Screening of Foreign Direct Investments Through European Company Law

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Contents

Abstract This chapter examines how screening of foreign direct investments could take place through European company law. It scrutinizes the contribution of both CJEU's case law and the harmonization of European company law to an effective screening of foreign direct investments. On the basis of this approach, this chapter is divided into two parts. The first part focuses on CJEU's case law, and the second part examines harmonization. An examination of the freedom of establishment of

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S. Hindelang, A. Moberg (eds.), *YSEC Yearbook of Socio-Economic Constitutions 2020,* YSEC Yearbook of Socio-Economic Constitutions (2021) 2020: 677–724,
https://doi.org/10.1007/16495_2020_9, Published online: 28 May 2020

companies in the light of CJEU's case law on corporate mobility sheds light on the screening of foreign direct investments. The impact of the privatizations of State-owned companies and of CJEU's golden share case law on the screening of foreign direct investments is discussed. This chapter analyzes how certain harmonizing instruments of European company law could contribute to the screening of foreign direct investments. The relationship between the goals of the harmonization of European company law and the screening of foreign direct investments is also scrutinized. The Takeover Bids Directive with its optionality and reciprocity regime and with its requirements for disclosure of information could contribute to an effective screening of a foreign direct investment behind a takeover bid. Additionally, this chapter examines how the Shareholders Rights Directive II, the Transparency Directive, the Cross-Border Mergers Directive (repealed and consolidated into Directive 2017/1132) and the European Company Statute (Societas Europaea – SE) could contribute to investment screening. Some concluding remarks are deduced on the importance and effectiveness of European company law for the screening of foreign direct investments.

1 Introduction

Screening of foreign direct investments could take place through European company law. The harmonization of company law in the European Union, as well as CJEU's case law, offers mechanisms in this regard. EU company law includes certain instruments that could constitute effective screening mechanisms: derogations to EU fundamental freedoms as interpreted by CJEU's case law, corporate control mechanisms, requirements for transparency and disclosure of information and veto powers in corporate restructuring harmonizing instruments. These company law instruments could be used indirectly for this screening as their primary aim is the harmonization of company law and the promotion of EU fundamental freedom of establishment (Arts. 49–54 TFEU). Although their primary objective is "the protection of the interests of members [i.e. shareholders] and others",[1] they could also contribute significantly to an effective screening of foreign direct investments.

The scope and the limits of European company law in the area of screening of foreign direct investments are revealed from CJEU's case law on corporate mobility scrutinizing the freedom of establishment of companies. It is accepted that a foreign investor from a third country must establish first a company in one of the Member States in order to benefit from EU fundamental freedom of establishment. Only EU companies fall within the scope of EU freedom of establishment (Arts. 49–54 TFEU)

[1] Art. 50(2)(g) TFEU.

and of harmonized rules. The focus of this chapter is on EU companies[2] controlled by a foreign (non-EU/third-country) investor and benefiting from freedom of establishment and on which tools of European company law could be used for the screening of the foreign (non-EU/third-country) investor controlling these EU companies.

This chapter examines how the screening of foreign direct investments could take place through European company law. It scrutinizes the contribution of both CJEU's case law and the harmonization of European company law to an effective screening of foreign direct investments. On the basis of this approach, this chapter is divided into two parts. The first part focuses on CJEU's case law, and the second part examines harmonization. An examination of the freedom of establishment of companies in the light of CJEU's case law on corporate mobility sheds light on the screening of foreign direct investments. The impact of the privatizations of State-owned companies and of CJEU's golden share case law on the screening of foreign direct investments is discussed. This chapter argues that lawful golden shares in privatized companies also play an important role in the screening of foreign direct investments. The golden share case law elaborated the conditions under which a Member State could exercise control over a privatized company. In *Commission v Belgium*,[3] the CJEU stipulated the conditions under which golden shares could be justified and, as a result, could be lawful. These conditions for lawful golden shares could be used by Member States in order to structure an effective screening mechanism for foreign direct investments. Lawful golden shares could either block a foreign investor from investing in the capital of a privatized company or control and restrict its actions when the foreign investor is already a (controlling) shareholder of the privatized company. Conflicts of interests in privatizations of State-owned companies are also taken into account. This chapter analyzes how certain harmonizing instruments of European company law could contribute to the screening of foreign direct investments. The relationship between the goals of the harmonization of European company law and the screening of foreign direct investments is also scrutinized. The Takeover Bids Directive with its optionality and reciprocity regime and with its requirements for disclosure of information could contribute to an effective screening of a foreign direct investment behind a takeover bid. This chapter refers also to political considerations and protectionism in takeover bids and to their impact on the screening of foreign direct investments. Additionally, this chapter examines how the Shareholders Rights Directive II, the Transparency Directive, the Cross-Border Mergers Directive (repealed and consolidated into Directive 2017/1132) and the European Company Statute (Societas Europaea—SE) could

[2]With the term "EU company", this paper refers to a national company established in a Member State under its domestic law. An "EU company" falls within the scope of Art. 54 TFEU and could benefit from freedom of establishment. The term "EU company" was chosen in order to distinguish such companies from "non-EU companies", which are companies established in non-EU States.

[3]Judgment of the Court of 4 June 2002, Commission v Belgium, C-503/99, ECLI:EU:C:2002:328.

contribute to investment screening.[4] Some concluding remarks on whether European company law could constitute an effective mechanism for the screening of foreign direct investments are deduced.

It is necessary to explain in advance what the term investment screening means in the context of European company law. The term investment screening has a twofold meaning in European company because it serves two objectives: the public interest and the interest of shareholders and other stakeholders. This distinction derives from the fact that European company law has the promotion of EU fundamental freedom of establishment of companies as its primary objective and investment screening as its secondary objective. On the one hand, investment screening in the context of the exercise of EU fundamental freedom of establishment of companies and of CJEU's case law on corporate mobility is related to the assessment of foreign direct investments on grounds of public interest. CJEU's case law interprets the available justifications of restrictions on the freedom of establishment of companies, which contribute to investment screening. Moreover, investment screening in the light of privatizations and the golden share case law takes place on the basis of public interest considerations. The CJEU explained under which conditions golden shares could constitute justified restrictions on EU fundamental freedoms and, as a result, could be lawful and could also serve as a screening mechanism. On the other hand, investment screening in the context of harmonization of company law entails an assessment of foreign direct investments on the basis of both the protection of the interests of shareholders and other stakeholders and the protection of public interest. An investment screening during a takeover bid assesses the bidder controlled by a foreign investor. In the context of the Shareholders Rights Directive II, investment screening is related to the promotion of the interests of the company through encouragement of long-term shareholder engagement by identification of shareholders, transmission of information, facilitation of the exercise of shareholder rights, disclosure of engagement policy and transparency and approval of related party transactions. Investment screening in the framework of Transparency Directive encompasses an assessment of foreign direct investments on the basis of investor protection and market efficiency, which include the protection of the interests of shareholders. In specific corporate restructuring harmonizing instruments, such as the Cross-Border Mergers Directive (repealed and consolidated into Directive 2017/1132) and the European Company Statute (Societas Europaea—SE), investment screening comprises an assessment of foreign direct investment on the basis of public interest.

Hence, it could be deduced that investment screening in the context of European company law takes place on two bases: public interest and the interest of shareholders and other stakeholders. Their common denominator is that the interest of shareholders and other stakeholders is not always confined to the narrow limits of the company. Sometimes the interest of shareholders and other stakeholders touches

[4]Reference is also made to Shareholders Rights Directive I and to Statute for a European Cooperative Society (SCE).

public interest. Quite often, a company is crucial for the interests and the welfare of the general public. This is quite common in the case of "strategic companies" and of "national champions", where the interest of shareholders and other stakeholders is intertwined with the public interest. "Strategic companies" and "national champions" play a major economic, political and social role in many Member States, which affect significantly the public interest. The importance of such companies for the various national interests of Member States gives sometimes the impression that public interest is hiding behind the interest of shareholders and other stakeholders. In addition to their own interests, shareholders and other stakeholders of "strategic companies" and "national champions" sometimes should take into account public interest in their decisions. Screening is required for "unwanted" foreign investments, which might be detrimental both to shareholders and other stakeholders' interests and to public interest. In the case of "strategic companies" and "national champions", an investment screening taking place through European company law might reveal and sometimes frustrate "unwanted" foreign direct investments.

2 Freedom of Establishment of Companies, CJEU's Case Law on Corporate Mobility and Screening of Foreign Direct Investments

EU fundamental freedom of establishment is conferred on both natural persons and companies (legal persons) by Arts. 49–54 TFEU. Article 49 TFEU (ex Art. 43 TEC) proclaims the freedom of establishment, while Art. 54 TFEU (ex Art. 48 TEC) specifies the meaning of companies or firms, which can benefit from the freedom of establishment.[5] The effect of Arts. 49 and 54 TFEU was illustrated by the prominent *Centros* case: "*The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person*."[6]

[5]According to the definition of "companies" of Art. 54 TFEU, the freedom of establishment of companies could not be enjoyed by companies having been formed abroad and subsequently having been reincorporated into an EU company. A company shall be "*formed in accordance with the law of a Member State*" in order to fall within the scope of freedom of establishment. Hence, a non-EU company of a foreign investor could not enjoy the benefits of freedom of establishment by reincorporating into an EU Member State. The foreign investor shall form a new EU company capable of benefiting from freedom of establishment.

[6]Judgment of the Court of 9 March 1999, Centros Ltd v Erhvervs- og Selskabsstyrelsen, C-212/97, ECLI:EU:C:1999:126 para. 20 citing: Judgment of the Court (Second Chamber) of 10 July 1986, D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, 79/85, ECLI:EU:C:1986:308 para. 13; Judgment of the Court of

Moreover, the CJEU elucidated how freedom of establishment could be exercised by companies: "*In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52. [. . .] A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company.*"[7] Freedom of establishment of companies does not allow discriminatory treatment of a company with a registered office in another Member State: "[. . .] *As the Court has already stated, in [. . .]Case 270/83 Commission v France [. . .] acceptance of the proposition that the member state in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another member state would deprive article 58 of all meaning*."[8]

An EU company set up in an EU Member State by a foreign investor could benefit from EU fundamental freedom of establishment (Arts. 49–54 TFEU). A foreign investor could accrue all the benefits of the internal market by setting up a company in a Member State, which could then exercise its right of establishment. On the one hand, EU companies set up by a foreign investor could exercise their right of primary establishment, where the EU company could move its seat/registered office to another Member State through conversion/reincorporation in compliance with the conditions and restrictions of the national laws applicable to companies, which were interpreted by the CJEU in a series of cases. On the other hand, EU companies set up by a foreign investor could exercise their right of secondary establishment by setting up agencies, branches or subsidiaries in other Member States, which was interpreted in liberal way by the CJEU.[9] With regard to secondary establishment, EU companies

28 January 1986, Commission v France, 270/83, ECLI:EU:C:1986:37 para. 18; Judgment of the Court of 13 July 1993, The Queen v Inland Revenue Commissioners, ex parte Commerzbank AG, C-330/91, ECLI:EU:C:1993:303 para. 13; and Judgment of the Court of 16 July 1998, Imperial Chemical Industries plc v Kenneth Hall Colmer, C-264/96, ECLI:EU:C:1998:370 para. 20, Dashwood et al. (2011), p. 648.

[7]Judgment of the Court of 27 September 1988, The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, 81/87, ECLI:EU:C:1988:456 para. 17; Dashwood et al. (2011), p. 648.

[8]Judgment of the Court (Second Chamber) of 10 Jul 7 1986, D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, *79/85*, ECLI:EU:C:1986:308, paras 13–14; Dashwood et al. (2011), p. 648.

