CLEARY GOTTLIEB

ALERT MEMORANDUM

The Restless Italian FDI Landscape: a Snapshot of the Latest Developments

February 17, 2026

Over the past few months, the Italian FDI (the so-called "golden power") regime has once again witnessed multiple key developments that investors and potential targets should take into due account, notably:

- the Council of State overturned settled practice (also previously upheld by the lower courts), holding that the creation of a share pledge is subject to FDI notification only in limited circumstances (particularly, in case voting rights are transferred upfront to the secured creditor);
- for the first time, the Italian government reportedly cleared an acquisition subject to remedies consisting of a divestiture;
- the European Commission ("EC") opened infringement proceedings against Italy for the first time with respect to the Italian FDI regime; and
- relatedly, the Italian government has amended the FDI regime applicable to transactions in the financial sector.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

ROME

Giuseppe Scassellati-Sforzolini
+39 06 6952 2220
gscassellati@cgsh.com

Francesco Iodice
+39 06 6952 2697
fiodice@cgsh.com

Camilla Cozzani
+39 06 6952 2257
ccozzani@cgsh.com

Leonardo Fabio Fancello
+39 06 6952 2804
lfancello@cgsh.com

This memorandum summarizes these developments, and how these could impact future investments and transactions.

1. Revised case law on share pledges

Under the Italian FDI regime, the creation of a security interest over a "strategic" asset (as identified by the applicable FDI regulations) shall be notified to seek the government's clearance, provided that such security impacts the "control" or "availability" of the asset. Similarly, a pledge over the shares of a company holding such an asset has consistently been treated as a security interest subject to the same notification requirement.

However, it was unclear and debated at what stage and under what conditions a filing should be submitted, *e.g.*, whether at the time the security interest is granted or only thereafter, upon enforcement.

Certain public precedents suggested that a filing should be made already at the time the security interest is granted. This was also the conclusion reached by the Administrative Court of Latium in May 2024, in a case where the Italian government had cleared the extension of a share pledge over Cedacri S.p.A. as security for newly issued notes, subject to certain prescriptions. In that case, the court held that if the government review were required only upon enforcement of the security, such review may prove untimely: if the secured creditor were prevented from enforcing its security in connection with the FDI process, it would be deprived of its protection.

In December 2025, however, the Council of State overturned that judgment on appeal, holding that:

- the relevant consideration is whether the security entails, at the time of its creation, an *actual* change in control over the asset (or the company holding it);
- in the case of a share pledge, to the extent that the voting rights attached to the relevant shares remain with the shareholder at least until the occurrence of an event of default (as is customary for financing transactions) and the deed of pledge conditions enforcement on FDI clearance, there is no change in control yet, and thus no need to seek the government clearance at that early stage;
- conversely, if voting rights are transferred to the secured creditor at the time the pledge is granted, a change of control occurs at that stage already, and thus the pledge should be notified at that time.

This Council of State's decision has provided much needed clarity, at least as far as share pledges are concerned, and is expected to reduce the number of filings in these situations, thereby contributing to expediting the completion of financing transactions.

Based on the Council of State's reasoning, the same conclusion should extend to other types of security interests where there is no transfer of possession of the collateral, *e.g.*, a mortgage, in which possession of the collateral normally remains in the hands of its owner until enforcement / foreclosure.

2. Structural remedies: a first in Italy

In the merger control landscape, it is common for antitrust authorities to address major competition issues by requiring the buyer to divest certain assets (of the buyer or the target), *e.g.*, where there is an overlap in certain markets and thus the risk to restrict competition.

On the other hand, these concerns do not arise in the FDI context, whose ultimate goal is the protection of public order and public security. Therefore, at least in Italy, remedies (known as "prescriptions") have traditionally been behavioral in nature (*e.g.*, appointment of Italian nationals to certain key positions, restricting access to certain information, ensuring continuity in certain supplies, or maintaining certain operations in the Italian territory). Even where structural remedies have been imposed (*e.g.*, the sale of a minority interest in the target to a government-controlled entity), they have not extended to the divestiture of (control over) assets or operations.

Recently, however, the Italian government reportedly cleared the acquisition of Tinexta S.p.A. (an Italian digital technologies company), subject to the spin-off of the target's cybersecurity business unit into an *ad hoc* blind trust, to be subsequently sold to a third-party buyer to be approved by the Italian government.

The government prescriptions specifically address the creation and management of the trust,[1] the sale process,[2] and the operation of the spun-off business unit pending completion of such process.[3]

It is likely that the relevant sector (defense and national security) influenced the outcome of this case. Nonetheless, this precedent marks a significant development in the type of remedies that can be expected, and parties should therefore be advised to address this possibility in their transaction documents.

3. EU Infringement proceedings

In November 2024, UniCredit launched a tender offer over Banco BPM, subject to receipt of various regulatory clearances, including by the EC under the EU Merger Regulation ("EUMR"), the European Central Bank ("ECB") under the applicable prudential legislation (the Single Supervisory Mechanism Regulation), and the Italian government for FDI purposes.

The FDI clearance was issued in April 2025, subject to prescriptions that would largely apply to the merged bank upon completion of the transaction,[4] which stood in contrast with the EC's conditional merger control clearance.[5] UniCredit decided to abandon the transaction in July 2025 after an Italian court substantially upheld the government's decision. The EC has challenged the Italian government's course of action on two parallel fronts.

