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**Golden shares: overview and possible lessons from one  
share one vote and state owned enterprises theory**

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## Abstract

Golden shares, or special rights<sup>1</sup>, as some prefer to say, are the inspiration – or at least the starting point - of several academic studies which touch a broad array of subjects: such studies range from literature on comparative corporate law, to studies on the free movement of capital within the European Union, studies on the governance of European integrated markets and studies on how far the European Court of Justice<sup>2</sup> can go in reviewing the national corporate law of member-states.

Because – as we will mention below – they have been considered as restrictions on the free movement of capital in the European Union, they also spark interest because of their nature as control enhancing mechanisms, or mechanisms which allow for economic interest and voting rights in a shareholding to be unbundled. In this sense, golden shares are also a deviation from the “*One Share One Vote Principle*”.

This study will consist of two parts: (i) a first part, which introduces the reader to the background of golden shares, analyses the existing types of golden shares and comments on some of the most important decisions by the ECJ on the subject and (ii) a shorter section which comments on the theory behind the one share one vote theory and calls the attention to certain perspectives which can be found in the existing literature on privatizations and state owned enterprises.

Our purpose is to make an attempt to connect the subjects of golden shares and the one share one vote rule and demonstrate how the first subject could be enriched by the existing studies on the proportionality between ownership and control and state owned enterprises.

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1 The term “golden shares” is more familiar to us and as such it will be the preferred expression throughout the length of this dissertation.

2 From hereinafter, we will refer to the European Court of Justice simply as ECJ.

# I

## Golden Shares

### 1. Privatization

As we first mentioned, golden shares are a product of the privatization movement that is generally understood to have initiated in the United Kingdom, during the government of Margaret Thatcher, even though at least two previous initiatives were carried out by the government of a different country (we're thinking of the Federal Republic of Germany, whose government was responsible for a public offering of shares in Volkswagen, in 1961 and a similar offering of shares in VEBA, in 1965<sup>3</sup>. The term "privatization" comes from the United Kingdom, where it was adopted by Margaret Thatcher after being coined by Peter Drucker<sup>4</sup>).

Privatization has spread all over the globe, as several industrialized and developing nations alike have launched privatization programs, with varying degrees of success. In western Europe Italy, Germany, Spain, Portugal and France come to mind; in eastern Europe the privatization of Russian state-owned enterprises has been widely discussed and in Latin America divestment programs have been implemented by several countries, with Chile being notorious for being the first Latin American Country to implement a privatization program and Brazil deserving special attention because of the size of its economy<sup>5</sup>.

### 2. "Denationalization"

This privatization movement, which some consider to be arguably the largest transfer of ownership in the history of the

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3 William L. Megginson and Jeffrey M. Netter, From State to Market: A Survey of Empirical Studies on Privatization, *Journal of Economic Literature*, Vol. 39, no.2, 2001.

4 William L. Megginson and Jeffrey M. Netter, From State to Market: A Survey of Empirical Studies on Privatization, *Journal of Economic Literature*, Vol. 39, no.2, 2001.

5 William L. Megginson and Jeffrey M. Netter, From State to Market: a Survey of Empirical Studies On Privatization, 4-5 (2001).

corporation<sup>6</sup> was not more than a process of “denationalization” or the return of certain industries to the private sector, following a period on which ownership of enterprises by the state was seen favourably by many, who, amongst other reasons for nationalization, considered state ownership to be the solution for market failures.

This was certainly the case of the United Kingdom, where the second-half of the 1940's was a period of intense nationalization activity by the government<sup>7</sup>.

In Continental Europe privatizations were also preceded by nationalizations occurred decades before. For example in Spain, following a period on which telephone service was originally operated by a number of private undertakings, which ran a network of several local small concessions, Compañía Telefonica Nacional de España was incorporated as a private company, with Spanish as well as non-spanish investors. This company was then nationalized in 1945 by Franco's regime (who bought a significant portion of the shares detained by the largest foreign shareholder, International Telephone and Telegraph Co, thus becoming the company's largest individual shareholder) and brought back to the private sector in a gradual process that was composed of three successive public offerings, occurred in 1987, 1995 and 1997<sup>8</sup>.

Nationalization was often considered an adequate solution to the natural monopolies which exist in certain markets.

Although economists do not completely agree on a single definition of what constitutes a natural monopoly, there is at least a general consensus that a natural monopoly implies *the existence of pervasive economies of scale so that the highest level of efficiency is attained when production is centered in a single firm*<sup>9</sup>. For a simple definition of natural monopoly highlighting the importance of this

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6 Bernardo Bortolotti & Maria Faccio, Government Control of Privatized Firms, ECGI Working Paper no. 40/2004. 2004

7 For a description of this period and a theory on the motivations behind the large number of nationalizations see Robert Millward, The 1940's Nationalizations in Britain: Means to an End or the Means of Production?, The Economic History Review, New Series Vol. 50 No.2, 1997.

