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MODERN PROTECTIONISM IN A GLOBALIZED WORLD

Lorenzo Locci

Modern protectionism in a globalized world*

(*Il protezionismo moderno in un mondo globalizzato*)

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ABSTRACT [En]:

The spread and frequent use of foreign direct investment control mechanisms adopted by domestic legal systems poses significant obstacles to the process of globalization and the creation of a Capital Markets Union. At the same time, these instruments aim at safeguarding the strategic interests of the Member States, with the result that we assist to a delicate attempt to balance protectionist trends and integration processes. In this context, the compatibility of such control mechanisms with the European freedoms set out under the Treaties shall also be assessed.

Keywords: protectionism; globalization; golden share; golden power; privatizations, European freedoms; foreign direct investments; law and economics.

ABSTRACT [IT]:

La diffusione e il frequente utilizzo dei meccanismi di controllo degli investimenti esteri diretti adottati dagli ordinamenti domestici pone significativi ostacoli al processo di globalizzazione e di creazione di un Mercato Unico dei Capitali. Al contempo, tali strumenti sono funzionali a salvaguardare gli interessi strategici degli Stati membri, con la conseguenza che si assiste ad un delicato tentativo di bilanciamento tra istanze protezionistiche e processi di integrazione. In tale contesto, si rende altresì necessario valutare la compatibilità di tali meccanismi di controllo con le libertà europee sancite dai Trattati.

Parole chiave: protezionismo; globalizzazione; golden share; golden power; privatizzazioni; libertà europee; investimenti esteri diretti; diritto dell'economia.

1. A RENEWED TENSION BETWEEN GLOBALIZATION AND DOMESTIC PROTECTIONISM

The legal mechanisms established at the domestic level to protect national essential public interests – through the attribution in favor of local authorities of special powers over the organization and management of companies operating in strategic sectors (e.g., "*golden share*", "*action spécifique*", "*golden powers*", etc.) – have been carefully scrutinized by the European Commission and the European Court of Justice over the years, in order to assess the compatibility of these measures with the fundamental freedoms set forth under the European Treaties[1].

Indeed, these powers may affect significantly all aspects of the business of "strategic" companies which are nowadays entirely privatized, with the consequence that the public influence of the State is unrelated to a pre-existing or current shareholding in the share capital of the companies concerned. In this perspective, since there is no longer a link between the possibility to influence the operations of these entities through the special governmental powers and the economic risk undertaken by the State-investor, the European authorities have often considered domestic regulations on special powers to restrict investments within the EU and, therefore, to infringe the freedoms of establishment and the free movement of capital provided under the Treaties[2].

However, after an initial phase of gradual alignment of national regulations with the interpretative principles provided by the European Court of Justice, member States started again to adopt protectionist measures aimed at safeguarding their own strategic assets from the risk of hostile takeovers by foreign buyers, facilitated in times of crisis. In this respect, the lower capitalization of national champions – in an environment of distrust in the European integration process – prompted local jurisdictions towards a *modern protectionism* in the economic sphere in order to safeguard the nationality of assets deemed critical for the economy and politics of each country.

Therefore, we are now assisting again to a renewed tension between the indications provided at European level – which are inspired by the principles underlying the economic and political union – and the need of domestic authorities to supervise, with deep powers, the development of strategic economic activities that affect each national territory.

*Il contributo è stato approvato dai revisori.

[1] On this topic see, *ex multis*, SACCO GINEVRI, *I golden powers fra Stato e mercato ai tempi del Covid-19*, in *Giur. comm.*, 2021, 282 et seq.; GALLO, *La questione della compatibilità dei golden powers in Italia, oggi, con il diritto dell'Unione,* in *Rivista della Regolazione dei mercati*, 2021, 26 et seq.

[2] See LOCCI-PISTOCCHI, *The State's role in strategic economic sectors*, in *Law and Economics Yearly Review*, supplement no. 1/2022, 232 et seq.

2. FROM PRIVATIZED COMPANIES TO STRATEGIC ASSETS AND OPERATORS: THE ITALIAN CASE

The abovementioned trends are particularly evident when looking at the evolution of the Italian legal framework regulating the screening of foreign direct investments. Indeed, the latter have been significantly redesigned several times by the Italian legislator in order to meet the criteria established by the European Court of Justice to ensure the compatibility between domestic protective measures, on the one hand, and the European freedoms set out under the Treaties, on the other hand.

Reference is made, in particular, to the transition from the so-called "golden share" – notably, the legal framework introduced in Italy by Article 2 of Law Decree no. 332 of May 31, 1994, converted with amendments into Law no. 474 of July 30, 1994, and subsequently amended, which set forth the provisions to accelerate the divestment procedures of State's and public agencies' shareholdings in joint stock companies[3] – to the existing "golden power" regulation.

The legal regime previously in force ("golden share") provided for the possibility to introduce in the by-laws of the companies undergoing the privatization process – and therefore opening their shareholding structure to the market – certain powers in favor of the Minister of Treasure, in coordination with the Minister of Finance and Industry. These included: *(a)* the power to approve the acquisition of relevant stakes representing 5% of the share capital of such entities (or the lower percentage set forth by decree of the Minister of Treasure), entailing the prohibition to exercise the voting rights attached to such stakes pending the aforementioned approval and, in case of denial, the obligation to sell the shares within one year; *(b)* the power to approve the execution of shareholders' agreements (even implicitly resulting from coordinated behaviors) representing at least 5% of the

