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Para Carlota, por toda su paciencia.

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ABBREVIATIONS

CEO	Chief Executive Officer
Covid-19	Coronavirus disease 2019
EC	European Commission
ECJ	European Court of Justice
ENDESA	Empresa Nacional de Electricidad S.A.
ENEL	Ente Nazionale Per l´Energia
EON	Energy On
EU	European Union
FDI	Foreign Direct Investment
IFM	Australian global infraestructure fund
PRISA	Promotora de Informacions, S.A.
STC	Saudi Telecommunication
UK	United Kingdom

Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you is worth savin'
And you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'

Bob Dylan

I. ECONOMIC PROTECTIONISM IN EUROPE: AN INTRODUCTION

Rodrigo Buenaventura, the president of the Spanish National Securities Market Commission[1] said loud and clear on the Spain Investors Day (23/06/2022) " *I am aware that many interests have to be weighed up in this area, and that it is up to the government to look after the general interest, but from the point of view of the stock market and the interests of shareholders and investors, international openness is a value in itself. It will therefore be positive if the standardisation of market parameters allows for a standardisation of the regime of control of foreign investments in Spanish listed companies*"[2].

His words are the response to the decision of the Spanish government to extend and harden the so-called takeover shield on strategic companies[3]. This measure was introduced in the darkest days of the pandemic (March of 2020) and required that investors willing to obtain more than the 10% of a Spanish company, shall obtain an

[1] Comisión Nacional del Mercado de Valores, ` CNMV functions´ < CNMV - CNMV functions> Accessed on 04/06/2023: *The National Securities Market Commission (CNMV) is the body responsible for the supervision and inspection of Spanish securities markets and the activity of all those involved in them […] The aim of the CNMV is to ensure the transparency of Spanish securities markets and the correct formation of prices, as well as the protection of investors.*
[2] Pablo Martín Simón y Manuel Granda, `La CNMV sugiere que se retire el escudo antiopas sobre las empresas españolas´ *Cinco Días* (Madrid, 13 Jan 2022) < La CNMV sugiere que se retire el escudo antiopas sobre las empresas españolas | Mercados Financieros | Cinco Días (elpais.com)> Accessed 06 Jun 2023
[3] *Ibid*

approval of the government if the target company is in a strategic sector such as energy, telecommunications or healthcare.

The measure was done to protect important strategic companies that like Naturgy (energy), PRISA (communications) or Telefónica (telecommunications) were suffering a drop in the stock market and therefore were exposed to opportunistic buyers[4].

At the beginning, the measure was only applied to investors based outside the European Union (the EU), but later the government ended up extending the shield also to European investors. This measure had a temporary nature, and it was approved in the context of a situation of abnormality. However, and even if the Covid times are deemed to be surpassed, the measure was extended in time, first until the end of 2022 and lastly until the end of 2024[5].

In France and Italy, similar rules were introduced and during 2021[6], it was sounded how the Italian government of Mario´s Draghi vetoed three Chinese takeover attempts in a row[7].

However, even if this measure can be justified under the troubled times of Covid, those with a better economic memory will agree that since the liberalizations in the 90´s, Member States have been reluctant to foreign investors acquiring control stakes on strategic companies or "national champions" with a strong national identity (a lot of the times the same company can be both).

In that regard, and after a thorough research carried by DINC and EREL[8], the scholars could only conclude that European governments are more likely to support domestic acquirers and oppose foreigners: "*Most importantly for our analysis 75,7 % of all mergers*

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[4] Agustín Marco, `Moncloa alarga el escudo antiopas para blindar a Telefónica, energéticas y Prisa´ *El Confidencial* (Madrid, 12 Dic 2022) < Moncloa alarga el 'escudo antiopas' para blindar a Telefónica, energéticas y Prisa (elconfidencial.com)> accessed 31 Dec 2023

[5] Álvaro Bayón, ` El Gobierno prorrogará dos años el escudo antiopas sobre los sectores estratégicos´ *Cinco días* (Madrid, 12 Dic 2022) < El Gobierno prorrogará dos años el escudo antiopas sobre los sectores estratégicos | Empresas | Cinco Días (elpais.com)> accessed 06 Jun 2023

[6] Francesca Prenestini, `Golden Power and Anti-Takeover Corporate Mechanisms´(2022) 19 European Company and Financial Law Review 591, 560

[7] Giuseppe Fonte and Ella Cao, ` Italy´s Draghi vetoes third Chinese takeover this year´ *Reuters* (Rome, 23 Nov 2021) < https://www.reuters.com/markets/deals/italys-draghi-vetoes-third-chinese-takeover-this-year-2021-11-23/> accessed 06 Jun 2023.

[8] Serdar Dinc and Isil Erel, ´Economic Nationalism in Mergers and Acquisitions` (2013) 6 The Journal of Finance 2471, 2480

attempts that are resisted by the governments are initiated by foreign acquirers while only 17,1% of the bids supported by the governments are foreign bids"

Even more enlighten is another conclusion that the scholars reach after the research: the chances of the success of a takeover decrease when there is an opposition of the government, whereas governmental support increases the chance[9].

As explained by Spanish professor ANIBAL SÁNCHEZ, takeover have been portrayed as raids or felonious attacks in the national imaginary [10]. Thus, each country has its own nationals' fables where heroic domestic companies repelled, in fierce battles, foreign companies painted as invaders[11].

These fables can be explained under the effects of takeovers in national economies. In addition to strategic arguments (such as ensuring the supply of energy), other national interest of member states weight in. This is clearly showed by the fact that there is a positive correlation between the possibility of facing government opposition and the number of domestic jobs in jeopardy[12].

In this regard, States can also adopt extra-legal measures to hinder a foreign takeover. Two of these predominant strategies are a "*moral persuasion*" and the search of a more friendly "white knight"[13].

In the first one, the government tries to hinder the takeover by clearly stating that they are against it. Therefore, even if the government does not have actual legal backgrounds to stop it, the possibility of having to deal with an unfriendly government can be a dissuasive factor.[14]

In the second one, we can find plenty of cases where the government had orchestrated alternative bids with offerors that enjoyed governmental support. For example, the French

[9] *Ibid*
[10] Anibal Sánchez Andrés, `Sobre los modos de oposición a una Opa Hostil: Blindajes y otras medidas defensivas´(2003) 8 Revista Jurídica Universidad Autónoma de Madrid 331, 341
[11] *Ibid* The author quotes, for example, the takeover between the British company ICI against Courtland, the French BSN against Saint Gobain and also the Vodafone and Mannesmann.
[12] Maximilian Rowoldt and Dennis Starke, `The Role of Governments in Hostile Takeovers-Evidence from Regulation, Anti-takeover Provisions and Government Interventions´ (2016) 47 International Review of Law and Economics 1, 2
[13] Serdar Dinc y Isil Erel (8), 2476
[14] *Ibid*

government avoided the buy-out of Aventis by Novartis (Swiss group) strongly supporting an alternative takeover carried by French Sanofi[15].

Another prominent case can be found in Spain: When the German electricity company E.O.N. launched a takeover bid to acquire control of ENDESA (Spanish largest electricity company), the Spanish government, openly hostile to the offer, hindered the German offer and coordinated a rescue mission that ended with ENDESA being bought by the Acciona (Spanish company) and ENEL (Italian company)[16].

Going back to where we started, the measures adopted in the different legislation throughout the pandemic are not remotely the first glimmers of economic protectionism in Europe. In that sense, due to fierce opposition from the member states, the European Commission ("EC" or "the Commission") had to water down with optionality rules a Takeover Directive that, in an attempt to open the European market, tried to eradicate from Europe the defence mechanism against takeovers. At the same time, the European Court of Justice ("the Court" or "the Court of Justice") had to, in a herculean way, gradually narrow the scope of the golden shares, used by governments to entrench control in strategic companies.

Thus, the governments have historically used their legal system to protect their strategic companies.

Therefore, the purpose of this thesis is to conduct a journey through the economic protectionist regulations adopted by the member states when dealing with foreign investor, which will necessarily end in the measures adopted in the pandemic.

Only then we will be able to provide a view of the European horizon, as one might wonder if the protectionism is coherent with the idea of the European Union or if these measures are ultimately justified when foreign funds seem to be shopping in the internal market.

[15] Anibal Sánchez Andrés (10) 341

[16] Joe Ortiz, `Endesa deal spurs political war´ *Reuters* (Madrid, 9 Aug 2007) Endesa deal spurs political war | Reuters and also look at footnote 233 at G Ferrarini, GP Miller. "A Simple Theory of Takeover Regulation in the United States and Europe" (2009) 42 Cornell International Law Journal,

II. THE FAILURE OF THE TAKEOVER DIRECTIVE OR *A CHRONICLE OF A DEATH FORETOLD.*

1. Takeover regulation and economic protectionism.

In the European Union, takeovers are regulated by the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2002] OJ L 142/12 ("the Takeover Directive" or "the Directive").

The definition of takeover bid can be found in article two of the Directive, which reads as follow:

'takeover bid' or 'bid' shall mean a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law;

Like any directive it is binding, and it sets the result that the European legislator wants to achieve, leaving to the domestic authorities the choice of forms and methods to implement the result in the national legislation[17].

The European Commission efforts to reach such directive started in 1989 and, in reality, the desire to have a common regulation of takeover in the European Union is consistent and keeps a correlation with the integration effort that took place in so many different areas within the single market journey. In that regard, the Commission White Paper of 1985[18], whose purpose was to "*spell out the programme and timetable*" for the achievement of the single market and that lists some of "*the essential and logical*

[17] Article 288 of the Treaty on the Functioning of the European Union.
[18] European Commission, `Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985)´ COM (85) 310 < [completing the internal market: white paper from the commission to the european council (milan, 28-29 june 1985) - Publications Office of the EU (europa.eu)]>

consequences of accepting that commitment", includes the proposal for a directive on takeover bids.

In words of KNUDSEN[19]:

"*Securing a legal framework for takeovers can therefore be seen as a major building block in order to establish a single European market*".

The idea was to strengthen and make more competitive the European Union by opening the European market for control and integrating the national economies throughout the facilitation of takeovers[20].

To do so, it was necessary to harmonise the different legal system around the idea that anti frustration rules tying down the power of the board to resist a takeover were needed[21].

It is crucial to understand that governments can influence the result of a foreign takeovers by direct intervention, yes, but also throughout the takeover regulation. Governments can use the takeover regulation to restrict the openness of the national takeover market to foreign bidders[22].

Thus, in the different Member States, there were mechanism in place that allowed companies to defend themselves and thus, reduce the takeover activity.

Facilitating takeovers was, therefore, the purpose and aim of the Takeover Directive[23]. Needless to say, this aim was accompanied by other accessory principles, that naturally

[19] J.S Steen Knudsen, \`Is the Single European Market an Illusion? Obstacles to Reform of EU Takeover Regulation´ (2005) 11 European Law Journal 507, 508. In that regard also see Thomas Papadopoulos, *EU Law and the Harmonization of Takeovers in the Internal Market* (Wolters Kluwer 2010) 113: *The establishment of a level playing field in the EU market in corporate control has long been vitally necessary, since only this could lead to market integration.*

[20] Matteo Gatti, \`Optionality Arrengements and Recirpocity in the European Takeover Directive´ (2005) 6 European Business Organization Law Review 553,556 and KJ Hopt, \`Obstacles to corporate restructuring: observations from a European and German perspective´. In: Tison, M., De Wulf, H., Van der Elst, C., Steennot, R. (Eds.), Perspectives in Corporate Law and Financial Regulation (2009 Cambridge University Press) 373, 37

[21] The first proposal for a takeover directive (1989) stated that the board of directors could not issue shares or "*engage in transactions which do not have the character of current operations concluded under normal conditions*" without the approval of the approval of the shareholders.

[22] Maximilian Rowoldt and Dennis Starke (12) 1

[23] KJ Hopt, \`Obstacles to corporate restructuring: observations from a European and German perspective´(20) 37

flowed from the main purpose, such as the protection of the minority shareholder, the legal certainty and the need to achieve a "*level playing field* [24]".