8 Germà Bel and Francesc Trillas, Privatization, Corporate Control and Regulatory Reform: The case of Telefonica.

9 William W. Sharkey, The theory of natural monopoly, 13-20, 1982.

characteristic see, for example, Baumol et al. (1977): “By a natural monopoly we mean an industry whose cost function is such that no combination of several firms can produce an industry output vector as cheaply as it can be provided by a single supplier”<sup>10</sup>.

Natural monopolies are a result of the state of the technology employed in the production of a certain good or service. The level of technological development influences the cost structure of certain industries by making the level of investment which is required to gain entrance to such industries so high that the most efficient outcome will only be obtained if a given firm manages to reduce its average cost of production by increasing the production scale to the highest possible level, which in turn will only be possible if the same firm is the only operator selling in the market<sup>11</sup>.

This situation, will inevitably lead to problems caused by a misalignment of the interests of market consumers with the interests of the monopolist firm. Given the assumption that a monopolist firm cannot be expected to act in any way other than what would be rational in light of its interests, this lack of convergence will lead to a situation in which the monopolist produces sub-optimal levels of the product or service in question, from a social perspective<sup>12</sup>.

Several arguments were then used to justify nationalization of firms operating in natural monopolies as an adequate solution for the abovementioned problems.

We do not want to comment on the merit of these arguments – we believe that we do not possess the necessary knowledge to do so and that it would require extensive research which would exceed the scope of this study. Nonetheless, it appears that at least in the West these arguments for nationalization have been abandoned in favour of alternatives such as governmental regulation.

Apart from motivations of economic nature – and regardless of the merit of the arguments of those who find state-ownership to be an

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10 W. J. Baumol, E. E. Bailey and R. D. Willig, Weak invisible hand theorems on the sustainability of multiproduct natural monopoly, *American Economic Review* 67 (1977).

11 João Confraria, *Regulação e Concorrência – Desafios do Século XXI*, 60-61, 2005.

12 João Confraria, *Regulação e Concorrência – Desafios do Século XXI*, 62, 2005.

efficient solution for certain market failures – nationalizations were also caused by political motivations: the nationalization of several enterprises in Portugal, immediately after the Carnation Revolution of 1974, and the nationalization of enterprises owned by nationals of former colonial powers in post-colonial countries in Africa and Latin America are good examples of that<sup>13</sup>.

### 3. Golden shares as a consequence of reluctance to relinquish total control

Not surprisingly, when the previous trend of nationalization started reversing, governments, at the very least, were reluctant to fully renounce to the control they detained in what used to be state owned enterprises and, through various mechanisms, such as ownership pyramids, dual-class shares, statutory restrictions and golden shares attempted to unwind ownership from control in privatized companies, letting go of the former, through direct sales or initial public offerings, but holding on to the latter<sup>14</sup>.

This phenomenon is well documented by Bortolotti and Faccio, who define it as *reluctant privatization*: “*We define reluctant privatization as the privatization of a SOE [State Owned Enterprise] characterized by the sale of equity without a corresponding transfer of control rights. This may happen because the government remains the largest ultimate shareholder of the company, although it no longer owns 100% of the stocks, or because it enjoys veto or special powers through its possession of so-called «golden shares»*”<sup>15</sup>.

Amongst such mechanisms employed by governments to withhold control in privatized companies, golden shares can be found frequently, specially in companies in which the government did not make use of other tactics to ensure that it remains the largest

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13 On the nationalization of enterprises owned foreigners in former colonies see William L. Megginson and Jeffrey M. Netter, *From State to Market: a Survey of Empirical Studies on Privatization*, 3, 2001 and J. Frederick Truitt, *Expropriation of Foreign Investment: Summary of the Post World war II Experience of American and British Investors in the Less Developed Countries*, *Journal of International Business Studies*, Vol.1., No.2 (1970).

14 See, for example, Erika Szyczak, *Golden Shares and Market Governance*, *Legal Issues of Economic Integration* 29(3), 255, 2002.

15 Bernardo Bortolotti, Mara Faccio, *Reluctant Privatization*, Center for Economic Institutions Working Paper Series, No. 2006-5, 2006.

shareholder or that it retains a significant level of “traditional” influence, as documented by the same authors.

In 2004, the European Commission carried out a survey with the intention to evaluate the situation of golden shares and special rights in the European Union, whose results were made public in its 2005 report on special rights in privatised companies in the enlarged Union<sup>16</sup>.

The Commission identified golden shares in 141 companies, covering a broad array of sectors such as telecommunications, electricity, gas, energy, postal services, banking and insurance. This number may appear impressive but, according to the Commission, it represents a reduction of golden shares in the European Union when compared with the figures which were found in 1997, when it conducted a similar survey following its communication on intra-EU investment from the same year<sup>17</sup>, at least as regards the member-states which were already a part of the Union before the 2004 enlargement<sup>18</sup>.