[3] On this topic see, among others, SACCO GINEVRI, *La nuova golden share: l'amministratore senza diritto di voto e gli altri poteri speciali*, in *Giur. comm.*, 2005, II, 707 et seq.; ROSSI, *Privatizzazioni e diritto societario*, in *Riv. soc.*, 1994, 390 et seq.; SANTONASTASO, *Dalla "golden share" alla "poison pill": evoluzione o involuzione del sistema?*, in *Giur. comm.*, 2006, I, 383 et seq.; ID, *La "saga" della golden share tra libertà di movimento di capitali e libertà di stabilimento,* in *Giur. comm.,* 2007, I, 302 et seq.; CARBONE, *Golden share e fondi sovrani: lo Stato nelle imprese tra libertà comunitarie e diritto statale,* in *Dir. comm. int.*, 2009, 503 et seq.; ROSSI, *La legge sulla tutela del risparmio e il degrado della tecnica legislativa*, in *Riv. soc*, 2006, 1 et seq.; SCIPIONE, *La "golden share" nella giurisprudenza comunitaria: criticità e contraddizioni di una roccaforte inespugnabile*, in *Società*, 2010, 856 et seq.; COLANGELO, *Regole comunitarie e golden share italiana*, in *Mercato concorrenza regole,* 2009, 595 et seq.; FRENI, *Golden share, ordinamento comunitario e liberalizzazioni asimmetriche: un conflitto irrisolto*, in *Giorn. dir. amm*, 2007, 145; CAVAZZA, *Golden share, giurisprudenza comunitaria ed applicazione dell'articolo 2450 c.c.,* in *Le Nuove Leggi Civili Commentate,* 2008, 1193 et seq.; SAN MAURO, *Golden shares, poteri speciali e tutela di interessi nazionali essenziali*, Roma, Luiss University Press, 2003; DEMURO, *Società privatizzate*, in *Diritto commerciale*, directed by Abriani, in *Dizionari del diritto privato* promoted by Irti, Milano, Giuffrè, 2011, 905 et seq.; ID, *La necessaria oggettività per l'esercizio dei poteri previsti dalla golden share*, in *Giur. comm.*, 2009, II, 640 et seq. In general on the privatization process see FOSCHINI, *Profili rilevanti delle c.d. "privatizzazioni",* in *Studi in memoria di Franco Piga,* II, Milan, 1992, 1276; OPPO, *Diritto privato ed interessi pubblici*, in *Riv. dir. civ.*, I, 1994, 25 et seq.; CASSESE, *La nuova costituzione economica*, Bari, 2004, 7 et seq.; IRTI, *L'ordine giuridico del mercato*, Bari, 2003, 121 et seq.; MARCHETTI, *Le privatizzazioni in Italia: leggi e documenti,* in *Riv. soc*, 1994, 194 et seq.; COSTI, *Privatizzazione e diritto delle società per azioni*, in *Giur. comm*, 1995, I, 77 et seq.; SICLARI, *Le privatizzazioni nel diritto dell'economia,* in *Corso di diritto pubblico dell'economia*, edited by Pellegrini, Padua, 2016, 413 et seq.; NAPOLITANO, *Regole e mercato nei servizi pubblici*, Bologna, 2005, *passim*; DEMURO, *Società privatizzate*, in *Diritto commerciale*, edited by Abriani, in *Dizionari del diritto privato*, promoted by Irti, Milan, 2011, 905 et seq.

company's voting share capital, or the lower percentage set forth by decree of the Minister of Treasure[4]; *(c)* the power to veto the adoption of resolutions concerning the company's dissolution, the transfer of going concerns, mergers and demergers, the transfer of the corporate office abroad, the change of the company's corporate purpose and the amendment of the special powers introduced in the company's by-laws pursuant to the regulation at hand, provided that in all these cases the dissenting shareholders were entitled to exercise the withdrawal right from the company's share capital[5], and *(d)* the power to appoint one director or a number not higher than 1/4 of the board members and one statutory auditor[6].

However, the attribution to the Italian Government of the aforementioned prerogatives – which, as anticipated, were addressed to a number of specifically identified companies operating in public utilities sectors – generated significant incompatibilities with certain key principles of the Italian corporate system and the fundamental freedoms provided by the European Treaties (i.e., the principles of freedom of establishment and free movement of capital)[7]. In particular, a series of decisions of the European Court of Justice assessed the issue of the compatibility with European law of national legal frameworks (including the Italian one) that granted domestic governments with the power to intervene over the shareholding structure and management of privatized companies belonging to strategic sectors of the economy[8].

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[4] See LIBONATI, *La faticosa 'accelerazione' delle privatizzazioni*, in *Giur. comm.*, 1995, 44; LOMBARDO, *Golden share,* in *Enc. giur.,* Rome, 1998, 9; SODI, *Poteri speciali, golden share e false privatizzazioni*, in *Riv. soc.*, 1996, 383; PARDOLESI-PERNA, *Fra il dire e il fare: la legislazione italiana sulla privatizzazione delle imprese pubbliche,* in *Riv. crit. dir. priv.,* 1994, 568; COSTI, *I patti parasociali e il collegamento negoziale*, in *Giur. comm.*, 2004, 2, 212.

[5] Paragraph 227, letter c), of Article 4, of Law no. 350/2003, provided for the power to veto, duly motivated in relation to the concrete prejudice caused to the vital interests of the State, on the adoption of resolutions for the dissolution of the company, the transfer the going concern, the merger, demerger, transfer of the registered office abroad, change of the corporate purpose, and for introducing amendments to the by-laws that suppress or modify the powers referred to in Article 2 of Law Decree 332/1994. The decision to exercise the veto power could be challenged within six days by the dissenting shareholders before the Regional Administrative Court of Lazio. See DI CECCO, *Le clausole statutarie che attribuiscono al Ministero del Tesoro la titolarità dei cc.dd. poteri speciali. Spunti di riflessione in merito al veto previsto dall'art. 2, comma 1, lett. c della legge 474/1994,* in *Profili giuridici delle privatizzazioni*, edited by Marasà, Turin, 1997, 63 et seq.

[6] The introduction of such legal tool raised certain concerns – transposed in Italy from foreign jurisdictions – including the compatibility with the disciple on directors' conflict of interest set forth under Article 2391 of the Italian Civile Code (which provided for a duty of information upon the director in conflict, while leaving unaffected the possibility to exercise his/her voting rights); see SACCO GINEVRI, *La nuova golden share: l'amministratore senza diritto di voto e gli altri poteri speciali*, in *Giur. comm.*, 2005, II, 707 et seq.; MARCHETTI, *Le privatizzazioni in Francia*, in *Riv. soc.*, 1994, I, 267; ROSSI, *Privatizzazioni e diritto societario*, mentioned, 390 et seq.; DONATIVI, *Esperienze applicative in tema di nomina pubblica "diretta" alle cariche sociali (artt. 2458-2459 c.c.)*, in *Riv. soc*, 1998, II, 1301; GRAHAM-PROSSER, *Privatising nationalised industries: constitutional issues and new legal techniques,* in *MLR,* 1987, 34; GRUNDMANN-MOSLEIN, *Golden Shares – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects,* in *European Banking & Financial Law Journal (EUREDIA)*, 2001-2, 4, 623 et seq.

[7] See CIRENEI, *Le società di diritto "speciale" tra diritto comunitario delle società e diritto comunitario della concorrenza: società a partecipazione pubblica, privatizzazioni e "poteri speciali"*, in *Dir. comm. int*, 1996, 771; BALLARINO-BELLODI, *La golden share nel diritto comunitario*, in *Riv. soc.*, 2004, I, 2 et seq.; BONELLI, *Il codice delle privatizzazioni nazionali e locali*, Milan, 2001; MERUSI, *La Corte di Giustizia condanna la golden share all'italiana e il ritardo del legislatore*, in *Dir. pubbl. comparato europeo*, 2000, III, 1236 et seq.