However, the achievement of the Takeover Directive, was not a smooth ride and it took almost fifteen years, a conciliation procedure between the European Parliament and the European Council, the rejection of the European Parliament and the creation of the High-level Group of Company Law Experts to finally adopt it on 21 April 2004[25].

The High-level Group of Company Law Experts was created by the Commission once the directive failed to be approved on the Parliament. The objective of the Group was to provide a solution to the main issues raised by Member States. It was led by professor Jaap Winter and they issued a document (`The Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids 2002´) that was used as the starting point for negotiations.

With such determination from the Commission and the noble purposes flagged up, one may ask how is it possible that HOPT[26] concluded laconically "*The number of member states implementing the directive in a seemingly protectionist way is unexpectedly large*" ,or how could the -at the time- Internal Market Commissioner, Frits Bolksetin state that the Directive "*is not worth the paper it´s written on*" since it was an example of national protectionism[27].

This question takes on even greater relevance if the fact that there is a directive (harmonization instrument) in place is taken into consideration, which in addition contains two powerful mechanisms that hinders the frustration of takeovers: the board neutrality (art 9) and the breakthrough-rule (art 11).

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and later recognize by the European Commission `Report on the Implementation of the Directive on Takeoever Bids´ COM 2012/0347 < [LexUriServ.do (europa.eu)]>

[24] Paul Davies, Edmund-Philipp Schuster and Emilie van de Walle de Ghelcke, `The Takeover Directive as a Protectionist Tool?´ (2010) 141, European Corporate Governance Institute 20, 2 and

[25] For a more detailed explanation of the process see Vanessa Edwards, `The Directive on Takeover Bids-Not worth the Paper It´s written on? (2004) 4 European Company and Financial Law Review 416, Thomas Papadopulos 111-114 and J.S Steen Knudsen (19) 509-511

[26] Hopt, K,J. "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" 20.2 Columbia Journal of European Law 249, 255

[27] Vanessa Edwards, `The Directive on TakeoverBids-Not worth the Paper It´s written on? (25) 417 .

It is clear that economic protectionism showed its maw, and the member states opposed to leaving their companies unarmed. However, how were they able to do it, will be answered in the next section[28].

2. The Takeover Directive 2004/25/EC:

In the novel of Garcia Cortazar "*A Chronicle of a Death Foretold*", the reader knows from the beginning that Santiago Nasar, the main character, is going to be killed, and therefore what remains of the novel will be the explanation of how Santiago has ended in such pickle.

The same happens here, the reader already knows that the Takeover Directive was a failure when compared to the objective it was intended to achieve. In reality, any keen observer, when the different member states started to rally against the Commission, could have inferred that he was before the chronicle of a death foretold and that the Takeover Directive, as proposed, was never going to succeed.

Therefore, the aim of this section is to explain how the opposition of the European governments emptied of content the Takeover Directive and how the actual legal framework for takeover remains.

In order to achieve that conclusion, in the next sections an overview of the following precepts of the Directive is going to be given:

- The board neutrality (art 9)
- The breakthrough rule (Art 11)
- The options rules (art 12)

2.1 The board neutrality

[28] Marco Becht, `Reciprocity in Takeovers´ (2003) Working Paper Nº 14/2003 European Corporate Governance institute, 3

According to article 9 of the Directive, the board of directors shall obtain the authorisation of the general meeting of shareholders before taking any action, other than seeking alternative bids, which may result in the frustration of the bid.

Regarding the actions, the article makes a particular mention to the issuing of shares that could prevent the offeror form seizing control.

The Spanish legislator, for example, went beyond the Directive and specified other defensive actions that could not be taken without the approval [29]:

In particular, they may not:

(a) Agree to or initiate any issue of securities that may impede the success of the bid.

b) Carry out or promote, directly or indirectly, when this may impede the success of the bid, transactions in the securities to which the bid relates or in others, including acts aimed at encouraging the purchase of such securities.

c) To dispose of, encumber or lease real estate or other corporate assets, when such transactions may impede the success of the bid.

d) Distribute extraordinary dividends or remunerate shareholders or holders of other securities of the offeree company in any other way that does not follow the usual policy of distributing dividends, unless the corresponding corporate resolutions have been previously approved by the competent corporate body and made public.

This rule constitutes what is called the neutrality, passivity, or anti-frustration rule[30] because it is aimed to prevent the board of directors from taking defensive measure that could hinder the result of the takeover.

This rule comes from the UK where it has been applied since the late 60s and therefore it is a well-established institution in the City of London[31].

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[29] Art 28 of Real Decreto 1066/2007, de 27 de julio, sobre el régimen de las ofertas públicas de adquisición de valores.

[30] Maximilian Rowoldt and Dennis Starke, (12) 3

[31] Carsten Gerner-Beuerle, Davis Kershaw and Matteo Solinas, `Is the board neutrality rule trivial? Amnesia about corporate law in European takeover regulation´ (2011) LSE Legal Studies Working Paper No.3/2011, 2

The *rationale* of this rule is the misalignment that a takeover can create between the board and the shareholders[32]. Due to the fact that the directors can lose their position after the takeover, they are incentivised to entrench their position, seek the failure of the latter and, in essence, don't act in the best interest of the shareholders in order to protect themselves[33].

In addition, it is argued that the decision to tender (and at what price) in the event of a takeover should only concern the shareholders, who at the end of the day are the ultimate owners of the securities[34]. Therefore, the shareholders shall have the right to decide solely on the merits of the bid and is not the administrators place to prefer a bid nor decide if a takeover must succeed[35].

However, the article leaves a little room for manoeuvres, and the board of directors[36] can: seek for an alternative bid and obtain the approval from the shareholders[37].

The first option is referred to, in the textbooks and the legal practice, as the search for a "white knight". The search of the white knight is allowed because it is perfectly compatible with the passivity rule. If the goal of the latter is to protect the interest of shareholders, no problem should arise when the board finds another bid for a better price

[32] Maximilian Rowoldt and Dennis Starke (12)
[33] KJ Hopt, `Obstacles to corporate restructuring: observations from a European and German perspective´. (20) 376-377, see as well Maximilian Rowoldt and Dennis Starke (12) and John Armour and David A. Skeel Jr ¨Who wites the Rules for Hostile Takeovers and Why?- The peculiar Divergence of U.S and U.K. Takeover Regulation (2007) 95 The Georgetown Law Journal, 1727, 1733-1734 but more importantly Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids < Internal Market - Company Law - Final Report iof the High Level Group of Company Law Experts (ecgi.global)> (2002) < 21: "*Most importantly, managers are faced with a significant conflict of interests if a takeover bid is made. Often their own performance and plans are brought into question and their own jobs are in jeopardy. Their interest is in saving their jobs and reputation instead of maximising the value of the company for shareholders. Their claims to represent the interests of shareholders or other stakeholders are likely to be tainted by selfinterest"*
[34] Carsten Gerner-Beuerle, Davis Kershaw and Matteo Solinas (31)
[35] Report of the High-Level Group of Company Law Experts on Issues Related to Takeover Bids (33) and David Kershaw, *Principles of Takeover Regulation* (Oxford 2016) and Knudsen (19)

[36] Please note art 6.2 of the Directive: *For the purposes of paragraph 2, where a company has a two-tier board structure 'board' shall mean both the management board and the supervisory board.*
[37] Regarding the authorisation of the general meeting, it must be stated that, for example, in Spain, the regulation prior to the implementation of the directive was stricter, as it did not even allow the board of directors to consult the general meeting on the possibility to prevent the success of the takeover bid, see Isabel Fernandez Torres, "Luces y Sombras en la Reforma de OPAs: El Papel de la Junta General en Relación con las Medidas Defensivas (2008) Documentos de Trabajo del Departamento de Derecho Mercantil, 15

that maximise the shareholders benefits[38]. It can also be argued that there is no need for authorisation because the search of another offer just gives the shareholders another choice but does not actually hinder the original bid[39]. In essence, the search of a white knight cannot be considered as an actual defence mechanism[40].

Regarding the White Knights, two interesting debates arise. The first one deals with whether or not the board bears the obligation of looking for a white knight that could maximize the benefit of shareholders taking into consideration that they duty is to always act in the best interest of shareholders[41].

The second issue is the need to specify in the directive that only the search of non-coercive offers is compatible with the neutrality rule. As explained by MUCCIARELLI, in takeover bids the shareholders can face actions problems (e.g., not being able to coordinate) that pressure them to tender.[42] Therefore some bids can be coercive, which by all means will be contrary to the board neutrality[43].

This prior approval, that can be granted if the shareholders find the offer detrimental, represent the consent of the legitimate interested parties and therefore dismantles the agency problems that explain the need of the board neutrality. Not for nothing, the ultimate goal of the Directive is to shield shareholders from the directors' opportunistic behaviours by assuring that shareholder, who are ultimately the owners, have the last word when deciding on the future of their company[44].

The directive does not state any formal requirements for acquiring the consent of the shareholders, leaving the decision in the Member State hands. In that regard, under

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[38] Federico M. Mucciarelli, `Does the search for competitive bids always benefit the shareholders of "target companies"?´ (2006) 3 European Company and Financial Law Review

[39] *Ibid*

[40] *Ibid*

[41] Against it KJ Hopt, `Obstacles to corporate restructuring: observations from a European and German perspective´ (20) (it must be stated that the author makes a distinction when: "there is a firm evidence of having a chance to get an improved offer from another serious potential bidder") and in favour Isabel Fernandez Torres (37)

[42] Federico M.Mucciarelli (38)

[43] *Ibid*

[44] *Ibid, 45*

Spanish law, in order to obtain a true reflection of the will of the shareholders, the "*reinforced quorum for special cases*" is need [45].

Lastly, it should be mentioned that section 5 of the article imposes to the board the obligation of issuing and making public a reasoned opinion on the bid (in favour or against), "*including its views on the effects of implementation of the bid on all the company´s interests*[46]". The idea behind it is clear: since the board as insiders have more information about the situation of the target, they should issue an opinion that enables the shareholders to make an informed decision[47].

Therefore, the board can use this instrument to show their opposition, however the reasoned opinion cannot be a purely subjective opinion and must be detailed and reasoned[48].

In fact, for many scholars, the term "board neutrality" is not strictly correct and to a certain point misleading since the board must give their opinion and is entitled to search for a more favourable candidate[49].

However, in this thesis we will use the aforementioned term, and the term board neutrality must be understood as the incapacity of the board to repel a takeover throughout defence mechanisms without the approval of shareholders.

In order to assure that the opinion is a true assessment, in Spain the opinion of directors dissenting from the majority should be incorporated in the opinion[50] and in Italy the independent directors must issue a separate opinion[51].

[45] This quorum is established in article 194 of the Ley de Sociedades de Capital and it is mandatory for situations that are considered of vital relevance such as amendment of the article of association, increase or reduction of the capital, relocation, abolish or limit the pre-emptive right to acquire new shares…
[46] Art 9.5 of the Directive
[47] Javier Garcia de Enterría, `El informe sobre la OPA del órgano de administración de la sociedad afectada en Derecho español´ (2012) 27 Advocatus 27, 28.
[48] Art 9.5 of the Directive and art 28.4.b of the Real Decreto 1066/2007, de 27 de julio, sobre el regimen de las ofertas públicas de adquisición de valores.
[49] Carsten Gerner-Beuerle, Davis Kershaw and Matteo Solinas, (31)

[50] Art 29 Real Decreto 1066/2007, de 27 de julio, sobre el régimen de las ofertas públicas de adquisición de valores
[51] KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26)

A certain contradiction can be perceived on the part of the European legislator in this regard. One can only agree with CLARKE[52], because it is odd to introduce the board neutrality under the assumption that the misalignment caused by the takeovers will make them confront the transactions solely for selfish reasons, but then expect them to give advice in the form of an objective opinion.

2.2 The breakthrough rules.

The neutrality rule was not happily welcomed by Member States when it was introduced in the Takeover Directive proposal of 1996.

For example, The Netherlands, who had a long tradition of using the "Dutch foundations" (independent entities created to hold shares and therefore political rights) as a defence mechanism, was a strong opponent of the Directive[53].