[9]Judgment of the Court of 9 March 1999, Centros Ltd v Erhvervs- og Selskabsstyrelsen, C-212/97, ECLI:EU:C:1999:126; Judgment of the Court of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd., C-167/01 ECLI:EU:C:2003:512; Judgment of the Court of 5 November 2002, Überseering BV v Nordic Construction Company Baumanagement GmbH, C-208/00, ECLI:EU:C:2002:632; Judgment of the Court (Grand Chamber) of 13 December 2005, SEVIC Systems AG, C-411/03, ECLI:EU:C:2005:762; Judgment of the Court (Grand Chamber) of 13 December 2005, Marks & Spencer plc v David Halsey, C-446/03, ECLI:EU:C:2005:763; Judgment of the Court of 6 June 1996, Commission v Italy, C-101/94 ECLI:EU:C:1996:221; Judgment of the Court of 28 January 1986, Commission v France, C-270/83, ECLI:

(including letterbox companies) setting up a secondary establishment in another Member State and the resulting regulatory competition were favoured by the CJEU in *Centros* and subsequent cases, which struck down many restrictions. With regard to primary establishment, the possibility of seat transfers at EU level was not harmonized for a long time, and some Member States put restrictions on inbound and/or outbound seat transfers and reincorporations. While the CJEU accepted the possibility of Member States to retain specific restrictions on seat transfers,[10] it put certain limits to these powers of Member States by allowing seat transfers of companies wishing to change also their applicable law and, as a matter of fact, by providing the possibility of cross-border conversions.[11] Finally, cross-border conversions at EU level were harmonized by Directive 2019/2121,[12] which is going to change completely the landscape of seat transfers at EU level.

In CJEU's case law on the freedom of establishment of companies, Member States put an effort in justifying on the basis of the available justifying grounds of TFEU (Art. 52 TFEU) or on the basis of the mandatory requirements of the general interest formulated by CJEU's case law the various restrictions imposed by them on the freedom of establishment of companies. The CJEU applied also the well-known *Gebhard* test[13] to these corporate mobility cases. These justifications invoked by Member States could contribute to an effective screening against a foreign investor benefiting from the freedom of establishment through an EU company. Some examples of these justifications are the following: (1) (a) that capital requirements reinforced financial soundness and protected public creditors (as, unlike other creditors, they could not secure their debts through guarantees); (b) that all creditors were protected from the risk of a fraudulent bankruptcy related to the insolvency of a company following an inadequate initial capitalization (*Centros*); (2) protection of

EU:C:1986:37; Judgment of the Court (Second Chamber) of 10 Jul 7 1986, D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen, 79/85. For a discussion of primary and secondary establishment of companies, see: De Luca (2017), pp. 85–111; Myszke-Nowakowska (2014), pp. 25–31.

[10] Judgment of the Court of 27 September 1988, The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc, C-81/87, ECLI:EU:C:1988:456.

[11] Judgment of the Court (Grand Chamber) of 16 December 2008, CARTESIO Oktató és Szolgáltató bt, C-210/06, ECLI:EU:C:2008:723; Judgment of the Court (Third Chamber), 12 July 2012, VALE Építési kft, C-378/10, ECLI:EU:C:2012:440; Judgment of the Court (Grand Chamber) of 25 October 2017, Polbud, C-106/16, ECLI:EU:C:2017:804.

[12] Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019, pp. 1–44.

[13] "*However, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it*" Judgment of the Court of 30 November 1995, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, C-55/94, ECLI:EU:C:1995:411.

creditors, protection of minority shareholders, protection of employees and requirements of taxation authorities (*Uberseering*); (3) prevention of fraud, protection of creditors, effectiveness of tax inspections and the need to ensure fairness in business dealings (*Inspire Art*); (4) protection of the interests of creditors, minority shareholders and employees, preservation of the effectiveness of fiscal supervision and fairness of commercial transactions (*SEVIC*); and (5) tax avoidance (*Marks & Spencer*).[14] While the CJEU accepted these justifications as valid justifying grounds, in the individual cases, the Member States' measures did not comply with the principle of proportionality and, as a matter of fact, could not be accepted.

All these categories of justifications of restrictions constitute public policy grounds under which an effective screening could take place. It should be noted that this is wide reading of screening, which aims at screening for sufficient capitalization, non-fraudulent behaviour, etc. Nevertheless, even in the context of such a wide reading of screening, certain corporate activities or decisions of an EU company controlled by a foreign investor could be restricted lawfully. This screening on the basis of justified restrictions could stop an EU company controlled by a foreign investor to expand its activities at cross-border level via the establishment of agencies, branches or subsidiaries in other Member States. Nevertheless, Member States should make sure that the invoked justifications used as a screening mechanism must comply with the principle of proportionality. Member States should not neglect that non-compliance with the principle of proportionality is the most common ground for rejection of the justifying grounds invoked by them. Moreover, it should be stressed that purely economic considerations (e.g. budgetary grounds or grounds related to the national economy or financial interests of domestic companies, etc.) can never serve as justifications for restrictions. Hence, purely economic considerations of Member States cannot hinder a foreign investor's EU company from exercising freedom of establishment.

3 Privatizations of State-Owned Companies, Golden Shares and Screening of Foreign Direct Investments

3.1 Golden Shares as an Effective Tool to Screen Foreign Directive Investments

"Golden Shares" or "Special Shares" (hereinafter "golden shares") are defined as "*any legal structure applicable to individual companies which preserves or helps to perpetuate the influence of the State on such companies*".[15] This definition encompasses special rights and privileges that Member States retain in certain privatized

[14] Papadopoulos and Moloney (2012), paras [2254]–[2260].

[15] Judgment of the Court (Grand Chamber) of 23 October 2007, Commission v. Germany, C-112/05 ECLI:EU:C:2007:623; Van Bekkum et al. (2008), p. 8; Van Bekkum (2010), p. 13.

companies. These special rights and privileges do not correspond usually to the State's percentage of shareholding in the privatized company, meaning that there is no proportionality between capital and control in the State's shareholding. The motive behind the introduction of these golden shares in privatized companies was the protection of public interest.[16] This pursue of public interest took more specific shapes. The main reasons put forward by Member States for keeping ownership control rights over a company after its privatization include the following: (1) to ensure that ownership and control of the company do not fall into hostile or undesirable hands (i.e. takeover protection); (2) to ensure that the company retains its corporate purpose and jurisdiction of incorporation; (3) to prevent the sale of strategic and key company assets while retaining the current corporate structure, purpose and form of the undertaking; (4) to ensure that the new owners of privatized enterprises comply with certain commitments included in the sales agreement; (5) to guarantee the provision of services of general interest in sensitive sectors of the economy; (6) to safeguard public security, public health and national defence.[17]

The prerogatives that golden shares grant could be broadly categorized into three large categories: (1) guarantee of certain voting rights or blocking power, such as the right to outvote other shareholders at general meetings or to veto certain decisions of the company, such as the sale of core assets; (2) provisions in the company's articles of association or shareholders' agreements intended to ensure that no shareholder is beneficially entitled to an interest in more than a fixed proportion of voting shares; and (3) power of Member States to nominate some of the directors and to influence the management of the company.[18] Some Member States adopted golden shares on the basis of existing company law, while other Member States adopted new legislation introducing State privileges in privatized companies.[19]

The European Commission (hereinafter referred to as "Commission") argued that golden shares were infringing EU fundamental freedoms, more specifically free movement of capital and freedom of establishment. In its 1997 Communication, the Commission stated that several of these golden shares are accompanied by public interest considerations as a basic justification for their use. It is useful to mention at this point the argumentation of the Commission. Despite the fact that public interest considerations are often connected to theoretically non-discriminatory measures

[16]The State as a shareholder wished to continue to strive for public interest after the privatization by exercising a certain degree of control over privatized companies, which now had private investors as their major shareholders.

[17]European Commission Staff Working Document (22 July 2005), Special rights in privatised companies in the enlarged Union–a decade full of developments, p. 6. For an analysis of protectionism and golden shares, see: Rickford (2010), pp. 54–94. Biondi (2010), pp. 95–102.

[18]For a discussion of the composition of board of directors as a vehicle for State intervention in corporate governance, see: Licht (2012), pp. 597–622. For challenges to State's defensive measures, see: Strauss (2019), p. 119.

[19]Andenas and Wooldridge (2009), pp. 14–15. See, also an interesting study on the change in government control of privatized firms in OECD countries: Bortolotti and Faccio (2009), pp. 2907–2939.

(e.g. prior authorization), this condition does not seem to be sufficiently transparent and could, as a matter of fact, result in a situation of discrimination against foreign investors as well as legal uncertainty.[20] Moreover, this concept could include both economic and non-economic conditions exceeding the judicially accepted justifications to the free movement of capital and freedom of establishment. On the basis of these arguments, the Commission did not accept that public interest considerations could be used as a justifying ground for these golden shares.[21] The CJEU decided many cases[22] in which the free movement of capital and the freedom of establishment were directly or indirectly restricted through golden shares held by Member States in privatized companies. In these golden share cases, the CJEU examined these national privatization schemes in the light of free movement of capital and freedom of establishment.

State-owned companies in various Member States could also attract the interest of foreign investors. Many of these State-owned companies belong to strategic areas of the economy. In privatizations of State-owned companies, where foreign investors are seeking to acquire their corporate control, golden shares compatible with internal market rules could constitute an effective screening mechanism. As mentioned above, the CJEU had the chance to examine many national golden share schemes in privatizations of State-owned companies. These golden shares were considered to infringe free movement of capital (Art. 63 TFEU) and freedom of establishment (Arts. 49, 54 TFEU). In its golden share case law, the CJEU structured the criteria under which a golden share scheme could be compatible with internal market

[20] Communication of the Commission on certain legal aspects concerning intra-EU investment, OJ C 220. 19.7.1997, pp. 15–18, para. 8.

[21] Ibid.

[22] Judgment of the Court of 23 May 2000, Commission v Italy, C-58/99, ECLI:EU:C:2000:280; Judgment of the Court of 4 June 2002, Commission v Portugal, C-367/98, ECLI:EU:C:2002:326; Judgment of the Court of 4 June 2002, Commission v France, C-483/99, ECLI:EU:C:2002:327; Judgment of the Court of 4 June 2002, Commission v Belgium, C-503/99, ECLI:EU:C:2002:328. Judgment of the Court of 13 May 2003, Commission v Spain, C-463/00, ECLI:EU:C:2003:272; Judgment of the Court of 13 May 2003, Commission v UK, Case 98/01, ECLI:EU:C:2003:273; Judgment of the Court (First Chamber) of 2 June 2005, Commission v Italy, C-174/04, ECLI:EU:C:2005:350; Judgment of the Court (First Chamber) of 28 September 2006, Commission v Netherlands, Joined Cases C-282 and C-283/04, ECLI:EU:C:2006:608; Judgment of the Court (Grand Chamber) of 23 October 2007, Commission v Germany, C-112/05, ECLI:EU:C:2007:623; Judgment of the Court (Third Chamber) of 14 February 2008, Commission v Spain, C-274/06, ECLI:EU:C:2008:86; Judgment of the Court (Third Chamber) of 17 July 2008, Commission v Spain, C-207/07, ECLI:EU:C:2008:428; Judgment of the Court (First Chamber) of 6 December 2007, Federconsumatori v Comune di Milano, Joined Cases C-463/04 and C-464/04, ECLI:EU:C:2007:752; Judgment of the Court (First Chamber) of 8 July 2010, Commission v Portugal, C-171/08, ECLI:EU:C:2010:412; Judgment of the Court (First Chamber) of 11 November 2010, Commission v Portugal, C-543/08, ECLI:EU:C:2010:669; Judgment of the Court (First Chamber) of 10 November 2011, Commission v Portugal, C-212/09, ECLI:EU:C:2011:717; Judgment of the Court (Fourth Chamber) of 8 November 2012, Commission v Greece, C-244/11, ECLI:EU:C:2012:694. O'Grady-Putek (2004), pp. 2219–2285; Artes (2009), pp. 457–482.

rules.[23] In all these cases, apart from one, Member States failed to convince the CJEU on the justifications to these infringements, which they invoked.[24] Only one golden share case, *Commission v Belgium*,[25] passed the test of the CJEU; the Belgian golden share scheme was found to be justified and, as a result, to be lawful. Belgian golden shares had certain characteristics that distinguished them from the golden shares of other Member States. The Belgian golden share scheme prescribed a right to oppose, ex post facto, some corporate decisions in privatized companies. The Belgian golden shares entailed a right to oppose only certain decisions concerning specific assets, did not allow any arbitrary exercise of the rights deriving from these prerogatives, required full justification of these decisions and opened the door to the possibility of judicial review by Belgian courts.[26] Hence, in *Commission v Belgium*, the CJEU stipulated the conditions under which golden shares could be justified and, as a result, could be lawful. These conditions for lawful golden shares could be used by Member States in order to structure an effective screening mechanism for foreign direct investments. Lawful golden shares could either block a foreign investor from investing in the capital of a privatized company or control and restrict its actions when the foreign investor is already a (controlling) shareholder of the privatized company.