[8] See ECJ 23 May 2000, Case 58/99, *Commission v. Italy*, in ECR I-3811; ECJ 4 June 2002, Case C-367/98, *Commission v. Portugal*, ECR I-4731; Case C-483/99, *Commission v. France*, ECR I-4781; Case C-503/99, *Commission v. Belgium*, ECR I-4809; ECJ 13 May 2003: Case C-463/2000, *Commission v. Spain*; C-98/01, *Commission v. United Kingdom*. On this topic see, among others, BOSCOLO, *Le golden shares di fronte al giudice comunitario*, in *Foro it.*, IV, 2002, 480 et seq.; SALERNO, *Golden shares, interessi pubblici e modelli societari tra diritto interno e disciplina comunitaria*, in *Dir. comm. int.*, 2002, 671 et seq.; PERICU, *Il*

More specifically, according to the ECJ, the "golden share" regulatory framework was found to be legitimate only to the extent it represented an instrument to protect mandatory public interests of the member States, in a *proportional* and *suitable* manner, and did not exceed what was strictly necessary to pursue such goal. The requirements identified by the European Court of Justice for these purposes included *(i)* the existence of a clear and precise legal framework (statutory precision); *(ii)* the provision of a subsequent State control instead of a prior authorization (i.e., an opposition *ex post facto*); *(iii)* the existence of precise time limits for such possible opposition by the State; *(iv)* the obligation to motivate the States' interference; *(v)* the existence of an effective judicial control over the measures imposed allowing the recipient to challenge the relevant decision[9].

In light of the above, prompted by the European Commission's and European Court of Justice's assessments, the Italian regulatory framework on States' special powers in strategic sectors was amended to meet the requirements identified at European level, also looking at the legislation in force in foreign jurisdictions (e.g., the Belgian "golden share")[10]. In particular, Article 4, paragraphs 227-231, of Law no. 350 of December 24, 2003, amended the original contents of the special powers set out under Article 2 of Law Decree no. 332/1994 in light of the European indications. In this respect, the provisions concerning the need to expressly motivate any decision undertaken pursuant to such regulatory framework, the opposition regime, the possibility to challenge the relevant decisions before the competent courts, the strict time limits, the exercise parameters (i.e., the harm to the vital interests of the State) and the new legal tool of the non-voting director were incorporated in the original legal framework on Italian "golden share" to fulfill the indications provided by the ECJ.

Nonetheless, despite the introduction of these adjustments, the legal framework on the Italian "golden share" did not survive the scrutiny of the European authorities relating to its compatibility with the principles provided under the European Treaties. Indeed, with decision dated March 26, 2009, the European Court of Justice found that Italy was in breach of the principles relating to the freedom of establishment and the free movement of capital with reference to the criteria for the exercise of the State's special powers indicated under Presidential Decree of June 10, 2004, with regard to both the exercise of the power of opposition and the veto power[11].

In particular, the ECJ shared the arguments of the European Commission, which claimed that the criteria set out in the aforementioned Presidential Decree did not make sufficiently clear the conditions for the exercise of the special powers and did not enable investors to know in what situations the powers would have been used. More specifically, the Commission noted that linking the exercise of these powers to the occurrence of a generic "*real and serious risk*" (as was provided at that time in Article 2, paragraph 1, from letter a) to letter d), of the

diritto comunitario favorisce davvero le privatizzazioni dei servizi pubblici?, in *Diritto del commercio internazionale*, 2001, 327 et seq.; FRENI, *L'incompatibilità con le norme comunitarie della disciplina sulla golden share*, in *Giorn. dir. amm.*, 2001, 1195 et seq.

[9] See FLEISCHER, *Judgments of the full Court of 4 June 2002*, in *Common Law Market Review*, 40, 2003, 497.

[10] See BALLARINO-BELLODI, *La golden share nel diritto comunitario*, mentioned, 17 et seq.; with regard to the Belgian golden share, established by two royal decrees, one of June 10, 1994 and the other of June 16, 1994, see the Case C-503/99, *Société nationale de trasportation par canalisations and Distrigaz.*

[11] See *Commission of the European Communities v Italian Republic*, Case C-326/07.

Presidential Decree concerned) would have extended their scope of application to a potentially undetermined and undeterminable number of cases. Such lack of precision in identifying the specific circumstances which justified the State's recourse to the special powers gave those powers a discretionary nature, having regard to the latitude enjoyed by the Italian public authority. The result was then to discourage investors in general, and more specifically those contemplating settling in Italy with a view to exercising an influence on the management of the undertakings to which the legislation at issue applied[12].

For the above purposes, the European Court of Justice recalled its past case law[13], according to which a State's powers of intervention result in a serious interference with the free movement of capital granted by the Treaties when the criteria for their exercise are not qualified by any condition – save for a generic reference to the protection of national interests – and are formulated in general terms without any indication of the specific objective and verifiable circumstances that trigger them[14]. In this respect, the aforementioned conclusions were applicable also to the Italian criteria for the exercise of the "golden share". Indeed, even if the new criteria established by the Italian legislator in 2004 concerned different kinds of public interests, they were still formulated in a general and imprecise manner. Moreover, the lack of any connection between such criteria and the special powers to which they related increased the uncertainty on their scope of application and gave them a discretionary nature, which was considered disproportionate in relation to the objectives pursued. Furthermore, a generic provision that the special powers could be used only in accordance with European law (see Article 1, paragraph 1, of the Presidential Decree of June 10, 2004) was not sufficient to ensure compliance with the European legal framework. This is because the general and abstract nature of the underlying criteria did not allow to ensure a use of these powers in compliance with European law[15]. In addition, the ECJ observed that the possibility to submit the relevant State's decisions to review by the national competent courts (as was provided under the new Article 2, paragraph 1, letters from a) to c), of Law Decree no. 332/1994) could not be considered on its own sufficient to cure the aforementioned incompatibilities with the European rules[16].

Given the above, since the aforementioned decision of the ECJ was addressed only to the secondary provisions set forth under the Presidential Decree of June 10, 2004, in November 2009 the European Commission also opened an infringement procedure (no. 2009/2255 – formal notice pursuant to Article 258

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[12] See SINISCALCO, *Governi alle porte: crisi del credito e fondi sovrani*, in *Mercato concorrenza regole*, 2008, 75 et seq.; BASSAN, *Una regolazione per i fondi sovrani*, in *Mercato concorrenza regole*, 2009, 95 et seq.; LAMANDINI, *Temi e problemi in materia di contendibilità del controllo, fondi sovrani e investimenti diretti stranieri nei settori strategici tra libera circolazione dei capitali e interesse nazionale*, in *Riv. dir. soc*, 2012, 510 et seq.; ALVARO – CICCAGLIONI, *I fondi sovrani e la regolazione degli investimenti nei settori strategici*, in *Consob Discussion papers*, no. 3 of July 2012.

[13] See, in this respect, ECJ, *Analir* judgment of February 20, 2001, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others v Administración General del Estado*, Case C-205/99, according to which "*if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned. Furthermore, all persons affected by a restrictive measure based on such a derogation must have a legal remedy available to them*".

[14] See Case C-483/99, *Commission v France*, 2002, ECR I-4781.

[15] See Case C-463/00, *Commission v Spain*, 2003, ECR I-4581.

[16] ECJ, February 20, 2001, Case C-205/99, *Analir*, mentioned.

TFEU of November 20, 2009) with reference to the primary legal framework on the Italian "golden share", which was considered to be in breach of the freedom of establishment and the free movement of capital principles despite the adjustments introduced.

