Investment (FDI) screening as a powerful field of study.

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Executive Summary

Chapter 1 of this dissertation provides an historical and theoretical introduction to the theme of Foreign Direct Investment (FDI) screening.

After 1989, evolutions such as "the end of the bipolar world, the German unification, the impressive economic growth of South-East Asia and astonishing technological progress"[605] contributed to relocating inter-state competition from the geo-strategic to the economic sphere. States' influence came to be measured primarily by their economic or financial capabilities and subtler commercial wars gradually replaced military ones. This new context of globalization and multipolarity witnessed the advent of the so-called "strategic State, whose task is to maintain or increase its privileged position in the world"[606]. Information, rather than for its potential effect on the Cold War politico-military balance, came to be valued and pursued for its ability to "modify the outcomes of economic competition"[607]. The nature of this competition also significantly changed, moving from conquest of new productive markets to the ownership structure of enterprises. Thus, new risks resulted from possible "hostile acquisitions, destabilizing financial schemes, attacks on the technological assets of national firms through industrial espionage, and so on"[608]. Overall, the main outcome of the post-1989 "revolution" is that "security is no longer a chiefly military concept, as in the bipolar world. It is now multidimensional and multifunctional"[609]. So-called "economic security" was also substantially reshaped. While in Cold War times it mainly referred to security of the "state-apparatus", it now generally implies security of a whole nation, that is, the well-being and living standards of its citizens. The 1994 American "National Security Strategy (NSS) of Engagement and Enlargement" was the first to state that a country, especially through its intelligence community, would track global developments "in order to adequately forecast dangers to democracy and to *U.S. economic well-being*"[610]. The American state would also "support U.S. trade negotiators (…) by identifying threats to U.S. companies from foreign intelligence services and unfair trading practices"[611]. In conclusion, states rediscovered their role as "local garrisons of the globalized economy"[612].

Moreover, states' new goal to protect and enhance their global economic position is pursued "through the creation of a favourable *geo-economic* framework"[613]. According to Edward Luttwak, as the conflicting nature of the post-Cold War international states-system remained unchanged and the relevance of military power waned in favour of economic one, "geo-economics" is "the best term I can think of to describe the admixture of the logic of conflict with the methods of commerce"[614]. The

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[605] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).
[606] Laris Gaiser, "L'intelligence economica per un nuovo ordine mondiale," *Sistema di Informazione per la Sicurezza della Repubblica* (2016): 4.
[607] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 14.
[608] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).
[609] Ibid.
[610] National Security Strategy (NSS) of Engagement and Enlargement (July 1, 1994): 14. Emphasis added.
[611] Ibid.
[612] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell'informazione nell'era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 63.
[613] Laris Gaiser, "L'intelligence economica per un nuovo ordine mondiale," *Sistema di Informazione per la Sicurezza della Repubblica* (2016): 4. Emphasis added.
[614] Edward N. Luttwak, "From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce," *The National Interest* n. 20 (1990): 19.

underlying central idea of this approach is that "in the era of geo-economics military power no longer trumps economic power"[615] and "the ability to wield economic leverage forms an essential means of power politics"[616]. Economic interdependence, given its inherent asymmetry, generates unbalanced power relations: by exploiting them, "geo-economics provides a way for states to conduct power politics that does not refer to military means"[617]. In the late 1990s, however, geo-economics partly faded into obscurity. It "rose again" in the 21st century, especially due to factors such as the advent of "a new and credible challenger for the United States for the coveted number one spot"[618] (China), the so-called "dark side of globalisation", waning support for the "commercial peace" project, the upsurge in state capitalism, the frequency of global financial crises and problems in resource scarcity[619]. Overall, most states have recently come to inform their own geo-economic "devices". These are influenced by national specificities and rely on several instruments, which are often grouped in two main categories: "high-tech colbertism" and geo-economic war[620]. Importantly, geo-economics must be viewed as both an interpretive lens for today's international relations and a range of possible actions for states to increase their competitiveness on international markets. As an analytical approach, this Chapter's theoretical overview suggests that current IR theories "insufficiently address certain vital aspects of what goes on in contemporary international relations"[621]. As a foreign policy practice, geo-economics might be used as a synonym for "economic statecraft", for its referring to "the application of economic means of power by states so as to realise strategic objectives"[622].

"Economic intelligence" is a vital element of any successful geo-economic strategy. In its general definition, it studies "the "information cycle" which is necessary for companies and states to make correct development choices"[623], and the role of intelligence agencies is "to provide "added value" to government decision-making process, strengthening the national comparative advantage"[624]. More technically, the term refers to the "pursuit and elaboration of information aimed at protecting economic, financial, industrial and scientific interests (…) [or] at identifying new and/or better growth opportunities for the economic-financial system"[625]. This economic information, which is often "non-significant of itself, unless contextualized within the relevant flow of information"[626],

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[615] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 11.

[616] Soren Scholvin and Mikael Wigell, "Power politics by economic means: Geoeconomics as an analytical approach and foreign policy practice," *Comparative Strategy* 37. n. 1 (2018): 81.

[617] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 4.

[618] Mark P. Thirlwell, "The return of geo-economics: globalisation and national security," *Lowy Institute for International Policy* (September 2010): 11.

[619] Ibid., 11-36.

[620] Carlo Jean, "Geopolitica, geostrategia e geoeconomia nel mondo post-bipolare," *Per Aspera ad Veritatem* n. 1 (Rivista di intelligence e cultura professionale, 1995).

[621] Soren Scholvin and Mikael Wigell, "Geo-economics as concept and practice in international relations. Surveying the state of the art," *FIIA Working Paper*/102 (Finnish Institute of International Affairs) (April 2018): 11.

[622] Ibid., 4.

[623] Carlo Jean and Paolo Savona, *Intelligence economica. Il ciclo dell'informazione nell'era della globalizzazione*, Soveria Mannelli, Rubbettino (2011): 21.