These privileges of Member States to continue to exercise control over the privatized company, even when they do not possess a sufficient percentage of capital and there is no proportionality between capital and control, deviate from investor ownership, which constitutes one of the foundations of company law.[27] Company law is structured primarily in a default way to contribute to the establishment and operation of investor-owned firms, i.e. firms in which the rights to control the firm and the right to receive the firm's net profits are closely linked to investment of equity capital in the firm. In an investor-owned firm, the right to participate in corporate control (involving voting for the election of directors and for the approval of major transactions) and the right to participate in the profits are proportional to the amount of capital contributed to the firm by the shareholder.[28] The proportionality between capital and participation in control and profits constitute the basis of corporate legislation. By retaining special powers in the company after its privatization, Member States derogate from this default principle of proportionality between capital and control in the context of investor ownership. These special rights of the State to continue to intervene in the control of a privatized company

[23] For a critical overview of golden share case law, see: Andenas and Wooldridge (2009), pp. 14–20.

[24] The CJEU found that the national provisions were not precise, clear and proportionate. Benyon (2010), p. 38.

[25] Judgment of the Court of 4 June 2002, Commission v Belgium, C-503/99, ECLI:EU:C:2002:328.

[26] Szabados (2015), p. 1127.

[27] Kraakman et al. (2017), p. 14. For an analysis in the context of protectionism and the market for corporate control, see: Bernitz (2010), pp. 191–206. Ringe (2010), pp. 209–240. Reisberg (2010), pp. 241–249.

[28] Kraakman et al. (2017), p. 13.

deviate from this element of investor ownership and could violate EU fundamental freedoms. However, this deviation from investor ownership could be justified according to the criteria of CJEU's golden share case law and, as a matter of fact, could be lawful. This lawful deviation from the default investor ownership rule serves the screening of foreign direct investments. State as a shareholder in a privatized company, which deviates from the investor ownership rule, invokes public interest considerations in the exercise of its control over the privatized company, which aims at screening the profile of the potential foreign investor. Moreover, golden shares are also quite useful in case of onward transfers of privatized activities. The Member State could continue to screen and to exercise control through golden shares over the privatized company when there is an onward transfer of ownership over the initial privatized shareholding from the initial investor to another investor.[29]

3.2 Privatizations of State-Owned Companies and Conflicts of Interests

In privatizations of State-owned companies at EU level, conflicts of interests might arise. The typical conflict of interest arises between the State continuing to hold shares in a privatized company and a private investor having acquired shares in this privatized company. This conflict entails the interests of private investor seeking to maximize the profits from such acquisition of shares and the interests of the State pursuing political and social goals with a positive (serving the public interest) or negative dimension (the product of rent seeking).[30] The State is very rarely a typical financial investor. As a result, State ownership is characterized by diversity in the shareholder base, which goes beyond that of a regular investor-owned company and from which peculiar conflicts of interest might emerge.[31]

A new kind of conflict of interests in State-owned companies might arise when the private investor is another State-owned company. In this case, there is going to be a foreign State-owned company participating in the privatization of another State-owned company. This is the case of "imperfect privatizations": when a State decides to privatize its activities, instead of transferring them to the private sector, it privatizes them to another State's public sector (e.g. a multinational State-owned company or a sovereign wealth fund).[32] The investor State-owned company might seek to achieve political objectives[33] and not simply to get some short-term or long-

[29]Strauss (2019), pp. 65–66.

[30]Pargendler et al. (2013), p. 571.

[31]Kraakman et al. (2017), p. 14.

[32]Strauss (2019), p. 121.

[33]For a perspective on political influence over the governance of Chinese State-owned companies, see: Wang (2014), pp. 631–669. Fu (2017), pp. 145–162, Wang (2017), pp. 183–211.

term profits. Although the business incentives could be dominant in the participation of a foreign State-owned company in the privatization of a State-owned company, political or strategic incentives should not be excluded.[34] This scenario results in a different conflict of interests: both the investor State-owned company and the investee State-owned company under privatization could seek to achieve political goals, which could be proved to be conflicting. Their shareholdings in such a case could be guided by conflicting political objectives. Hence, a State would prefer to avoid attracting a foreign State-owned company as a shareholder in its State-owned company under privatization or would like to know in advance the political goals that the foreign investor State-owned company might pursue. Moreover, "disguised State enterprises", which are private-sector businesses but with its State's ownership and control determining the interests they pursue, are an additional source of uncertainty regarding foreign direct investments in privatized companies.[35]

According to the CJEU's case law, lawful golden shares might help a Member State to screen the political intentions of a foreign State-owned company planning to invest in one of its privatized companies. Lawful golden shares might facilitate a Member State to control such foreign direct investments at the pre and post-investment stage.[36] Before the investment, lawful golden shares could dissuade an unwanted foreign State-owned company to participate in the capital of a privatized company. After the investment, lawful golden shares could grant the essential powers to the State to exercise an effective control over the privatized company in order to inhibit the foreign State-owned company to realize its political plans through its shareholding in the privatized company. Lawful golden shares provide the necessary means, such as veto rights, etc., to block certain decisions of the privatized company serving the political interests of a foreign State-owned company holding shares in this privatized company. Hence, lawful golden shares constitute an effective means of restricting the political influence that a foreign investor State-owned company might seek to exercise on this investee privatized company.

[34] Strauss (2019), p. 119.

[35] Strauss (2019), p. 125.

[36] For an analysis of pre-establishment and post-establishment restrictions to investments of Chinese State-owned companies in the context of international investment law, see: Wang (2019), pp. 83–84, Yin (2018), pp. 284–314.

4 Harmonization of European Company Law and Screening of Foreign Direct Investments

4.1 The Relationship Between the Goals of the Harmonization of European Company Law and the Screening of Foreign Direct Investments

According to Art. 50(2)(g) TFEU, harmonization of European company law seeks to coordinate "*to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union*". The aim of this harmonization is the attainment of freedom of establishment, as proclaimed by Art. 50 (1) TFEU.[37]

When the harmonizing instruments of company law were adopted, their primary goal was not the screening of foreign direct investments. Their primary goal was the facilitation of the freedom of establishment of companies, according to their legal basis (Art. 50 (2)(g) TFEU). The same consideration applies to the relevant corporate mobility cases decided by the CJEU on the basis of the freedom of establishment of companies (Art. 49 TFEU), which were discussed above. However, the screening of foreign direct investments could take place to a certain extent through European company law.[38] Harmonization of company law in the EU offers mechanisms that could be used for the screening of foreign direct investments. These harmonized company law instruments could be used indirectly for this screening as their primary aim is the harmonization of company law. Although their primary objective is "*the protection of the interests of members [i.e. shareholders] and others*", they could also contribute significantly to an effective screening of foreign direct investments, in parallel with this primary objective. Without prejudice to its aim (i.e. the attainment of EU freedom of establishment), certain provisions of the harmonization of company law could achieve an effective level of screening of foreign direct investments. While a link is required between harmonization of company law on the basis of Art. 50(2)(g) TFEU and facilitation of the freedom of establishment of companies, a generous construction of this link allows pursuing other secondary goals, such as screening of foreign direct investments.[39]

[37]Dashwood et al. (2011), p. 677.

[38]For a critique of protectionism in the context of company law, see: Waymouth (2010), pp. 32–53. Hansen (2010), pp. 176–190.

[39]Edwards (1999), p. 7. Dashwood et al. (2011), p. 678. The CJEU did not have the chance to examine the legal basis of Art. 50(2)(g) TFEU. However, in *European Parliament v Council*, the CJEU had the opportunity to discuss the appropriateness of Art. 352 TFEU (ex Art. 308 EC Treaty) instead of Art. 114 TFEU (ex Art. 95 EC Treaty) as a legal basis for a supranational corporate entity such as the European Cooperative Society. Judgment of the Court (Grand Chamber) of 2 May 2006, European Parliament v Council of the European Union, C-436/03 ECLI:EU:C:2006:277.

As it was mentioned in the introduction, investment screening in the context of harmonization of company law entails an assessment of foreign direct investments on the basis of both the protection of the interests of shareholders and other stakeholders and the protection of public interest. On the one hand, these harmonized provisions focusing on the protection of the interest of shareholders and other stakeholders could also be used indirectly for the protection of public interest. The protection of the interest of shareholders and other stakeholders sometimes includes elements of public interest. This happens quite often in the case of "strategic companies" or "national champions". These latter companies play a major role in the national economy and in some other fundamental interests of Member States. Hence, in "strategic companies" or "national champions", the protection of the interest of shareholders and other stakeholders is quite often underpinned by the protection of public interest. On the other hand, some of these harmonized rules focus directly on the protection of public interest by providing veto rights to relevant national supervisory authorities. These harmonized company law provisions aiming directly at the protection of public interest are related to the supervisory role of Member States in the area of cross-border corporate restructuring.

The limits of harmonization of company law with regard to the screening of foreign direct investments are founded on the attainment of freedom of establishment. A harmonizing company law instrument could contribute to the screening of foreign direct investments through the realization of the objective of the freedom of establishment of companies stated in Art. 50 (1) TFEU. As long as a harmonizing instrument contributes primarily to the freedom of establishment of companies, it could also be used for the screening of foreign direct investments. Otherwise, there might be a constitutional law problem regarding the legal basis of this harmonizing instrument; a harmonizing company law instrument contributing primarily to another objective, such as the screening of foreign direct investments, and not to the freedom of establishment might violate the legal basis invoked for its adoption (Art. 50 (2) (g) TFEU).[40]

The harmonization of European company law could play an effective but complementary role in the screening of foreign direct investments, especially in the capital of "strategic companies" and "national champions. The identity and intentions of a foreign investor acquiring corporate control or even a portfolio investment might have important repercussions on corporate relationships and management within and outside the company. These harmonized company law instruments could identify and evaluate such identity and intentions. On the one hand, in Member States without a special and sophisticated system of screening of foreign direct investments, these harmonized company law instruments, which must be implemented on a mandatory basis by Member States, provide the possibility of screening foreign direct investments in the capital of EU companies. On the other

[40]See, the "Tobacco Advertising" case and the subsequent case law discussing the Union competence to regulate the internal market: Judgment of the Court of 5 October 2000, Germany v Council and Parliament, C-376/98, ECLI:EU:C:2000:544; Dashwood et al. (2011), p. 678.

hand, in Member States with a special and sophisticated system of screening of foreign direct investments, these harmonized company law instruments operate complementarily with the screening system and enhance it by providing additional information. Although these harmonized company law instruments capable of screening foreign direct investments are addressed to EU companies and their stakeholders (directors, shareholders, creditors, employees), sometimes they give powers to national supervisory authorities, which could block certain corporate procedures and actions.

4.2 Takeover Bids Directive and Screening of Foreign Direct Investments

4.2.1 Basic Concepts and Key Provisions

A takeover bid is a corporate control transaction between a third party (the acquirer) and the company's shareholders.[41] A "takeover bid" is a method often used to carry out a takeover or merger and takes the form of an offer to buy all the shares of the company.[42] What happens is that one company, the offeror or bidder or acquiring company, buys either all or at least a voting majority of the shares in another, the offeree or target company.[43] After the takeover, the two companies remain in being, and the offeree company becomes a subsidiary (perhaps a wholly owned subsidiary) of the other, and it is thereafter controlled by the acquiring company through its majority shareholding and its ability to remove the existing directors and appoint its own nominees in their place.[44] A takeover bid is a quite common method of acquiring control of an EU company: the third-country investor sets up an EU company (offeror company/bidder), which launches a takeover bid towards another EU company (offeree company/target company) in order to acquire its corporate control. Since 2004, takeover bids at EU level have been harmonized by the Takeover Bids Directive (Directive 2004/25/EC).[45] It is interesting to examine, in the context of the Takeover Bids Directive, how a target company could screen a foreign direct investment occurring through a takeover bid and how it could reject a bid and, simultaneously, a foreign direct investment, which is hostile and unwelcome.

[41] Kraakman et al. (2017), p. 205.

[42] Weinberg et al. (1979), p. 3.

[43] Sealy (1993), p. 135.

[44] Ibid.

