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Screening of foreign direct investments through European company law

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-Screening of foreign direct investments could also take place through European company law.

-The **harmonization** of company law in the EU, as well as the **CJEU's case law** offer mechanisms, which could be used for the screening of foreign direct investments.

-These 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"(Art. 50(2)g TEU), they could also **contribute significantly** to an effective screening of foreign direct investments.

LIMITS OF EUROPEAN COMPANY LAW

EU fundamental freedom of establishment (Art. 49-54 TFEU)

EU companies controlled by a Foreign (non-EU) Investor

Only **EU companies** fall within the scope of EU freedom of establishment (Art. 49-54 TFEU) and the deriving harmonized rules.

Article 54 TFEU (ex Article 48 TEC)
"*Companies or firms 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…*"

Screening of FI in the light of the following:

-Takeover Bids Directive (Directive 2004/25/EC)

-Privatization of State-owned companies and CJEU's golden shares case law (Arts 49 and 63 TFEU).

-Shareholders Rights Directive II (Directive 2017/828)

-Other corporate mobility harmonizing instruments: Cross-border Mergers Directive (repealed and consolidated into Directive 2017/1132), European Company Statute (Societas Europaea-SE) and Transparency Directive (Directive 2004/109/EC)

Takeover Bids Directive (Directive 2004/25/EC)

The two main provisions of the Takeover Bids Directive are:

1) the board neutrality rule,

2) the breakthrough rule

MAIN CHARACTERISTICS OF THESE TWO PROVISIONS: **optionality-reciprocity**

The adoption of both the optionality and the reciprocity systems by Member States gives their listed companies the possibility **to frustrate hostile takeovers** by bidders controlled by unwanted foreign investors.

DISCLOSURE OF INFORMATION IN TAKEOVER BIDS

-Moreover, the Takeover Bids Directive has certain **provisions obliging the bidder to disclose its plan and intentions regarding the target company.**

-Art. 6 is dedicated to **important information** concerning bids.

-According to Article 6(2), the "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".

Art. 6(3) states that: "[t]he offer document referred to in paragraph 2 shall state at least: … (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;… (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; … (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."

All these required information could be used as a screening mechanism for foreign investors by both the target company and the relevant supervisory authority.

GOLDEN SHARES

-**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.

-Golden shares or special shares constitute special rights and privileges that Member State continue to enjoy in privatized companies after their privatization.

-**The CJEU had the chance to examine many golden shares schemes** in privatizations of State-owned companies at many Member States.

GOLDEN SHARES CASE LAW

Case C-58/99 *Commission v Italy*
Case C-367/98 *Commission v Portugal*
Case C-483/99 *Commission v France*
Case C-503/99 *Commission v Belgium*
Case C-463/00 *Commission v Spain*
Case 98/01 *Commission v UK*,
Case C-174/04 *Commission v Italy*
Joined Cases C-282 and C-283/04 *Commission v Netherlands*
Joined cases C-463/04 and C-464/04 *Federconsumatori and Others* (C-463/04) *and Associazione Azionariato Diffuso dell'AEM SpA and Others* (C-464/04) v *Comune di Milano*
Case C-112/05 *Commission v Germany*
Case C-274/06 *Commission v Kingdom of Spain*
Case C-207/07 *Commission v Kingdom of Spain*
Case C-326/07 Commission v. Italian Republic
Case C-171/08 *Commission v Portuguese Republic*
Case C-543/08 *Commission v Portuguese Republic*
Case C-212/09 *Commission v Portuguese Republic*
Case C-244/11 *Commission v Greece*
Case C-95/12 *Commission v. Germany*

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 investments.

HOW?

Lawful golden shares could either block a foreign investor from investing in the capital of a privatized company or could control and restrict its actions when the foreign investor is already (controlling) shareholder of the privatized company.

The newly adopted **Shareholders Rights Directive II** (Directive 2017/828) could also play a major role in this field. There is a new provision for the **identification of shareholders** (Art. 3a), 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.

-Additionally, Art. 3g introduces an **engagement policy:** "institutional investors and asset managers shall develop and publicly disclose **an engagement policy that describes how they integrate shareholder engagement in their investment strategy**". 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 **investment strategy of institutional investors and arrangements with asset managers** (Art. 3h) and for transparency of asset managers (Art. 3i).

-The Shareholders Rights Directive II has also some new provisions on **transparency and approval of related party transactions.**

-Transparency and approval of related party transactions are crucial for screening certain **activities 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 from the investee company.**

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).

Cross-border Mergers and European Company (SE)

-Public interest considerations could inhibit the completion of cross-border corporate restructuring.

-Member States enjoy 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 a cross-border merger or of the establishment of a European Company (SE), when such processes are against public interest.**

-Effective screening mechanism against undesirable foreign investors.

Moreover, **the transfer of the registered office of an SE and the confidentiality duty of members of an SE's organs** are also subject to public interest considerations (Arts. 8 and 49 of Regulation on the Statute for a European company (SE)).

Outside European Company Law

What about *national company law* (non-harmonized areas of company law)?

For example: director's duties, shareholder's duties, capital maintenance rules, dividends, etc.

Member States could indirectly screen FI through non-harmonized, national company legislation, as long as they comply with primary and secondary EU law.

Structural changes/new specific rules or interpretation of generic company law provisions.

National courts

CONCLUSIONS

-It is obvious that EU Company Law could play indirectly an important role in investment screening.

-The optionality and the reciprocity regime of the **Takeover Bids Directive** could operate as a screening mechanism. The disclosure of information required by the Takeover Bids Directive could also serve as a screening mechanism.

-Lawful golden shares in privatized companies could also assist in screening foreign investors interested in acquiring shares in privatized companies.

CONCLUSIONS

-Moreover, **the Shareholders Rights Directive II** (Directive 2017/828) could contribute to investment screening.

-Screening of foreign investments could also take place through some other **corporate mobility harmonizing instruments.**

-**The Cross-border Mergers Directive** (repealed and consolidated into Directive 2017/1132) and **the European Company Statute (Societas Europaea-SE)** could also block the process of a cross-border merger or of the establishment of an SE, which are threatening public interest.

CONCLUSIONS

-However, we should not forget that EU needs a **special legal framework** for investment screening.

-These company law instruments **cannot play alone** the role of a strong and consolidated institutional framework for screening of foreign direct investments, **but they can contribute significantly to this goal.**