



SIOI Sezione Piemonte
e Valle d'Aosta
UNA Italy

Conoscere per tutelare

**SPUNTI DI METODO
PER UNA PIÙ EFFICACE INDIVIDUAZIONE
DEGLI ASSET STRATEGICI
IN TEMA DI SICUREZZA CIBERNETICA**

Executive Summary



Fondazione
Compagnia
di San Paolo

Conoscere per tutelare Spunti di metodo per una più efficace individuazione degli asset strategici in tema di sicurezza cibernetica

Final report of the project

“Mappatura degli asset tecnologici strategici per l'esercizio del golden power”

SIOI Piemonte e Valle d'Aosta – in partnership with the Theseus Centre, Politecnico di Torino
funded by the Fondazione Compagnia di San Paolo

Executive Summary

- **Background and Scope of the Analysis.** Technology has always been a critical ground for pursuing national strategic interests. Against this background, the recent resurgence of competition between states on innovation and the worsening of international tensions imply a notable strengthening of the strategic nature of technological instruments. This phenomenon has key implications for the digital sector, as it emphasises the urgent need to ensure the security of the cyber domain. Indeed, every public or private activity relies on digital infrastructures and services developed and supplied by private entities. The dependence on private actors for digital technologies constitutes a vital risk factor for cybersecurity and, in turn, for national interests in that sector. Indeed, strategic assets controlled by market players – especially in the very sensitive areas of the 5G technology and of critical infrastructures – are exposed to influences and takeover operations by potentially hostile players.
The risks arising from the coexistence of public and private actors in the cybersecurity field require effective tools for shielding public interests in strategic sectors from harmful foreign investments. That is the aim of foreign direct investment control tools, such as the Italian so-called “Golden Power” regime. This mechanism allows the Italian Government to exercise special prerogatives on the management of companies operating in some strategic sectors, particularly in the case of acquisitions of shareholdings by third parties. These powers consist, in particular, of the possibility to dictate conditions for the acquisition of shareholdings, to veto the adoption of certain decisions and to forbid the acquisition of shareholdings.
- **The Project’s Aim: Developing a Methodology for Assessing the Strategic Nature of Technological Assets.** Foreign direct investment control tools, such as the *Golden Power* mechanism, involve operations targeting undertakings in several critical domains. However, before exercising special powers, decision-makers must assess

whether the specific assets involved in the investment have a strategic nature. This evaluation is particularly complex: effective protection requires a straightforward methodology to reduce political discretion in identifying strategic assets.

The research conducted as part of the project '*Mappatura degli asset tecnologici strategici per l'esercizio del golden power*' aims to provide foundations for a methodological framework to assess the strategic nature of technological assets in the cybersecurity field, to exercise public powers against potential threats posed by foreign direct investments under the Italian *Golden Power* mechanism.

- **A Multidisciplinary Approach.** The research outcomes illustrated in the report result from fruitful dialogue between different methodologies and disciplines. Indeed, legal, economic and political science perspectives, taken alone, cannot capture the methodological issues inherent in assessing the strategic character of assets relevant to the security of the cyber domain. Therefore, the added value of the present research lies in the sequential application of different approaches: each discipline involved – legal, economic and political – provided the necessary tools to frame and shape the path towards the project's goal.
- **The EU Legal Framework.** From a legal viewpoint, the report advances a reconstruction of the multilevel legal regime of the *Golden Power* mechanism, thus considering both the supranational and domestic normative layers. In the European Union (EU) context, foreign direct investments are subject to a complex regulatory framework. On the one hand, Member States' legislation displays longstanding experience in establishing legal tools to protect strategic assets from possible foreign influence through investment operations. On the other hand, until 2019 the EU legal order did not provide for relevant control mechanisms.
Nonetheless, foreign direct investments are crucial tools within the single market. In recent years, concerns emerged about the systemic implications associated with this phenomenon. The acquisition of Member States' undertakings in strategic sectors by non-European players has underlined the need for the EU to establish tools for the regulation and control of foreign direct investment. Even though many Member States already had a national control mechanism in place, the absence of a supranational regulatory framework represented a considerable weakness for the Union as a whole. Regulation (EU) 2019/452 addresses that need and represents a fundamental paradigm shift in the EU approach. While it does not replace national mechanisms, the Regulation strengthens the action of Member States and their cooperation in monitoring foreign direct investment.
- **A High Level of Political Discretion Characterises the Italian *Golden Power* Mechanism.** The Italian *Golden Power* regime pre-dates the EU regulation and constitutes the culmination of a long evolutionary process within the legislative framework on protecting national strategic interests in economic fields. The current