[45] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4.2004, p. 12–23. For an analysis of the Takeover Bids Directive, see: Papadopoulos (2010), Papadopoulos (2008) pp. 13–103.

Investment screening in the context of takeover bids constitutes an assessment of the potential bidder controlled by a foreign investor and the possibility of frustrating its bid and ultimately the acquisition of control of the target company. This investment screening is very important when the target company is a “strategic company” or a “national champion” of a Member State. This assessment takes place primarily on the basis of the protection of the interests of the target company’s shareholders. First, the Takeover Bids Directive contains certain provisions capable of screening the identity of the bidder, the conditions of the bid and the plans and intentions of the bidder towards the target company after a successful takeover bid. Secondly, the Takeover Bids Directive allows under certain conditions the adoption of defensive measures by the target company’s board capable of frustrating a hostile bid behind which a foreign investor is found. The interests of the target company’s shareholders could be affected adversely by the acquisition of the target company’s control by a hostile bidder, especially when its plans are detrimental to the value of the company. However, sometimes, in case of takeover bids towards “strategic companies” or “national champions”, public interest could be also affected indirectly by the negative and harmful plans of the bidder towards the target company. “Strategic companies” and “national champions” very often serve public interest considerations in addition to the protection of the interests of their shareholders and other stakeholders. When a “strategic company” or a “national champion” is the target of a bid launched by a hostile bidder, which is controlled by a foreign investor, the protection of public interest is concealed behind the protection of the interest of the target company’s shareholders. The acquisition of corporate control of a “strategic company” or of a “national champion” by a hostile or at least dubious bidder, which is controlled by a foreign investor, might endanger certain vital national interests served by it (e.g. national defence, national security, energy security, telecommunications, transports, various utilities and networks, etc.). Some examples of these dangers for “strategic companies” and “national champions” are the following: seat transfer out of a particular Member State, divestment of activities and assets, collective redundancies, technology transfer, loss of tax revenues, control of networks, control of natural resources, winding up or liquidation, bankruptcy fraud, strategic bankruptcy, etc.). The Takeover Bids Directive contains certain provisions capable of investment screening, which include both disclosure of certain information about the bid and the bidder and the possibility of frustrating the bid. This investment screening could protect the interests of the target company’s shareholders, but it could also protect indirectly public interest, in case of “strategic companies” or “national champions”. First, this investment screening might identify and reveal the profile of an unwelcome bidder with hostile plans towards a target company, which is also a “strategic company” or a “national champion”. Secondly, it allows under specific conditions the frustration of such bid. This investment screening would protect primarily the interests of target companies’ shareholders, but it would also ensure that the national interests served by such companies would not be jeopardized.

In the context of listed companies, the Takeover Bids Directive could be used for the screening of foreign direct investments. The two main provisions of the Takeover

Bids Directive are (1) the board neutrality rule, which does not allow the board of the target company to adopt defensive measures during the period allowed for the acceptance of the bid (Art. 9),[46] and (2) the breakthrough rule, under which any restrictions on the transfer of securities or on voting rights shall not apply vis-à-vis the offeror during the time allowed for the acceptance of the bid or shall not have effect at the general meeting of shareholders, which decides on any defensive measures (Art. 11). However, these two main provisions of the Takeover Bids Directive are optional. Article 12 of the Takeover Bids Directive introduces a complicated multi-level optionality and reciprocity system. According to the optionality system, Member States may reserve the right not to require companies to apply the board neutrality rule and/or the breakthrough rule. Moreover, where a Member State makes use of optionality and opt-outs, it shall nevertheless grant its companies the option, which shall be reversible, of applying the board neutrality rule and/or the breakthrough rule. According to the reciprocity system, Member States may, under the conditions determined by national law, exempt companies that apply the board neutrality rule and/or the breakthrough rule if they become the subject of an offer launched by a company that does not apply the same articles as they do or by a company controlled, directly or indirectly, by the latter.[47]

The adoption of both optionality and reciprocity systems by Member States gives their listed companies the possibility to frustrate hostile takeovers by bidders controlled by unwanted foreign investors. On the one hand, in a Member State applying the optionality regime, a target company could allow its board of directors to adopt various defensive measures[48] capable of frustrating a bid launched by a hostile company controlled by a foreign investor. Optionality could also permit the introduction of restrictions on the transfer of securities or on voting rights capable of inhibiting permanently the takeover by a hostile bidder controlled by a foreign investor.[49] On the other hand, in a Member State applying the reciprocity regime, a target company could retaliate and could allow defensive measures and restrictions

[46]For a critique to the board neutrality rule, see: Davies et al. (2010), pp. 107–125.

[47]For an analysis of the choices made by Member States and by companies in the implementation of board neutrality rule, see: Davies et al. (2010), pp. 125–152.

[48]The board of the target company can choose from a great variety of defensive measures. The "poison pill" is a mechanism implemented by a company that could become the target of an unwelcome takeover bid. This mechanism makes sure that a successful takeover bid will trigger some frustrating event that substantially reduces the value of the company. Pallister and Isaacs (2002), p. 392. Other defensive measures adopted by the board of the target company, which could frustrate a hostile takeover bid, are: "the sale of crown jewels" or "spin-offs" (selling valuable assets of the company), "lock-up options" (granting preferential options over shares or assets to white knights or other persons), "green mail" (which involves paying the hostile bidder to withdraw its bid), the "Pac Man" defence (which involves launching a bid for the bidder itself) and "golden parachutes" (which involves contractually binding the target company to make large severance payments to incumbent managers in the event of a change of control). Dashwood et al. (2011), p. 881; Kirchner and Painter (2002), p. 452; Pallister and Isaacs (2002), p. 393.

[49]This is the distinction between ex ante and ex post defensive measures. Ex ante defensive measures exist in the target company's articles of association or in agreements between

on the transfer of securities or on voting rights against a company, which is not open itself to takeovers by adopting defensive measures.

4.2.2 Optionality and Screening of Foreign Direct Investments Made Through a Takeover Bid

Optionality results in differences with regard to who decides on the bid and who screens the foreign investor behind the bidder. This issue presents a great interest for investment screening taking place during takeovers of "strategic companies" or "national champions", where various public interests served by them might be jeopardized after a transfer of corporate control.

In case of an opt-out from the board neutrality rule, the board of the target company could screen and reject an unwelcome foreign direct investment made through a takeover bid. As mentioned above, it should be stressed that such investment screening is very important for takeovers of "strategic companies" or "national champions", where certain public interests promoted by such companies might be threatened by a hostile bidder controlled by a foreign investor. In case of an opt-out from the board neutrality rule, the screening and the decision whether to reject a foreign direct investment made through a takeover bid is vested in the target company's board and not in the target company's shareholders. The target company's shareholders are alienated from the process to screen and reject a foreign direct investment made through a takeover bid as this power was granted to the target company's board.[50] It is easily understood that this opt-out influences the possibility to screen a foreign direct investment through a takeover bid; the board and not the shareholders are responsible for examining a foreign direct investment made through a takeover bid and for deciding on the adoption of defensive measures against this bid. It should be mentioned that EU Member States consider opt-out from the board neutrality rule as an effective protectionist measure. After the implementation of the Takeover Bids Directive, it was found that more Member States decided to opt-out from the board neutrality rule, while before the adoption of the Takeover Bids Directive, they had already in place the board neutrality rule.[51]

shareholders before the launch of the takeover bid, while ex post defensive measures are adopted by the board after the launch of the takeover bid. De Luca (2017), p. 415.

[50]Nevertheless, there is a requirement for transparency of the defensive measures, which were adopted. Shareholders should be aware of the existing defensive mechanisms put already in place. Recital 18 of the Takeover Bids Directive's Preamble states: "*In order to reinforce the effectiveness of existing provisions concerning the freedom to deal in the securities of companies covered by this Directive and the freedom to exercise voting rights, it is essential that the defensive structures and mechanisms envisaged by such companies be transparent and that they be regularly presented in reports to general meetings of shareholders*."

[51]Davies et al. (2010), p. 138. Optionality constitutes an important danger of protectionism for the implementation of the Takeover Bids Directive: Johnston (2010), pp. 170–172.

In case of an opt-in for the board neutrality rule, the decision on the bid and, as a matter of fact, the screening of the foreign direct investment taking place through the takeover bid belong to shareholders. Again, this issue is very important for investment screening at takeovers of “strategic companies” or “national champions”. Such an opt-in grants the decision on the bid only to shareholders by excluding the board from the corporate control transaction between the bidder and the target company’s shareholders. In this opt-in case, the shareholders, who have the power to examine and decide whether to accept the bid, could also perform a screening on the foreign investor behind this takeover bid. The shareholders and not the board screen the foreign direct investment taking place through the takeover bid and decide on whether to accept it. Nevertheless, opting in the board neutrality rule provides the possibility for shareholders to authorize the board of the target company to adopt defensive measures: defensive actions by the board of the target company, which might frustrate a takeover bid, are lawful only if the shareholders have approved them.[52] In this case, shareholders grant to the board the power to screen the foreign investor behind a takeover bid and to decide whether to adopt defensive measures capable of frustrating the bid. According to Art. 9 of the Takeover Bids Directive, this authorization to the board of the target company to adopt defensive measures is specific to a certain bid and not a general one given prior to any bid submitted against the target company. This implies that when the shareholders of the target company would decide to grant such an authorization to the board in order to adopt defensive measures, they would have already screened at least preliminarily the foreign investor, who is launching through his EU offeror company the specific bid. In the context of this preliminary screening, the shareholders would have probably examined the status and intentions of the foreign investor behind the takeover, as well as the terms of its offer, before authorizing the board to proceed to any defensive actions.

4.2.3 Screening of Foreign Direct Investments and the Powers of the Target Company’s Board to Look for Competing Bids and to Publish Its Opinion on the Bid

Although the board neutrality rule does not allow the board to adopt independently defensive measures, it does not require the board to remain completely inactive during the period allowed for the acceptance of the bid.[53] According to Art. 9(2) of the Takeover Bids Directive, the board complying with the board neutrality rule could seek for alternative/competing bids without the prior authorization of shareholders.[54] The board could try to enlarge the available offers to shareholders by

[52]Kraakman et al. (2017), p. 211.

[53]Kraakman et al. (2017), p. 213.

[54]For a critical approach to the benefits of competing bids, see: Mucciarelli (2006), pp. 408–425.

seeking for a "white knight".[55] A "white knight" is a welcome and friendly competing bidder compared to a first unwelcome and hostile bidder. It is quite obvious that the board performs a screening of the first bidder before deciding to look for a competing bidder. After a careful screening of the first bidder, the board could decide that this bidder is an unwelcome one and could start looking for friendlier bidders. If the results of the screening of the first bidder reveal that this bidder has plans against the interests of the target company, the target company's board could contact a potential friendly bidder (i.e. white knight) in order to invite it to submit a competing bid. This search for a friendly competing bidder also entails a careful screening of this potential competing bidder in order to identify its friendly stance towards the target company. This search for a friendly competing bidder could be very useful for "strategic companies" or "national champions", which are the target of a hostile bidder jeopardizing certain public interests served by such target companies.

While the board cannot adopt defensive measures due to the board neutrality rule, it could seek to influence the view of shareholders and to persuade them to take a specific decision. Recital 17 of the Takeover Bids Directive's Preamble states: "*The board of an offeree company should be required to make public a document setting out its opinion of the bid and the reasons on which that opinion is based, including its views on the effects of implementation on all the company's interests, and specifically on employment*." Article 3(1)(b) of the Takeover Bids Directive introduces a general principle on the expression of the board's opinion on the takeover bid, which assists shareholders in deciding on the bid: "*the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business*". According to Art. 9(5) of the Takeover Bids Directive, the board expresses its non-binding, consultative opinion on the bid and circulates it among shareholders with the aim of affecting their views and choices in a particular way.[56] Similarly, with the efforts to find competing bids, the board is not characterized by complete passivity as it could issue its opinion on the advantages and disadvantages of the bid, which proposes to shareholders the route they should follow. This possibility of the board to express its opinion on the bid deals with the information asymmetry problems of the target company's shareholders.[57] This opinion of the board might be exposed to conflicts of interests in case this board would be replaced after a successful bid. Such conflicts of interest could be mitigated if independent experts participate in the preparation of the document expressing the board's opinion on the bid.[58] This opinion of the board includes also

[55]The alternative/competing bids are considered to have a wealth-enhancing impact on target company's shareholders. Kraakman et al. (2017), p. 214.