The German opposition is without a doubt paradigmatic. It is important to remember that Schröder, the social democrat chancellor of the moment, was one of the strongest supporters of the Takeover Directive[54]. However, everything changed when Vodafone acquired the German company Mannesmann throughout a hostile takeover and when Ford Motor Company showed interest in buying the legendary Volkswagen[55]. The mindset drastically changed in Germany, the support of the Directive faded and Schröder promised the Volkswagen workers at a factory in Lower Saxony, that the government would repeal the American threat[56].

From that moment, Germany took to the hills, drifted apart from the common position reached in the Parliament and became the leader of a group of rebels that opposed the proposed Directive in the European Parliament[57] .

[52] Blanaid Clarke, Reinforcing the Market for Corporate Control (2010) Research Paper No. 39/2010 University College of Dublin 10

[53] As stated by Vanessa Edwards in Vanessa Edwards (25) 422: *The Netherlands also opposed the 1996 proposal. In the Netherlands target companies enjoyed a number of defensive tactics for frustrating a hostile bid, as a result of which there had never been a successful hostile bid.22*

[54] KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26)

[55] Jonathan Mukwiri, `The End of History for the Board Neutrality Rule in the EU´ (2020) 21 European Business Organization Law Review, 253

[56] J.S Steen Knudsen (19) 510

[57] Marco Becht (28) 3

This "*late change of heart*" led to the rejection of the Directive in the Parliament and therefore to the failure in the very last steps of the legislature process after more than 10 years negotiating[58].

The main argument of Germany and the rest of the "rebels" was that the lack of a level playing field[59]. While in some countries takeover defence mechanisms were being dismantle in other European countries those mechanism still prevail. Therefore, by imposing a neutrality rule, those companies from countries that allowed defence mechanisms were playing with an advantage. As BECHT perfectly portrayed[60]:

It was unfair, so they argued, that some countries were depriving their corporations of all takeover protection while others were not, allowing their corporations to go on hostile acquisitions sprees in the neighbours gardens wearing a bullet proof vest.

The Commission, far from giving up, created the aforementioned High-level Group of Company Law Experts to, among other things, assist and provide a solution for the ensuring of a level playing field in the European Union[61].

Their solution was the "breakthrough rule" that is currently laid down in article 11 of the Takeover Directive[62].

According to article 11 of the Directive, any restriction on the transfer of shares and any restriction on voting rights provided in the article of association of the target company or in contractual agreements, shall not apply to the offeror during the validity of the tender offer.

In addition, multiple-vote shares will only carry one vote each at the general shareholder meeting that will discuss if defensive measures are going to be taken.

This rule also applies *ex post* (once the operation is closed) because if the offeror acquires more than 75% of control of the company the pre-existing restrictions on transfer and voting already mentioned will not apply, "*nor any extraordinary rights of shareholders concerning the appointment or removal of board members*". Also, the offeror will be

[58] Carsten Gerner-Beuerle, Davis Kershaw and Matteo Solinas (31) 51
[59] J.S Steen Knudsen (19)
[60] Marco Becht (28) 3
[61] Vanessa Edwards (25) 426
[62] Thomas Papadopoulos, *EU Law and the Harmonization of Takeovers in the Internal Market* (Wolters Kluwer 2010) 127

entitled to call a general shareholder meeting, where the one share-one vote principle applies, with the purpose of amending the bylaws and remove or appoint members of the board and thus secure control of the target.

The *raison d'être* of this article are the different legal mechanisms foreseen in the State Members jurisdictions, that allows the board to entrench his position and hinder takeovers[63]. Therefore, the purpose of the precept is clear: enforce the proportionality principle[64] and reach a level playing field through the dismantling of the multiple antitakeover devices[65].

This article was inadmissible for Member States where dual voting rights are deeply rooted to the business culture[66]. Therefore, countries like Sweden, Finland, Denmark or France vigorously opposed this article.

In article 11 *in fine*, two exceptions are made: the article is not applicable when there is specific pecuniary advantage as a compensation for the restriction of votes and also it does not apply when a "*Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the treaty, or the special rights provided for in national law which are compatible with the Treaty or to cooperatives"*.

Therefore, the precept does not apply to the "golden shares" that the state might hold. Although golden shares are going to be studied in the next chapter of this thesis, the fact that they are out of the scope of article 11 is, in fact, an indicator of the determination of member states to maintain control over certain companies and the necessity to reach a compromise if the Directive wanted to be approved.

[63] Marco Ventoruzzo, "Europe´s Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends" (2006) 41:171 Texas International Law Journal 171 and G Ferrarini, GP Miller (16)

[64] Thomas Papadopulos *EU Law and the Harmonization of Takeovers in the Internal Market* (62)*"According to this principle, the degree of risk/reward that the shareholders are prepared to accept should determine the degree of control to be exercised by shareholders"*

[65] Matteo Gatti (20)

[66] Marco Becht (28) 3

It must be stated that when these rights are removed, the affected shareholders shall receive an equitable compensation for the loss suffered[67].

However, it has been stated how, due to the narrow scope of the precept, the breakthrough rule allows other restriction that can also obstruct a takeover[68]. In that sense, the non-voting rights, that are used by shareholders to ensure that their control is not diluted in the board with the entry of new investors (and that can be used potentially to approve the implementation of defence mechanisms), are perfectly compatible with the Directive[69]. The same can be said about the ceiling or time-lapse voting shares typically used in France[70] or the pyramid structures and crossholding[71].

This leads Professor PAPADOPOULOS to label the breakthrough rule as "*mini breakthrough*"[72].

2.3 The Opt-out right, the reciprocity rule and it effects in the different European jurisdictions.

So far, this thesis has shown that the board neutrality and the breakthrough rules were introduced in the Takeover directive besides the opposition Member States, and therefore the question raised at the end of the last section prevails. How did the Commission manage to approve the Takeover Directive? How can a directive that introduces the board neutrality and the breakthrough rule can be implemented in a protectionist way? The answers will finally come.

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[67] Art 11.5: Where rights are removed on the basis of paragraphs 2, 3, or 4 and/or Article 12, equitable compensation shall be provided for any loss suffered by the holders of those rights. The terms for determining such compensation and the arrangements for its payment shall be set by Member States.
[68] Thomas Papadopulos *EU Law and the Harmonization of Takeovers in the Internal Market* (62) 131."
[69] *Ibid*
[70] *Ibid: `The first problem is created because of the text of the Directive itself. Article 2 (1) (g) defines `multiple voting securities´as ´securities included in a distinct and separate class and carriying more than one vote each´. Ceiling or time-lapse voting securities are not covered by the breakthrough rule´. These shares are fully enfranchised after a specific holding period and are not covered because, while the voting rights will vary form time to time, according to the contingency of the duration of a holding, they remain of the same class.*
[71] KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26) 186
[72] Thomas Papadopulos *EU Law and the Harmonization of Takeovers in the Internal Market* (62)131

The truth is that the anti-frustration rules are not mandatory and can be opted-out since article 12 of the Directive recognise the Member State right not to require companies to introduce the board neutrality and the breakthrough rule[73].

The second section of the article, establishes that the States that have opted-out the aforementioned rules, should allow companies to introduce them if they want to. It must be stated, however, that in the member states where board neutrality or the breakthrough rule where not opted in, the companies have not chosen to voluntary do so[74].

The article is a pure reflection of the level of compromise that was needed to approve the Takeover Directive and was, in fact, the precondition for its success[75]. It is clear that the intention of the Commission was to introduce a single set of rules applied equally in all member states that removed barriers to takeover[76] and thus, it is clear that the opt-in is considered to be the correct choice[77].

However, Member States would have never accepted a Directive that could leave their national companies unarmed when faced with foreign investors. As one academic

[73] Art 12 of the Directive: "*Member States may reserve the right not to require companies as referred to in Article 1(1) which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11*"

[74] Paul Davies, Edmund-Philipp Schuster and Emilie van de Walle de Ghelcke (24) 41 and Peter Böckli, Paul Davies, Eilis Ferran, Guido Ferrarini, José Garrido Garcia, Klaus Hopt, Alain Pietrancosta, Katharina Pistor, Rolf Skog, Stanislaw Soltysinski, Jaap Winter and Eddy Wymeersch, `Response to the European Commission´s Report on the Application of the Takeover Bids Directive (2014) University of Cambridge Faculty of Law Research Paper No. 5/2014

[75] Paul Davies, Edmund-Philipp Schuster and Emilie van de Walle de Ghelcke (24) "*Agreement was reached between the Council (representing the Member States) and the Parliament on the final text of the Directive only on the basis that member states could decide to opt out of the BNR (contained in article 9) when they came to transpose the Directive"* and KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26) 269: "*As already stated, the Directive with its prohibition of frustrating action in Article 9 and its breakthrough rule in Article 11 was only adopted because Article 12 contained an opt-out"*

[76] S Steen Knudsen (19) 508

[77] KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26) 16: "*It is fully clear what article 9 of the Directive considers to be the correct legal policy. If another legal policy had been considered to be superior, Article 9 itself would had to be diluted and not just followed by optional arrengements in Article 1, as exercised by individual Member States, including Germany*". Also see, sharing the same view, but with a different argument, Jonathan Mukwiri (55) "*That the Commission aimed at exhaustive harmonisation is evident from the first recital of the Takeover Directive. Arguably, only by exhausting harmonisation coul those safeguard be made equivalent throughout the EU […] To prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures. It is difficult to see how 'arbitrary differences in governance and management cultures' in the diverse laws and practices of Member States can be prevented from distorting 'corporate restructuring' other than by exhaustive harmonisation of EU takeover laws. But while the Commission had aimed at exhaustive harmonisation, the Takeover Directive was adopted as a minimum harmonisation instrument.*

brilliantly exposed: *After 30 years of political unwillingness to agree on the board neutrality rule,19 the Takeover Directive was watered down to minimum harmonisation*[78].

In essence, the European Union followed the "*half a loaf is better than no loaf*" approach and introduced the option rule. At the end of the day, Brussels thought, a minimum standard of harmonisation is better than none[79].

But that's not all, and there is yet another rule that helps hampering the harmonisation of takeover defence mechanisms within the EU.

Section third of article 12 also introduces the so called "reciprocity rule". According to this rule member states can exempt companies form applying the board neutrality and the breakthrough rule if they become the target of a company that does not apply them. ("*or by a company controlled, directly or indirectly, by the latter*").

Once the member state has decided to introduce the reciprocity rule, to be implemented in the companies, the general meeting must authorise it (no earlier than 18 months before the bid)[80].

The situation was the following: As I mentioned before, one of the main concerns was the lack of a level playing field within the European Union. This concern also exceeded the limits of the European Union since the idea that the board neutrality could create a systematic disadvantage vis-à-vis an American company, because the latter could make use of defence mechanisms[81], was also in the air.

However, the solution proposed by the High-level Group of Company Experts to deal with this problem was not accepted and the European Parliament´s directive proposal containing the breakthrough rule was rejected[82]. Thus, arose the reciprocity as a compromised solution[83].

As some commentators have said, the reciprocity is "*one of the oddest results of the compromise that finally led to the adoption of the takeover*"[84]. Firstly, because it

[78] Jonathan Mukwiri (55) 257
[79] Vanessa Edwards (25) 439 and Blanaid Clarke (52)
[80] Art 12.5 Directive
[81] Paul Davies, Edmund-Philipp Schuster and Emilie van de Walle de Ghelcke (24)
[82] The High-level Group of Company Law Expert, proposed that the mandatory anti frustration rules only applied when dealing with bids between European public listed companies
[83] Marco Becht (28) 2
[84] *Ibid*, 22

complicated enormously the framework created by the Directive since, together with the option right, it increased the number of possible combinations [85] turning it into a complicated scheme with different levels. In words of the High-level Group of Company Experts[86], it "*complicated the application of the rules on takeover bids, creating a situation where the control over the company may be acquired by some but not by other bidders, which regulatory situation is prone to manipulation*[87]". Secondly, because wanting to satisfy those who were never going to be satisfied, a rule that diluted the anti-frustration rules, by granting companies the possibility of avoiding them in certain situations, was introduced.