discipline is dictated by Law Decree No. 21 of 2012, subsequently converted into law and supplemented by various implementing regulations issued by the government. This legal regime empowers the Presidency of the Council of Ministers to examine and, if necessary, impose specific conditions or recommendations or prohibit corporate transactions or resolutions relating to activities or assets that qualify as ‘strategic’.

The Golden Power mechanism applies to undertakings operating in some specific sectors defined by the relevant legislation. Still, the mere fact that the target company of the foreign investment falls within those sectors is not a sufficient condition for the exercise of said special powers. In fact, the public decision-maker must also assess the strategic nature of the specific assets in question. It is precisely in this evaluation that the Government enjoys a large measure of discretionary power.

The peculiar characteristics of the Italian foreign investment screening mechanism highlights the extent of discretion left to the public decision-maker. Indeed, the Italian screening mechanism is poorly analytical, as it merely requires a ‘general description’ of the investment, which should cover some key profiles. Still, it does not include standardised entries in which the notifying party is required to report the specific data requested, thus leaving investors with greater leeway in defining the content of the notification. As a result, the public decision-maker does not command information based on predetermined criteria for identifying strategic assets and mapping them at the national level.

It might be argued that acquiring a comprehensive and pre-defined set of information on individual market transactions would allow the Presidency of the Council of Ministers to have standardised elements better to assess the strategic nature of the assets involved. At the same time, this may lead to circumscribing public authorities’ sphere of discretion. Whether this outcome would be thoroughly advisable and warranted in an international order characterised by growing tensions and increasing threats to national security is an open question, and possibly left to future research.

- **The Italian Practice Explained: Between Weak and Strong Explicative Factors.** The political science analysis of the Italian practice well captures the paucity of a pre-determined methodology in evaluating the strategic nature of technological assets. As anticipated, the project focused on the practice related to foreign investments targeting assets relevant to cyberspace security, thus considering cases concerning 5G technological assets and critical infrastructures, analysing the decision-maker’s practice by means of an inductive approach. On that basis, the Report outlines trends and commonalities emerging from the practice analysed.

In that regard, the Report shows that a set of factors account for the Italian Government’s approach in assessing the strategic character of target assets. (These findings have been validated with external experts.)