For the sake of rigour, it must be said that it is possible that a number of the golden shares which were identified by the Commission do not exist anymore, either because they were abolished as a result of unfavourable ECJ decisions or infringement proceedings conducted by the Commission or because member-states have voluntarily abolished them – according to the 2005 Commission report the extinction of several special rights was already planned for by the respective member-states -, something which we are not able to verify. Nonetheless, it appears to us that they still are widely used in the European Union and will not disappear completely in the immediate future, preventing this study from becoming obsolete all too soon.

#### 4. Different configurations of special rights

Special rights of states in privatized companies may exist under different forms and confer different powers to the government.

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16 European Commission, Special Rights in privatised companies in the enlarged Union – a decade full of developments, Commission Staff Working Document, 2005.

17 European Commission, Communication on certain legal aspects concerning intra-EU investment, OJ 1997 C 220/15.

18 European Commission, Special Rights in privatised companies in the enlarged Union – a decade full of developments, Commission Staff Working Document, 19, 2005.

In some member-states, the adoption of one method to confer special rights to the government in detriment of others is merely an option and a matter of preference. In others, however, legislation requires certain approaches to be followed in order for the government to be granted special rights in a company.

A first distinction can be made between special rights which grant to governments a specific influence in company decisions and special rights which are aimed at guaranteeing that governments have a word in what concerns ownership structure. A second distinction is justified to separate special rights which are granted on the basis of the general company law of a member-state and special rights which rest upon special legislation specifically enacted to grant governments privileges which they otherwise could not hold because such arrangements would be forbidden under national legislation<sup>19</sup>.

As regards special rights which grant to governments a specific influence in company decisions, attention ought to be paid to shares which carry along with them the power to veto important decisions, or shares whose consent is required in order for certain shareholders' resolutions to be approved. This was the case, for example, of the golden share held by the British government in the British Airports Authority, which was the object of ECJ decision C-98/01: the articles of incorporation of the company provided that the "Special Share" (such was the name which was attributed to the golden share of the British government), besides the fact that it should only be possessed by "*one of Her Majesty's Secretaries of State, another Minister of the Crown or any other person acting on behalf of the Crown*", had to approve a number of important decisions before they could be considered effective. Amongst other matters, such decisions included, for example, any decisions by means of which the company would cease to have control over its subsidiaries, proposals related to the voluntary winding up or dissolution of the company or its subsidiaries,

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19 These distinctions can be found in both European Commission, Special Rights in privatised companies in the enlarged Union – a decade full of developments, Commission Staff Working Document, 5-6, 2005 and Stefan Grundmann and Florian Möslein, State Control in Privatised Companies: Comparative Law, European Law, and Policy Aspects, *European Banking and Financial Law Journal*, 8-15, 2004.

and decisions related to the transfer of airports operated by the company<sup>20</sup>.

This special rights were conferred on the basis of general British company law, which allows such arrangements, and originated directly from the articles of association of the British Airports Authority. Conversely, the Belgian golden shares in Société Nationale de Transport Par Canalisations (or SNTC) and Société de Distribution du Gaz (or Distrigaz), which grant the Belgian Minister in charge of the country's energy policy the right to oppose, in those companies, any transfers of assets which are considered to have a negative effect in the Belgian energy strategy, can be an example of special rights based in autonomous legislation<sup>21</sup>. This is also the case of Portugal Telecom, whose articles of association provide that certain resolutions may not be approved against the majority of votes which correspond to the “class A shares”<sup>22</sup>, ranging from amendments to the articles of incorporation, capital increases and issuance of securities – such provisions have their legal source on the Portuguese Framework Law on Privatizations (Law no. 11/90), of 5 April 1990 and Decree-Law no. 44/95, of 22 February (which regulated the first stage in the privatization of the Portuguese telecommunications company).

Another type of special rights which allow national governments to have a disproportionate influence in privatized companies are appointment rights, or rights which, by one form or another, allow governments to influence the composition of the board of directors of a company or to appoint a number of representatives which sit in board meetings. For example the Belgian golden shares allow the government to appoint two representatives to sit on the board of directors of Société Nationale de Transport Par Canalisations and Société du Distribution du Gaz, who may “*propose to the Minister the annulment of any decision of the board of directors which they regard as contrary to the guidelines for the country's energy*

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20 ECJ decision C-98/01, 10.

21 ECJ decision Royal Decrees of 10 June 1994 and 16 June 1994.

22 Such is the name of the Portuguese government golden shares given in the articles of association of Portugal Telecom..