At the end of the day, different technical arguments could be raised (such as the lack of a level playing field) but, what really lay behind it all was a rejection of the whole anti-frustration approach of the European Commission. This can be seen in the fact that even with the inclusion of the reciprocity rule, only a few member states reached the goal intended (implementation of both the neutrality and the *breaktrough rule*).

On the contrary, and as it will be seen in a few lines, significant number of member states took advantage of the situation, and without implementing the breakthrough rule, they introduced the reciprocity rule, weakening the only mechanism that was left: the board neutrality rule. Others went even further and just introduced the reciprocity rule without a mandatory neutrality in place.

In addition, for many authors, the drafting of the reciprocity rule, left many unanswered questions that lead to different interpretations in Member States. For instance, is not clear what would happen if there were two potential buyers, one that is subject to the board

[85] Serves, wonderfully, as an example this convoluted parragrah of Thomas Papadopoulos, *EU Law and the Harmonization of Takeovers in the Internal Market* (62) 134: "*In a Member State that has opted out of Articles 9 and/or 11, the board of a target company that has opted into either or both of these Articls may frustrate a bid by another company registered in that same Member State that has not opted in, but it may not frustrate a bid by a company registered in that same Member Sate that has opted in or by a a company registered in any other Member State that is subject to relevant Articles, either because the relevant Member State has not opted out, or because, although the relevant Member State has opted out, the bidder has opted in. This appears to be a quite complicated outcome, which does not contribute to legal certainty*".
[86] The High-level Group of Company Law Expert (33)

neutrality and other that is not[88]. In other words, could the reciprocity be adduced against all the buyers?

Another unresolved matter is the possibility to use the reciprocity against not EU members, taking into consideration art 12 states "*if they become the subject of an offer launched by a company which does not apply the same Articles as they do"* [Article 9(2) and (3) and/or Article 11]. Therefore, what shall prevail? An extensive interpretation where an equivalence check[89] must be made or a strict interpretation taking into account that non-european companies do not apply the same articles since they are not bound by the Directive?[90]

In essence, the reciprocity rule can be defined as a source of uncertainty[91]

After this critical analysis of article 12, it is now possible to address the multiple outcomes of the legislation in the different Member States with the introduction of the option rule and the reciprocity rule[92]:

- Opt-out the board neutrality and/or the breakthrough rules but allow companies that voluntarily want to introduce them and opt-in the reciprocity rule for those companies that choose to comply with the aforementioned rule.

- Opt-out the board neutrality and/or the breaktrough but allow companies that voluntarily want to introduce them and opt-out the reciprocity rule

- Opt-in the board neutrality and/or the breakthrough rule but introduce the reciprocity rule for those companies that chose to do so, therefore making the application of these rules' conditional on the offeror compliance with them.

[88] Paul Davies, Edmund-Philipp Schuster and Emilie Van de Walle de Ghelcke (24) 22-23. The authors point out how, while the French legislation allows defensive measures against all if one of them is not subject to the reciprocity, other legislations remain ambiguous.
[89] That is the approach followed by the French and Italian legislator, see *Ibid* 24
[90] KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26) 22.
[91] Thomas Papadopoulos, *EU Law and the Harmonization of Takeovers in the Internal Market* (62) 134 and KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26) 17. Hopt claims that a "revision in terms of clarification" is needed (or even a repeal).
[92] Marco Ventoruzzo (63) 212 and Paul Davies, Edmund-Philipp Schuster and Emilie Van de Walle de Ghelcke (24) 25-26 and Matteo Gatti (20)

- Opt-in the board neutrality and/or the breakthrough rule without the reciprocity rule. In this case, companies do not have any choice to circumvent these rules.

Regarding the board neutrality France, Greece, Portugal, Slovenia and Spain[93] are the Member States that introduced the board neutrality but subject to the reciprocity.

Other countries such as Germany, Belgium, Denmark, Hungary, Luxembourg, Netherlands and Poland [94] have not introduced the board neutrality but have however, introduced the reciprocity rules[95]. Therefore, a situation could arise where the defence mechanisms available in those countries could be applied by the board of directors without any kind of restriction.

Lastly, the remaining fourteen jurisdiction[96] have committed themselves with the board neutrality rule by introducing this rule and leaving out the reciprocity rule. Austria is a perfect example of this approach[97].

Italy deserves a separate mention[98], because the board neutrality is optional, but however it is adopted as a default rule[99]. Therefore, it shifts the bargain to the companies, because unless they exclude the board neutrality in their article of association, they are going to be bound by it.

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[93] *Ibid*

[94] *Ibid*

[95] Also Belgium, Denmark, Hungary, Luxembourg, Netherlands and Poland follow this approach, see Paul Davies, Edmund-Philipp Schuster and Emilie van de Walle de Ghelcke 31

[96] *Ibid: Cyprus, Czech Republic, Estonia, Finland, Ireland, Latvia Lithuania, Malta, Romania, Slovakia, Sweden*

[97] Stefan Weber, Stefan Arnold and Katharina Oberhofer `The supervision of Takeovers matters in the European Union- The Austrian Part´ (2009) Institute of European Studies at Saarland University

[98] It is important to note how Italy has changed three times the approach to board neutrality, in this regard see: G Ferrarini, GP Miller (16): *Italy implemented the Takeover Directive in three steps, the first, under the Prodi government, making both the neutrality and breakthroug rules mandatory for all listed companies; the second, under the Berlusconi government, reversing in favor of pure optionality-wherein the rules only apply if the companies opt into their effect […] The third step, made recently by the same government, reintroduced board neutrality as a default rule, the application of which listed companies can exclude in their charter.*

[99] Decree-Law No. 146, art. 1(3), Sept. 25, 2009, Gazz. Uff. No. 246, Oct. 10, 2009.

All of this numbers must be also taken into consideration with the fact that only Estonia, Latvia and Lithuania apply the breakthrough rule while the rest of the Members have opted the precept out, therefore being, *de facto,* an empty precept[100].

3. Conclusion

Despite the Commission´s strong will of promoting take-overs in the European Union, as a necessary extension of the internal market; the Member States won the battle by introducing opting rights, that made the core provisions of the Directive optional, and a reciprocity rule that diluted the anti-frustration rules.

The reason is simple, takeover regulation can be used to protect national companies by allowing anti-takeover mechanism. In this regard, Member States could not bear to see their companies unarmed when facing foreign investors. The mistrust of foreign capital is clear. One must only look at Germany´s change of heart after having two national champions faced with takeovers. The fact that after being offered a solution to the "level playing field" problem, Member States still did not accept the *break-through* rule, is also very illustrative.

The result was a directive, emptied of content, that after being severely patched to achieve a consensus, ends up granting Member States the possibility of restricting the openness of the national takeover market. In this regard, it is very enlightening the conclusion reached by DAVIES, SCHUSTER and VAN DE WALLE DE GHELCKE[101]:

"*Only five out of the eleven states that did not have a mandatory BNR before decided to implement it as a consequence of the Directive. At the same time, almost half the formerly mandatory BNR countries diluted their former choice after the Directive*"

[100] KJ Hopt, "Takeover Defense in Europe: A Comparative, Theoretical and Policy Analysis" (26) 268. The author also points out a highly interesting point in this regard: this rule is unknown in non-EU states.
[101] Paul Davies, Edmund-Philipp Schuster and Emilie van de Walle de Ghelcke (24) 49

III. THE GOLDEN SHARES IN THE EUROPEAN UNION. A GAME OF CAT AND MOUSE.

1. From state ownership to Golden Shares.

State ownership has always been linked to the history of Europe. This phenomenon, however, underwent an exponential growth, in the interwar years and, more precisely, after 1945 [102].

After the devastation of Europe due to the Second World War, the State adopted an investor role and the stimulation of the economy rested in his hands. In that regard, not only key companies were nationalised but also complete strategic industries[103].

In essence, there was a consensus around the idea of a mixed economy. A free-market economy was non-negotiable, but so was the state interventions in certain areas to remedy market failure and thus, ensure the services.[104]

Even in some countries the sale of stakes or assets of state companies was prohibited by law. In the case of Portugal, for example, it was a constitutional prohibition[105].

However, there was a change of paradigm, and the European market undertook a comprehensive privatization process[106]. UK was, without a doubt, the most prominent example since it started this process in 1979, way before any other European country[107]. Privatization was, in fact, the flagship of the new conservative Prime Minister Margaret Thatcher[108].

Even though, at the beginning privatization was linked to the neo-capitalist postulates based on the idea that the state presence is inefficient[109]; the truth is that sooner or later privatization ended up coming to the European market and in the 90´s it was an

[102] David Parker, `Privatization in the European Union: A Critical Asseesment of its Development, Rationale and Consequences´ (1999) 20 Economic and Industrial Democracy 9
[103] David Parker, ´Privatization in the European Union an Overview´ in David Parker (ed), *Privatization in the European Union: Theory and Policy Perspectives* (Routledge 1998) 10
[104] *Ibid* 20
[105] *Ibid* 13
[106] Judith Clifton, Francisco Comín and Daniel Díaz Fuentes `Privatizing Public Enterprise in the European Union 1960-2002: Ideological, Pragmatical, Inevitable? (2006) 13 Journal of European Public Policy 736
[107] David Parker, ´Privatization in the European Union an Overview´(102) 10
[108] Judith Clifton, Francisco Comín and Daniel Díaz Fuentes (106) 736
[109] *Ibid* 738

undeniable reality. Even social democrats' governments in countries with a strong state intervention tradition, had to make peace with their social base and implement privatization measures[110].

The reasons of this new paradigm have been object of study for many scholars, but there are two main arguments that explain this shift: the reduction of government debt and the necessity to adopt these measures due to the creation of the liberalised European Market throughout the Single European Act of 1986[111].

However, and in despite of the above, the European governments where reluctant to let go completely the control of strategic companies that granted services of general interest and thus, appeared the golden shares that rapidly extended throughout Europe [112].

The golden shares are defined by the Oxford Dictionary of Law as a share "*that enables the holder, usually the government, to outvote all other shareholders on certain types of company resolution"*.

More profoundly a golden share can be defined[113] as a priority share that grants the holder a variety of special rights as if it was the owner of a majority stake. The holder of the golden share is the government, and the object are the recently privatised companies. Thanks to golden shares the government can veto company decisions and control the changes on the shareholder structure and the board of director. Thus, golden shares are used by the governments to protect the public interest as it enables them to shield the strategic companies from takeovers (especially from foreign companies) and limit the business strategies taken by the board of directors that might be contrary to the public interest.

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[110] David Parker, `Privatization in the European Union: A Critical Asseesment of its Development, Rationale and Consequences´ (102) 9 and David Parker, ´Privatization in the European Union an Overview´ (103) 10

[111] *Ibid*

[112] Francesca Prenestini (6) 591 and Nadie Gaydarska, Steohan Rammeloo, `The Legality of the Golden Shares under EC Law´(2009) 9 Maastricht Faculty of Law Working Paper 4

[113] For the complete definition of the golden shares in this paragraph: Ilektra Antonaki, *Capital, Market and the State: Reconciling Free Movement of Capital with Public Interest Objective*s (Brill Nihoff, 2021), ‚Jérémie Houtet, ` Acciones de Oro y Patriotismo Económico: Enfoque Nacional, Desarrollo Europeo (2016) 54 Cuadernos Europeos de Deusto 203, 204 and Thomas Papadopoulos, `Privatized Companies, Golden Shares and Propery Ownership in the Euro Crisis Era: A Discussion after Commission v. Greece´12 European Company and Financial Law Review, 1, 2

Golden shares can take many forms[114] but the purpose always remains the same: grant the state a special privilege.

The need for an *ex-ante* authorisation for investments above a capital/voting rights threshold was one of the most common golden shares, present in countries like Italy, France, Portugal, Spain or the UK[115].

For example, in Portugal, by law [116], the acquisition of more than the 10% of the voting rights in re-privatised enterprises, needed the prior authorization of the Ministerio das Finaças.