[624] Cunctator, "Intelligence economica e decisione politica," *Istituto Italiano di Studi Strategici "Niccolò Machiavelli"* (2012): 5.

[625] *Sistema di Informazione per la Sicurezza della Repubblica*, "Glossario Intelligence. Il linguaggio degli Organismi informativi" (2019): 59.

[626] Nicolò Pollari, "Ipotesi di lavoro per l'intelligence economica: strutture organizzative e moduli operativi," *Per Aspera ad Veritatem* n. 19 (Rivista di intelligence e cultura professionale, 2001).

often pertains to one of the following six areas of interest[627]: (i) the technological competitiveness of the "firms-system"; (ii) the commercial competitiveness of national firms; (iii) the penetration of foreign interests in vital or strategic national sectors; (iv) critical geo-economic scenarios; (v) the controllability of instruments of economic policy; (vi) economic crimes in financial markets. Theoretically, there exist at least three "schools of thought" on economic intelligence[628]. The "Italian school" approximates the French one for its regard of "economic intelligence" as a process (rather than a product), but also the Anglo-Saxon one for its focus on intelligence services (rather than private enterprises); it also treats economic espionage as a legitimate activity. Importantly, national approaches to economic intelligence may depend on the "development stage" of a country's economy and on its general culture, intended as "the sense which citizens have of themselves"[629]. For an overview of the potential activities of intelligence agencies in the economic field, this Chapter defers to Mauro Morbidelli[630]: counter-espionage activities are distinguished from the flow of economic information towards government decision-makers (which takes several forms), which in turn must be separated from support by intelligence agencies to private economic operators. Overall, rather than promoting mercantilism or protectionism, thus weakening the positive impact of interdependence, "Luttwakian geo-economics (…) strives to seize all opportunities afforded by globalization, getting as large as possible a portion of global wealth"[631]. To conclude, the economic intelligence systems of three pioneering countries can provide powerful insights. The American reference model stands out for its systemic and integrative nature, while the French one is based on a particularly rooted cooperation between the state and the private sector, especially in so-called *pôles de compétitivité.* Finally, the Japanese model feeds off coordination between its ministerial, professional and scientific poles, resulting in the partial irrelevance of public intelligence agencies.

While these three countries were quick to realize the geo-economic nature of changes in the post-Cold War international system, this recognition process was slower in Italy. Law 124/2007 sanctioned "the inclusion of the economic-industrial realm, that is, a mainly private realm, within the sphere of its national interest"[632]. It views Italy's national economic interest as the need to "defend and support our growth, competitiveness and financial stability"[633], thus recognizing the role of intelligence agencies in boosting as well as protecting Italy's economy. Two "economic intelligence" objectives are seen as priority by the Inter-ministerial Committee for the Security of the Republic (CISR)[634]: (i) protection of the credit-financial system's stability, especially from techno-finance risks, clandestine banking channels and the hostile strategies of foreign financial operators; (ii) defence of Italy's strategic industrial assets and technological excellence from foreign interests. In fact, Italy has been recently faced with "the continuing interest on the part of foreign players for its national production sector, especially SMEs [small and medium-sized enterprises], affected by a prolonged state of

[627] Ibid.
[628] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 14.
[629] Evan H. Potter, cited in Niccolò De Scalzi, Leopoldo Gudas and Luigi Martino, "Intelligence economica. Limiti e prospettive dell'interesse economico nazionale nella geopolitica del XXI secolo," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 73.
[630] Mauro Morbidelli, "Intelligence economica e competitività nazionale," *Centro Militare di Studi Strategici* (2005): 1-88.
[631] Carlo Jean, cited in ibid., 32-33.
[632] Adriano Soi, "Intelligence economica e interessi nazionali nella più recente esperienza italiana," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 535.
[633] Alessandro Pansa, "Il sistema di informazione per la tutela degli interessi economici nazionali," *Dipartimento Informazioni per la Sicurezza* (2017): 9.
[634] Ibid., 13-15.

crisis"[635]. Thus, its current approach to economic-financial intelligence stands out as substantially "defensive"[636]. At operational level, the main economic intelligence actors within Italy's security services are the departments and central offices of the Department of Information Security (DIS), the External Intelligence and Security Agency (AISE) and the Internal Information and Security Agency (AISI)[637], as well as the Central Office for Secrecy (UCSe, within the DIS) and the CISR. The integration of SMEs in Italy's economic intelligence, however, is far less advanced than for larger "national champions". Finally, several proposals have been formulated by scholars in order to formalize a stronger and more transparent relationship between intelligence agencies and private firms.

As a crucial element of any "economic intelligence" system, a state's *defence* of its essential economic interests is increasingly achieved through its so-called "special powers". That is, through norms regulating a government's right to impose conditions upon or block a Foreign Direct Investment (FDI), based on its potential impact on public interests. Alessandro Aresu has recently coined the expression "geopolitics of protection" to refer to "the instruments by which states (…) develop and favour mechanisms for the screening of investments"[638]. Three macro-trends have increased the relevance of the "geopolitics of protection": the ambiguous return of the State, the rise of China as a scientific-technological power and net exporter of capital, and the evolution of the concept of "infrastructures" as a consequence of digital transformations. Thus, geo-economics increasingly "responds to geopolitical projects, and therefore sets up offensive and defensive strategies, which depend on a state's influence and on its ability to generate, disseminate and defend standards"[639]. The political concept of "protection" has assumed increasing importance and "the decision on what to protect is a crucial element of sovereignty"[640]. Overall, legal mechanisms for FDI screening are "examples of a rush to legal weapons (…) in order to protect strategic economic interests, restricting the contendibility of firms"[641]. Recent regulatory reforms in several countries share common features and investment decisions by foreign operators take place in an increasingly complex and unpredictable legal-economic environment. Still, foreign investment attraction remains a policy goal for all countries and a crucial driver of economic growth.