*policy, including the Government's objectives concerning the country's energy supply*<sup>23</sup>. The golden shares held by the Portuguese government in Portugal Telecom are also good examples of appointment rights: pursuant to the articles of incorporation of the company, the appointment of a third of the members of the board of directors, including the chairman, requires the favourable vote of the class A shares<sup>24</sup>.

As examples of special rights which allow governments to have a certain degree of control in the ownership structure of companies, the *action spécifique* formerly held<sup>25</sup> by the French government in the petroleum company Elf-Aquitaine stands out. Pursuant to Decree No. 93-1298 of 13 December 1993, which is no longer in force, “*any direct or indirect shareholding by a natural or legal person, acting alone or in conjunction with others, which exceeds the ceiling of one tenth, one fifth or one third of the capital of, or voting rights in the company*”<sup>26</sup> required previous approval by the French Minister for Economic Affairs. A similar provision – that is, a similar system of prior administrative authorization for share transactions above certain thresholds - existed in the Spanish golden shares in Repsol, Endesa, Telefonica, Banca Argentario and Tabacalera<sup>27</sup>. In the case of Portugal Telecom, the Portuguese government also has a degree of influence in the ownership structure of the company, but not through the legal imposition of an *ex ante* administrative control. Instead, any acquisitions of shares above a threshold of 10% of the outstanding share capital by shareholders which are direct or indirect competitors of any companies that are part of the Portugal Telecom group<sup>28</sup> have to be authorized by a shareholders resolution, with the favourable vote of class A shares.

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23 As translated in ECJ decision C-503/99.

24 Article 19/2 of the articles of incorporation.

25 As will be mentioned further ahead in this study.

26 As translated in ECJ decision C-483/99.

27 See Nadia Gaydarska and Stephan Rammeloo, The legality of the “golden share” under EC Law, Maastricht Faculty of Law Working Paper 2009-9, 12, 2009 and ECJ decision 483/00, para. 9.

28 The special rights mentioned herein by reference to “Portugal Telecom” and which came to the attention of the ECJ in decision C-171/08 exist in Portugal Telecom, SGPS, S.A., a Portuguese law holding company (*Sociedade Gestora de Participações Sociais*).

As can be seen, a broad array of tactics are employed by governments to ensure that control in privatised companies is not completely transferred to the private sector. We believe this is an important observation in itself, as it allows us to understand that in different jurisdictions the special powers embedded in golden shares have different sources and that sometimes an interesting interaction between public and private law has taken place to make room for golden shares.

#### 5. The view of the European Commission and the decisions of the ECJ

The European Commission has been skeptical of the legality of golden shares under European Union law from very early<sup>29</sup>. In its 1997 communication on certain legal aspects concerning intra-EU investment, it stated that “*although these [golden shares] are often linked to theoretically non-discriminatory measures such as granting of authorisation, this criterion does not appear to be sufficiently transparent and could thereby introduce an element of discrimination against foreign investors, as well as legal uncertainty. Furthermore, this concept could encompass both economic and non-economic criteria going well beyond the exceptions allowed in Community law*”<sup>30</sup>.

After the survey which was carried out following this communication<sup>31</sup>, the Commission entered a dialogue with several member-states where it identified the use of golden shares, aimed at compelling such member-states to voluntarily abolish or modify the respective special rights<sup>32</sup>.

Although some member-states opted to relinquish their special rights, as was the case, for example, of Ireland, which extinguished the special rights held in Irish Life Assurance Company and Telecom

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29 Erika Szyszczak, Golden Shares and Market Governance, 263, Legal Issues of Economic Integration 29 (3), 2002.

30 European Commission, Communication on certain legal aspects concerning intra-EU investment, OJ 1997 C 220/15, para. 8.

31 See page 6 above.

32 European Commission, Special Rights in privatised companies in the enlarged Union – a decade full of developments, Commission Staff Working Document, 4, 2005.

Eireann<sup>33</sup>, other member-states refused to abolish or modify the special rights as requested by the Commission.

This led to a group of landmark rulings by the ECJ, namely: C-58/99<sup>34</sup>, C-483/99<sup>35</sup>, C-503/99<sup>36</sup>, C-367/98<sup>37</sup>, C-463/00<sup>38</sup>, C-98/01<sup>39</sup>, C-282/04 and C-283/04<sup>40</sup>, C-174/04<sup>41</sup>, C-112/05<sup>42</sup>, C-463/04 and C-464/04<sup>43</sup>, C-274/06<sup>44</sup>, C-207/07<sup>45</sup>, C-171/08<sup>46</sup> and C-543/08<sup>47</sup>. In all cases except one, the ECJ considered that the golden shares constituted a breach of European law.