On the one hand, at first the EC questioned the compatibility of such prescriptions with the EUMR. In particular, pursuant to Article 21 EUMR, the EC has exclusive jurisdiction to review EU-dimension concentrations. While Member States retain the power to take appropriate measures to protect legitimate interests (other than competition), they are allowed to do so only in limited circumstances[6] and subject to specific procedural requirements. In this respect, the EC took the preliminary view in July 2025 that the prescriptions imposed on UniCredit could not be justified by any of the reasons set forth in Article 21(4) EUMR, including "public security" as defined by the case law of the European Court of Justice ("ECJ"), requiring a real and sufficiently serious threat to a fundamental interest of society). As a consequence, Italy should have complied with the prior notification and standstill obligations set forth in Article 21(4) EUMR. This proceeding is still pending, and it is unclear whether the EC intends to issue a decision, which would be binding on the Italian government.

In parallel, in November 2025, the EC also opened an infringement procedure under Article 258 TFEU challenging Italy's broad discretionary FDI powers to block transactions in the banking sector. In its

1 In particular, the government required that the trustee be designated by the buyers but approved by the government; and reserved for itself the right to also designate the trust's guardian, who will support the trustee and monitor the operations of the spun-off business unit as well as the sale process.

2 To be conducted with transparent and non-discriminatory means, for a price of no less than the relevant book value. The proceeds of the sale shall be paid to Tinexta S.p.A., net of the trust's expenses.

3 These include a prohibition for Tinexta S.p.A. (and, indirectly, its new controlling shareholders) to exercise its voting rights or otherwise affect the management of the spun-off business unit; a restriction from access to information other than as strictly necessary to draw the accounts; an obligation to ensure that the spun-off business unit continue to be managed by its existing management and that the revenues be invested in the business and not distributed upstream.

4 Consisting of the obligation (i) not to lower the loan-deposit ratio of UniCredit and BPM Italy below the current ratio for the next 5 years; (ii) not to reduce the UniCredit and Banco BPM's project finance portfolio in Italy below the current level; (iii) to ensure that Anima SGR (an asset manager controlled by Banco BPM) did not reduce its investment in Italian government bonds for 5 years; and (iv) to discontinue UniCredit's Russian operations within 9 months.

5 The EC cleared the acquisition for merger control purposes subject to the divestiture of some 200 branches.

6 In particular, Article 21(4) EUMR provides that, prior to taking any such measure, Member States shall first notify the EC and wait for its authorization (except where the relevant legitimate interests are public security, media plurality or prudential rules).

formal notice,[7] the EC found Italy in breach of the Single Supervisory Mechanism Regulation ("SSMR"), the Capital Requirements Directive ("CRD IV"), and Articles 49 (freedom of establishment) and 63 (free movement of capital) of the TFEU.

Italy was given two months to respond and reportedly did so in late January 2026. The EC is currently reviewing Italy's response and the recent amendments to its FDI golden power regime (see Section 4, below). If the EC is satisfied with Italy's response, it may close the proceedings without further action. Otherwise, it may issue a reasoned opinion, the next formal step in the infringement procedure. As a last step, the EC may bring a complaint against Italy to the ECJ, whose judgment is binding on the parties.

4. Amendments to the FDI rules in the financial sector

Reportedly with a view to addressing the concerns underlying the mentioned objections raised by the EC, in January 2026 the Italian Parliament introduced certain changes to the FDI rules applicable to the review of transactions in the financial (including banking and insurance) sector, notably:

- if a transaction is subject to the authorization of the EC for competition assessment and/or the ECB for prudential purposes, then the Italian government cannot conclude its "golden power" review and possibly exercise its powers (*i.e.*, clearing the transaction subject to remedies or vetoing it) until that EU institution's review has ended;
- accordingly, the FDI notification deadline for a financial sector transaction to be submitted to government review is also suspended pending the applicable EU authorizations;
- importantly, the amendment expressly states that, in verifying whether public order or public security may be jeopardized, the government is authorized to consider "*national economic and financial security*", to the extent the protection of the State's essential interests is not suitably ensured by the EU regulatory reviews. This appears to depart from the established ECJ case law, which has ruled out that public security extends to economic considerations.

Regardless of whether these changes are deemed adequate to ensure compatibility with EU law, the impact of this reform is that the timeline of transactions in the financial sector will be considerably extended, as it will no longer be possible for the Italian "golden power" review to run in parallel with other regulatory reviews.

In addition, as noted, this rule applies not only when the ECB is involved (which by definition may occur only in the banking sector), but more generally also in case the EC is involved in the merger control review of a transaction. Because the EC's review does not depend on the relevant market but only on whether the applicable turnover thresholds are met, this provision will cause a different treatment of transactions:

- if the acquisition concerns a target active in a non-banking sector, such transaction will benefit from a "faster track", since the EC review would not suspend the Italian government review;
- by contrast, if the target is active in the financial sector, the Italian government would need to wait for the EC (and possibly the ECB)'s review before it can start its own "golden power" assessment.

…

CLEARY GOTTLIEB

[7] INFR(2025)2152.