[56]Kraakman et al. (2017), p. 213.

[57]Kraakman et al. (2017), p. 213.

[58]Sergakis (2018), p. 138.

elements of screening of foreign direct investment launched through a takeover bid. Screening of a foreign direct investment behind a bid is an indispensable part of the preparation of this document. The board evaluates the foreign investor behind the bid and states its findings from this screening process in its opinion. Actually, some of the shareholders would prefer their board to perform a screening of the foreign direct investment behind the bid in order to help them get a better understanding of the offer. The requirements of the public document expressing the board's opinion on the bid are described by Art. 9(5) of the Takeover Bids Directive.[59] According to this latter provision, during the drafting of this public document, the board should proceed to a very careful, diligent and fully justified screening of the foreign investor behind the bid in order to comment on "*the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business*".

Moreover, this non-binding, consultative opinion on the bid expressed by the board of the target company could be very useful for "strategic companies" or "national champions", which are the target of a hostile bidder jeopardizing certain public interests served by such target companies. A "strategic company" or a "national champion" might serve additional public interests and not only the interests of their shareholders and other stakeholders. Taking into account the requirements of this document as prescribed by Art. 9(5), a "strategic company" or a "national champion" might play a crucial role in the labour market of a Member State by offering a high number of jobs, which might be threatened by a hostile bidder having declared collective redundancies. Moreover, the "location" of the places of business of a "strategic company" or of a "national champion" within a specific Member State might serve specific public interest considerations (e.g. defence industry or high-technology company). The plans of a hostile bidder to transfer the seat or the business of such "strategic companies" or "national champions" abroad might endanger such public interest. A hostile bidder might also have various other "strategic plans" that are detrimental to the public interest served by such "strategic companies" or "national champions". The view of the target company's board on such plans of a hostile bidder could facilitate shareholders to assess the bid and to decide whether to accept it, which constitutes an effective screening mechanism.

[59] Art. 9 (5) states: "*The board of the offeree company shall draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business as set out in the offer document in accordance with Article 6(3)(i). The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.*"

4.3 Disclosure of Information in Takeover Bids and Screening of Foreign Direct Investments

Disclosure of information in the context of a takeover bid is essential for the screening of a foreign investor launching a takeover bid through an EU company. An offer document should provide detailed information on the bidder, the conditions of its offer, and its strategic plans and intentions for the target company. Recital 13 of the Takeover Bid Directive's Preamble states: "*The holders of securities should be properly informed of the terms of a bid by means of an offer document [. . .].*"

Article 3(1)(b) of the Takeover Bids Directive introduces a general principle on the conditions under which shareholders decide on the bid: "*the holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid;*". Hence, the provision of sufficient information is a prerequisite for a *properly informed decision on the bid* and contributes to the screening of a foreign direct investment constituting the basis of a takeover bid. This requirement for sufficient information permits shareholders to screen the status of the foreign investor, the conditions of its offer and its strategic plans on the target company before reaching their decision on whether to accept the bid.

The Takeover Bids Directive has certain provisions obliging the bidder to disclose its plans and intentions regarding the target company. Article 6 of the Takeover Bids Directive is dedicated to important information concerning bids. This is a disclosure obligation for the pre-offer announcement, as well as during and after the offer announcement.[60] More specifically, Art. 6(2) of the Takeover Bids Directive requires the bidder to disclose certain information concerning its bid through the publication of a detailed offer document:

> Member States shall ensure that an offeror is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. Before the offer document is made public, the offeror shall communicate it to the supervisory authority. When it is made public, the boards of the offeree company and of the offeror shall communicate it to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.
>
> Where the offer document referred to in the first subparagraph is subject to the prior approval of the supervisory authority and has been approved, it shall be recognised, subject to any translation required, in any other Member State on the market of which the offeree company's securities are admitted to trading, without its being necessary to obtain the approval of the supervisory authorities of that Member State. Those authorities may require the inclusion of additional information in the offer document only if such information is specific to the market of a Member State or Member States on which the offeree company's securities are admitted to trading and relates to the formalities to be complied with to accept the bid and to receive the consideration due at the close of the bid as well as to the tax

[60] Sergakis (2018), pp. 132–139.

arrangements to which the consideration offered to the holders of the securities will be subject.

Article 6(3) of the Takeover Bids Directive prescribes the minimum content of the offer document: "*[t]he offer document referred to in paragraph 2 shall state at least: (a) the terms of the bid; (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company; … (f) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire; (g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company;… (h) all the conditions to which the bid is subject; (i) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business; … (k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities; (l) information concerning the financing for the bid; (m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company; (n) the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts*".

The offer document delves into the identity and the background of the bidder and could disclose also certain information of a foreign investor, who is controlling the bidder. The offer document does not require information only on the bidder, but it also asks the disclosure of information on the characteristics and the conditions of the bid, which could reveal the stance of the bidder towards the target company. This required information could be used as a screening mechanism for foreign investors by the target company, the relevant national supervisory authority for takeovers and the relevant national supervisory authority for the screening of foreign direct investments. Apart from the identity of the bidder, the offer document should disclose the existing holdings of the bidder and of persons acting in concert with him, the identity of persons acting in concert with him, the conditions applying to a bid, the bidder's intentions and strategic plans for the future business of the target company, the impact on employment conditions, information about securities offered as consideration and information concerning the financing of the bid.[61] This latter issue on the financing of the bid is quite important because quite often the necessary capital for the takeover bid would be injected under the free movement of capital provisions from the foreign investor into its EU subsidiary company launching the bid. The financial position of the bidder should be disclosed as the bid would not be self-funded but would be based on external funding deriving from a foreign investor.

[61] Sergakis (2018), p. 136.

Nevertheless, many bidders do not go into much detail and depth, when they provide information concerning bids, because they want to be adjusted to the new realities and conditions following a bid and to avoid being firmly bound about future actions, which might not be realizable or which might be negative for the bidder.[62] This lack of in-depth information might diminish the possibility of screening a foreign direct investment behind a takeover bid.

The required information of the offer document listed above assists the board and the shareholders in evaluating not only the conditions of the takeover bid but also the status and the intentions of the bidder and simultaneously of the foreign investor. Thus, the board and the shareholders of the target company could screen the foreign direct investment behind the bid through the information disclosed by the offer document. This disclosure of information alleviates the coordination problems of the target company's shareholders when there is an opt-in for the board neutrality and the breakthrough rules. When a bid is addressed to the shareholders of the target company, they confront important coordination problems because the decision whether to accept the bid is taken individually by the shareholders and is not a collective one binding all shareholders.[63] This mitigation of coordination problems of the target company's shareholders through the disclosure of information allows them to screen without pressure the foreign direct investment behind the takeover bid and facilitates their decision-making power. The time allowed for the acceptance of the bid also provides the possibility for the target company's shareholders to screen diligently and without pressure the foreign direct investment behind the bid and to reach a careful decision. Article 7(1) of the Takeover Bids Directive states: "*Member States shall provide that the time allowed for the acceptance of a bid may not be less than two weeks nor more than 10 weeks from the date of publication of the offer document*." This period allows the shareholders to absorb the information[64] and, as matter of fact, the outcome of the screening of the foreign direct investment behind the bid.

Moreover, additional information could be provided. First, company law has general rules on the disclosure of information, which apply in addition to the Takeover Bid Directive's disclosure rules.[65] Nevertheless, general company law rules on the disclosure of information present serious disadvantages. The annual financial statements are quite often obsolete, in spite of the continuing reporting obligations imposed on listed companies.[66] Thus, the special provisions of the Takeover Bids Directive requiring the disclosure of information regarding the takeover bid and the bidder are essential for an effective screening of the foreign direct investment as general company law provisions on the disclosure of

[62]Sergakis (2018), p. 136. Kersaw (2016), p. 278.

[63]Kraakman et al. (2017), p. 224.

[64]Kraakman et al. (2017), p. 225.

[65]Kraakman et al. (2017), p. 225.

[66]Kraakman et al. (2017), p. 225.

information are not really effective.[67] Secondly, in addition to the information disclosed by the offer document, any other important information about the bid must be provided on an ad hoc basis by the companies participating in a bid to the relevant national supervisory authority on its request, depending on the relevant powers granted to the supervisory authority by national capital market law. National supervisory authorities must have a decisive presence with regard to the disclosure of information during the pre-offer and the post-offer announcement until the completion of the bid. Moreover, national supervisory authorities, which constitute an expression of State interventionism in the area of disclosure of information in takeover bids, should seek to achieve the best level of transparency in takeover bids.[68] This certainly enhances the possibility of screening a foreign direct investment behind the bid.

Article 6(2) of the Takeover Bids Directive gives Member States the power to require prior approval of the offer document by national supervisory authorities. National supervisory authorities of other Member States must recognize this offer document (translated, if required), and there is no need to approve it again, but they could require the inclusion of additional information under certain conditions described in Art. 6(2) of the Takeover Bids Directive. This latter provision is important for the screening of a foreign investor behind a takeover in situations with a cross-border element, when the target company's securities are admitted to trading in the markets of more than one Member States.

4.4 Political Considerations and Protectionism in Takeover Bids and Their Impact on the Screening of Foreign Direct Investments

Apart from the legal provisions regulating takeover bids, political considerations play a very important role. Many Member States reject the idea of an acquisition of control of their "strategic companies" or "national champions" by foreign

[67] Special disclosure and scrutiny obligations are also prescribed for cross-border mergers of companies, which could be used as a screening mechanism for a foreign investor wishing to merge its EU subsidiary with a company from another Member State. See the following articles of Directive 2017/1132 codifying the provisions of the Cross-Border Mergers Directive (Directive 2005/56/EC): Art. 122 on common draft terms of cross-border mergers, Art. 123 on publication, Art. 124 on report of the management or administrative organ, Art. 125 on independent expert report, Art. 127 on pre-merger certificate, Art. 128 on scrutiny of the legality of the cross-border merger, Art. 130 on registration. Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, pp. 46–127. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, pp. 1–9.

[68] Sergakis (2018), p. 147.

investors.[69] The political cost is quite high for governments of Member States, where successful takeovers resulted in a control shift of "strategic companies" or "national champions" to foreign investors. The public worries about the repercussions of takeover bids on the national economy and is afraid of collective redundancies following the completion of a takeover bid.[70] The Takeover Bids Directive provides the ground for protectionism under which the screening of an unwelcome foreign investor behind a takeover bid could lead to the rejection of its bid. Hence, political considerations appear in the EU market for corporate control and could affect the implementation of the Takeover Bids Directive. Member States implemented the Takeover Bids Directive in a protectionist way.[71] There are examples of takeovers of "national champions" attracting political controversy and reactions from the public, such as the Cadbury/Kraft takeover and the Alstom/General Electric acquisition.[72]

Additionally, national supervisory authorities could waive national takeover rules in accordance with derogations prescribed by their national law and taking into account circumstances determined at national level (Art. 4(5)(i)–(ii) of the Takeover Bids Directive). Member States enjoy discretion with regard to the derogations to takeover rules adopted in their national laws. This power of the supervisory authority to waive takeover rules according to specific national derogations permits it to consider protectionist political views, as long as the relevant EU and national rules are not infringed. The decision of the supervisory authority on whether it should grant a waiver could also be based on a prior screening of the foreign direct

[69] Kraakman et al. (2017), p. 239.

[70] Kraakman et al. (2017), p. 240.

[71] Hopt (2009), p. 375; Kraakman et al. (2017), p. 239. With regard to the transposition of the optional provisions of the Takeover Bids Directive, 19 Member States implemented the board neutrality rule, 3 Member States implemented the breakthrough rule and 13 Member States permit their companies, which apply the board neutrality rule and/or breakthrough rule (by legislation or based on the company's articles of association), not to apply the rule when they are the target of a takeover bid by a bidder which does not apply the same rule (reciprocity). European Commission (28 June 2012), Report from the Commission on Application of Directive 2004/25/EC on takeover bids, COM (2012) 347 final, p. 3. Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC(2007) 268. The 2007 Report on the implementation of the Takeover Bids Directive comments on the protectionist approach of Member States: "*However, there is a risk that the board neutrality rule, as implemented in Member States will hold back the emergence of a European market for corporate control, rather than facilitate it. It is unlikely that the breakthrough rule, as implemented in Member States would bring any significant benefits in the short term. A large number of Member States have shown strong reluctance to lift takeover barriers. The new board neutrality regime may even result in the emergence of new obstacles on the market of corporate control. The number of Member States implementing the Directive in a seemingly protectionist way is unexpectedly large*." Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, SEC(2007) 268, p. 3. Benyon (2010), p. 69. It is extremely difficult for the Commission to challenge such protectionist choices in the implementation of the Takeover Bids Directive, which were provided by the Takeover Bids Directive itself. Davies et al. (2010), p. 143. For a different approach against the view that the implementation of Takeover Bids Directive followed a protectionist approach, see: Hansen (2010), pp. 1186–1190.