Chapter 2 is entirely focused on the Italian device for screening foreign direct investments, also known as the "Golden power". This is a "broad and indeterminate power"[642], exercised in the form of veto or conditional consent to transactions/corporate resolutions/equity interest acquisitions concerning Italian firms performing "strategic activities" or holding "strategic assets" in specific sectors. Its only limit is a finalistic one: the Golden power must be viewed as having one "proper

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[635] Adriano Soi, "I Servizi di informazione e la tutela degli interessi economici nazionali. Il caso italiano alla luce dei più recenti documenti governativi e parlamentari," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 387.

[636] Simone Pasquazzi, "Geo-economia, guerra economica e intelligence. Quadro teorico-concettuale e caso di studio," *Istituto Italiano di Studi Strategici "Niccolò Machiavelli"* (2014): 18.

[637] Gabriele Mancini and Mario Caligiuri, "Covid-19, Golden Power e Fondo Sovrano: considerazioni e proposte per l'Intelligence Economica italiana," *Società Italiana di Intelligence* (2020): 16.

[638] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 7.

[639] Ibid., 19.

[640] Ibid., 22.

[641] Luca Arnaudo, "A l'economie comme a la guerre. Note su golden power, concorrenza e geo-economia," *Mercato Concorrenza Regole* n. 3 (December 2017): 436.

[642] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

function, that is, to ensure that economic freedoms do not unfold in contrast with fundamental public interests"[643]. Moreover, FDI screening is exceptionally important for Italy, as a country which stands out as "deficient from the point of view of capital availability but rich in terms of technologies and quality brands, which (…) are highly attractive to competitive firms"[644]. In general terms, the Golden power contributes to analysing "the ways in which Italy portraits itself and makes a "constant and profound evaluation" of its priorities"[645].

A so-called "Golden share" was introduced in 1994 as a form of *ex ante* protection of public interests. By virtue of a clause inserted by law within the statute of certain public companies, the Italian state maintained powers of approval, veto and appointment after their privatization. In fact, Italy's Golden share was part of a "wider set of provisions aimed at pursuing, more or less surreptitiously, industrial policy goals"[646]. In the early 2000s, however, the European Court of Justice (ECJ) ruled that Italy's Golden share discipline was contrary to European law, especially its freedom of establishment and free movement of capital principles. Following the opening of a new infringement procedure (2009/2255), Italy reformed its regulatory *corpus* on "special powers".

The transition to a new "Golden power" was sanctioned by Law Decree 21/2012, whereby Italy's special powers are no longer linked to the previous or current public control of enterprises, but can be activated based on firms' belonging to specific, pre-determined sectors. Law Decree 21/2012 recognizes the Italian government the power to oppose the acquisition of shareholding by foreign parties (oppositional power), impose specific conditions and prescriptions over a foreign investment (prescriptive power) or veto company resolutions (pre-emptive power): (i) concerning firms operating in the defence and national security sector (in relation to their "strategic activities"), "*upon an effective threat to the serious detriment* of the fundamental national defence and security interests" (Article 1); (ii) concerning firms operating in the energy, communications and transport sectors (in relation to their "strategic assets"), in the event of "*an exceptional situation of effective threat to the serious detriment* of the public interests concerning the security and operation of the networks and systems, as well as the continuity of supply" (Article 2). Article 1 applies to both controlling and non-controlling investments and extends to foreign buyers based in EU Member States, while Article 2 only applies to controlling investments and foreign buyers based outside the EU. Under the two articles, foreign operators or Italian firms are subject to an obligation to notify. Law 21/2021 also specifies the time frame for both notifications and the government's Golden power decisions, and transfers formal powers to Italy's Prime Minister. Importantly, no public hearings are foreseen and a mechanism of "no objection" is in place. Moreover, if foreign or Italian firms do not fulfil their notification obligations, sanctions can be imposed. However, similar decisions can be challenged before the Regional Administrative Court (TAR) of Lazio. In conclusion, in compliance with the ECJ's observations, Law Decree 21/2012: (i) reduced indeterminacy in the grounds for special powers exercise by identifying the public interests which must be threatened by a foreign investment; (ii) introduced gradualism and proportionality by differentiating between conditions/prescriptions

[643] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 162-163.

[644] Adriano Soi, "Intelligence economica e interessi nazionali nella più recente esperienza italiana," in Umberto Gori – Luigi Martino (eds.), *Intelligence e interesse nazionale* (Ariccia: Aracne editrice, 2015): 546.

[645] Alessandro Aresu, "Golden power e interesse nazionale: tra geodiritto e geotecnologia," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 117.

[646] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 126.

and vetoes; (iii) partially limited government discretion by allowing for administrative judicial review.

Following its establishment in 2012, the Golden power's scope was gradually enlarged on multiple occasions, starting from 2017. Law Decree 148/2017 sanctioned the extension of Italy's Golden power, as exercised in the energy, transport and communications sectors, to "high-tech sectors". These mainly included "critical infrastructures" (data storage and management, and financial infrastructures) and "critical technologies" (Artificial Intelligence, robotics, semiconductors, technologies with potential dual-use applications, network security, space and nuclear technology). However, secondary legislation identifying "strategic assets" in high-tech sectors was not subsequently adopted. Regulation (EU) 2019/452 of the European Parliament and of the Council "establishing a framework for the screening of foreign direct investments into the Union" was approved two years later, but entered into force in October 2020. It calls for new forms of control of non-EU investments at EU level, on grounds of "security or public order" (Article 3) and concerning a wide range of economic sectors (Article 4). Accordingly, this is achieved based on a new cooperation mechanism between Member States and the European Commission. Overall, the Regulation does not institute a "European Golden power" or oblige Member States to create FDI screening mechanisms, and the authority on final decisions on foreign investments rests with Member States. Still, the Regulation marks a breakthrough in the European institutions' approach to FDI screening, relaxing their unconditional opening to foreign investments. However, the screening established by the Regulation "remains finalistically bound to the protection of public interests which have an essentially extra-economic nature"[647]. By increasing legal certainty, procedural transparency and judicial review of screening decisions, the Regulation could in fact be "a prerequisite for defending the EU's current openness against a protectionist backlash and an increasing politicization of individual FDI transactions"[648]. Nonetheless, in terms of impact on national screening instruments, the general effect of the Regulation "will probably be a race to the top"[649]. Thereafter, Law Decree 22/2019 (known as the "Brexit Decree") enlarged the scope of Italy's Golden power to "broadband electronic telecommunication networks based on 5G technology". By adding Article 1-bis to Law Decree 21/2012, the Italian legislator included these networks as part of the defence and national security sector (rather than communications). The outcome of this choice has been to make the premises for a Golden power exercise less restrictive. Still in 2019, Law Decree 64/2019 was approved but eventually not converted into legislation. However, its content was almost identically reproduced by Law Decree 105/2019, which established Italy's "perimeter of cyber national security". This Decree regulates the relationship between cyber national security and the "Brexit Decree" on 5G technology networks. Specifically, Article 4-bis contributes to "autonomously regulating procedural aspects, making the discipline [on 5G technology networks] in fact self-sufficient"[650].