As the scope of this study is not to perform a thorough analysis of European golden shares case law, we shall only take a brief overview of a sample of the above mentioned decisions, which we consider to represent well the most important issues at stake

#### 6. C-483/99, C-503/99 and C-367/98

Decisions C-483/99, C-503/99 and C-367/98 sparked the interest of academic authors worldwide, because of the legal reasoning of the ECJ and their somewhat groundbreaking nature in what regards the subject of the fundamental freedoms of the EC, specially the freedom of circulation of capital.

In C-483/99 the Commission disputed the existence of a provision of French law which granted a golden share (*action spécifique*) to the French government. As already mentioned before, this *action spécifique* not only established a system of *ex ante* administrative control for acquisitions of shares above certain

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33 European Commission, Special Rights in privatised companies in the enlarged Union – a decade full of developments, Commission Staff Working Document, 17, 2005.

34 Commission/Italy.

35 Commission/France.

36 Commission/Belgium.

37 Commission/Portugal.

38 Commission/Spain.

39 Commission/United Kingdom.

40 Commission/The Netherlands.

41 Commission/Italy..

42 Commission/Germany.

43 Commission/Italy.

44 Commission/Spain.

45 Commission/Spain.

46 Commission/Portugal.

47 Commission/Portugal.

thresholds but also conferred to the French Minister of Economic Affairs the power to oppose any decisions to transfer or use as security certain assets of Elf-Aquitaine – such assets were the majority of the share capital of four subsidiaries of the company.

In C-503/99 the Commission disputed certain provisions of Belgian law which grant the state golden shares in two companies already referred by us: SNTC and Distrigaz. Such golden shares entitle the Belgian government to (i) be notified in advance of any decisions to transfer, use as security or change the destination of certain assets of both companies and oppose such decisions if they are considered to have an adverse effect on Belgian energy policy and (ii) appoint two representatives to sit on the board of directors of each company, who can propose the cancellation of any company decisions which are considered to be contrary to the guidelines for the country's energy policy, including the Government's objectives concerning Belgium's energy supply.

Finally in C-367/98 what was brought to the attention of the ECJ was a series of provisions of Portuguese law which (i) had the effect of limiting the acquisition of shares in privatized companies by foreign entities above a certain threshold and (ii) implemented a system of *ex ante* administrative control for acquisitions above a certain limit.

In C-483/99 the Commission argued that the French special rights “*although applicable without distinction, create obstacles to the right of establishment of nationals of other Member States and to the free movement of capital*”<sup>48</sup>.

The Commission recognized that in certain cases, restrictions such as those under judgment could be justified under Articles 45, 46 and 58 of the EC treaty<sup>49</sup> and overriding requirements of general interest, provided that they were “*qualified by stable, objective criteria which have been made public, in such a way as to restrict to the minimum the discretionary power of the national authorities*”<sup>50</sup>,

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48 C-483/99, para. 21.

49 After the amendment introduced by the Treaty of Amsterdam.

50 C-483/99, para. 22.

but it considered that in the case none of those exceptions did apply.

The ECJ considered that, although the motives referred by the French government could potentially justify an exception to the fundamental freedoms of the treaty, i.e. that “*safeguarding of supplies of petroleum products in the event of a crisis, falls undeniably within the ambit of a legitimate public interest*”<sup>51</sup>, the special rights that were adopted were not acceptable.

Regarding the system of *ex ante* administrative control for shareholdings exceeding certain limits, it was considered unacceptable because the conditions under which the French government would authorize or deny such shareholdings were not precisely defined under French internal law, thus leaving investors in a situation of legal uncertainty<sup>52</sup>. The ECJ further stated that “*such a wide discretionary power constitutes a serious interference with the free movement of capital, and may have the effect of excluding it altogether. Consequently, the system in issue clearly goes beyond what is necessary in order to attain the objective pleaded by the French Government, namely the prevention of any disruption of a minimum supply of petroleum products in the event of a real threat.*”. A similar reasoning was applied to the other special right conferred to the French government: the ECJ considered that restriction to be non-acceptable as well, because French law failed to set out precise criteria for the exercise of opposition rights by the government<sup>53</sup>.

In the end, the ECJ struck down both special rights on the basis that they constituted a breach of the freedom of circulation of capital contained in Article 56 of the EC treaty. It did not pronounce itself on the freedom of establishment.

A similar outcome took place in C-367/98, where the Commission disputed certain provisions of Portuguese law which had the effect of limiting the number of shares which could be directly or indirectly acquired by foreign entities in privatized Portuguese state owned enterprises, and created a system in which shareholdings

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51 C-483/99, para 47.

52 C-483/99, para. 50.

53 C-483/99, paras. 52 and 53.

above 10% in privatized companies had to be authorized by the Minister for Financial Affairs.