As a result, the Italian legislator reformed, by way of urgency, the entire regulation on Italian foreign direct investment screening by repealing the previous "golden share" legal regime and introducing the new Law Decree no. 21 of March 15, 2012, converted, with amendments, into Law no. 56 of May 11, 2012, that – after having been further amended several times in the subsequent years – represents still today the main piece of law regulating the Italian FDI screening mechanism aimed at protecting assets and operators deemed crucial for the essential interests of the State[17].

[17] As reported by SACCO GINEVRI-SBARBARO, *La transizione della Golden Share nelle società privatizzate ai poteri speciali dello stato nei settori strategici: spunti per una ricerca*, in *Le Nuove Leggi Civili Commentate*, 2013, 109 et seq., the last act in the "*golden share saga*" is dated February 16, 2011, when the European Commission reiterated, once again, that the Italian legislation on special powers (prior to Law Decree no. 21/2012) attributed to the national authorities a position that could lend itself to arbitrariness and that, in any case, it could potentially discourage direct investments, in breach of Articles 49 and 63 of the Treaty (concerning the freedom of establishment and free movement of capital, respectively). As illustrated in bill no. 5051 for the conversion of Law Decree no. 21/2012, submitted by the Government to the Parliament on March 15, 2012 and available at *www.camera.it*, the objective of safeguarding certain vital interests of the State, while in principle justifies limitations to the European freedoms, did not justify – in the opinion of the European Commission – restrictions on corporate acquisitions that are not adequate to achieve such protection. Even the powers of veto to the adoption of company resolutions or to shareholders' agreements, as provided for by the Italian legislation then in force, were neither appropriate nor proportionate to the objective of protection pursued in the European Commission's view. In response to these findings, on April 14, 2011, Italy submitted a draft for a comprehensive reform of the national legal framework – redacted by the Ministry of Economy and Finance and subsequently shared by the other competent administrations – which reformulated and circumscribed the State's special powers both subjectively (no longer linked to public shareholding, but rather referring to specific companies operating in predefined strategic sectors) and objectively (relating to acquisitions above predetermined thresholds and specific resolutions to change ownership or control over strategic assets). In addition, the exercise of special powers was redefined in a more rigorous and guarantee-oriented manner, including from a procedural perspective. The text was discussed with officials of the European Commission (Directorate General Internal Market and Services) at a meeting in Brussels in July 2011. The European Commission gave a substantially negative assessment of the draft text submitted by the Italian Government. In particular, it considered as incompatible, in principle, with EU law the exercise by the State of special powers in private enterprises in the form of restrictions on ownership acquisitions. As for possible veto rights over company resolutions, in the Commission's view these could only be envisaged if it could be demonstrated that the European sectoral legislation already in force was not capable of protecting specific security needs of the Member States. Moreover, in the opinion of the Directorate-General for the Internal Market and Services, in light of the most recent harmonization directives in the areas of energy, telecommunications and transport, there would have been no scope for state intervention in these areas. The European Commission's position was slightly more cautious on possible special powers in the defense and national security sectors. However, even in this case, the Italian reform project was still considered too general and therefore in need of a more precise indication of the criteria and scope of application of the special powers, with the use of more markedly product-related criteria (with the specification, in particular, of the specific productions to be protected and the reasons for them), according to the model chosen by the German legislator, being considered appropriate. On the Italian side, a commitment had been undertaken to transmit to the European Commission by September 30, 2011 a new draft articulation of the reform project, which would have taken into account the remarks made by the Directorate General for the Internal Market and Services, a deadline, however, not complied with by the Italian authorities. On November 24, 2011, the Meeting of Commissioners decided to refer Italy to the Court of Justice of the European Union, granting the suspension of the filing of the appeal, in consideration of the intervening change of Government.

3. A NEW PLAYER SITTING AT THE NEGOTIATING TABLE

The new State prerogatives granted under the "golden power" legal framework now provide the Italian Government with powers to intervene on the transfer of shares and extraordinary transactions carried out by companies operating in certain strategic economic sectors, regardless of the fact that the State holds (or held) a stake in their share capital.

In addition to the possibility to oppose or veto the transactions involving such entities and assets, the public authority often exercises the power to impose discretional conditions and prescriptions – for instance, on purchasers of qualified shareholdings in the share capital of domestic strategic companies – which may have a permanent impact, at the organizational and managerial level, on the structure and activity of the companies subject to the "golden powers". This entails, more and more often, the imposition of constraints and mandatory indications addressed to the competent corporate bodies of the entities considered more sensitive under a strategic perspective[18].

In light of the above, the legal framework currently in force in Italy – after having abandoned the traditional objective of preserving the State's influence following the loss of corporate control over the privatized companies – is now aimed at protecting the essential public interests without subjective preclusions of any kind. For these purposes, the Italian Government shall be entitled to exercise a deep influence in any situation where the operation of economic activities deemed strategic for the country is jeopardized, regardless of the nature of the entity managing the asset.

The result is a significant extension of the economic activities potentially subject to the exercise of the State's special powers, which currently include all assets deemed strategic for the State as long as they are identified by the Government through special decrees or regulations. This explains the use of the expression "golden powers" – and no longer "golden share" – to identify the current special powers to which the Italian Government is entitled, given that any connection between those powers and the shareholding of the State in a given company (current or past) has disappeared.

In this perspective, while in the repealed "golden share" regulation the presence of specific provisions in the companies' by-laws highlighted that the latter were subject to the special powers of the State, now in the current regulatory framework the applicability of the "golden powers" must be inferred case-by-case, on the basis of a complex interpretation of the applicable rules by the operators involved.

This regulatory approach, in addition to confirming the gradual abandonment of corporate law devices serving public objectives – such as, for example, the State's right to appoint a non-voting director under the "golden share" – may give rise to applicative concerns (and subsequent litigation) due to the lack, compared to the past, of incontestable formal elements highlighting the circumstance that the companies involved are subject

[18] For examples of such prescriptions see LOCCI, *Foreign Direct Investments. The Vivendi/TIM case*, in VV. AA., *Commentaries and Cases on Italian Business Law*, directed by Sacco Ginevri, Milano, 2025, 325 et seq.

to the potential exercise of the State's special powers.

The aforementioned concerns, in combination with the almost complete equalization of public and private investors for the purpose of the Italian FDI scrutiny and with the solutions adopted by contiguous foreign legal systems[19], explains why the current regulatory framework on "golden powers" has placed the Italian State as a privileged interlocutor in the context of the negotiations between private entities, even in the preliminary stage, whenever the transaction involves economic activities that seem potentially strategic for the Country[20].

Such conclusion seems confirmed in light of the regulatory process towards the strengthening of the State's special powers implemented in Italy (and in other European member States) in the recent years[21]. In particular, the spread of the Covid-19 pandemic further accelerated the rise of foreign direct investment mechanisms in several national legal systems[22], including Italy, based on the assumption that the enhancement of government prerogatives could prevent "*predatory buying of strategic assets by foreign investors*", otherwise favored by depressed corporate values due to the health emergency[23].