Overall, the regulatory evolution of the Golden power discipline from 2017 to 2019 has been described as an "irresistible ascent"[651]. It is generally seen as the outcome of two factors: "on the one

[647] Ibid., 134.

[648] Giovanni Pitruzzella, "Foreign direct investment screening in the EU," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 69.

[649] Giulio Napolitano, cited in Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 132.

[650] Ibid., 144.

[651] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

hand, the rapid technological transformation and the related emergence of new types of threats, on the other, the perceived need to protect more effectively certain strategic assets from hostile investments which might undermine essential public interests"[652]. If previously an "entrepreneur" and then a "regulator" of foreign investments, the Golden power's evolution has given the Italian state the new role of a "strategist"[653] or "customs officer"[654].

Finally, a few weeks after the outburst of the COVID-19 pandemic, Law Decree 23/2020 (known as the "Liquidity Decree") was approved on April 8, 2020. Its Articles 15, 16 and 17 "affect each of the pillars on which the Golden power discipline is based"[655]. More specifically, Article 15 extends the scope of subjective application of the Golden power and introduces significant changes for both EU and non-EU investors, while Article 16 allows the Italian government to initiate a Golden power procedure *ex officio*, in the ascertained event of a failure to notify. Overall, the Liquidity Decree provides "a plastic representation of the current historical turning point"[656]. The core of what the Italian state feels it needs to protect has been clearly expanded. More generally, the reform could signal a powerful "return of the state". The milestones of the ECJ's approach, however, are maintained, especially in terms of proportionality and pursuit of an adequate balance between sovereign interests and the fundamental freedoms set forth in European Treaties.

In administrative and institutional terms, the Golden power review process is regulated by two Decrees of the President of the Republic. This process is centred around the Inter-ministerial Coordination Group, set up within the Presidency of the Council, but also involves "control committees", intelligence agencies, sectorial administrative authorities and administrative courts. However, the regulatory evolution of the Golden power also poses significant problems of "structural adequacy"[657]: especially as recently amended, it "calls on the variously competent structures (…) to perform several tasks, in most cases in a very short time, requiring a very high level of technical knowledge"[658]. Moreover, the contribution of intelligence agencies to Italy's FDI screening is the most visible manifestation of the new trend in "economic intelligence". This contribution takes three different forms: "information provision, participation to the procedural implementation stages of the current legislation [by informally attending meetings of the Inter-ministerial Coordination Group], and participation to the debate, even internationally, on the evolutionary profiles of the relevant legal devices"[659]. In addition, the 2020 Liquidity Decree implies an even deeper "structuring of intelligence activities in this sector"[660]. Thus, it seems reasonable to expect that the role of intelligence agencies in the protection of national economic interests will continue to increase.

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[652] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 146.

[653] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 9.

[654] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 549.

[655] Chiomenti, "Il rafforzamento del Golden Power nell'emergenza sanitaria ed economica: guida alle modifiche normative" (April 2020): 3.

[656] Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 405.

[657] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 11.

[658] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 147.

[659] Alessandro Pansa, "Sintesi intervento del 20 novembre 2018 in materia di poteri speciali," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 103.

[660] Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 418.

In conclusion, the economic life of contemporary states is marked by the inevitable "double movement of attracting and screening"[661] foreign direct investments. States pursue a subtle balance between their commitment to protecting strategic public interests and the need not to discourage foreign capital investments. The core of the debate is whether "the extension of the terms for the exercise of special powers, coupled with the enlargement of the scope of government intervention in recent legislative developments, is likely to result in a stronger compression of the economic freedom of market operators"[662]. In this context, the exercise of the Golden power must be viewed as truly "effective" when it neutralizes threats to fundamental interests without simultaneously compromising attractiveness to foreign investments. This exercise must be based on a principle of "*exceptional* nature of defence instruments"[663] and a clearly defined hierarchy of interests, incorporating the idea that if anything is "strategic", nothing really is. As underlined by Natalino Irti, "National security is an essential boundary. I cannot set it without telling what is outside"[664]. Political or media debates on the Italian Golden power, however, are tainted by "a basic misunderstanding, that is, that special powers can be invoked (and thus exercised) whenever a foreign investment questions the national character of an enterprise which is regarded (for various reasons) as strategic"[665]. Those fearing a neo-protectionist use of the Golden power could have a point, insofar as both formal and practical features of its application risk contradicting the instrument's "exceptional" nature[666]. Still, use of the Golden power by the government has been "moderate"[667] so far. A leading scholar attributes this to the "human factor", that is, the professional origins of people heading the Inter-ministerial Coordination Group, who have been "able to apply the "antitrust" culture (…) to a discipline otherwise easily employable for protectionist ends"[668].