The provisions which limited the acquisition of shares in privatized companies by foreign entities did not give place to extensive legal reasoning by the court, as they so blatantly breached the rules of the EC treaty that Portugal recognized that they were unacceptable. As such, the intervention of the ECJ on this matter was limited: it merely stated that it would not be sufficient for Portugal to adopt a policy line of not enforcing these restrictions and demanded that they be repealed<sup>54</sup>. The provisions which required shareholdings above 10% in privatized companies to be authorized by the Portuguese Minister for Financial Affairs deserved a deeper analysis by the ECJ, however. As they were worded in Portuguese law, those provisions applied equally to Portuguese and non-Portuguese shareholders, a fact which Portugal brought to the attention of the ECJ<sup>55</sup>. The ECJ however considered the rule to be unacceptable, regardless of the fact that it did not impose a formal discrimination: “*Even though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. They are therefore liable, as a result, to render the free movement of capital illusory*”<sup>56</sup>. The ECJ, on the basis of previous case-law, further dismissed the arguments which had been presented by Portugal that the disputed legal provisions were necessary in order to protect the financial interest of the Portuguese Republic<sup>57</sup>.

As happened in the C-483/99 decision, the ECJ struck down the disputed provisions on the basis that they constituted a breach of the freedom of circulation of capital and considered it was not necessary to pronounce itself on the subject of freedom of establishment.

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54 C-367/98, para. 40-42.

55 C-367/98 para. 43-

56 C-367/98, para. 45.

57 C-367/98, paras. 31-32 and 52-53.

In contrast with the above two decisions, decision C-503/99 had an unexpected outcome: to date it is the only decision in which the ECJ found special rights of a member-state to be acceptable.

The ECJ found that the Belgian legal provisions which we already mentioned above in page 12 were acceptable, as they were “*justified by the objective of guaranteeing energy supplies in the event of a crisis*”<sup>58</sup>.

The ECJ was satisfied that the administrative control provided by the Belgian special rights consisted of an *ex post* procedure which could eventually lead to the opposition of the Belgian government, instead of a system of prior approval. The ECJ also found it relevant that “*in order for that power of opposition to be exercised, the public authorities are obliged to adhere to strict time-limits*”<sup>59</sup>. Furthermore, the ECJ also believed that it was important that the disputed provisions specifically provide that the opposition powers can only be used in very limited situations, in which the energy policy of Belgium is at stake, and that instances of utilization of such powers may be disputed in court<sup>60</sup>. This aspect is well summarized in para. 52 of the decision, which reads: “*The scheme therefore makes it possible to guarantee, on the basis of objective criteria which are subject to judicial review, the effective availability of the lines and conduits providing the main infrastructures for the domestic conveyance of energy products, as well as other infrastructures for the domestic conveyance and storage of gas, including unloading and cross-border facilities. Thus, it enables the Member State concerned to intervene with a view to ensuring, in a given situation, compliance with the public service obligations incumbent on SNTC and Distrigaz, whilst at the same time observing the requirements of legal certainty*”.

Finally, the ECJ also mentioned that the Commission failed to show how Belgium could have implemented less restrictive measures than those that were disputed in this case to attain its objectives.

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58 C-503/99, para. 55.

59 C-503/99, para. 49.

60 C-503/99, para. 51.

## 7. C-112/05 (Commission/Germany, Volkswagen)

Decision C-112/05 was also paid extensive attention by academic commentators, who discussed its possible role as a precedent which opens for the ECJ the possibility to analyze national company law provisions.

The disputed law under this decision was the *Volkswagengesetz*, which was based on a 1959 agreement between the Federal Republic of Germany and the *Land* of Lower Saxony (*Niedersachsen*) and was aimed at providing a solution to an old dispute related to the ownership of Volkswagen, as well as protecting the employees of the company from layoffs or other undesirable occurrences caused by a takeover by a large outside shareholder<sup>61</sup>.

In this case, the situation was slightly more complex than in the other decisions resumed herein, as the disputed laws did not provide, at least formally, for the existence of special rights detained by the Federal Republic of Germany or by the *Land* of Lower Saxony. Instead, the *Volkswagengesetz* acted as special company law regime for Volkswagen. It provided for a ceiling of 20% of the outstanding voting rights (i.e. a single shareholder could not issue more than 20% of the outstanding voting rights in the company, regardless of the amount of shares he held) and implemented an 80% necessary majority for certain important company decisions (against the 75% default majority set forth in the *Aktiengesetz*). Furthermore, it also provided that the Federal State and the Land of Lower Saxony had the right to appoint two members to the supervisory board of Volkswagen, as long as they held a shareholding in the company<sup>62</sup>.

What made the situation judged in C-112/05 unique was the fact that, by themselves, the provisions of the *Volkswagengesetz* did not establish formal special rights of the Federal Republic of Germany or of the *Land* of Lower Saxony, neither did they establish a legal regime which was prohibited by the *Aktiengesetz*. The rules which were provided by the *Volkswagengesetz* applied without

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61 Wolf-Georg Ringe, The Volkswagen Case and The European Court of Justice, *Common Market Law Review* 45 (2008), 538. 2008.