Another prominent golden share is the right to veto management decisions. In this regard, Spain established in the 1995 the right to veto management decisions in companies that used to be public in the following sectors: Oil&Gas (Repsol), Telecommunications (Telefónica), Banking (Argentaria), Electricity (ENDESA) and Tabacalera (Tobacco)[117]. Hence, the Spanish government had the power to authorise or deny the decisions of the board of directors regarding vital aspects such as mergers, disposal of assets or transactions regarding the share capital.

Lastly, the power to name director on the board can also be mentioned[118]. Thus, in Italy, the government had the right to appoint the directors of companies like Società Finanziaria Telefónica and Telecom Italia.

2. The position of the European Commission and the European Court of Justice.

From the very first moment, the European Commission dismissed the golden shares as protectionist and contrary to the free movement of capital and the right of establishment

[114] Nadie Gaydarska, Steohan Rammeloo (112) 8

[115] European Commission, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments´ (22-07-2005). ´< Special rights in privatised companies in the enlarged Union–a decade full of developments (europe.bg)>

[116] Decree-law No 380/93

[117] Ley 5/1995 de 23 de marzo de régimen jurídico de enajenación de participaciones públicas en determinadas empresas

[118] European Commission, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments (115)

in the EU[119]. In 1997, the Commission published a Communication under the name "Communication of the Commission on Certain Legal Aspects Intra-Eu Investments" that raised doubts about the legality of golden shares[120]. In the mind of the Commission, golden shares could potentially hinder the running of the Internal Market[121] and it started various infringement proceedings against the Member States that had them in place.

Thus, began a snowball of cases in the European Court of Justice that ended up with judgements against most of the existing golden shares in the Member States[122]. The Court understood that most of them were incompatible with the free movement of capital (article 63 of the TFEU) and the right of establishment (art 49)[123].

The bulk of the Court of Justice doctrine on golden shares was developed in a number of rulings in the early 2000´s against Italy, Portugal, France, Belgium, Spain and the UK[124]

In reality, the European Court of Justice did not prohibit *per se* the golden shares, but rather gradually defined a number of minimum requirements that need to be observed in in order to affirm their compatibility with the mentioned fundamental freedoms[125]. It must be stated that the criterion is subject to a strict application, and thus the legality of golden shares can be defined as an illusion[126]. At the end of the day, the exceptions to any

[119] Tamás Szabados, `Recent Golden Shares Cases in the Jurisprudence of the Court of Justice of the European Union´ (2015) 16 German Law Journal, 1100

[120] European Commission, ` Communication of the Commission on Certain Legal Aspects Intra-Eu Investments´ OJ C 220/06 < EUR-Lex - 31997Y0719(03) - EN - EUR-Lex (europa.eu)>

[121] European Commission Staff Working Document, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments´, (115) 16

[122] The cases have been carefully collected in J. Houtet, (113) 205

[123] A more profound debate on which freedom shall be applied can be found in Tamás Szabados (119) 110. However I agree with professor Urrea when in Mariola Urrea Corres, `El Régimen de Autorizaciones Administrativas Previas en las Empresas Privatizadas´(2003) 15 Revista de Derecho Comunitario Europeo, 683 she explains that the debate "*does not, in fact, affect the solution to be offered in relation to their compatibility-incompatibility with European Community law, since the Court of Justice offers the same treatment for both freedoms*".

[124] European Commission Staff Working Document, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments´ (115) 11. The cases are: Case C-58/99 *Commision v, Italy* [2000] ECR I-03811, Case C-98/01 *Commission v. United Kingdom* [2003] ECR I-04641, Case C-367/98 *Commission v. Portugal* [2002] I-04731, Case C-483/99 *Commission v. France* [2002] ECR I-04781, Case C-463/00 *Commission v Spain* [2003] ECR I-04581, Case C-503/99 *Commission v. Belgium* [2002] ECR I-04809

[125] Thomas Papadopoulos, ´Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era (113) 1 and Jérémie Houtet (113) 207

[126] Jérémie Houet, (113) 207

fundamental freedom must be applied in "*narrow sense*"[127]. However, examples like the case of Belgium, where the court hold the validity of the golden shares, can be found.

The requirements are the following[128]:

1. Public safety or general interest reasons.

The safeguard of supply in the event of a crisis of strategic services or services of public interest has been recognised by the European Court of Justice as a justification for golden shares[129]. On the contrary, "*general financial interest of a Member States*[130]" cannot bound the weight of priority shares. As explained in the Case C-367/98 Portugal v. Commission, purely economic reasons cannot be used as a justification to undermine fundamental freedoms. Thus, objectives raised by governments such as "*strengthening the competitive structure of the market concerned*" o "*modernising and increasing the efficiency of means of production*" do not comply with the golden shares minimum requirements[131].

2. Proportionality between the measure and the goal pursued. Thus, they cannot go beyond what is strictly necessary to achieve the goal.
3. There cannot be other less restrictive measure with which to reach the goal. In this regard, the Court of Justice states that *ex post* controls are less damaging and restrictive than *ex-ante* controls[132].

These two last requirements, can be perfectly observed, for example, in the case *Commission v Spain*[133]*: "The Spanish Government has not shown either that prior administrative approval is the least restrictive means at its disposal or that it is the only*

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[127] European Commission Staff Working Document, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments´ (115) 27
[128] Mariola Urrea Corres (123) 683, Francesca Prenestini (6) 591
[129] European Commission Staff Working Document, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments´ (115) 29
[130] Case C-367/98 *Commission v. Portugal* parragraph 52
[131] *Ibid*
[132] Case C-463/00 *Commission v Spain* , paragraph 36: " *A system of prior administrative approval, which is necessarily more restrictive than a system of ex post facto control*" and 78: "*In that regard, it is clear from paragraphs 49 to 52 of Commission v Belgium, first, that the system examined in that judgment was one of ex post facto opposition, which is less restrictive than a system of prior approval such as that in the present case (see, to that effect, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 Reisch and Others [2002] ECR 1-2157, paragraph 37)*"
[133] Case C-463/00 *Commission v Spain*

effective way of supervising, reviewing and possibly prohibiting certain investments which are incompatible with the objectives pursued"

4. It must be based on objective and transparent criteria know before hand by the interested parties and subject to the review of the courts. Hence, they cannot be applied in a discriminatory manner.

For example, in the case *Commission v. France*[134], the court found that even if safeguarding the supply of petroleum "*falls undeniably within the ambit of a legitimate public interest*"[135],the approval of the Minister of the French minister for Economic Affairs for the purchase of a certain shareholding percentage in the company Societé Nationale Elf-Aquitaine, was contrary to the fundamental freedoms. First of all, because it gave a discretionary power to the government since "*the investors concerned are given no indication whatever as to the specific objective circumstances in which prior authorisation will be granted or refused* [136] ", and secondly because "*the system in issue clearly goes beyond what is necessary in order to attain the objective pleaded by the French Government*". In other words, the court found that it was not based on objective criterion and that it was like using a *sledgehammer to crack a nut*.

The exact same happened in the case *Commission v. Spain*[137], where the Court of Justice struck down, following the same arguments, the prior authorization regime established in companies from several sectors such as telecommunications, in order to guarantee a minimum supply[138].

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[134] Case C-483/99 *Commission v. France*

[135] Paragraph 47: "*In the present case, the objective pursued by the legislation at issue, namely the safeguarding of supplies of petroleum products in the event of a crisis, falls undeniably within the ambit of a legitimate public interest. Indeed, the Court has previously recognised that the public-security considerations which may justify an obstacle to the free movement of goods include the objective of ensuring a minimum supply of petroleum products at all times [Campus Oil, paragraphs 34 and 35). The same reasoning applies to obstacles to the free movement of capital, inasmuch as public security is also one of the grounds of justification referred to in Article 73d(1)(b) of the Treaty*"

[136] Paragraph 51

[137] Case C-463/00 *Commission v Spain*

[138] Paragraph 74 and 76:" *Exercise of the State's right is not subject, under the relevant provisions, to any conditions. The investors concerned are given no indication of the specific, objective circumstances in which prior approval will be granted or withheld*" […] " *The administrative authorities have in this sphere a particularly broad discretion which represents a serious threat to the free movement of capital and may end by negating it completely. The rules concerned therefore go beyond what is necessary to attain the objective relied on by the Spanish Government, namely preventing any impairment of supplies of petroleum products or electricity or of telecommunication services*".

The case against Spain is also interesting, since it specified, in a certain way, what could be understood as a company providing public service, when it excluded from that category the banking and tobacco sector[139]: "

On the contrary, in the case of Commission v. Belgium[140] the court found that the special right granted to the government and challenged by the European Commission in Societé Nationale de Transport Par Canalisations and Distrigaz where compatible with the European law.

In this case, the public safety requirement was met since the goal of the Belgian government was also to safeguard the supply of energy in the event of crisis. However, the golden share also complied with the other requirements. It was not a prior authorization but an opposition regime. It was also subject to strict time limits, limited to certain decisions of the companies and subject to revision by the courts.

Therefore, the European Court of Justice could only conclude that [141]:

"The scheme therefore makes it possible to guarantee, on the basis of objective criteria which are subject to judicial review, the effective availability of the lines and conduits providing the main infrastructures for the domestic conveyance of energy products, as well as other infrastructures for the domestic conveyance and storage of gas, including unloading and cross-border facilities. Thus, it enables the Member State concerned to intervene with a view to ensuring, in a given situation, compliance with the public service obligations incumbent on SNTC and Distrigaz, whilst at the same time observing the requirements of legal certainty ".

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[139] *"In this case, the Spanish Government contends that the regime at issue is justified by overriding requirements of the general interest linked to strategic imperatives and the need to ensure continuity in public services. In that regard, it should be stated at the outset that Tabacalera SA, which produces tobacco, and Corporación Bancaria de España SA (Argentaria), a group of commercial banks which operate in the traditional banking sector and which are not claimed to carry out any of the functions of a central bank or similar body, are not undertakings whose objective is to provide public services. In merely referring to 'certain lines of business' which in the past fell within the remit of public savings banks, the Spanish Government does not establish that there are particular circumstances as a result of which the banking group takes responsibility for a public-service function. It follows that the regimes relating to Tabacalera SA and Corporación Bancaria de España SA (Argentana) cannot be justified"*

[140] Case C-503/99 *Commission v. Belgium*

[141] Paragraph 52

This cases in the early 2000 were already definitive[142], however the Commission´s persecution efforts, as well as the control of the European Court of Justice had to continue for many years.

For instance, in the year 2005, the European Commission issued on the 22/07/2005 the Commission Staff Working Document (`Special rights in privatised companies in the Enlarged Union-a Decade Full of Developments´) where it stated that there were still golden shares present in privatised companies in both new entrants and old members. In addition, some of these special rights were present in crucial companies and key players in the European economy[143].

In my opinion the reasons can be found in the fact that the rulings of the Court of Justice case law did not have the chilling effect expected and many countries, stubbornly, kept golden shares, until they were knocked down.

In addition, many newly member states had a communist past (Poland, Czech Republic, Hungary)[144]. Thus, the European Commission had to remain vigilant since the privatisation effort was huge, and it extended over a long period of time[145].

Lastly, during the euro crisis, indebted Member states had to implement privatizations, and the tentation to bring back golden shares could not be avoided. For example, privatizations were a requirement in the bail out deal offered by the European Union and the International Monetary Fund to Greece[146]. Leaving aside, everything we have learned in the previous lines, the Greek government approved a system of prior authorization when acquiring voting rights in the old public limited companies[147] and put in place an

[142] Thomas Papadopoulos, `Privatized Companies, Golden Shares and Property Ownership in the Euro Crisi Era (113) 2

[143] European Commission Staff Working Document, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments´ (115) 33

[144] European Commission Staff Working Document, ´Special Right in Privatised Companies in the Enlarged Union-a Decade Full of Developments´ (115), 33

[145] *Ibid*

[146] Thomas Papadopoulos, `Privatized Companies, Golden Shares and Property Ownership in the Euro Crisi Era (113) 4

[147] *Ibid*, "*More specifically, in respect of strategic public limited undertakings having, or having had, a monopoly, in particular with regard to companies owning, operating or managing national infrastructure networks, the acquisition by a shareholder other than the Greek State or by companies related to that shareholder or by shareholders acting jointly and in a concerted manner of voting rights representing more than 20% of the total share capital shall be subject to prior authorization*"

ex post control for certain corporate decisions[148]. As the reader can predict, this scheme was struck down by the European Court of Justice in the year 2012[149].