Chapter 3 provides a cross-country analysis of tools for FDI screening, in order to assess differences and similarities vis-à-vis the Italian Golden power and draw possible insights for Italy. A special focus is laid on the legislative and procedural history of the Committee on Foreign Investment in the United States (CFIUS). This sheds light on the gradual sophistication of FDI screening in the world's largest recipient of foreign investments. CFIUS's evolution has also "tended to mirror the geopolitical and geo-economic threat perceptions of the United States[669]".
The Committee was created in 1975 by Executive Order. A widely shared interpretation of its establishment sees early CFIUS as the outcome of an interbranch compromise between Congress's protectionist ambitions and the Executive's internationalist commitment to free-trade. Thereafter, in

[661] Alessandro Aresu, "Golden power e interesse nazionale: tra geodiritto e geotecnologia," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 118.
[662] Pietro Maccarone, "Poteri speciali e settori strategici: brevi note sulle recenti novità normative," *Osservatorio Costituzionale* (Fascicolo 2-2020): 147.
[663] Marcella Panucci, "Golden power. Cornice europea e nuovi paradigmi di concorrenza," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 128. Emphasis added.
[664] Alessandro Aresu, "Golden power e interesse nazionale: tra geodiritto e geotecnologia," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 119.
[665] Pietro Maccarone, "I poteri speciali dopo il decreto-legge "liquidità": un'analisi e alcune note in prospettiva," *Osservatorio Costituzionale* (Fascicolo 1-2021): 160.
[666] Ibid., 160-162.
[667] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 550; Aldo Sandulli, "Le relazioni fra Stato e Unione Europea nella pandemia, con particolare riferimento al golden power," *Diritto pubblico* (Fascicolo 2, Il Mulino – Rivistaweb, May-August 2020): 419.
[668] Giulio Napolitano, "L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere," *Giornale di diritto amministrativo* 5/2019: 550.
[669] Uday Khanapurkar, "CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China," *Journal of Current Chinese Affairs* 48, n. 2 (2020): 234.

1988 the US Congress approved the so-called "Exon-Florio Amendment" to the Defense Production Act of 1950. This transformed CFIUS "from an administrative body with limited authority to review and analyse data on foreign investment, to an important component of US foreign investment policy with a broad mandate and significant authority to advise the President on foreign investment transactions and to recommend that some transactions be suspended or blocked"[670]. In 1993 the so-called "Byrd Amendment" also required CFIUS to review any transaction in which the foreign buyer was "controlled by or acting on behalf of a foreign government". In recent times, the CFIUS discipline was comprehensively reformed a first time by the 2007 Foreign Investment and National Security Act (FINSA), which was in fact "the first intervention codifying CFIUS"[671]. FINSA gave statutory authority to CFIUS and singled out three factors for consideration during the Committee's review. It also set out the procedure for CFIUS review and sanctioned the presence of the Director of National Intelligence (DNI) as a non-voting *ex officio* member. Overall, this reform left America's general attitude towards foreign investment unchanged. Nonetheless, the number of filings by private investors and transactions reviewed by CFIUS increased exponentially after 2007. Finally, CFIUS's latest comprehensive reform is the 2018 Foreign Investment Risk Review Modernization Act (FIRRMA). This was inspired by a convergence of factors, including CFIUS's increasing caseload following the 2008 financial crisis, new trends in foreign investment and jurisdictional gaps, developments in digital dual-use technology, and China's new plans for technological leadership in strategic high-tech sectors[672]. As a result, FIRRMA expanded the scope of transactions covered by CFIUS review and added further factors which the US President might consider in determining whether a foreign investment impairs American national security. It also introduced a declaration process ("light filing") and increased the time length available to CFIUS for reviews and investigations. Finally, it introduced special treatment for investments coming from "countries of special concern" and mandated the Treasury Secretary to "establish a formal process for exchanging information with governments of countries that are allies or partners of the United States"[673]. Many have linked FIRRMA's approval to the perceived need to prevent Chinese firms "from exploiting the US open capital markets to facilitate tech transfer"[674]. At least three provisions of FIRRMA have been viewed as targeting Chinese entities specifically.

Procedurally, CFIUS review of foreign investments is divided into three formal stages: "review", "investigation" and Presidential determination, which is not subject to judicial review. These can be preceded by an informal pre-notification phase and/or by a voluntary "light filing" procedure. Congressional oversight over CFIUS reviews has also been gradually extended since 2007. One author has suggested that CFIUS is best understood as a "Congressional notification service"[675] and could serve as a paradigm for Congress's role in shaping US national security policy. In practice, a Presidential determination has suspended a transaction for just 5 times since 1975 and some have

[670] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 7-8.
[671] Alessandro Aresu and Matteo Negro, "La geopolitica della protezione. Investimenti e sicurezza nazionale: Gli Stati Uniti, l'Italia e l'UE, " Fondazione per lo studio sui mercati pubblici (prima edizione 2019): 32.
[672] *See* Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1492-1499.
[673] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 25.
[674] Uday Khanapurkar, "CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China," *Journal of Current Chinese Affairs* 48, n. 2 (2020): 227.
[675] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 81.

spoken of a "mildness of CFIUS review"[676]. However, the number of transactions blocked by a US President should be taken as "deceptive"[677]. There is general awareness that "blocking a transaction is a crude tool and serves no purpose when more subtle remedies are available"[678]. These are essentially of two types: a so-called "quiet prohibition" and "mitigation agreements", which entail conditions upon a transaction as a "tax (…) in exchange for its [the Committee's] approval of an acquisition"[679]. In fact, the frequent employment of mitigation agreements has turned the CFIUS process into a "quasi-legalistic administrative"[680] one. Finally, as of 2017 empirical evidence pointed to the Committee's use of a "three-threat framework", ensuring a strict focus on national security issues. According to Theodore H. Moran, CFIUS is largely concerned with three types of national security threats: (I) leakage of sensitive technology; (II) denial or manipulation of access to a critical input; (III) penetration, surveillance and sabotage, including surveillance via proximity to US military bases or defence installations[681].