62 C-112/05, paras. 4-7.

distinction to all shareholders of the company.

At the time of the judgment, the Federal Republic of Germany had already disposed of its shareholding, but the *Land* of Lower Saxony kept a shareholding of 20% of the company's share capital<sup>63</sup>.

The argument of the Commission, as regards the fact that the *Volkswagengeetz*, required a majority of 80% for certain company decisions, was that the provision enabled the *Land* of Lower Saxony to block certain decisions on the basis of its shareholding of 20%. As such, the Commission argued, the reinforced special majority of 80%, although it appeared not discriminatory, was created for the exclusive benefit of the public authorities<sup>64</sup>. As regards the voting ceiling of 20% of outstanding voting rights, the Commission called the attention of the ECJ to the fact that such ceiling had been imposed by legislation on the private shareholders, instead of having been chosen by themselves<sup>65</sup>. Finally, the Commission argued that the *Volkswagengesetz*, by providing that the Federal Republic of Germany and the *Land* of Lower Saxony could, as long as they remained shareholders of the company, appoint two members of the supervisory board each, limited the ability of other shareholders to participate effectively in the management and control of Volkswagen<sup>66</sup>.

The ECJ mainly adhered to the arguments of the Commission<sup>67</sup> and held that all the disputed provisions of the *Volkswagengesetz* were in breach of the freedom of circulation of capital<sup>68</sup>.

## 8. Golden shares and the freedom of circulation of capital

In all the above commented decisions, the ECJ ruled that the

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63 C-112/05, paras. 4849.

64 C-112/05, para. 34.

65 C-112/05, para.31.

66 Under the *Aktiengesetz*, only a third of the members of the supervisory board who are elected by shareholders may be directly appointed by specific shareholders. Because in Volkswagen only 10 members of the supervisory board are elected by shareholders, the number of representatives who could be appointed by the Federal Republic and the *Land* of Lower Saxony was higher than one third.

67 C-112/05, paras. 50-52, 56 and 59-69.

68 C-112/05, summary.

disputed legal provisions conflicted with the freedom of circulation of capital which was contained in Article 56 of the EC treaty.

In a sense, this consisted of an evolution of European law by itself, as until those decisions the freedom of circulation of capital was mainly analyzed in relation to tax law issues<sup>69</sup> and therefore was relatively under-explored in litigation before the ECJ (not unsurprisingly, given the potential for the freedom of movement of capital to interact with the other economic freedoms of the European Union<sup>70</sup>).

Pursuant to Article 56(1) of the EC treaty, all restrictions on the movement of capital between member-states or between third countries and member-states shall not be permitted. Such restrictions can either be formally discriminatory or not, as has been pointed out by decisions C-367/98 and C-483/99 : “*article 73b<sup>71</sup> of the Treaty lays down a general prohibition on restrictions on the movement of capital between Member States. That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets<sup>72</sup>.*”.

On the basis of this understanding of the free movement of capital, the ECJ has considered most golden shares to be unacceptable because they can deter investors from other member-states from investing in shares of companies where they exist. In other words, golden shares have been considered by the ECJ to represent a restriction on the free circulation of capital because they can make investing in companies where they exist less attractive for outside investors. A good example of this reasoning – which was followed by the ECJ in most golden share decisions – can be obtained from C-483/99, para. 41: “*they [the special rights] are liable to impede the acquisition of shares in the undertaking concerned and to dissuade investors in other Member states from investing in the capital of those*

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69 Stefan Grundmann and Florian Möslin, State Control in Privatised Companies: Comparative Law, European Law, and Policy Aspects, *European Banking and Financial Law Journal*, 19, 2004.

70 Erika Szyszczak, Golden Shares and Market Governance, *Legal Issues of Economic Integration* 29(3), 269, 2002.

71 Before the amendment introduced by the Treaty of Amsterdam, the freedom of movement of capital was contained in Article 73 of the EC treaty.

72 Paras. 44 and 40, respectively.

*undertakings. They are therefore liable, as a result, to render the free movement of capital illusory”.*

The ECJ does recognize that sometimes the free movement of capital may be restricted. However, such restrictions are only admitted under very strict circumstances, as can be seen, for example, in C-503/99, para. 45: “*the free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty*<sup>73</sup> *or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality.*”<sup>74</sup>. This strict interpretation appears to be in line with previous case law of the ECJ on the subject of restrictions of the fundamental freedoms: in *Gebhard*<sup>75</sup> the court stated that “*national measures liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the Treaty must fulfill 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*”.

As we mentioned above, only on one occasion did the ECJ consider that golden shares in privatized companies could be tolerated. The path which has been followed by the ECJ is, as such, one where it appears to be very difficult for a government to find justification to maintain a privileged position in privatized companies.