Reference is made, in Italy, to Law Decree no. 23 of April 8, 2020 (the so-called "*Liquidity decree*") [24],

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[19] See PLOTKIN, *Foreign Direct Investment by Sovereign Wealth Funds: Using the Market and the Committee on Foreign Investment in the United States Together to Make the United States More Secure*, in *The Yale Law Journal*, 2008, 91 et seq.; GUACCERO – PAN – CHESTER, *Foreign Direct Investment by Sovereign Wealth Funds: Forms of Control in the US-European Comparative Perspective, in Riv. soc.*, 2008, 1359 et seq.

[20] See SACCO GINEVRI, *Le società strategiche*, in *Trattato delle società,* directed by Donativi, Milan, 2022, 843 et seq.

[21] The Commission has invited all Member States to be vigilant and use all available tools at the national and EU level to prevent the ongoing crisis from leading to a loss of critical resources and technologies (see, in particular, the communications dated, respectively, March 13 and 26, 2020). For an overview of the amendments introduced in the regulatory framework on FDI screening mechanisms in foreign jurisdictions to contrast the effects of the crisis see STEIN, *The rule on direct investment control in the transportation sector in Germany*, in *Law and Economics Yearly Review*, supplement to no.1/2022, 50 et seq.; YUAN, *Economic security considerations in FDI screening*, *ibidem*, 64 et seq.; SBARBARO – GRIMALDI, *The committee on foreign investment in the United States (CFIUS) in the evolving national security landscape*, *ibidem*, 126 et seq.; MORONI, *National security and public order in investment screening: any lessons from the EU trade controls experience?*, *ibidem*, 160 et seq.; FECHTER, *National security and the quest for technological leadership*, *ibidem*, 182 et seq.; WEBER – HERBERT HOMENDA, *The new competencies of the polish competition authority in FDI screening*, *ibidem*, 263 et seq.

[22] See NAPOLITANO, *L'irresistibile ascesa del golden power e la rinascita dello Stato doganiere*, in *Giornale dir. amm.*, 2019, 549 et seq.

[23] Reference is made to the communication from the Commission dated March 26, 2020 on "*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.

[24] On the amendments introduced by Law Decree no. 23/2020 to the "golden powers" regulation see NAPOLITANO– SACCO GINEVRI, *Il golden power? Temporaneo e solo in casi estremi*, in *La Repubblica*, *Affari & Finanza* of April 27, 2020, 13 et seq.; BASSAN, *Prime note prospettiche sul Golden power applicato a banche e assicurazioni*, available at *www.dirittobancario.it*, April 2020; DONATIVI, *I golden powers nel "d.l. liquidità"*, available at *www.ilcaso.it*, April 2020; POLLASTRO, *La tutela delle imprese italiane: tra misure adottate (golden power) e misure suggerite (voto maggiorato)*, in *Il diritto dell'emergenza: profili societari, concorsuali, bancari e contrattuali,* edited by Irrera, available in *www.centrores.org*, April 2020, 80 et seq.; SANTOSUOSSO, *Interi settori sono a rischio: poteri più duraturi allo Stato*, interview published on *IlSole24Ore* of 25 April 2020, 16; BALASSONE, *Conversione in legge del DL 8 aprile 2020, no. 23*, Hearing of the Head of the economic Structure Service of the Bank of Italy at the Chamber of Deputies, available at *www.bancaditalia.it*, April 27, 2020, 9 et seq.; GASPARI, *Poteri speciali e regolazione economica tra interesse nazionale e crisi socio-economica e politica dell'Unione europea*, in *Federalismi*, May 27, 2020, CAGGIANO, *Covid-19. Misure urgenti sui poteri speciali dello Stato nei settori della difesa e della sicurezza nazionale, dell'energia, dei trasporti e delle telecomunicazioni*, in *Federalismi*, April 29, 2020; MAGLIANO, *Gli orientamenti della Commissione europea sul controllo degli investimenti esteri diretti e i golden powers rafforzati in tempo di pandemia*, available at *www.dirittobancario.it*, July 2020; A. NAPOLITANO, *Il ritorno decisivo dello Stato imprenditore. Dalla nazionalizzazione di Alitalia alla estensione dei c.d. golden powers*, in *Dir. pubbl. europ. rassegna*

which extended the scope of application of the Italian "golden power" in order to counter the negative effects of the health emergency connected to the spread of the virus, and introduced the possibility that the special powers can be autonomously (*ex officio*)[25] exercised by the Italian Government even in lack of a regulatory filing by the companies concerned. After that, Articles 24 et seq. of Law Decree no. 21 of March 21, 2022 (converted with amendments by Law no. 51 of May 20, 2022) – setting forth urgent measures to counter the economic and humanitarian effects of the Ukrainian crisis (so-called "*Ukrainian Decree*") [26] – crystalized the effects of certain of those emergency provisions which had been introduced in the "golden power" legal framework on a temporary basis during the pandemic, and extended the State's special powers even to certain transactions that involve solely Italian players[27].

The aforementioned scenario highlights a widespread use – at European and international level – of the "golden power" as a defensive tool aimed at preserving the localism of major domestic strategic companies in a historical moment when they are easily subject to takeovers by foreign investors, as well as an instrument to continue supervising – even after the recovery – and potentially affect the execution of transactions involving assets that are considered crucial for the Italian essential interests.

In this respect, the legislative policy concerns that prompted the introduction of the regulation of the State's special powers back in 1994 seems to revive, as the State is once again retaining deep powers over the management and organization of the companies deemed strategic – even if the public shareholdings have been divested in favor of private market operators – in order to allow the Government to prevent hostile takeovers or unwanted changes of corporate control.

4. FUTURE TRENDS AND PERSPECTIVES

The new prerogatives granted to domestic governments to affect the business decisions of strategic operators raise the issue of their compatibility potential with the European freedoms[28]. In this regard, the

online, 2020/2, 11 et seq.; SACCO GINEVRI, *Golden powers e infrastrutture finanziarie dopo il Decreto Liquidità*, available at *www.dirittobancario.it*, April 2020; ID., *The Italian Foreign Direct Investments Screening in times of COVID-19: trends and perspectives*, in *Law and Economic Yearly Review*, 2020, 122 et seq. RIGANTI, *I "golden powers" italiani tra "vecchie" privatizzazioni e "nuova" disciplina emergenziale*, in *Le Nuove Leggi Civili Commentate*, 2020, 867 et seq.

[25] See, for a similar provision in the US legal system, MANN, *The global rush towards foreign direct investment screening: lessons from the United States*, in VV.AA., *Foreign Direct Investment Screening*, *Il controllo sugli investimenti esteri diretti*, edited by Napolitano, Bologna, 2019, 15 et seq.