Crucially, CFIUS's recent evolution raises interpretive questions which resonate with Italy's academic and political debate on the Golden power, especially concerning the relationship between foreign investment, national security and the economy. CFIUS has historically managed to maintain a strict focus on national security issues and its reviews have grown pretty "rigorous and predictable"[682]. However, it has been suggested that 2018 FIRRMA is contributing to broadening CFIUS' mandate "beyond the original narrow focus on the national security implications of individual investment transactions, to a more comprehensive assessment"[683]. It could be the case that national security will no longer provide "the *only* justification for interference in market decisions"[684]. Importantly, however, FIRRMA has not accommodated the entire range of CFIUS reforms proposed during its discussion, which in fact powerfully challenged the Committee's traditional focus. As emphasized by a former US Under Secretary of the Treasury for International Affairs, "while FIRRMA does expand CFIUS's jurisdictional scope to permit it to review certain types of non-controlling direct investment, the legislation maintains CFIUS's historical, sole focus on national security"[685].

Lessons for Italy's Golden power could also be drawn from an overview of Germany's and France's FDI screening systems. Both countries have recently displayed a "strong tendency (…) towards a stricter approach regarding the screening of foreign investment and the legal implications thereof"[686]. On the one hand, the legal basis of Germany's FDI screening regime is found in the German Foreign

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[676] Ibid., 121.
[677] Amy Deen Westbrook, "Securing the Nation or Entrenching the Board? The Evolution of CFIUS Review of Corporate Acquisitions," *Marquette Law Review* 102, n. 3 (Spring 2019): 661.
[678] David Zaring, "CFIUS as a Congressional Notification Service," *Southern California Law Review* 83, n. 1 (November 2019): 106.
[679] Ibid., 108.
[680] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 875.
[681] Theodore H. Moran, "CFIUS and National Security: Challenges for the United States, Opportunities for the European Union," *Draft Paper for the Peterson Institute for International Economics* (February 21, 2017): 5-10.
[682] Ibid., 1.
[683] James K. Jackson, "The Committee on Foreign Investment in the United States (CFIUS)," *Congressional Research Service Report* (Updated February 14, 2020): 39.
[684] Matthew J. Baltz, "Institutionalizing neoliberalism: CFIUS and the governance of inward foreign direct investment in the United States since 1975," *Review of International Political Economy* 24, n. 9 (2017): 860.
[685] Heath P. Tarbert, "Modernizing CFIUS," *The George Washington Law Review* 88, n. 6 (November 2020): 1522.
[686] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 79.

Trade and Payments Act (AWG) and Foreign Trade and Payments Ordinance (AWV). Both empower the Federal Ministry for Economic Affairs and Energy (BMWi) to review foreign investments. In terms of screening scope, two different regimes apply: one for "cross-sectoral investments" and one for "sector-specific investments", including in military weapons and crypto technology. The "screening net" is extremely wide, as "any transaction concluding with the purchase of 25% of the voting rights of a German company can be subjected to an investment review, regardless of which industrial field it can be ascribed to, so long as public order or security in Germany is affected"[687]. This inclusive regime is the outcome of several amendments of 2017-2018 resulting from "fears of Chinese acquisitions of German market and technology leaders as well as Chinese investments in German critical infrastructures"[688] Moreover, "substantial legislative amendments (…) have been accompanied by a tightened administrative practice of the BMWi"[689]. Finally, following the outbreak of the COVID-19 pandemic, German FDI screening has been addressed by three *ad hoc* legislative reforms, which have significantly expanded its scope. On the other hand, the legal basis for France's FDI review mechanism is found in the Monetary and Financial Code (MFC). The French mechanism stands out for its ancient origins, dating back to a 1966 law on foreign financial relations, and the governmental authority competent for foreign investment screening is the Ministry of Economy and Finance. While its original review scope was quite limited, it was significantly extended since 2014 and particularly in 2018 and 2019. Importantly, the decisive factor for the applicability and scope of French FDI screening is "the respective category of "foreign investor" in each individual case"[690] (EU/EFTA, non-EU/EFTA or foreign-controlled French investors), to which different review regimes apply. In conclusion, two reforms of French FDI screening were specifically triggered by the COVID-19 pandemic: a ministry order of April 2020 permanently expanded the list of so-called "sensitive" sectors by including "*research and development* activities relating to *biotechnologies*", while a second order of July 2020 has temporarily lowered the threshold triggering review for French listed companies targeted by non-EU or EFTA investors.

Comparing Italy and the US on foreign investment control is particularly useful, as the American model is known to have "inspired the Italian Golden power in a certain sense"[691]. Since the Exon-Florio Amendment, foreign investment screening in the United States has presented the traits of a "safe harbour" system. This makes it "significantly distant from the automatisms"[692] of the Golden power. Moreover, the US model for foreign investment review stands out for two characteristic elements: CFIUS's ability for independent decision-making, reinforced by the presence of a specialized bureaucratic structure serving the Committee, and the incontestability of Presidential decisions. FDI screening in Italy, however, differs from the US on both features. Finally, compared

[687] Debevoise & Plimpton, "Foreign Direct Investment Rules in Selected European Countries – An Overview," *Debevoise in Depth* (Updated on June 16, 2020): 6.
[688] Jacob von Andreae, "Challenges in a new reality: German foreign investment control in times of change," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 77.
[689] Ibid., 78.
[690] Philipp Stompfe, "Foreign Investment Screening in Germany and France," in Steffen Hindeland – Andreas Moberg (eds), *YSEC Yearbook of Socio-Economic Constitutions 2020. A Common European Law on Investment Screening (CELIS)* (Cham: Springer, 2021): 103.
[691] Roberto Garofoli, "Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative," *federalismi.it*, n. 17 (2019): 10.
[692] Andrea Guaccero, "*Compliance* e tutela degli investimenti esteri diretti. Spunti di comparazione tra Stati Uniti ed Europa," in Giulio Napolitano (edited by), *Il controllo sugli investimenti esteri diretti*, Il Mulino (2020): 145.

to CFIUS, Italy's foreign investment review may need to be "updated in light of technological disruption"[693].