3. Conclusion

What this chapter of the European economic history shows us is clear: the limitation of the golden shares did not come naturally, and the Court of Justice had to constantly chase and monitor, as in a game of cat and mouse, the activity of Member States. In other words, if it were up to Member States, the golden shares, and thus a degree of state control over certain companies, would have remained in force.

In words of the European Commission:

"Although in some cases the government redeemed their special rights in privatised companies at the request of the companies to dispel investors uncertainty or at the time of the sale or merger of the companies […] it was primarily the European Court of Justice rulings that obliged governments to reconsider carefully the future of golden shares".

Thus, the same distribution of roles and the same "tug-of war" analysed in the previous section can be observed. On the one hand, there is the Member States trying to secure protectionism mechanism and on the other hand the European Commission trying to eliminate these traces of state power and entrenchment for the sake of an efficient and genuine internal market.

[148] *Ibid, "Moreover, there was a provision for ex post control with regard to the adoption of certain decisions. Certain decisions of these strategic undertakings shall be subject to authorization by the Minister for Finance for purposes of general interest. These decisions concerned dissolution and liquidation of these undertakings, restructuring (conversion, merger and break-up) and certain transactions on their assets (transfer, transformation or conversion, disposal, supply as a guarantee, as well as transformation or alteration of the allocation of strategic elements of the assets of these undertakings and of the basic networks and infrastructure necessary for the economic and social life of the country as well as its security)*

[149] Case C-244/11 *Commission v Greece* [2012]

IV. SCREENING OF FOREIGN DIRECT INVESTMENT IN THE EUROPEAN UNION. THE COVID-19 AS A *CASUS BELLI* FOR EUROPEAN ECONOMIC PROTECTIONISM.

1. The change of the paradigm. The FDI regulation and the EC Communication

According to the Oxford Dictionary, a *casus belli* is "*an act or situation used to justify a war".* For example, the Assassination of Archduke Franz Ferdinand was the *casus belli* of the First World War, since it gave Austria-Hungary an excuse to send Serbia an impossible ultimatum and hence declare them war. Other examples can be found throughout history, like the abduction of Helen by Paris causing the Trojan War or the destruction of an US submarine in Cuba (The Maine) that led to the Spanish-American war in 1898.

At the beginning of this thesis, I´ve mentioned how, during Covid, most Member States laid down rules to shield strategic companies from foreign investor. However, an important piece of information was kept for literary reasons: This was done under the command of the European Union.

In 2020, the European Commission launched the Communication "Guidance to Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe´s strategic assets[150]". In this communication, the European Commission urged Member States to either make us or their foreign direct investment screening mechanism or set up a screening mechanism regulation in case there was none. Such was the urgency, that for those member states without a screening regulation, the European Commission urged them to "*in the meantime to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs*".

A screening regulation is defined as "*instrument of general application, such as law or regulation, ad accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on ground of security or public order*[151]".

After having studied in this thesis the constant fight for an open market and the freedom of capitals, one may be surprised to see the European Union seeking for investment control.

It is true that the European Commission was concerned with the loss of critical assets and technology since, due to economic situation, strategic companies where vulnerable to opportunistic buyers[152]. However, this communication was the tipping point, and Covid was just the *casus belli* for a change of paradigm that had already started a few years ago[153].

For many years, in Europe, there was a consensus around the idea that foreign direct investment was beneficial, desirable and a source of prosperity[154]. In fact, the European

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[150] European Commission, ` Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)´ OJ C 99/1 <[EUR-Lex - 52020XC0326(03) - EN - EUR-Lex (europa.eu)]>

[151] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. [2019] OJ L 79/1

[152] The Commission was specially concerned with the healthcare sector:

[153] In words of: *The Commission´s latest call on the EU Member States during COID-19 crisis to use their investment screening regimes to the fullest, or to introduce such if still lacking, should have been enough to convince the last doubter that we are living in different times.*

[154] F.Wernicke, `Investment Screening : The Return of Protectionism? A Business Perspective ´, in S. Hindelang (eds) and A. Moberg (eds), *Yearbook of Socio-Economic Constitutions 2020 a Common*

Union has always been "*one of the world's most open environments for the free flow of international capital*[155]".

Not for nothing, the free movement of capital, recognised in article 63 of the Treaty on the Functioning of the European Union[156] is one of the backbones of the European Union: "*Within the framework of the provision set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited".*

In addition- and as we have seen through the lines of this thesis- in the European Union, there is always a "*guardian*" overseeing and enforcing the compliance with the treaties and thus, with the freedom of capital: European Commission[157].

In essence, in Europe, an investor will be looking at an area where capitals can be moved freely with-almost- no restrictions, and with a judicial power that enforces such rule and always ensures the principle of "*non-discrimination, proportionality and legal certainty"*[158].

However, everything started to change around 2017 when China, the panda in the room[159]. could no longer be unnoticed. Between 2010 and 2016, the investment of Chinese companies in the European Union increased 17 times[160]. More precisely, between the year 2015 and 2016, there was an increase of 77% in the investments[161]. This means

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European Law on Investment Screening (Springer 2020) 36 and Martin Nettesheim, ` Preserving "Public Order and Security", Securing Reciprocity in International Trade, or Supporting Certain Social, Environmental, or Industrial Policies´, in S. Hindelang (eds) and A. Moberg (eds), *Yearbook of Socio-Economic Constitutions 2020 a Common European Law on Investment Screening* (Springer 2020), 482

[155] Joanna Warchol, `The Birth of the EU Screening Regulations´ in S.Hindelang (ed) and A. Moberg (ed), Yearbook of Socio-Economics Constitution 2020 a Common European Law on Investment Screening (Springer 2020), 57

[156] Consolidated Version of Treaty on the Functioning of the European Union [2012] OJ L 326/49

[157] *Ibid*, 60

[158] *Ibid,* 57

[159] Expression brilliantly used by Stephan F.Wernicke (154) 29. Also see how the authors ends his article: "So *its free markets as a tool to protect the economy and the society against the possible abuses of public and private power that we should preserve or else the political panda might wake up and tell us that, possibly, democrazy and liberalism, asw e understand it, are no longer a condition of development and economic statecraft*".

[160] *Ibid*

[161] Sven Simon, `Investment Screening: The Return of Protectionism? A Political Account´, in S. Hindelang (eds) and A. Moberg (eds), *Yearbook of Socio-Economic Constitutions 2020 a Common European Law on Investment Screening* (Springer 2020), 45

that in 2016 the investment made are nearly 50% more than over the last ten years together[162].

It is clear, that there was a political agenda behind this move, and indeed, this investment must be understood in the context of:

- Going Global Strategy: a strategy that started in 1999, with the aim of promoting the investment and operability of Chinese companies abroad[163].

- One Belt One Road initiative: plan seeking to connect countries through Asia, Africa and Europe throughout the investment in infrastructures (rail and roads networks, ports, oil and gas pipelines…)[164]. It evokes the silk road as an historical commercial link and aims at creating a new one for this century[165]. This initiative vas accompanied with the creation of new funders such as the Silk Road Fund and the Asian Infrastructure Investment Bank[166].

- Made in China 2025 programme: initiative to make China a world leader in key high-tech industries ("*new information technology, numerical control tools, aerospace equipment, high-tech ships, railway equipment, energy savings, new materials, medical devices, agricultural machinery, power equipment"*)[167].

For many scholars, the tipping point was the takeover by Chinese company, Midea of the leading German robotics company, Kuka in 2016[168]. The fear in Europe is that the acquisition of key companies in high tech sectors with cutting edge technology, can lead to a know-how and technology assets drain to China.

On top of that there is the lack of reciprocity. Many have argued that there is no fair playing field, since in China, due to the restrictive regulation, it would be impossible to

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[162] Joanna Warchol (155) 55
[163] *Ibid,*54
[164] I*bid,* 54-55
[165] Christina Müller, `One Belt, One Road: el Sueño Chino y su Impacto Sobre Europa´ (2016) 148 Notes Internacional CIDOB, 1
[166] Joanna Warchol (155) 55
[167] Institute for Security & Development Policy, `Made in China 2025´(2018) < Made-in-China-Backgrounder.pdf (isdp.eu)> Accessed 31 Dec 2023
[168] Mentioned in both as a reason for the change of paradigm: Stephan F.Wernicke (154) 30 and Sven Simon (161) 44

carry out similar transactions as the ones that Chinese companies conduct peacefully in Europe[169].

Lastly, many Chinese companies are state owned or clearly influenced by the government trough funding. This may lead the companies to select targets taking into considerations strategic interests rather than the merely economic ones[170]. Plus, due to this link with the state, this companies have access to more financial resources than any other potential bidder[171].

In words of NETTESHEIM[172]: "*There is simply no role for countries with an activist government injecting money into globally operating state firms, which at the same time severely restricts the commercial freedom of foreign investors within its one market*".

In this regard, it is very illustrative, the card sent by the economic ministers of Germany, France and Italy at the moment, to Trade commissioner Cecilia Mälmstrom where they raised the reciprocity and transfer of technology argument and asked for a common EU-level reaction. In their words, Europe was unable to combat the "*lack of reciprocity and sell-out of European expertise*" with "*effective instruments*"[173].

It is true that, many Member States had already screening or authorization mechanisms in place. In the case *Eglise de scientologie*, the Court of Justice[174], outlined the conditions under which this type of mechanism can be lawful.

The Court starts by reminding that any law submitting foreign investment to prior authorization is a restriction on the movement of capital *ex* art 73 of the Treaty on the Functioning of the European Union (now 63). However, the Court explained how Member States can limit the free movement of capital on "*public-policy*" and "*public*

[169] Martin Nettesheim (154) 483

[170] *Ibid, 483* "*sovereign funds pursue objectives that diverge from classical private actors*" 483
[171] Sven Simon (161) 46, Martin Nettesheim (154) 483 "*sovereign funds pursue objectives that diverge from classical private actors*"
[172] Martin Nettesheim (146) 483

[173] It can be accessed in the following link <[schreiben-de-fr-it-an-malmstroem.pdf (bmwk.de)]>
[174] Case 54/99. *Eglise de Scientologie*, [2000]

security" grounds. However, these grounds must be applied strictly[175] and always following the proportionality principle[176].

In addition, the Court establishes that the prior authorization must be clearly defined and detailed, in such a way that the investors are "*given indication to the specific circumstances in which prior authorisation is required*" and it "*enable individuals to be apprised of the extent of their rights and obligations*". In other words, it must follow the principle of legal certainty. Subsequent judgments will add the need for objective and non-discriminatory principles[177].

However, due to the integration and cohesion of the internal market, even if one Member state has a well-structured screening mechanism, a dangerous foreign direct investment unsupervised in another Member State can also pose a danger to its the security or public order[178].

Finally, after an unsuccessful attempt of Union Act proposal by the European People Party in the Euro Parliament, the Commission took the initiative and prepared a legislative proposal.

The Commission view was clear, one must only look at Jean Claude Juncker words in his State of the Union address (2017)[179]:

"*We are not naïve free traders. Europe must always defend its strategic interests. That is why today we are proposing a new EU framework for investment screening. If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our backyard so that we can protect our collective security if needed*".