[26] The new regulatory framework is commented by ASSONIME, *Poteri speciali dello Stato. Evoluzione del quadro normativo e profili operativi dei Golden Power*, Circolare no. 11 of April 17, 2023. See also SACCO GINEVRI, *Le società strategiche*, in *Trattato delle società,* mentioned, 843 et seq.; SANDULLI, *La febbre del "golden power"*, in *Riv. trim. dir. pubbl.*, 2022, 743 et seq.; LOCCI-JENA, *The strategic relevance of banking and finance sectors under the FDI screening perspective*, in *Law and Economics Yearly Review*, volume 13, special issue, 2024, 304 et seq.; ROSSANO-SACCO GINEVRI, *Governance sanitaria e golden power*, in this *Review*, 2025, 29 et seq.

[27] See LOCCI-PISTOCCHI, *The State's role in strategic economic sectors*, mentioned, 232 et seq.

[28] See LAMANDINI-PELLEGRINI, *Investimenti diretti e investimenti di portafoglio tra diritto di stabilimento e libera circolazione dei capitali*, in *Diritto societario europeo e internazionale*, edited by Benedettelli-Lamandini, Turin, 2017, 89 et seq.; see also ROJAS

European Commission and the European Court of Justice indicated that such State powers must be exercised without discrimination and their use shall be permitted only to the extent that they are based on objective, well-reasoned and clearly identified criteria, and are justified by overriding reasons of general interest[29].

These principles shall remain valid even when the market conditions justify a deeper intervention of the State to protect national strategic companies from speculative investors, such as in times of crisis[30]. However, even in such scenarios, State's intervention in the economy should be temporary and should be aimed at fostering the recovery of the sector in line with the public objectives pursued.

Different evaluations come into play if the temporary strengthening of the applicable FDI legal regime is made permanent, as happened in Italy, and thus exceeds the duration of the special market conjuncture. In this context, the extension of the Italian "golden powers" in particular to the financial sector (e.g., banks, insurance companies, etc.)[31] raises significant concerns. Indeed, although these entities play a systemic role for the whole economy which justifies a deeper intervention[32], on the other hand a too protectionist policies seem not compatible – in a long-term perspective – with the necessary technological development of the sector, which would require greater internationalization of financial operations[33].

An attempt to find a balance between the different positions at stake could consist in adopting a more

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ELGUETA, *Il rapporto fra discipline nazionali in materia di "foreign direct investment screening" e diritto internazionale degli investimenti*, in *Riv. dir. comm. int.*, 2020, 325 et seq.

[29] See for instance the European Court of Justice decision in the Polbud case, October 25, 2017, C 106/16; On this topic see MUCCIARELLI, *Trasformazioni internazionali di società dopo la sentenza Polbud: è davvero l'ultima parola?*, in *Le Società*, 2017, 1331 et seq.; DE LUCA-GENTILE-SCHIAVOTTIELLO, *Trasformazione transfrontaliera in Europa: prime considerazioni su Polbud*, in *Le Società*, 2018, 5 et seq.; BARTOLACELLI, *Trasformazione transfrontaliera e la sentenza Polbud: corale alla fine del viaggio?*, in *Giur. comm.*, 2018, II, 428 et seq.

[30] See, *ex multis*, GALLO, *La questione della compatibilità dei golden powers in Italia, oggi, con il diritto dell'Unione,* mentioned, 26 et seq.; SACCO GINEVRI, *I golden powers fra Stato e mercato ai tempi del Covid-19*, mentioned, 282 et seq.; ID., *The Italian Foreign Direct Investments Screening in times of COVID-19: trends and perspectives*, mentioned, 129 et seq.

[31] See on this topic SACCO GINEVRI, *Golden powers e banche nella prospettiva del diritto dell'economia*, in *Rivista della Regolazione dei mercati*, 2021, 67 et seq.

[32] See the European Court of Justice decision of July 19, 2016, *Kotnik case*, C-526/14, paragraph 50, where the Court also noted that "*the banks are often interconnected and a number of them operate internationally. That is why the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. That is likely, in its turn, to produce negative spill-over effects in other sectors of the economy*". See also the European Court of Justice decision of July16, 2020, *OC and Others*, C-686/18, paras. 92 and 93, according to which "*the objectives of ensuring the stability of the banking and financial system and preventing a systemic risk are objectives of public interest pursued by the European Union. (see, to that effect, judgments of 19 July 2016, Kotnik and Others, C-526/14, EU:C:2016:570, paragraphs 69, 88 and 91; of 20 September 2016, Ledra Advertising and Others v Commission and ECB, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraphs 71 and 74; and of 8 November 2016, Dowling and Others, C-41/15, EU:C:2016:836, paragraphs 51 and 54). 93 Indeed, financial services play a central role in the economy of the European Union. Banks and credit institutions are an essential source of funding for businesses that are active in the various markets. In addition, banks are often interconnected and a number of them operate internationally. That is why the failure of one or more banks is liable to spread rapidly to other banks, either in the Member State concerned or in other Member States. That is liable, in turn, to produce negative spill-over effects in other sectors of the economy (judgments of 19 July 2016, Kotnik and Others, C-526/14, EU:C:2016:570, paragraph 50, and of 20 September 2016, Ledra Advertising and Others v Commission and ECB, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 72)*". On this topic see ANTONUCCI, *Gli "aiuti di Stato" al settore bancario: le regole d'azione della regia della Commissione*, in *SIE*, 2018, 587 et seq.; SACCO GINEVRI, *The Italian Foreign Direct Investments Screening in times of COVID-19: trends and perspectives*, mentioned, 129 et seq.

[33] SEPE, *Innovazione tecnologica, algoritmi e intelligenza artificiale nella prestazione dei servizi finanziari*, in *Riv. trim. dir. econ.*, 2021, 186 et seq.; LEMMA, *"Banking" e "shadow banking" al tempo del Covid-19: riflessioni nella prospettiva del "martket" in "crypto-assets"*, in *Riv. dir. banc.*, 2020, 851 et seq.; ROSSANO, *L'intelligenza artificiale: ruolo e responsabilità dell'uomo nei processi applicativi (alcune recenti proposte normative)*, in *Riv. trim. dir. econ.*, 2021, 212 et seq.

modern and rigorous interpretation of the notions of "national security" and "national interest", in order to limit the interference of the public authority in the economic sphere and protect strategic assets without disproportionately affecting the rights of market operators[34]. This approach would allow to find a compromise between the need to foster the flows of investments in a globalized market and the equally legitimate need to protect national essential and strategic interests from hostile takeovers and predatory acquisitions.

It is therefore necessary that national jurisdictions do not set up overly aggressive barriers to the inflow of foreign investments, and that foreign and domestic investors operate at reciprocal conditions. In this perspective, it shall be noted that the Regulation (EU) no. 2019/452 leaves unaffected the prerogatives of the member States to establish domestic FDI screening mechanisms, provided that they comply with the principles indicated by the European case law[35].

However, this approach determines a lack of harmonization in the regulation of these screening systems and legitimates legal frameworks that attribute to political authorities the power to exercise the "golden powers" with a wide discretion. This is a significant difference compared to the supervisory activity characterizing regulated sectors – such as the banking and insurance ones – which is attributed to independent and technical authorities and is harmonized at the European level. In this respect, the States' powers to screen foreign direct investments have given content to new operational forms that may produce negative impacts not only at the level of the adequate development of the sectors concerned, but also in the process of European integration[36].