[72] Kraakman et al. (2017), p. 240.

investment behind this takeover. This prior screening before the waiver is vulnerable to political and protectionist influences. When Member States are structuring the derogations to the takeover bid rules allowed under Art. 4(5) of the Takeover Bids Directive, they should insulate the decision-making process of their supervisory authority from political and protectionist influences.

Some Member States have already adopted special national legislation for the screening of foreign direct investments,[73] which could interact with the national takeover rules implementing the Takeover Bids Directive. Certain decisions on a takeover bid deriving from a foreign direct investment are taken on the basis of the findings of a screening process conducted in the context of the special national legislation for the screening of foreign direct investments. The Takeover Bids Directive has its own rules allowing the screening of a foreign investor behind a takeover bid. In addition to these takeover rules allowing the screening, this special screening process of national law brings additional information to the board and the shareholders, which could be used for their decisions on the bid. These special national regimes for the screening of foreign direct investments should comply with the newly adopted Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the EU.[74]

4.5 Shareholders Rights Directive II and Screening of Foreign Direct Investments

4.5.1 Introduction

The newly adopted Shareholders Rights Directive II (Directive 2017/828)[75] could also play a major role in this field. Some of the goals that this Directive seeks to achieve are the following: (1) to develop significantly the engagement of asset owners and asset managers with their investee companies; (2) to make much easier the transmission of cross-border information (including voting) across the investment chain, in particular through shareholder identification; (3) to ameliorate the advice of proxy advisors; (4) to strengthen the transparency and shareholder

[73]For a discussion of the German approach towards popular fears of globalization and trends towards political protectionism regarding takeovers and foreign direct investments with emphasis on German foreign direct investment law, see: Hopt (2009), pp. 381–391.

[74]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, OJ L 79I, 21.3.2019, pp. 1–14.

[75]Directive (EU) 2017/828 amending Directive 2007/36/EC of the European Parliament and of the Council of 17 May 2017 as regards the encouragement of long-term shareholder engagement, OJ L 132, 20.5.2017, pp. 1–25. Dijkhuizen (2015), pp. 45–50.

supervision of related party transactions.[76] These goals, which this Directive is pursuing, also have important repercussions on the screening of a foreign investor, who holds shares in EU companies sometimes through complex ownership structures involving intermediaries.

4.5.2 Identification of Shareholders, Transmission of Information and Facilitation of the Exercise of Shareholder Rights in the Context of Screening of Foreign Direct Investments

In this Directive, there is a new provision for the identification of shareholders (Art. 3a of the Shareholders Rights Directive II), which could assist in the screening of foreign investors participating in the capital of EU companies. More specifically, companies have the right to identify their shareholders.[77] There are also provisions obliging intermediaries holding shares to transmit specific information from the company to the shareholder (Art. 3b of the Shareholders Rights Directive II).[78] The exercise of shareholder rights is also facilitated: "*Member States shall ensure that the intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings*" (Art. 3c of the Shareholders Rights Directive II). Hence, foreign investors, who are shareholders in EU companies, cannot hide behind intermediaries as easily as in the past.[79] Indirect

[76] European Commission (9 April 2014), Proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, COM/2014/0213 final, 2014/0121 (COD), p. 2. For an analysis of the transparency issues of sovereign wealth funds in the context of the Shareholders Rights Directive II, see: Ginevra and Presciani (2017), pp. 826–828 and 832–834.

[77] Art. 3a states that: "*1. Member States shall ensure that companies have the right to identify their shareholders. Member States may provide for companies having a registered office on their territory to be only allowed to request the identification of shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0,5 %. 2.Member States shall ensure that, on the request of the company or of a third party nominated by the company, the intermediaries communicate without delay to the company the information regarding shareholder identity[. . .]*." Böckli et al. (2015), pp. 6–9; Gargantini (2019), pp. 214–235: Ahern (2018), pp. 94–96; Malberti (2017), pp. 77–78; Andrew/Morrow (2014), p. 5. For a discussion of the risks of intermediation, see: Gullifer (2010), pp. 4–12.

[78] Art. 3b states that: "*1. Member States shall ensure that the intermediaries are required to transmit the following information, without delay, from the company to the shareholder or to a third party nominated by the shareholder: (a) the information which the company is required to provide to the shareholder, to enable the shareholder to exercise rights flowing from its shares, and which is directed to all shareholders in shares of that class; or (b) where the information referred to in point (a) is available to shareholders on the website of the company, a notice indicating where on the website that information can be found*."

[79] Article 3e is addressed to third-country intermediaries and states that: "*This Chapter also applies to intermediaries which have neither their registered office nor their head office in the Union when they provide services referred to in Article 1(5).*" This provision is very important for foreign investors cooperating with third-country intermediaries in the context of their shareholding in EU companies. Moreover, a company has five core structural characteristics: (1) legal personality,

sources of control over a company and the way that this control is exercised, as well as the motives behind such control, could be identified and screened.[80] Some foreign investors, who are considered to be unwelcome in specific Member States, hold shares in EU companies of such Member States through complex chains of intermediaries, resulting in difficulties in identifying them as shareholders of these EU companies. Disclosure of plans, intentions and shareholder engagement demand this identification of shareholders. Intermediaries cannot be used any more as a cover for an unwelcome foreign investor holding shares in an EU company and are obliged to provide all information with regard to the identification of this foreign investor as a shareholder.[81]

4.5.3 Engagement Policy and Screening of Foreign Direct Investments

Additionally, Art. 3g of the Shareholders Rights Directive II introduces an engagement policy[82]: "*institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy* and *institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes[. . .]*". This engagement policy could contribute to the screening of foreign investors holding shares in EU companies. These foreign investors must disclose specific aspects of their plans for the investee company. There are also provisions for the disclosure of investment strategy of institutional investors and of arrangements with asset managers (Art. 3h of the Shareholders Rights Directive II)[83] and for the transparency of asset managers (Art. 3i of the

(2) limited liability, (3) transferable shares, (4) centralized management with a board structure and (5) investor ownership. These characteristics sometimes make it difficult to discern the owners of company and their interests. Kraakman et al. (2017), p. 5.

[80] Strauss (2019), p. 59.

[81] Recital 4 of the Preamble of Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJ L 132, 20.5.2017, pp. 1–25.

[82] Malberti (2017), p. 76; Böckli et al. (2015), pp. 1–5. Johnston and Morrow (2014), pp. 6–7; Johnston and Morrow (2015), pp. 22–26; Birkmose (2018), pp. 613–642. Birkmose (2014), pp. 214–257. Chiu (2015), pp. 25–36. Chiu (2016), pp. 31–44.

[83] Art. 3h states that: "*1. Member States shall ensure that institutional investors publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets. 2. Member States shall ensure that where an asset manager invests on behalf of an institutional investor, whether on a discretionary client-by-client basis or through a collective investment undertaking, the institutional investor publicly discloses the following information regarding its arrangement with the asset manager: [. . .].*"

Shareholders Rights Directive II).[84] These provisions could also constitute an effective method of screening foreign investors. A foreign investor having set up an EU company and conducting business at EU level through this EU company must comply with these disclosure requirements of Shareholders Rights Directive II. The various plans and incentives of the foreign investor must be disclosed in the context of this harmonized framework. One of the main goals of this Directive is the enhancement of the rules on the "monitoring" of investee companies and on engagement by institutional investors and asset managers, which were often inadequate and focused excessively on short-term returns.[85] It is obvious that this goal also contributes significantly to the screening of foreign investors in EU companies.

4.5.4 Related Party Transactions and Screening of Foreign Direct Investments

The Shareholders Rights Directive II has also some new provisions on the transparency and approval of related party transactions. Related party transactions are defined as "*transactions between a company and its management, directors, controlling entities or shareholders, [which] create the opportunity to obtain value belonging to the company to the detriment of shareholders, and in particular minority shareholders*".[86] The harmonized rules on related party transactions seek to address transactions among affiliated companies, which quite often belong to the same group of companies, where a company could be unfairly advantaged to the detriment of another company and of its shareholders raising issues with fiduciary duties of directors.[87]

The problem with related party transactions is that shareholders are lacking adequate information in advance of this planned transaction and quite often do not have any mechanisms allowing them to object to abusive related party transactions. The problem could be solved by enhancing the control rights over related party

[84] Art. 3i states that: "*1. Member States shall ensure that asset managers disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund.[. . .].*"

[85] Recital 2 of the Preamble of Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJ L 132, 20.5.2017, pp. 1–25.

[86] European Commission (9 April 2014), Proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement COM/2014/0213 final, 2014/0121 (COD), p. 5. For an analysis of related party transactions in State-owned companies, see: Milhaupt and Pargendler (2019), pp. 245–259.

[87] Ventoruzzo et al. (2015), p. 343.

transactions, which would provide additional protection to minority shareholders.[88] Transparency and approval of related party transactions are crucial for screening certain transactions between the investee company and other subsidiaries of the foreign investor. These provisions could restrict transactions planned by the foreign investor and aiming at technology transfer or asset stripping of the investee company.[89]

Article 9c of the Shareholders Rights Directive II is dedicated to transparency and approval of related party transactions.[90] The definition of related party transactions by Member States should consider "*(a) the influence that the information about the transaction may have on the economic decisions of shareholders of the company; (b) the risk that the transaction creates for the company and its shareholders who are not a related party, including minority shareholders*" (Art. 9c(1) of the Shareholders Rights Directive II). The public announcement of related party transactions include "*at least information on the nature of the related party relationship, the name of the related party, the date and the value of the transaction and other information necessary to assess whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders*" (Art. 9c(2) of the Shareholders Rights Directive II). With regard to the approval of related party transactions, Art. 9c(4) of the Shareholders Rights Directive II requires related party transactions to be "*approved by the general meeting or by the administrative or supervisory body of the company according to procedures which prevent the related party from taking advantage of its position and provide adequate protection for the interests of the company and of the shareholders who are not a related party, including minority shareholders*". Additionally, Art. 9c(7) of the Shareholders Rights Directive II regulates related party transactions between the related party of the company and that company's subsidiary examining "*whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders*".

From the provisions cited above, it is obvious that transparency and approval mechanisms of related party transactions are strengthened significantly. These provisions could also be used for screening related party transactions involving EU company/ies of foreign investors. The new harmonized framework on transparency and approval of related party transactions does not allow a foreign investor to plan and to materialize abusive related party transactions (i.e. technology transfer or asset stripping). Moreover, Member States always enjoy the discretion to introduce special rules for related party transactions addressed to certain categories of their

[88]European Commission (9 April 2014), Proposal for a Directive amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement COM/2014/0213 final, 2014/0121 (COD), p. 5.

[89]Prud'homme et al. (2018), pp. 150–168. Prud'homme and Von Zedtwitz (2019).

[90]Malberti (2017), pp. 80–81. Groenland (2019), pp. 44–49. Reynisson (2016), pp. 175–182.

strategic companies by tightening the related party transaction rules for such strategic companies in comparison with regular companies. For example, strategic innovative companies in the area of technology could be protected from technology transfers abroad through more specialized stringent rules on related party transactions. It could be deduced that Art. 9c of the Shareholders Rights Directive II is definitely an important development in European company law enriching the available tools for the screening of foreign direct investments. Foreign investors controlling EU companies would be discouraged from looting their assets and transferring them to third countries.