[175] "*Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious thereat to a fundamental interest of society*"
[176] "*only if they are necessary for the protection of the interests wich they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures*"
[177] Carlos Esplugues Mota, ` La Suspensión de la Libre Circulación de Inversiones Extranjeras en España por la Crisis del Covid-19´ (2020) 12 Cuadernos de Derecho Transnacional, 372
[178] Cecilia Malmström, `Foreword: A Common European Law on Investment Screening´ in S. Hindelang (eds) and A. Moberg (eds), *Yearbook of Socio-Economic Constitutions 2020 a Common European Law on Investment Screening* (Springer 2020), v.
[179] President Jean Claude Juncker´s State of the Union address 2017 < State of the Union Address 2017* (europa.eu)>

However, the issue was far from being pacific, and some dissenting voices were raised, especially when the proposal was being discussed in the European Council. Funnily enough, France and Germany were together this time, but "*traditional free traders*" Member States, like the Netherlands or Sweden were against it, as they considered it a protectionist instrument[180]. Cecilia Malmström remembers particularly bitter debates between the Ministers in the Trade Council. There was also the opposition of countries that like Portugal, Spain or Greece were big recipients of Chinese capital[181].

However, the Regulation proposed by the Commission in 2017 was finally approved and it came into force in April of 2019, begging to apply to transaction concluded after October 2020. The legislative process was rather quick, and the compromised was reached after a trilogue between the European Parliament, the Council of the European Union and the European Commission[182].

2. Regulation (EU) 2019/452 of the European Parliament and of the council of 19 March 2019 establishing a framework for the screening of foreign direct investment into the Union

The first thing that must be taken into consideration is that this Regulation does not establish a unified European screening mechanism and the decision whether to authorise a foreign investment rest solely on individual Member States.

As stated in recitals (5), with certain sarcasm in my opinion: "*There is no currently no comprehensive framework at Union level for the screening of foreign direct investment on the grounds of security or public order, while the major trading partners of the Union have already developed such frameworks*"

On the contrary, the regulation establishes[183] (i) the minimum requirements that any EU screening mechanism should have and a list of potential factors that may be taken into

[180] *Ibid*, v.
[181] *Ibid,* v.
[182] For a detailed explanation of the process, see Joanna Warchol (155)
[183] Article 1: "*This Regulation establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments*".

consideration when considering if a foreign investment affects security or public order, (ii) cooperation mechanism between the Member States and the Commission.

First of all, foreign direct investment is defined as: "*an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investment which enable effective participation in the management or control of a company carrying out an economic activity*".

Article 3 of the Regulation establishes that Member state "*may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order*". Regarding the requirements, the article establishes:

- The rules and procedures must be transparent[184]
- The confidential information shared by the intended investor must be protected.
- There must be a possibility to seek for judicial redress against the decision of the national authority.
- There should be defined timeframes for the screening decision.

The regulation also gives the Commission a "coordinator" role since, the screening mechanism as well as any amendment must be notified to the Commission (Art 5). In addition, Member states must send the Commission annual reports of the foreign direct investment activity (Art 5) [185].

Regarding the factors that must be taken into consideration by Member States, since there is a high possibility of security or public order affection, article 4 of the Regulation establishes the following:

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[184] "*In particular, Member States shall set out the circumstances triggering the screening, the grounds for screening and the applicable detailed procedural rules"*

[185] Art 5. "*By 31 March of each year, Member States shall submit to the Commission an annual report covering the preceding calendar year, which shall include aggregated information on foreign direct investments that took place in their territory, on the basis of information available to them, as well as aggregated information on the requests received from other Member States pursuant to Articles 6(6) and 7(5). 2. For each reporting period, Member States that maintain screening mechanisms shall, in addition to the information referred to in paragraph 1, provide aggregated information on the application of their screening mechanisms".*

- critical infrastructure ("*including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure*").

- critical technologies and dual use items ("*including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies*").

- Supply of critical inputs ("*including energy or raw materials, as well as food security*").

- Access to sensitive information ("*including personal data, or the ability to control such information*").

- The freedom and pluralism of the media

In addition, the regulation also considers a likelihood of security or public control affection when: (i) there is direct or indirect government control of the potential investor. (ii) when the investor had carried activities that have affected the security or public order in other Member State (iii) when there is a risk of illegal or criminal activities

The other main aspect of the Regulation is the cooperation mechanism[186]. Broadly put, the mechanism is as follow:

Member states that are screening a direct foreign investment, must notify the Commission and other member States. Moreover, a Member State can send comments to another Member State, when it considers that a foreign investment under screening in the latter,

[186] Article 6 of the Regulation.

can affect its security or public order or when it possesses relevant information. These comments shall also be sent to the Commission.

The Commission in the other hand, can also send an opinion to a Member State that is screening a foreign investment, when it considers that the investment can affect the security or public interest of other Member States, or it possess relevant information[187].

The Member State screening the investment, must send the Commission and the interested Member State information about the transaction and the investor. On the other hand, they both must send the Member State the comments in a "*reasonable period of time, and in any case later than 35 calendar days following receipt of the information*[188]"

The comment and opinions raised by other state and/or the Commission are not binding, even though the State must give them "*due consideration*".

There is a similar mechanism for foreign direct investment that are not undergoing screening since they can also affect security or public order in other Member State[189].

Lastly, article 8 of the Regulation gives the Commission the possibility of issuing an opinion to the Member States that is facing a foreign investment when, under the Commissions consideration, the investment can "*affect projects or programmes of Union interest on grounds of security or public order".*

3. The case of Spain: from a liberalized approach to an *ex-ante* authorization.

Spain is one of the most significant examples of this change of paradigm. Before Covid-19, the general rule in Spain, according to Law 19/2003[190], was the liberalization of foreign investments[191]. The liberalization could only be suspended when the transactions could affect, activities related to the (even if only occasionally), exercise of public power, or activities directly related to national defence, or activities which affect or may affect

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[189] Article 7 of the Regulation.
[190] Ley 19/2003, de 4 de julio, sobre régimen jurídico de los movimientos de capitales y de las transacciones económicas con el exterior y sobre determinadas medidas de prevención de blanqueo de capitales.
[191] In reality,an ex-post notification to the Administración General del Estado is needed ("General State Administration") but only for statistical purposes.

public order, public safety and public health[192]. For those investments, an *ex-ante* authorization of the Council of Ministers following a report by the External Investment Board[193] was needed.

Thus, unlike others member states, Spain did not have a screening mechanism. However, due to the Covid crisis and encouraged by the European Union, the Spanish Government, through a Royal Decree, suspended the liberalized regime of Law 19/2003[194]. As of that moment, the foreign investment became subject to *ex ante* governmental authorization or screening mechanism. For the sake of clarity, under Spanish law, a Royal Decree is a law that the Government is entitled to approve without the approval of Parliament in case of urgent need. After that, three more Royal Decrees were approved, to solve some of uncertainties and deficiencies of the first one[195].

The change was done through the introduction of a new article in Law 19/2003 (7 bis) that states:

- The liberalisation regime is suspended for direct foreign investments in certain strategic sectors and for those affecting public order, public safety, and public security. The strategic sectors are clearly defined in the article, and are the following:

    1) Critical infrastructures, whether physical or virtual (including energy, transport, water, health. s, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities), as well as land and real estate that are key to the use of such infrastructure.

[192] Art 7 of Ley 19/2003: *El Gobierno podrá acordar la suspensión del régimen de liberalización establecido en esta ley cuando se trate de actos, negocios, transacciones u operaciones que, por su naturaleza, forma o condiciones de realización, afecten o puedan afectar a actividades relacionadas, aunque sólo sea de modo ocasional, con el ejercicio de poder público, o actividades directamente relacionadas con la defensa nacional, o a actividades que afecten o puedan afectar al orden público, seguridad pública y salud pública. Tal suspensión determinará el sometimiento de ulteriores operaciones a la obtención de autorización administrativa, de acuerdo con lo señalado en el artículo 6.*
[193] Advisory Body on the subject formed by representatives of all ministerial departments
[194] Real Decreto-Ley 8/2020, de 17 de marzo, de medidas urgentes de apoyo a la solvencia empresarial y al sector energético, y en materia tributaria.
[195] Real Decreto-Ley 11/2020, de 31 de marzo y Real Decreto-Ley 34/2020, de 17 de noviembre.

2) Critical and dual-use technologies, key technologies for industrial leadership and capacity building, and technologies developed under programmes and projects of particular interest to Spain, including telecommunications, artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies, biotechnologies, advanced materials and advanced manufacturing systems.

3) Supply of fundamental inputs, in particular energy, understood as those regulated in Law 24/2013, of 26 December, on the Electricity Sector, and in Law 34/1998, of 7 October, on the Hydrocarbons Sector, or those referring to strategic connectivity services or raw materials, as well as food security.

4) Sectors with access to sensitive information, in particular personal data, or with the capacity to control such information, in accordance with Organic Law 3/2018, of 5 December, on the Protection of Personal Data and the guarantee of digital rights.

5) Media

6) There is a catch-all provision: The Government may suspend the regime of liberalisation of foreign direct investment in Spain in those sectors not contemplated in paragraph 2 of article 7 bis (the sectors detailed above) when they may affect public safety, public order and public health.

- For the purpose of this law, direct foreign investment can be defined as all those investments as a result of which, the investor acquires a holding equal to or greater than 10% of the share capital of a Spanish company, and all others investments which as a result of a corporate transactions, act or legal business carried out the control of all or part of it is acquired by application of the criteria established in article 7 of Law 15/2007, of 3 July, on the Defence of Competition. All of this provided that the investment is made:

1) By residents of countries outside the European Union and the European Free Trade Association.

2) By residents of the European Union or European Free Trade Association countries whose real ownership belongs to the residents of countries outside the European Union and the European Free Trade Association. Such beneficial ownership shall be deemed to exist when the latter ultimately own or control, directly or indirectly, more than 25% of the capital or voting rights of the investors, or otherwise exercise control, directly or indirectly, over the investor.

- Liberalisation of foreign direct investment is also suspended in the following cases:

1) if the foreign investor is directly or indirectly controlled by the government, including public bodies or the armed forces, of a third country. For the purposes of determining the existence of control, the criteria established in Article 7.2 of the Law on the Defence of Competition being applied

2) if the foreign investor has made investments or participated in activities in the sectors affecting security, public order and public health in another Member State, and especially those listed in paragraph 2 of this Article.

3) if there is a serious risk that the foreign investor will engage in criminal or illegal activities affecting public security, public order or public health in Spain

As an example, in July of 2021, the Spanish government, after six month of consideration, approved IFM bid for a 22,79% stake of Naturgy. IFM is an Australian investment fund whilst Naturgy is an historical Spanish energy company.

The approval was subject to several conditions to ensure, in the words of Teresa Ribera (Minister of Ecological Transition), the "*spanishness*" of the company and a long-term commitment of IFM with Naturgy strategic investments towards descarbonisation[196].

Some of the conditions where[197]:

- Keep the registered office and effective headquarter of the company in Spain, as well as retain a "*significant part of the workforce*" in Spain.

- During the five years following the takeover, IFM must vote in favor of investments in "*projects linked to the energy transition in Spain that contribute to generating long-term value, are sustainable and meet market standards in terms of profitability and risk profile*". Both in the board of directors and at the Shareholders meetings.

- IFM cannot approve any divestment that ends with the loss of control over subsidiaries "*that could jeopardize the proper functioning if the transmission and distribution of electricity and natural gas in Spain*" nor any delisting on the Spanish stock market.

- Maintain a "*prudent dividend policy that allows IFM to undertake the investment policy linked to energy transition*"

- Maintain the grade credit rating and do not exceed the debt radios set by the Spanish regulator.

[196] Bernardo Díaz y Antonio Martos Villar, `Ribera asegura que IFM "debe garantizar" la transformación de Naturgy´*Cinco días* (Madrid, 28 Jun 2021) < Ribera asegura que IFM "debe garantizar" la transformación de Naturgy | Empresas | Cinco Días (elpais.com) >Accessed 15 Nov 2023 and Ramón Muñoz, `El Gobierno aprueba con condiciones la opa de IFM sobre el 22,7 % de Naturgy´ *El Pais* (Madrid, 15 Nov 2023) <Ribera asegura que IFM "debe garantizar" la transformación de Naturgy | Empresas | Cinco Días (elpais.com) >Accessed 15 Nov 2023

[197] *Ibid*

This new regime had a temporary nature, and it was approved in the context of a situation of abnormality. However, the measure was extended in time, first until the end of 2022 and lastly until the end of 2024.