In light of the above, it seems that a possible solution to ensure compliance of FDI screening mechanisms with the European freedoms – and therefore support the creation of a real capital markets union – would be to entrust a supranational authority, independent from political influences, with the powers to monitor the foreign direct investments that take place within the territory of the European Union. At the same time, domestic FDI screening mechanisms should not apply to transactions that do not involve foreign players in order to maintain their original function of shield against the potential buy-out of strategic assets by foreign speculative investors.

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[34] See SACCO GINEVRI, *L'espansione dei golden powers fra sovranismo e globalizzazione*, in *Riv. trim. dir. econ.*, 2019, 151 et seq.

[35] See MAGLIANO, *Tutela degli interessi strategici e controllo degli investimenti esteri diretti: la proposta di regolamento delle istituzioni europee*, in *Il diritto del commercio internazionale*, 2018, 705 et seq.; ALVARO-LAMANDINI-POLICE-TAROLA, *La nuova via della seta e gli investimenti esteri diretti in settori ad alta intensità tecnologica*, in *Quaderni giuridici Consob,* no. 20, January 2019, 36 et seq.; LOCCI-VELÀZQUZ, *Foreign Direct Investments screening: a short overview of the Italian, European and South American regulation*, in *Open Review of Management, Banking and Finance*, 2018, 2, 12 et seq.; NAPOLITANO, *Il regolamento sul controllo degli investimenti esteri diretti: alla ricerca di una sovranità europea nell'arena economica globale*, in *Rivista della regolazione dei mercati*, 2019, p. 2 et seq.; GAROFOLI, *Golden power e controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative*, in *Federalismi*, 2019, no. 17, p. 4 et seq.; VELLUCCI, *The new regulation on the screening of FDI: the quest for a balance to protect EU's essential interests*, in *Dir. comm. int*, 2019, 142 et seq.; MACCARRONE, *Poteri speciali e settori strategici: brevi note sulle recenti novità normative*, in *Osservatorio cost.*, 2020, 130 et seq.; AMICARELLI, *Il controllo degli investimenti stranieri nel regolamento europeo del 2019*, in *Giorn. dir. amm.,* 2019, 6, 763 et seq.; SCARCHILLO, *Golden powers e settori strategici nella prospettiva europea: il caso Huawei. Un primo commento al Regolamento (UE) UN 2019/452 sul controllo degli investimenti esteri diretti,* in *Riv. dir. comm. int.*, 2020, 569 et seq.

[36] The issue about the fact that the wide catalogue of events triggering the Italian "golden powers" could extend the use of the special powers over transactions which, on their own, would have not be included in the FDI scope of application was pointed out by SACCO GINEVRI-SBARBARO, *La transizione dalla golden share nelle società privatizzate*, mentioned, 122 et seq. and LOCCI, *Foreign Direct Investments. The Vivendi/TIM case*, mentioned, 263 et seq.

Provided that such objectives would require the adoption of legal initiatives in a field – that of FDI screening – where member States are reluctant to transfer sovereignty in favor of external authorities[37], the described process will likely take long time. A first step towards a greater harmonization at European level on these matters has been taken recently with the proposal of revision of the FDI screening European regulatory framework, which aims at addressing the shortcomings highlighted by Regulation (EU) no. 2019/452 and ultimately repealing it, with a view to, *inter alia*, determining the minimum scope for compulsory screening of transactions subject to an authorization requirement[38].

In the meantime, the competent authorities of each member State should exercise the special powers granted to them in a proportional and well-reasoned manner, in order to affect to the minimum extent possible the business autonomy of market operators. Indeed, it is certainly true that the deeper economic crises have traditionally been followed by a strengthening of the State's role in the economy, including in support of entrepreneurial recovery[39]. However, it is also true that a return to structural supervision logics – leading to the attribution to the State of the power to closely monitor the operators of the private sector – could reopen old problems in a new globalized market[40], eventually converting "strategic" companies into new limited-sovereignty corporations[41], in clear contradiction to established principles of economic and corporate law.

Rather, action should be taken to find incentives for market operators to remain under Italian ownership and to support the ecosystem in which strategic Italian companies are established. In fact, the main goal to be pursued seems that of placing Italian companies, both public and private, at the center of the next structural reforms, in order to support growth, infrastructure, research and innovation after the pandemic and energy crises[42]. This would require legislative initiatives in which strategic players must be actively involved, including towards a digitalization and modernization of the public administration, the innovation of the justice system organization, the strengthening of production chains, the digital and transitions, the strengthening of investments in training and research, etc.[43].

The aforementioned approach would allow to encourage the sense of belonging of Italian strategic companies, and therefore tie them to the territorial economy with full alignment of the interests at stake. Looking

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[37] On the fact that, as a result of the Lisbon Treaty of 2009, the European Union has exclusive competence over foreign investment under the common commercial policy see, among others, BERTOLI, *Tutela degli investimenti esteri e rilancio dell'economia italiana*, in *Dir. commercio internaz.*, 2020, 3 et seq.

[38] Reference is made to the European Commission's communication COM(2024) 22 final, dated January 24, 2024, titled *Advancing European economic security: an introduction to five new initiatives*, available on *www.eur-lex.europa.eu.*

[39] See, among others, URBANI, *La disciplina sulle moratorie e sulle garanzie pubbliche dei finanziamenti bancari tra Covid e post-Covid*, in *Banca Impresa Società*, 2022, 157 et seq.; CAPRIGLIONE, *Nuova finanza e sistema italiano*, Milan, 2016; CASSESE, *La nuova costituzione economica*, Bari, 2004; NAPOLITANO, *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali*, Bologna, 2012.

[40] See CAPRIGLIONE–SACCO GINEVRI, *Metamorfosi della governance bancaria,* Milan, 2019, 110 et seq.; RESCIGNO–RIMINI, *Golden power and coronavirus: regole per l'emergenza o per il futuro*, in *Analisi giuridica dell'economia*, 2020, 528 et seq.

[41] See MIGNOLI, *Interesse di gruppo e società a sovranità limitata*, in *Contr. e impr.*, 1986, 729 et seq.

[42] See CAPRIGLIONE, *Il dopo Covid-19: esigenza di uno sviluppo sostenibile*, in *Nuova giur. civ. comm.*, 2020, supplement no. 5, 26 et seq.

[43] See PELLEGRINI, *Innovazione tecnologica e diritto dell'economia*, in *Riv. trim. dir. econ.*, 2019, 40 et seq.; SEPE, *Innovazione tecnologica, algoritmi e intelligenza artificiale nella prestazione dei servizi finanziari*, in *Riv. trim. dir. econ.*, 2021, 186 et seq.

forward, this approach would also legitimate anti-takeover mechanisms – which would be then voluntarily implemented by national companies[44] – aimed at preserving the entrepreneurial advantages deriving from the connection with the reference State[45]. In this context, the national recovery would fit into a broader European development strategy in response to the global challenges fostered by the financial crises that affected all the relevant stakeholders[46].