4.5.5 Shareholder Rights Directive I and Screening of Foreign Direct Investments

Apart from the Shareholders Rights Directive II, Shareholder Rights Directive I[91] contains certain provisions facilitating the exercise of shareholders' rights, which could assist minority shareholders in screening indirectly the proposals, plans and intentions of a majority shareholder (foreign investor) controlling the company. The following articles of the Shareholders Rights Directive I could contribute to this screening: Art. 4 on equal treatment of shareholders, Art. 5 on information prior to the general meeting, Art. 6 on right to put items on the agenda of the general meeting and to table draft resolutions, Art. 7 on requirements for participation and voting in the general meeting, Art. 8 on participation in the general meeting by electronic means and Art. 9 on right to ask questions.

4.6 Transparency in Listed Companies and Screening of Foreign Direct Investments: The Role of EU Capital Markets Law

In addition to the Shareholders Rights Directive II, the foreign investor should be obliged to provide certain information (e.g. information about major holdings) in accordance with the Transparency Directive (Directive 2004/109/EC[92]). The aims of the Transparency Directive are prescribed by Recitals 1 and 2 of its Preamble: "*[t]he disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their*

[91] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, pp. 17–24.

[92] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38–57.

business performance and assets. This enhances both investor protection and market efficiency"[93] and "*[t]o that end, security issuers should ensure appropriate transparency for investors through a regular flow of information*".[94] The Transparency Directive sets specific thresholds[95] and demands the Member States to impose on natural persons or legal entities the requirement to notify, in case of acquisition or disposal of a shareholding in a company, the proportion of voting rights held by them reaching, exceeding or falling below these specific thresholds.[96]

The criteria of shareholder composition and changes with regard to major shareholdings play a very important role for investors' decisions affecting particularly institutional investors and influencing the price of shares.[97] Knowledge of the identity of major shareholders provides investors with important information, for example permitting them to evaluate the possibility of conflicts of interest.[98] The Transparency Directive contributes to the further integration of EU capital markets through the reduction or elimination of information asymmetries and through the strengthening of investor confidence in the financial position of issuers.[99] These harmonized disclosure obligations seek to secure market efficiency and to assist issuers and shareholders to be informed as to who exerts influence or is about to exert even more influence over issuers.[100] This provision of information combats the

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[93]Recital 1 of the Preamble of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, pp. 38–57.

[94]Recital 2 of the Preamble of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, pp. 38–57.

[95]Art. 9 of the Transparency Directive sets the following thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. Sergakis (2018), pp. 121–122. Strauss (2019), p. 61.

[96]It should be mentioned that the Commission enacted an implementing Directive and a delegated Regulation as Level 2 acts of the Lamfalussy process: Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, OJ L 69, 9.3.2007, pp. 27–36, and Commission Delegated Regulation (EU) 2015/761 of 17 December 2014 supplementing Directive 2004/109/EC with regard to certain regulatory technical standards on major holdings, OJ L 120, 13.5.2015, pp. 2–5. These acts are very important for the screening process taking place under the Transparency Directive. Veil (2017), p. 396, 399. Kraakman et al. (2017), p. 222. For a comparative analysis, see: Schouten and Siems (2010), pp. 451–483. Clausen and Sørensen (2002), pp. 201–247.

[97]Veil (2017), p. 396. For an analysis of the transparency issues of sovereign wealth funds in the context of the Transparency Directive, see: Ginevra and Presciani (2017), pp. 825–826, 829–832.

[98]Veil (2017), p. 396.

[99]European commission (26 March 2003), Proposal for a Directive on the harmonization of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, COM(2003)138, p. 2.

[100]Sergakis (2018), p. 120.

abuse of inside information. After the adoption of the Transparency Directive, new types of financial instruments (e.g. derivatives) not covered by its disclosure rules were started being used by investors aiming at circumventing the Directive. The danger with these new types of financial instruments was that investors could acquire stocks in companies, resulting in market abuse, and that they could display a false and misleading situation of economic ownership and corporate control of listed companies. In 2013, the Transparency Directive was amended (Art. 13 of the Transparency Directive) in order to cover all instruments with similar economic effect to holding shares and entitlements to acquire shares, which ensure that issuers and investors have full knowledge of the structure of corporate ownership.[101]

These harmonized rules on the disclosure of major shareholdings play a very important role in the screening of foreign direct investments. The disclosure of any changes with regard to major shareholdings contributes to a careful screening of the structure of corporate ownership. Knowledge of shareholder composition allows both investors and (EU and national) supervisory authorities to evaluate carefully foreign direct investments financing the acquisition of shares in the capital of listed EU companies. An effective disclosure of major shareholdings could be proved useful for national governments interested in screening any changes at the corporate ownership and control of their “strategic companies” or “national champions”, behind which an unwelcome foreign investor is found.[102] In case of privatizations of State-owned companies, these disclosure obligations reveal the relationships of control appearing below the surface of legal ownership, which assist in an assessment of a company’s underlying interests and which secures that privatized activities are performed in line with the State’s interests.[103]

Disclosure of major shareholdings revealing beneficial holders of shares plays also a very important role in the context of takeover bids. More specifically, this disclosure of major shareholdings assists the target company’s incumbent management in getting extra time, allowing it to design its defensive strategy, which would be developed after the launch of the bid in board neutrality jurisdictions (with the

[101]Recital 9 of the Preamble of Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, OJ L 294, 6.11.2013, pp. 13–27; Veil (2017), p. 397. See, also: Conac (2012), pp. 49–68; Zetzsche (2010), pp. 231–252; Strauss (2019), pp. 62–63.

[102]The disclosure rules of the Transparency Directive are aiming at making more difficult and costly creeping acquisitions. Creeping acquisitions constitute acquisition of a company’s de facto control without the submission of a formal takeover bid. Nevertheless, these disclosure rules are insufficient to inhibit creeping acquisitions: Enriques and Gatti (2015), pp. 73–75. Control of a company could also be acquired by a creditor through pledged shares as collateral in a loan agreement, when the company does not comply with its obligations under the loan agreement and subsequently the creditor gets control of the collateral. Strauss (2019), pp. 54–55, 64–65.

[103]Strauss (2019), p. 64.

permission of the general meeting of shareholders), or to start adopting pre-bid defensive measures in jurisdictions without the board neutrality rule.[104] This obligation to disclose major shareholdings facilitates the screening of a foreign investor during the pre-bid period by the board of the target company. Nevertheless, an important disadvantage of the Transparency Directive is that it does not oblige the shareholder to disclose its plan to acquire control and/or its aim to launch a takeover bid. Only a few Member States, like France and Germany, have rules imposing a duty to disclose the goal of an acquisition of a big amount of shares.[105] It is obvious that this disadvantage diminishes the efficiency of the Transparency Directive with regard to the screening of the intentions of a foreign investor having acquired a large number of shares.

There are some aspects of the Transparency Directive that enhance the screening of foreign direct investments financing the acquisition of a shareholding. The Transparency Directive requires disclosure from persons with the possibility of influencing voting rights.[106] This latter comprehensive approach covering additional instruments leads to a closer screening of foreign direct investment. As far as notification with regard to attribution of voting rights attached to third-party shares is concerned, disclosure requirements are imposed on persons acting in concert.[107] Art. 10(a) states: "*The notification requirements defined in paragraphs 1 and 2 of Article 9 shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them: (a) voting rights held by a third party with whom that person or entity* ***has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question;***" [emphasis added]. This requirement contributes to an effective screening of foreign direct investment because a foreign investor might have a specific agreement with another local or foreign person to exercise their voting rights in accordance with specific commitments. The disclosure requirements imposed on a foreign investor acting in concert with another local or foreign investor could reveal their "*lasting common policy towards the management of the issuer in question*", which could screen effectively their plans for the

[104]Kraakman et al. (2017), p. 222.

[105]Schouten (2009), p. 136. Ginevra and Presciani (2017), p. 826. For an analysis of motivations for acquiring control, see: Strauss (2019), pp. 55–58.

[106]Art. 13(1) of the Transparency Directive states: "*1.The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly: (a) financial instruments that, on maturity, give the holder, under a formal agreement, either the unconditional right to acquire or the discretion as to his right to acquire, shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market; (b) financial instruments which are not included in point (a) but which are referenced to shares referred to in that point and with economic effect similar to that of the financial instruments referred to in that point, whether or not they confer a right to a physical settlement.*" Veil (2017), p. 401.

[107]Veil (2017), p. 409.

company. Article 10 of the Transparency Directive also includes some more circumstances requiring notification with regard to the attribution of voting rights attached to third-party shares: temporary transfer of voting rights (Art. 10(b)), notification obligations of the secured party (Art. 10(c)), life interest (Art. 10(d)), voting rights held or exercised by a controlled undertaking (Art. 10(e)), deposited shares (Art. 10(f)), shares held on behalf of another person (Art. 10(g)) and voting rights exercised by proxy (Art. 10(h)).[108] In these cases, the voting rights of specific shares are attributed to persons other than the shareholders. The disclosure imposed on such situations by the Transparency Directive results in an effective screening of a foreign direct investment. First, the voting rights of an unwelcome foreign investor's shares might be attributed to another person with the aim of concealing the unwelcome foreign direct investment and of giving the impression of a friendly or at least neutral stance. Secondly, another scenario is a friendly or at least neutral foreign investor to attribute the voting rights of his shares to a person with hostile intentions. These latter problematic situations are addressed by Art. 10 of the Transparency Directive. The disclosure requirements in cases of attribution of voting rights adopted by the Transparency Directive could constitute a method of screening such foreign direct investments with elements of hostility.

Some Member States moved beyond the disclosure obligations harmonized by the Transparency Directive. France and Germany, inspired by similar US rules, adopted additional disclosure obligations requiring an investor to disclose its intentions and its plans underpinning the acquisition of voting rights in a specific company.[109] These intentions, which must be published by the issuer, include the plans to acquire control or at least additional shares or whether it wishes to affect the appointment or removal of board members.[110] Hence, this obligation of investors to notify intent requires a person to disclose his purposes with regard to future developments, corporate structure, business activities and other corporate and financial aspects of the issuer.[111] The Transparency Directive does not have provisions requiring such notification of intent. This lack of harmonized rules constitutes an important deficit of the process of screening a foreign investor at EU level. Undoubtedly, such notification of an investor's intent constitutes an effective tool for monitoring the investor's plan and strategy towards a company. A foreign investor, who is obliged to notify his intentions on the company, could be assessed more comprehensively and with greater clarity. Empirical research reveals that reactions of market participants in capital markets are affected not only by the disclosure of

[108] Veil (2017), pp. 408–420. For Art. 10g of the Transparency Directive, see: Zetzsche (2009), pp. 132–134.

[109] In US law, these disclosure obligations are described by Art. 13(d) of the Securities and Exchange Act, which were introduced by the 1968 Williams Act. These disclosure obligations on investors' notifications of intent are prescribed by Art. L.233-7 VII Code de Commerce and Art. 223-14 RG AMF in France and Art. 27a Wertpapierhandelsgesetz (WpHG) in Germany. Veil (2017), pp. 402, 424–425. Kraakman et al. (2017), p. 222; Sergakis (2018), pp. 126–127.

[110] Veil (2017), p. 402.

[111] Veil (2017), p. 424.

acquisition of major shareholdings but also by the goals that the relevant investor wishes to achieve through this acquisition.[112] Member States wishing to screen the goals of a foreign investor could adopt such additional rules on the notification of intent, like France and Germany. These additional rules would assist them in identifying the intentions behind the acquisition of shares by a foreign investor, which allows a screening of this foreign direct investment. In a future amendment of the Transparency Directive, notification of intent might be added to the disclosure obligations in order to have a more transparent EU capital market.

4.7 Corporate Restructuring Harmonizing Instruments and Screening of Foreign Direct Investments

Screening of foreign direct investments could also take place through some corporate restructuring harmonizing instruments. These instruments could be used in the context of cross-border corporate restructuring in order to assist a foreign investor to acquire control of a company. Public interest considerations could inhibit the completion of cross-border corporate restructuring. Member States enjoy the discretion under the Cross-Border Mergers Directive (repealed and consolidated into Directive 2017/1132) and the European Company Statute (Societas Europaea—SE) to block the process of cross-border merger or of establishment of a European company (SE) or of transfer of the registered office of a European company (SE) when such processes are against public interest.[113]

A cross-border merger could be inhibited on the basis of public interest considerations. Article 121 of Directive 2017/1132[114] (ex Art. 4(1)(b) of the Cross-Border Mergers Directive[115]) regulating conditions relating to cross-border mergers states: "*The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Article 21 of Regulation (EC) No 139/2004 is applicable*." Hence, a foreign investor seeking to merge his EU company with a company from another Member State could be blocked by the relevant national authority on the basis of public interest considerations. This provision is addressed mostly to the "strategic companies" or "national champions" of Member States. This opposition right must also comply with EU

[112]Scherr et al. (1993), pp. 66-78; Veil (2017), p. 424.