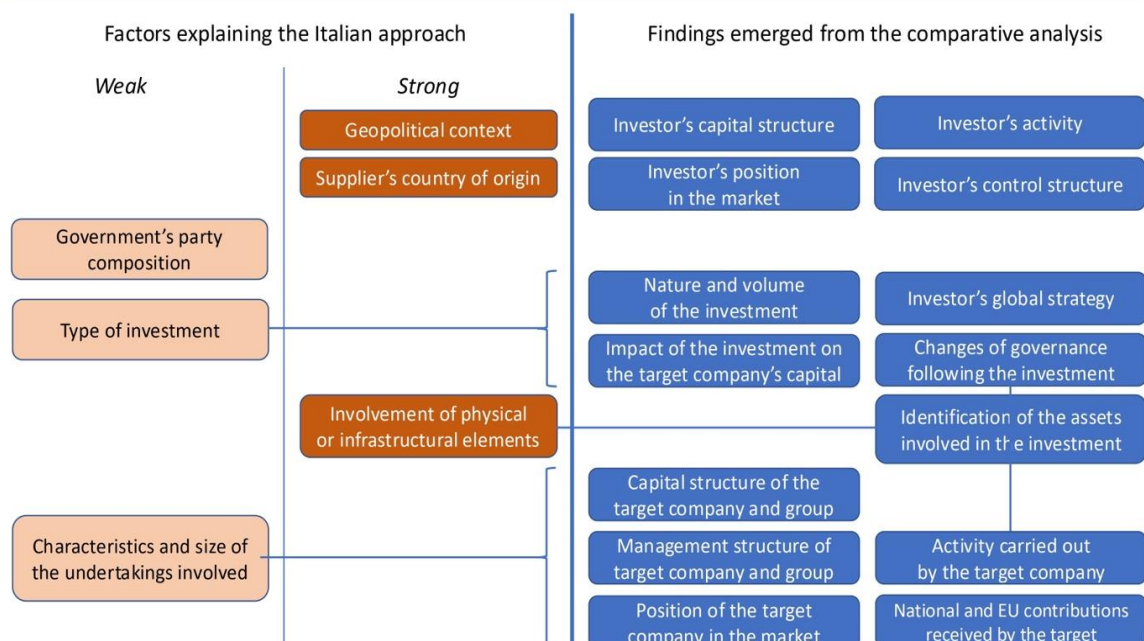
Firstly, the administrative decision appears to be strongly influenced (**strong explicative factors**) by the geopolitical context and the provenance of the entity supplying the asset, as well as the presence of physical or infrastructural elements in

the latter. Secondly, the evaluation activity also appears to be influenced – albeit with a lesser degree of intensity (**weak explicative factors**) – by the party composition of the government in office, the type of investment, and the characteristics and size of the business entities involved.

- Towards an Italian Methodology: Some Hints from the French and Spanish Mechanisms.** Against the feeble methodology characterising the Italian practice, the comparison with other foreign direct investment control tools offers essential hints for developing a more structured approach. By studying the screening system established by the French and Spanish governments, the Report highlights that they are characterised by a much higher analytical level than the corresponding Italian mechanism. The French and Spanish screening forms oblige the notifying party to provide a detailed information framework structured in analytical entries, thus leaving the investor little margin for selecting which pieces of information to notify. On that basis, the Report frames a tendency towards acquiring a uniform and coherent set of information grounding the public authority’s assessment of the strategic nature of the assets involved. Relevant entries include the shareholding structure of the targeted company, the changes in the management structure derived from the foreign investment, the position of the targeted company in the respective national and European supply chain and, of course, the type of individual assets involved in the investment.

The difference in the analytical level between, on the one hand, the explanatory factors of the Italian practice and, on the other hand, the information entries considered by French and Spanish decision-makers is straightforward, as the following table discloses:

Comparison between the explanatory factors emerged from the Italian practice and findings derived from the comparative analysis



- **Way Forward.** The project results are promising and disclose at least two clear paths for deepening the research towards developing a methodology to assess the strategic nature of technological assets, alongside the consideration of the difficult balance democratic government have to strike in implementing core state powers in the current geopolitical conditions.

Firstly, a continuation of the analysis should extend the qualitative political analysis to the practice of foreign direct investment control tools established by other EU Member States – with particular emphasis on the French and Spanish ones – to complement the normative analysis with an assessment of methodological experience gained in this respect.

Secondly, the continuation of the project should broaden the scope of the analysis to other substantive sectors beyond the cybersecurity domain whose assets are particularly critical in the current geopolitical scenario, such as the aerospace domain. At the same time, a valuable line of research may well involve the analytical and empirical assessment of the balance between standardisation of governmental decisions at the possible cost of curtailing room for maneuver to address potentially threatening menaces to national integrity and security. Whereas the introduction of a structured methodology to collect information is likely to be beneficial for the empowerment of governments, it is open to empirical scrutiny whether giving away degrees of discretion in the field of the governance of technological assets consistently results in better administrative – and political – action.

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Mappatura degli asset tecnologici strategici per l'esercizio del golden power

Un progetto di:



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