5. CONCLUSIONS

The analysis of the FDI screening mechanisms offers a key perspective to observe the evolution worldwide of the law and economics approach in financial markets.

In this field, public and private interests traditionally act in conflict, since national security and other strategic goals pursued by the domestic jurisdictions, mainly driven by changing political bodies, may often jeopardize individual economic rights of business players and investors. Finding a balance between such conflicting objectives depends on several aspects which vary over the years in light of the whole global context evolution.

An improvement and extension of public powers vested with political bodies in this area could be a useful tool to contrast – in the short term – the risks that are commonly triggered by international financial crises, including protecting national "strategic" target issuers from hostile takeovers. At the same time, however, attracting foreign investments is a key tool to boost national economies and, in a global financial environment, a vital source of progress for new, modern and digitalized markets, especially in times of crisis when access to capital markets is key to favor a sustainable recovery of each country's economy[47].

Therefore, an effort is required to set a tentative distinction between the new rules and case-law which incorporate a genuine evolution of the FDI tools in the perspective of an efficient national-security protection, on the one hand, and those innovations which aim solely at empowering political bodies in charge with a significant role in specific transactions and relevant sectors in order to increase the governmental influence over financial markets and transactions, on the other hand. Indeed, indicating a net separation between such conflicting interests and evolving objectives can support observers and financial players in a delicate exercise aimed at avoiding the application of FDI rules to fully domestic transactions, as well as preventing the risk of unpredictable outcomes in this field, or duplication of processes and burdens for the same transaction by different authorities, as usually happens in recent cross-border M&A deals.

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[44] See ENRIQUES, *Per un diritto societario resistente alla pandemia*, in *Riv. dir. soc.*, 2020, 701 et seq.

[45] See SACCO GINEVRI*, I golden powers fra Stato e mercato ai tempi del Covid-19*, mentioned, 282 et seq.; ID., *Le società strategiche*, mentioned, 843 et seq.

[46] See CAPRIGLIONE, *Finanza e politica nell'UE dopo la pandemia. Verso un auspicabile incontro*, in *Contratto e impresa*, 2021, 171 et seq.

[47] See on this topic ROSSANO, *La finanza alternative nella Capital Markets Union*, in VV. AA., *Diritti e mercati nella transizione ecologica e digitale*, edited by Passalacqua, Padova, 2022, 427 et seq.

Given the above, there is no doubt that market operations nowadays find an additional interlocutor, no longer animated by proprietary logic as at the time of the entrepreneurial State, but acting as a gatekeeper of the essential interests of the country. In fact, in comparison to the previous "golden share", one of the most important aspects of the transition that characterized the evolution of the Italian "golden powers" lies in the fact that, as of today, the latter are potentially applicable to all companies operating in the national territory – irrespective of their public or private nature – to the extent that they own and/or manage assets which fall in one or more of the categories identified by the Italian legislator. This means that any update of the aforementioned regulatory framework may potentially imply that the scope of application of the State's special powers is extended from time to time to new companies which – prior to such amendments – were not affected at all by the governmental control. In particular, by introducing new provisions that widen either the number of strategic sectors or the triggering events of the special powers, the public authority can reach a larger perimeter of companies in order to safeguard the essential interests of the State and, at the same time, carry out a deep monitoring activity over the operations of the entities falling with the scope of application of its supervision. However, as a result of such legislative initiatives companies may suddenly become subject to strong constraints to their business activity – imposed from outside the company and its managerial and financial dynamics – which affect deeply their operations and can jeopardize the corporate and entrepreneurial interest of their shareholders.

Therefore, market operators are now called to perform complex due diligence exercises over their activities, assets and relations in order to assess if they may be attracted under the scope of application of the legal framework under analysis. In this respect, the circumstance that golden powers exist, and are frequently used, impose a careful evaluation of all resolutions, acts and transactions undertaken in order to avoid that the notification obligations and the compliance with the prescriptions and conditions imposed are breached, and thus prevent the application of burdensome sanctions.

Of course, the regulatory framework on "golden powers" still maintains – and indeed emphasizes – its main function of foreign direct investment screening mechanism in case of potential prejudice of the State's essential interests. However, a closer look reveals that there may be other effective legal devices to protect domestic target companies from hostile takeovers[48].

In this perspective, the analysis carried out in this paper – and the concerns raised by the widespread application of FDI screening mechanisms – suggest the need for new legislative initiatives that, instead of strengthening investment screening control systems, aim at implementing structural interventions that encompass legal mechanisms to allow protection of corporations' value even when their sustainable growth is

[48] See, for instance, SACCO GINEVRI, *OPA e delisting*, in *Riv. soc.*, 2022, 937 et seq., for an analysis of the proposed amendments to the Italian legal framework on the mandatory takeover bid. See also DROBETZ–MOMTAZ, *Antitakeover Provisions and Firm Value: New Evidence from the M&A Market*, in *Journal of corporate finance*, 2020, 1, who noted that anti-takeover measures do not necessarily depress the value of the firm that introduces them, but rather, in particular contexts "*may increase firm value when internal corporate governance is sufficiently strong*" also in view of the fact that "*takeover threats can induce myopic investment decisions, which ATPS can mitigate. They lead managers to engage more often in value-creating long-term and innovative investing, and increase a firm's sensitivity to investment opportunities*".

threatened due to adverse market situations[49]. This approach would also allow to avoid an excessive proliferation of "strategic" companies, and the consequent change in their operating scheme, in cases where this is not fully justified by the public interests concerned[50].

As a result, the role of the State would once again become consistent with the European principles of an open and integrated economy[51], in which the relationship between public and private sectors would be governed by entrepreneurial dynamics, therefore preventing an excessive recourse to the "golden power" and the State's intervention, which would be potentially detrimental for the positive outcome of the globalization process and the creation of a Capital Markets Union.

[49] For similar considerations see ENRIQUES, *Extreme times, Extreme measures: Pandemic-Resistant Corporate Law*, April 2020, available at *www.ssrn.com*, who – after having observed that since it is more difficult for European target companies (unlike in the United States) to defend themselves against hostile takeovers which are favored by stock market values distorted by systemic crises – notes that "*companies may have to heavily rely on governments to fend off hostile bids (and activism). Government protection, though, can only be relied upon in a subset of cases; and it's far from free. First of all, the target may not hold "strategic assets" that trigger a government's vetting powers. In addition, the bidder may be better connected with a government than the target company: geopolitics may even get in the way and lead a government to acquiesce to a hostile bid from a company from a given country to maintain good relations with its government. Further, political capital may have to be spent in order to secure a government veto, which may then come with formal or informal strings attached. Finally, governments can rarely intervene against activists, if the latter stay below the thresholds that trigger the former's veto rights*".

[50] See OPPO, *Diritto privato ed interessi pubblici*, mentioned, 39 et seq.

[51] See ALPA, *Solidarietà. Un principio normativo*, Bologna, 2022, *passim*.