[113]For a discussion of the notion of public interest in the context of company law, see: Lee (2012), pp. 106–129.

[114]Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, pp. 46–127.

[115]Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, pp. 1–9.

fundamental freedoms. Moreover, this provision clearly excludes from its scope merger concentration from a competition law point of view (Art. 21 of Merger Regulation).[116] A procedure for the verification of this opposition right and an explicit requirement for its compliance with proportionality, like in Merger Regulation, are missing.[117] Additionally, from an empirical point of view, the majority of Member States granted this right of opposition to sectorial authorities (for mergers in the financial sector, mass media, etc.).[118]

The harmonized provisions of cross-border mergers mentioned above, through which screening of foreign direct investments could take place, get additional significance in the light of the geographical expansion of their scope. While the harmonization of cross-border mergers applies to "*mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union*" (Art. 118 of Directive 2017/1132 (ex Art. 1 of the Cross-Border Mergers Directive)), eight Member States are thought to have gold plated this provision and to have extended the geographical scope of their cross-border merger legislation implementing this provision, which now covers also cross-border mergers between EU and non-EU companies.[119] Nevertheless, this argument about the geographical expansion of the scope of the harmonized rules on cross-border mergers to non-EU countries must be treated cautiously because it derives from the fact that these eight Member States do not explicitly prohibit cross-border mergers with companies from non-EU countries and not from explicit national provisions allowing universally cross-border mergers between EU and non-EU companies on a worldwide basis.[120] It is obvious that this alleged geographical expansion is very important for foreign investors. Under this interpretation, the company of a foreign investor registered in a non-EU country could merge directly with an EU company. According to this approach, it would not be necessary for the foreign investor to set up an EU company in order to proceed to a cross-border merger with another EU company from another Member State, but it could merge directly its foreign company registered to a non-EU country with an EU company. In the context of this approach, the possibility of screening through the opposition right of Art. 121 of Directive 2017/1132 a cross-border merger encompassing a foreign direct investment is now expanded to non-EU companies. This alleged geographical expansion to non-EU companies strengthens the power of the national authorities to screen a foreign direct investment through the

[116]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, pp. 1–22. Bech-Bruun and Lexidale (2013), p. 101. For an excellent comparison between the protection offered under Art. 4(1)(b) of the Cross-border Mergers Directive and the protection offered under the Merger Regulation, see: Corradi and Nowag (2019), pp. 159–174. For the competition law aspects of direct cross-border investment, see: Benyon (2010), pp. 41–49.

[117]Benyon (2010), p. 64.

[118]Bech-Bruun and Lexidale (2013), pp. 101–103.

[119]Bech-Bruun and Lexidale (2013), p. 84.

[120]Bech-Bruun and Lexidale (2013), pp. 84–85.

opposition right of Art. 121 of Directive 2017/1132, which could cover not only cross-border mergers between EU companies but also cross-border mergers between EU and non-EU companies. It remains to see the evolution of this provision and whether any Member State would gold plate clearly this provision by adopting in the future explicit national rules expanding the geographical scope of the harmonized rules on cross-border mergers to non-EU companies.

A foreign investor might be interested in acquiring the control of a company through the formation of a European company (SE), an EU supranational corporate type introduced by the European Company Statute.[121] The formation of an SE by merger could be prohibited by Member States' competent authorities on grounds of public interest, which are subject to judicial review (Art. 19 of Regulation on the Statute for a European Company (SE)). The opposition on public interest must be expressed before the issue of the certificate referred to in Art. 25(2) of Regulation on the Statute for a European Company (SE), and its judicial review is exercised by a national judicial authority in accordance with national law. These public interest considerations are defined by national law in accordance with CJEU's case law.[122] This provision could be quite useful for the protection of the financial sector; national competent authorities could block the participation of their financial entities, such as banks or insurance companies, in the formation of an SE by merger in case there is a serious threat to their financial stability and to the interests of their stakeholders.[123] Nevertheless, opposition on public interest to the formation of an SE by merger might be circumvented if the participating companies decide not to merge but that one of them should acquire all the shares of the other.[124]

Moreover, the transfer of the registered office of an SE is also subject to public interest considerations (Art. 8(14) of Regulation on the Statute for a European Company (SE)).[125] More specifically, Art. 8(14) of Regulation on the Statute for a

[121]Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21. For an empirical analysis, see: Eidenmüller et al. (2010), pp. 334-348; Kirshner (2010), pp. 349–353.

[122]Hodt Dickens (2007), p. 1437; Van Gerven (2006), p. 38.

[123]Hodt Dickens (2007), p. 1437, Van Gerven (2006), p. 38.

[124]Storm (2006), p. 10.

[125]In case the foreign investor plans to materialize his investment through a European Cooperative Society (SCE), the same blocking power of Member States appears also in the Statute for a SCE (Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE) [2003] OJ L 207/1–24). This blocking power constitutes an effective screening mechanism under which the Member State could intervene under public interest considerations into important decisions. Art. 21 of the Statute for a SCE specifies the grounds for opposition to a merger and gives the possibility to a Member State to adopt national rules inhibiting one of its national cooperatives to participate in the formation of SCE through a merger only on grounds of public interest amenable to judicial review. Moreover, Art. 7(14) of the Statute for a SCE allows Member States' competent authorities to oppose the transfer of a registered office of an SCE registered in that Member State. The same provision refers also to cooperative financial institutions and states that: "*Where an SCE is supervised by a national financial supervisory authority according to Community directives, the right to oppose the change of registered office applies to this authority as well*".

European Company (SE) grants the right to competent authorities of Member States to stop on grounds of public interest the transfer of the registered office of an SE registered in that Member State resulting in a change of applicable law. These public interest considerations must be based on grounds specified by national law, and no other grounds could be invoked to block such transfer.[126] When an SE is a financial institution and is supervised by a national financial supervisory authority in accordance with EU banking and financial law, this national financial supervisory authority has also the right to restrict the change of registered office.[127] The exercise of these rights to inhibit the change of registered office of an SE is susceptible to judicial review by national courts.[128] With regard to the transfer of the registered office of an SE, the Member State of departure enjoys the possibility of stopping the transfer of the registered office of one of its SEs quite often constituting a "strategic company" or a "national champion". In a possible future amendment of the European Company Statute, this right of opposition to the transfer of registered office could also be expanded and granted to the Member State of destination. This expansion of the right of opposition to the Member State of destination is deemed to be essential for addressing the following problematic situation: a foreign investor cannot set up an SE in a specific Member State because it is considered to be unwelcome there, and its initiative to set up an SE could also be blocked under Art. 19 of Regulation on the Statute for a European Company (SE); instead of this, the foreign investor could set up the SE in a friendly jurisdiction and then transfer its registered office to the desired hostile jurisdiction. Hence, the right to oppose transfers of the registered office of SEs should also be extended to the relevant competent authorities of the Member State of destination. Although this extension might be included in a possible future amendment of the European Company Statute, Member States could possibly gold plate this provision and extend also this right of opposition to the Member State of destination.

It is interesting to mention some empirical data in order to see the trends among Member States: thirteen Member States implemented the opposition right of Art. 8 (14) of Regulation on the Statute for a European Company (SE), and also thirteen Member States implemented the opposition right of Art. 19 of Regulation

[126] Van Gerven (2006), p. 72.

[127] The relationship between the first and the second part of Art. 8(14) is quite obscure. The difference between these two parts is questioned. A textual interpretation leads to the following questionable conclusion: the opposition by a competent authority under the first part of Art. 8 (14) must be explicitly authorized by national law, while the opposition by a financial supervisory authority under the second part of Art. 8(14) could be based directly on the SE Regulation without the need to grant this power by national law. Werlauff (2003), p. 129.

[128] The exhaustion of an administrative appeal procedure as a prerequisite for judicial review is allowed as long as the possibility of judicial review is not affected adversely. The preliminary reference procedure to the CJEU under Art. 267 TFEU is also available, which might be proved particularly useful in the future for the interpretation of the notion of public interest. Werlauff (2003), pp. 129–130.

on the Statute for a European Company (SE).[129] With regard to Art.19 of Regulation on the Statute for a European Company (SE), Member States confer the power of opposition either on judicial authorities or on economic authorities. Moreover, with regard to Art. 19 of Regulation on the Statute for a European Company (SE), eight out of thirteen Member States, taking into account the cross-border characteristics of the merger, adopted stricter opposition rights than in similar domestic situations, while five out of thirteen Member States implemented similar opposition rights as in domestic situations.[130] Around half of Member States provided their national competent authorities the right to oppose the transfer of the registered office of an SE, according to Art. 8(14) of Regulation on the Statute for a European Company (SE).[131] Furthermore, all Member States granted their national financial supervisory authorities the right to restrict the establishment of an SE by merger when one of their domestic financial institutions (bank, investment fund, mutual fund, insurance company, pension fund, brokerage house) is participating.[132]

It is obvious that cross-border mergers of companies, the establishment of an SE through merger and the transfer of the registered office of an SE could be hindered by the relevant authorities on the basis of public interest considerations. These public interest considerations capable of restraining a foreign investor to participate in the capital of a company (domestic public or private limited company or SE) could constitute an effective screening mechanism against undesirable foreign investors. These opposition rights of Member States to block a cross-border merger or the establishment of an SE through merger or the transfer of the registered office of an SE constitute a deviation from investor ownership, for which rules of company law are designed.[133] Company law is structured primarily to contribute to the establishment and operation of investor-owned firms, i.e. firms in which the right to control the firm and the right to receive the firm's net profits are closely linked to investment of equity capital in the firm.[134] This State intervention blocking these corporate restructuring transactions constitutes a deviation from investor ownership. Nevertheless, this deviation could be justified on the basis of public interest considerations served by it.

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[129] Ernst & Young (2009), p. 35.
[130] Ernst & Young (2009), pp. 59, 77.
[131] Ernst & Young (2009), p. 75.
[132] Ernst & Young (2009), pp. 60, 78.
[133] Kraakman et al. (2017), p. 14.
[134] Kraakman et al. (2017), p. 13.

5 Conclusion

It is obvious that European company law could play an important role in investment screening. Both positive and negative integration in the area of European company law could provide the tools for screening a foreign direct investment.[135] Both case law and harmonization in the context of European company law pave the way for an effective screening of foreign direct investments. Freedom of establishment of companies as interpreted by CJEU's case law on corporate mobility could contribute to the screening of foreign direct investments. Lawful golden shares in privatized companies could also constitute effective tools in screening foreign investors interested in acquiring shares in privatized companies. Harmonization of company law at EU level could play a very important role in the screening of foreign direct investments. Various harmonizing instruments contain provisions capable of screening a foreign direct investment. The Takeover Bids Directive with its optionality and reciprocity regime and with its requirements for disclosure of information could contribute to an effective screening of a foreign direct investment behind a bid. Moreover, the Shareholders Rights Directive II (Directive 2017/828) could contribute to investment screening. Transparency requirements imposed on listed companies by EU capital markets law (Transparency Directive) could also constitute an effective screening mechanism for foreign direct investments. Additionally, screening of foreign direct investments could take place through some corporate restructuring harmonizing instruments. The opposition rights of the Cross-Border Mergers Directive (repealed and consolidated into Directive 2017/1132) and of the European Company Statute (Societas Europaea—SE) could block the process of cross-border merger or of establishment of an SE by merger or of transfer of the registered office of an SE, which are threatening public interest.

Although European company law contributes effectively to the screening of foreign direct investments, a special legal framework for investment screening continues to be necessary for Member States prioritizing the assessment and control of foreign direct investments. European company law is not primarily designed for screening foreign direct investments, but it could play a major role in this area. It could be deduced that European company law, without downgrading and diverting from its own objectives, could also simultaneously achieve the goal of screening foreign direct investments, a goal serving the greater purpose of internal market. European company law cannot play alone the role of a consolidated institutional framework for screening foreign direct investments, but it can contribute effectively to this goal.

[135]For an analysis of positive and negative integration in the development of European company law after the 2007/08 financial crisis, see: Hopt (2010), pp. 13–31.

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