Generally speaking, particular attention should be devoted to the post-COVID-19 expansion of FDI screening across the entire EU. Two long-term trends in the global economy can be viewed as explaining this resurgence, which COVID-19 mainly accelerated: "(i) the spread of general-purpose digital technologies and associated business models, as well as (ii) the growing rivalry between China and the United States"[694]. This suggests that few of the changes recently introduced by European governments, including in Italy, Germany and France, "are likely to be reversed [after the COVID-19 pandemic]; a permanent shift in the treatment of foreign investors is underway"[695]. In fact, some critics have suggested that "some countries are using foreign investment screening to protect wider economic and social concerns triggered by COVID-19"[696]. Thus, the pandemic shock could have provided policy-makers with additional arguments in favour of stricter FDI review, allowing them to present "a lot of old wine (well-known rationales for FDI screening) (…) in new bottles"[697].

Concerning Germany specifically, the overall picture is of a wider, albeit somehow lighter, net cast over foreign investments when compared to Italy's. The BMWi can be described as a gentle Leviathan: it enjoys very extensive powers, but places fewer burdens on foreign investors. It is also reticent to exercise its powers unless absolutely necessary, as shown by its practice. Concerning France specifically, its FDI screening model is structurally more similar to the Italian Golden power, although a few differences can also be spotted.

In conclusion, Italy's Golden power, when compared to the US, German and French "recipes" for FDI screening, sticks out for the following features: 1) it gives foreign investment review powers to an inter-ministerial Committee (like the inter-agency CFIUS), rather than to a single Ministry (as in Germany and France); 2) it lacks a specialized bureaucratic structure supporting the activities of the Coordination Group, which is often forced to rely heavily on intelligence agencies and is also formally incapable of independent decision-making; 3) it seems to lack the type of "safe harbour" orientation inspiring America's CFIUS: conditions over foreign investments, for instance, are authoritatively imposed rather than negotiated or agreed upon in order to "mitigate" national security threats; 4) it lacks a mechanism similar to American "light filing", Germany's "certificates of non-objection" or the French "fast-track" procedure, allowing the Coordination Group to formally and rapidly dismiss low risk investments; 5) finally, it guarantees judicial review of decisions on foreign investments by an administrative judge (as opposed to the incontestability of US presidential determinations); however, this review is limited to ensuring the appropriate exercise of discretionary power in terms of procedural legitimacy and reasonableness and, differently from the French model, does not impact on the specific content of decisions.

Chapter 4 presents a quantitative evaluation of available data on Italy's Golden power, obtained from governmental reports to Parliament. The general aim is to contribute to the scientific debate on Italy's FDI screening by gaining a full picture of its activities in practice, from the discipline's first application in 2014 to 2020. It could be possible to disentangle some trends, detecting an "Italian

[693] Paolo Messa, "Oltre il golden power. Il modello americano e il dibattito in Europa," in Sistema di Informazione per la Sicurezza della Repubblica, *Golden Power* (GNOSIS Rivista, 2019): 153.
[694] Simon J. Evenett, "What Caused The Resurgence in FDI Screening?" *SUERF (The European Money and Finance Forum) Policy Note* 240 (May 2021): 3.
[695] Ibid., 1.
[696] Baker McKenzie, cited in Ibid., 10.
[697] Ibid., 7.

way" to screening foreign investments: how often does Italy exercise its Golden power, in what form and in which sectors more than others?

The data suggest that the number of transactions reviewed by the Inter-ministerial Coordination Group has gradually, but outstandingly increased since 2014. This escalation is particularly remarkable for the 2019-2020 period, in conjunction with two of the most important Golden power reforms as well as the COVID-19 pandemic. Secondly, the legislative inclusion of 5G technology networks as part of the economic sectors covered by the Golden power (2019) has proven exceptionally relevant in practice, in terms of both notifications received and Golden power applications. Thus, more technical, sophisticated or technology-related competences will be required to ensure an adequate review of foreign investments into Italy's economy. Thirdly, the data suggest that, while vetoes over foreign investments are comparatively rare, the Italian government is increasingly willing to impose prescriptions or conditions as its main intervening instrument. Importantly, this especially applies to transactions concerning Italy's 5G technology networks. However, this quantitative evaluation also concludes that exercises of Italy's Golden power in fact concern a small percentage of total reviewed investments. It could be objected that this is not the absolute best measure of the Italian government's attitude towards interfering with foreign investments. Still, the available data suggest that the several scholarly descriptions emphasizing the government's cautious attitude towards its Golden power make a powerful point. In conclusion, both formally (as outlined in Chapter 2) and in practice, Italy's Golden power has considerably developed in recent years, especially since 2019.

This Chapter also presents two case-studies of foreign investments which have been blocked by the Italian government. The NEXT Ingegneria dei sistemi S.p.A. case (2017) is particularly insightful as it provides the first instance in which the Italian government formally prevented a foreign investment from taking place through its Golden power. Moreover, as the case concerns an Italian firm of the defence sector, it confirms the traditional importance of this industrial segment during the initial years of Italy's FDI screening. NEXT also provides the quintessential example of a medium-sized Italian firm endowed with exceptional technology, which is sought after by foreign (French) market competitors. Finally, the 2017 governmental decision should be viewed as linked to wider industrial-geopolitical relations, especially concerning Italy-France interactions in the defence sector. It did come as a surprise that Italy's first veto on a foreign investment was targeted at an EU-based firm.

