

NOT EVERY SHARE PLEDGE ENTAILS THE TRANSFER OF A STRATEGIC ASSET: ITALY’S HIGHEST COURT REDEFINES THE GOLDEN POWER BOUNDARIES

Authors: Enzo Marasà (partner), Alessandro Tanno (partner), Daniel J. Giuliano (associate)

The highest Italian administrative court, the Consiglio di Stato (the “**Council of State**”), recently ruled¹ that pledges over shares do not require notification under Italian foreign direct investment regulations (“**FDI Regulations**”)² if the voting and other administrative rights over the pledged shares remain with the pledgor. This decision overturns a previous ruling issued by the lower Regional Court and sets an important precedent with regards to the Italian FDI notification approach in debt transactions.

FACTUAL BACKGROUND

Cedacri S.p.A. (“**Cedacri**”), part of the ION group, provides outsourcing and digital transformation services to banks and financial institutions.

In May 2023, Cedacri’s board approved the issuance of a variable-rate bond, primarily aimed at distributing extraordinary dividends to shareholders. As security for the loan, the company agreed to extend existing pledges — previously approved by the Italian Government under FDI Regulations in connection with the acquisition of Cedacri by ION — over all shares held by its shareholder (DGB).

Amongst others, the deed of pledge provided that:

- Voting, administrative and economic rights would remain with the debtor unless an event of default occurred
- Upon the occurrence of an event of default, creditors could exercise rights over Cedacri’s shares subject to prior notification and approval by the Government under FDI Regulations.

Shortly thereafter Cedacri notified the pledge extension to the Government under FDI Regulations. The Government, after extensive investigation, responded by exercising its prescriptive powers³ and imposed two limitations. First, Cedacri was required to use the bond proceeds – secured by the pledge extension on its shares and bank accounts – exclusively to finance investments outlined in its industrial plan and any additional investments necessary to ensure the continuity, development, and strengthening of its strategic assets, rather than dividend distribution. Second, Cedacri was required to submit quarterly reports to the competent administration demonstrating compliance with the abovementioned requirement.

FIRST INSTANT JUDGEMENT

Cedacri challenged the Government’s decision before the competent Regional Administrative Court (TAR Lazio), arguing, inter alia, that the transaction at stake did not fall under FDI Regulations as the pledge agreement expressly reserved voting, administrative and economic rights to Cedacri as pledgor, with creditors potentially acquiring such rights only upon an event of default. Accordingly, the pledge extension did not entail any change of control over Cedacri’s strategic assets.

¹ Cons. Stato, Sez. IV, Decision No. 9619 of December 5, 2025.

² Legislative Decree No. 21 of March 15, 2012, as subsequently amended; and the implementing provisions contained in Prime Ministerial Decree (D.P.C.M.) No. 179 of December 18, 2020.

³ Prime Ministerial Decree (D.P.C.M.) of July 27, 2023.

The Regional Court rejected Cedacri's challenge, holding, amongst others, that the establishment of security inevitably affects the debtor's availability of, and control over, assets, as pledged shares remain subject to creditors' satisfaction, and postponing notification until enforcement would make FDI Regulations ineffective as at that stage dispossession would occur automatically, making preventive oversight impossible. The Court further held that the contractual reservation of voting, administrative and economic rights to Cedacri did not undermine such conclusions, as the pledge agreement could be modified through subsequent amendments granting creditors additional prerogatives capable of affecting the company's activities.

COUNCIL OF STATE'S JUDGEMENT

In appeal, the Council of State confirmed that the business carried out by Cedacri falls within the scope of FDI Regulations.

However, the Council disagreed with the Regional Court's position regarding the need to notify the transaction at stake. Distancing itself from the Regional Court, the Council emphasized that, to be relevant under Italian FDI Regulations, transaction must actually or imminently produce changes to governance structures.

According to the Council of State, such governance changes are neither actual nor imminent in the case at hand, since voting and other administrative rights over the pledged shares remain with the pledgor pursuant to the contractual arrangements governing the pledge. The pledge produces no consequence on corporate control or asset availability until the occurrence of an event of default. Only in such circumstances the pledge can be enforced, and only then does the requirement to notify the Government under FDI Regulations arise. The Council also addressed the Regional Court's argument regarding enforcement mechanics: while Italian law provides for creditor self-enforcement remedies upon the occurrence of an event default, these provisions are not mandatory and were expressly derogated in Cedacri's pledge agreement. Indeed, the parties agreed that any ownership transfer of the pledged shares would be subject to the condition precedent of prior clearance under FDI Regulations.

THE IMPACT OF EU LAW ON THE COUNCIL'S DECISION

The Council made clear that the decision's foundation lies in EU law. Indeed, the European Court of Justice has held that national FDI limitations constitute a restriction on freedom of establishment, and such restrictions are permissible only when justified by imperative reasons of general interest and must be strictly proportionate to the objective pursued⁴. From an EU perspective, regulatory certainty is crucial: businesses require legal predictability, especially when structuring strategic transactions.

The Council reinforced this position by referencing Article 41 of the Italian Constitution. The Constitutional Court has consistently held that restrictions on private economic initiative require genuine justification based on constitutional values, such as labor, health, and environment.

Both EU and Italian constitutional principles demand a strict interpretation of FDI Regulations, ensuring that relevant restrictions on establishment and economic freedoms are proportionate and aimed at protecting genuine public interest.

⁴ ECJ, 13 July 2023, C-106/22, X.M. Kft.

An expansive interpretation would risk rendering Italian law incompatible with EU principles and would enable the Government to impose sweeping monitoring measures on strategically important companies, transforming a security mechanism into a market control instrument.

TAKEAWAYS AND IMPLICATIONS

The Council of State's decision is significant in several respects. The principal interpretative guidance that can be applied in day-to-day practice is that notification under FDI Regulations is not required where the transaction consists of establishing or extending pledges and voting and other governance rights remain with the pledgor.

This restrictive interpretation is grounded in EU and Italian constitutional principles. The underlying rationale is that, pursuant to such principles, a transaction triggers notification requirements under FDI Regulations only where it produces an actual or imminent change of control. Conversely, where the change of control remains merely potential and contingent upon future circumstances, notification is not required at the time of establishment of the pledge but becomes due when such circumstances materialize.

This interpretation may influence the Government's approach when assessing whether a transaction falls within the scope of FDI Regulations, and it cannot be excluded that a similarly less restrictive approach may be applied to other types of transactions.

While the decision provides welcome clarity regarding notification requirements in debt transactions, certain drawbacks merit consideration. Where a company operates in strategic sectors and pledges are notified (and potentially cleared) only upon the occurrence of an event of default rather than at the time of the creation of the pledge, creditors may face considerable uncertainty.

Therefore, while it is welcome that pledges over shares are not automatically notifiable at the time of creation, creditors retain an interest in knowing whether or under what conditions the execution of the pledge would be cleared before it is mandatorily notifiable. However, as a result of this judgement and at the status of the FDI regulatory and procedural framework in Italy the Government may reject or simply refrain from responding to any formal or informal notification of a pledge, prior to the default event, aimed at seeking the Government's preliminary views or at obtaining a comfort on the possible outcome.