The application of the new foreign investment framework, set out in article 7 bis of Law 19/2003, still raised doubts, since several aspects remained to be determined. Thus, the Royal Decree 571/2023[198] was born. The *raison d'être* of this Decree is to develop and complete the Law 19/2003, showing the vocation of permanence of the new regime and granting legal certainty in the matter.

For example, the Decree[199] (i) reduces the legal term for issuing the decision (ii) regulates a voluntary consultation procedure in case there are doubts as to whether a transaction will be subject to screening (iii) introduces new exemptions (iv) regulates the consequences of "gun-jumping" (v) legally recognize the possibility of granting authorization but subject to conditions or commitments (this was something that occurred in practice, as we have seen with the IFM example, but there was no explicit legal permission)

In essence, the foreign investment regime in Spain have changed and it went from a liberalized regime to a system with *ex ante* authorizations or screening mechanisms.

Finally, when addressing this issue, I can´t resist to mention an extremely hot issue that arose while writing this thesis.

On the 7 th of September 2023, Spain woke up with unexpected news: the telecom operator from Saudi Arabia STC had amassed the 9,9% of Telefonica´s share capital. The news was a surprise even for Alvarez-Pallete, chairman and CEO of the company, who knew nothing about the operation and was, in fact, out of office in a business trip[200].

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198 Real Decreto 571/2023, de 4 de julio, sobre inversiones exteriores.

199 For a complete overview of Royal Decree 571/2023, see the client briefing on the matter prepared by leading Spanish law-firm Uría Menéndez Uría Menéndez, ` New Spanish Foreign-Direct-Investment Regulations´ Newsletters (6 July 2023) UM-Newsletter.pdf (uria.com) Accessed 07 December 2023.

200 Hadeel Al Sayegh, Andrés Gonzalez y Belen Carreño, `How Saudis quietly built influence at Spain´s Telefonica´ (Madrid, 8 Sept 2023) <https://www.reuters.com/markets/deals/how-saudis-became-top-shareholder-telefonica-spains-tel> Accesssed 27 November 2023

The controversy was served. On the one hand, STC is owned (64%) by the Public Investment Fund of Arabia Saudi, a country, that is not precisely a democratic champion. On the other hand, Telefonica is the flagship of Spanish telecoms and a highly strategic company in the cybersecurity field.

On top of everything, the acquisition was done secretly (but lawfully), to avoid communication to Telefonica and to the Securities Market Commission. Something that, for sure, would have skyrocket the price of the stock. Under Spanish law, communication to the target company and to the regulator must be made if the stake bought grants a 3% or more of the voting rights.[201]

However, STC advised by Linklaters and Allen & Overy, used the bank Morgan Stanley to buy smaller portions of stock, until reaching a 4,99 %. The remaining 5%, is owned trough a put/call option (financial derivative).

The share percentage is also not casual since, as we have seen, the government authorization is triggered when a 10 % is acquired. However, after the Royal Decree 571/2023, the government lowered the share percentage to 5% when dealing with companies that, like Telefónica, operate defense and security infrastructures[202]. That's why, after the purchase of the put/call option by Morgan Stanley in Telefonica´s name, the stock had to be bough to the surface and put under the scrutiny of the government. Thus, the government, has three months to decide on the transaction. If the authorization is not granted, Telefónica will not trigger the option call, remaining with a 4,99% stake.

In the communication sent to the Spanish National Securities Market Commission, STC[203] has reiterated the idea that this is an investment driven purely by financial reasons and that there is no intention of taking up Telefonica´s control or change the board of directors:

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[201] Art 23 of the Real Decreto 1362/2007, de 19 de octubre, por el que se desarrolla la Ley 24/1988, de 28 de julio, del Mercado de Valores, en relación con los requisitos de transparencia relativos a la información sobre los emisores cuyos valores estén admitidos a negociación en un mercado secundario oficial o en otro mercado regulado de la Unión Europea.

[202] Art 18 del Real Decreto 571/2023, de 4 de julio, sobre inversiones extranjeras.

[203] Comunicación de STC a la Comisión Nacional del Mercado de Valores (5 Sep 2023) < [Ver (cnmv.es)]>

"*STC Group does not intent to acquire control or a controlling interest in Telefónica. The investment reflects STC group´s confidence in Telefonica´s management team, strategy, and ability to create value*"

However, this has not removed the suspicions in Spain and many remember what happened after the arrival of Etisalat in Vodafone share capital. Despite having reassured the confidence laid on the board and the lack of plans to exercise control over it, Etisalat formed an alliance with other shareholders and forced the replacement of the CEO and a change to a more aggressive management style.

In fact, the Government is studying the possibility to use the Spanish State-Owned Industrial Holding Company (SEPI), a public law entity in charge of holding the shares owned by the government in industrial companies[204] to buy a 5 % percent of the company and thus, defend the Spanish interests [205].

This case shows how the issue is long from being resolved. For some, Arabia Saudi´s interest in Telefonica is flattering as it shows the attractiveness of Spanish listed companies. At the end of the day, one may say, capital injections in the Spanish market can only be positive. But for others, having the indirect influence of a regime known for its violation of human rights in a strategic industry is extremely worrying.

In any case, it is enlightening to see how state intervention is called for in a company that: used to be public, underwent a privatization process and was cleaned of golden shares by the European Court of Justice in 2003[206].

Nietzsche's words may come to mind: "*Everything goes, and everything returns, the wheel of existence rolls forever. Everything dies, everything blossoms anew; the year of existence runs on forever. Everything breaks, everything is joined new; the same house of*

[204] Majority owned, minority owned and indirect participation
[205] Cristina Galindo, `El Gobierno explora entrar en Telefónica para reforzar el capital español tras el desembarco de la saudí STC´ (Madrid, 31 Oct 2023) < El Gobierno explora entrar en Telefónica para reforzar el capital español tras el desembarco de la saudí STC | Economía | EL PAÍS (elpais.com) > Accesssed 27 November 2023
[206] Case C-463/00 *Commission v Spain*

existence builds itself forever. Everything departs, everything meets again; the ring of existence is true to itself forever".

4. Conclusion

It is true that the European Commission was concerned with the loss of critical assets and technology since, due to economic situation, strategic companies where vulnerable to opportunistic buyers[207]. However, this communication was the tipping point, and Covid-19 was just the *casus belli* for a change of paradigm that had already started a few years ago[208].

Despite what many think, the change of paradigm regarding the virtues of foreign investment did not start during Covid times. On the contrary is something that can be traced back and the adoption of the Foreign Direct Investment Regulation is the proof of that.

However, Covid was indeed the *casus belli* that precipitated everything[209].At the end of the day, even if some authors consider that it introduces a "*light-touch harmonization*" and a "*rough consensus*" [210]; the Foreign Direct Investment sets merely a framework[211]

But Covid, accelerated what would eventually come and it showed the European Union what could happen to its strategic companies. That is why the Commission issued the

[207] The Commission was specially concerned with the healthcare sector:

[208] In words of: *The Commission´s latest call on the EU Member States during COVID-19 crisis to use their investment screening regimes to the fullest, or to introduce such if still lacking, should have been enough to convince the last doubter that we are living in different times.*

[209] In the same direction, see Steffen Hindelang and Andreas Moberg, `A Complex Setting of Cooperation and (potential) Conflict: Regulation (EU) 2019/452 in a Doctrinal Perspective in S. Hindelang (eds) and A. Moberg (eds), *Yearbook of Socio-Economic Constitutions 2020 a Common European Law on Investment Screening* (Springer 2020), p. 838 *:*

[210] *Ibid, p. 841,* "*First, it initiates a light-touch harmonisation by introducing a number of procedural standards governing the screening of FDIs. Second, by suggesting a number of factors that the Member States "may consider" when determining whether or not an FDI is likely to affect security or public order, it initiates a collective process aiming at a converging interpretation and application of those legal terms across the EU Member States, in other words a "rough consensus". As a "harmonizing" measure, this rough consensus approach must yet prove, in practice, whether it can bring together the diverging interests and needs of the Member States when it comes to "security" and "public order*"

[211] See art 1: "*This Regulation establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments*".

Communication it did, urging the use of screening mechanism and its adoption in those countries without it.

The results are clear. Countries that like Spain or the Netherlands used to have a liberalized regime, even after the overwhelming Chinese investments, the discussion between Member States, and finally, even after the Directive; ended up introducing screening mechanism.

As perfectly explained by HINDELANG and MOBERG[212]:

"Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investment into the Union (EU Screening Regulation) is one of the clearest signs-and possibly also a catalyst- of this tectonic shift in the EU´s crust. The Commission´s latest call on the EU Member States during the COVID-19 crisis to use their investment screening regimes to the fullest, or to introduce such if still lacking, should have been enough to convince the last doubter that we are living in different times".

[212] Steffen Hindelang and Andreas Moberg (209)

V. CONCLUSION

In the light of everything discussed in this thesis, the following considerations can be reached:

1. The highly debated, screening or *ex ante* authorizations that were put in place during the Covid times, are not the first attempts made by Member States to protect strategic companies or national champions.

2. On the contrary, due to their implications for the national economies, Member States have always tried to shield their strategic companies and have always been reluctant to foreign capital. At the end of the day, it is in their very nature, and they cannot help it. As said in the introduction, there is a positive correlation between the possibility of facing government opposition and the number of domestic jobs in jeopardy[213].

3. In this regard, we have seen through the pages of this thesis, how Member States struck down a Take-Over Directive that wanted to leave their companies unarmed when facing a foreign bidder, by removing from their legal systems the anti-takeover devices. In addition, they also managed to include a reciprocity rule that watered down the Directive´s purpose.

4. Furthermore, it is clear how the European Commission had to hound Member States to eliminate the golden shares that allowed them to entrench their power in recently privatized companies. From the facts laid down in this thesis, it seems clear that, Member States would not have waived these privileges if they were not told to do so.

5. Even the debate around foreign direct investment is not new, and many Member States, before Covid, had been calling for a control of foreign capitals. The main

[213] Maximilian Rowoldt and Dennis Starke (12)

arguments were the lack of reciprocity and the fear of a *know-how* drain. Covid, merely acted as an accelerator or *casus belli* for a change of heart that had already occurred.

6. However, even if protectionism does not constitute a new topic in the European Union; the investigation carried to address this thesis has taught me that, indeed, something has changed.

7. Throughout the history of the European Union, as we have seen in this thesis, the narrative was always the same: Member States will try to use any leeway to protect their national companies, while the European Institutions were always chasing Member States, to enforce the principles of the internal market. It seemed that the European Institutions needed to remain vigilant, or Member States will revert to their "old ways".

8. However, in 2020, the Commission issued a communication, urging Member States, to make use of their screening mechanism. But the Commission went even further, and called on member states that did not have one, to "*set-up a full fledged screening mechanism and in the meantime to use all other available options*".

9. As we have seen, this led to the adoption of investment control mechanism by Member States that, until then, had always had a liberal regime. In other words, the unseen happened and the European Commission took the initiative in the promotion of protectionism.

10. In essence, the tension has always been, between the interest of one Member State and the interest of the Internal Market. In the case of the Takeover Directive, the aim was to facilitate the takeovers within the internal market. On the other hand, with the eradication of golden shares the aim was to boost the flow of capital by ending with the state entrenchment as a result of the privatisation process.

11. However due to several economic and geopolitical reasons- that exceed the legal field and my modest aims with this thesis- the European Union finds herself at a historic crossroads. Thus, under the siege of illiberal regimes that lack market status, the paradigm of the foreign investment virtues was shifted, and an autonomous European interest emerged. It is not the interest of Portuguese´s or French´s strategic companies or key technologies anymore, it is the interest of an European Union that claims a specific way of doing things and a place in the world.

12. Therefore, rather than reminding Nietzsche's eternal return and its "*Everything goes, and everything returns",* we must end this thesis with Bob Dylan legendary quote: "*the times they are a-changin"*

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