Secondly, the LPE S.p.A. case (2021) provides the third veto ever imposed upon a foreign investment through the government's Golden power. It confirms that 5G networks and emerging technologies, including chips and semiconductors (LPE's production segment), are rapidly acquiring national security importance. The Italian government's veto on the partial takeover of LPE is also the first imposed on a Chinese investor. Importantly, this case offers insights into the future implications of the EU Regulation on the screening of foreign investments. Indeed, the Italian government was provided with comments and opinions by both individual Member States and the European Commission, raising their own concerns about the transaction. Finally, LPE executive management's reaction to the government's decision is useful to highlight the most controversial aspect of FDI screening: is a state's desire to protect its national security allowed to trump the economic interests of national private firms? How does one separate strictly "national security" issues from industrial policy objectives, which could violate the rights of private enterprises?

Chapter 5 attempts an answer to similar questions by presenting normative policy proposals for Italy's Golden power. It also examines its possible prospects or future scenarios.

The conceptual starting point for this Chapter's policy proposals is that the risk of a "neo-protectionist" use of Italy's Golden power is in fact real and must be fought. Put bluntly, Italy's productive fabric would be at stake if foreign operators were dissuaded from investing in Italian firms. Thus, the goal should be to make Italy's Golden power more effective in two overlapping senses. On the one hand, by streamlining the administrative procedure, thus ensuring adequate material and informational resources to conduct a proper investigation for each transaction. On the other, by entrenching a clear separation between industrial policy goals and national security issues, which are in fact likely to threaten public interests. Accordingly, the best way to turn the Golden power into a more effective instrument is to "take the best" of the American model (especially in terms of procedural dynamics), while maintaining the core features of European screening mechanisms and some current specificities of Italian FDI review.

Thus, this Chapter presents a comprehensive policy reform, divided into three pillars: Pillar I: promoting a "safe harbour" environment (fast-track procedure and formal negotiations with foreign investors); Pillar II: institutional and bureaucratic engineering (specialized supporting structures and the new Coordination Group); Pillar III: a new national security "threat framework". Concerning Pillar III specifically, if the goal of separating national security and market dynamics is worth pursuing, a new "threat framework" must guide Golden power actions, reflecting a narrower focus. This Chapter suggests a new threat framework modelled around Theodore H. Moran's for the US. In sum, a foreign investment is likely to threaten Italy's public interests or national security whenever it concerns: (1) an Italian firm operating a sensitive technology, input or asset which could be subsequently employed by a foreign acquirer to the detriment of Italian interests; (2) an Italian firm operating assets or inputs which could allow a foreign acquirer to perform surveillance activities or control sensitive information to the detriment of Italian interests; (3) an Italian firm operating a critical input, asset or product which requires significant specialization and is not widely available in global markets. Only if a foreign investment classifies as (1), (2) or (3), Italian authorities should review the transaction and determine whether imposing a veto or conditions is an appropriate measure to alleviate the national security threat. Public control of the foreign investor should also be taken into due consideration. Taken together, Pillars I, II and III of this comprehensive policy proposal would result in a significant reform of Italy's screening device. The Golden power would transform into a partially renewed instrument, displaying thinner procedures, functioning through a more autonomous institution and employing a narrower focus on national security threats. This would allow Italy to pursue the goal of maintaining attractiveness to foreign investments and fostering economic growth. Still, specifically European and Italian features would be maintained.

Finally, a number of general expectations can be formulated concerning the future practice of Italy's Golden power. First of all, a post-COVID-19 reversal of the trend towards stricter FDI control in Italy and elsewhere is unlikely. What one could expect is a fine-tuning at best, with a re-formulation of the most extensive provisions but no comprehensive turnaround. Secondly, the new cooperation mechanism established at EU level will increasingly affect the Golden power's functioning. Thirdly, at the more specific level of Golden power review, this dissertation suggests that technology-related investments will constitute a growing fraction of cases reviewed, and the proportion of transactions on which conditions or vetoes are imposed is likely to increase as well. Finally, sector-specific developments (such as progress in renewable energy supply, new generation weapons or

electrification of cars) will also impact Italy's foreign investment screening. Moreover, the Golden power discipline is likely to be adapted to new sectoral trends through *ad hoc* amendments.
A more methodological description of the possible prospects of Italy's Golden power is provided through an "alternative futures analysis". This applies to the short- to medium-term (5 years) and relies on the identification of two critical factors to build a matrix. Geopolitical and technological competition between China and the United States is taken as the first critical and uncertain variable for the evolution of Italy's FDI screening. The second factor concerns Italy's strategic approach to its foreign investment control powers, whether based on domestic industrial policy concerns or a narrower focus on national security threats. Importantly, the COVID-19 shock can be expected to both exacerbate geopolitical competition and favour an industrial policy-based approach to the Golden power in a context of economic crisis. This dissertation's interpretation is therefore that scenario B ("omnipresence") is the most likely for the short- to medium-term evolution of Italy's Golden power. However, giving substance to the Chapter's policy proposals, this dissertation also suggests that the best policy for Italy would be to ensure that its strategic approach is institutionally and perceptually geared towards maintaining a "safe harbour" environment for foreign investors, without renouncing its national security concerns throughout. Even as geopolitical competition continues fiercely, Italy's foreign investment screening should preserve a narrow focus. Thus, it should control the risks for its own omnipresence, veering towards best-case scenario D ("controlled increase").
This Chapter's analysis, from policy proposals to future scenarios, applies to the Golden power as a defensive instrument. In terms of Italy's offensive geo-economic projection, it is a matter of debate whether security and industrial policy should be as much separated as this dissertation suggests. In fact, a double strategy could allow Italy to rip the most benefits from globalization, which is in fact the ultimate aim of "economic intelligence": careful defence with no detriment to international attractiveness, on the one hand, and offensive exploitation of others' economic or industrial weaknesses, on the other.

In sum, investigating a state's Foreign Direct Investment (FDI) screening allows to dive into its sovereign priorities and conceptualization of power, which chameleonically adapt over time. It also provides a powerful observational point to monitor trends in geopolitical competition and power distribution, the effects of global shocks and sector-specific developments. Thus, this dissertation aims to arouse a new interest in Foreign Direct Investment (FDI) screening as a powerful field of study.