This fact - that until now only one decision has been favorable to golden shares - limits the conclusions that can be drawn about the criteria which would have to be met for other golden shares

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73 Article 58 of the EC treaty, after the amendment introduced by the Treaty of Amsterdam.

74 The same is referred in C-367/98, para. 49 and C-483/99, para. 45.

75 C-55-94.

to pass an examination by the ECJ. Nonetheless, and regardless of the fact that case law on the matter is indeed very limited, there are still lessons to be learned with C-503/99.

The first lesson is that apparently the ECJ believes that if golden shares are to exist, the criteria for their exercise have to be well determined and so do the purposes which are sought to be served with such golden shares. In other words, it seems that in part the ECJ has accepted the Belgian golden shares because the disputed law in C-503/99 contained narrow borderlines for the exercise of State control rights, allowing investors to be aware of the situations in which such rights can be exercised<sup>76</sup>.

The second lesson is that the ECJ is also concerned with the substance of golden shares at the procedural level. In this regard, it can be seen in C-503/99 that the ECJ believes it is important, first, that administrative action in relation to the exercise of special rights is possible only within short periods of time and second that a system of *ex post* opposition is employed in place of a system of *ex ante* control<sup>77</sup>. Some authors have pointed out that this is understandable, because “*investors typically are more inclined to carry the risk of an acquisition being later forbidden than willing to accept an imperative requirement to obtain administrative approval prior to the acquisition*”<sup>78</sup>. We believe that those authors are mostly right, but that this interpretation has to be taken with a grain of salt: it could be argued that *ex ante* controls would provide for more legal certainty than systems of *ex post* opposition, as with the former investors would be aware of the intentions of the state before decisions are taken, while with the latter investors could run a risk of having their decisions being subsequently contested. Nonetheless we believe that what the authors meant was that an *ex ante* system would be more damaging for the circulation of capital, because it would prevent

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76 Stefan Grundmann and Florian Möslein, State Control in Privatized Companies: Comparative Law, European Law and Policy Aspects, *European Banking and Financial Law Journal* 1, 29-30, 2004.

77 Stefan Grundmann and Florian Möslein, State Control in Privatized Companies: Comparative Law, European Law and Policy Aspects, *European Banking and Financial Law Journal* 1, 30, 2004 and C-503/99, paras, 28, 49 and 51.

78 Stefan Grundmann and Florian Möslein, State Control in Privatized Companies: Comparative Law, European Law and Policy Aspects, *European Banking and Financial Law Journal* 1, 30, 2004.

potential investors from acquiring shares in companies with golden shares altogether, while an *ex post* system would not be much of an incentive to not acquire such shares, as no negative consequences can occur if the state does not exercise its rights of opposition and the negative consequences which can come from the exercise of such rights do not seem severe.

A final lesson would be that, if golden shares must be employed, for one of the valid motives recognized as such in the golden shares decisions, then it must be possible to submit to judicial review the actions of the state when it exercises its special rights. In order for this to be possible, procedural issues acquire relevance once again. In the case of the Belgian golden shares, all decisions by the Minister in charge of the energy policy of the country must be supported by formal statements of reasons<sup>79</sup>. Together with the fact that, as we already mentioned, the legal provisions which establish the Belgian golden shares provide for narrow borderlines for their utilization, this requirement is essential for the existence of an effective judicial review, as it guarantees that the Belgian governmental carries the burden of justifying its actions every time that it makes a decision to use the special rights. This increases the efficacy of judicial review enormously, because it ensures that, when required to do it, Belgian courts only have to perform a simple exercise of comparing the reasons which have been stated by the Belgian government against the criteria which are specified by the Belgian golden share laws.

Without doubt, it appears that the ECJ is concerned about the legal certainty which can be enjoyed by investors. Golden shares shall not be tolerated because, even if they are not discriminatory, they may deter investors from acquiring shares in the companies in which they exist, as they grant states with powers that are not proportionate to the economic interest they hold. Furthermore, when the legal provisions which create golden shares do not provide for strict borderlines for their utilization, investors may fear entering companies

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<sup>79</sup> C-503/99, para. 51.

with golden shares, as they are put in a position of legal uncertainty in which they do not know how and under what circumstances the state may use the golden shares and affect the economic value of their investment.

This brings us to the next section of our study, in which we will briefly analyze the corporate governance subject of proportionality between economic interest and control in a company. We will try to assess if, from an economic perspective it makes sense to have this proportionality be imposed by law, or if, conversely, it is not necessary to impose this proportionality because investors are willing to tolerate arrangements where it does not exist.

## II

### **The one share one vote rule (or 1s1v) and the economic theory on state owned enterprises**

#### 1. 1s1v In European Law

Interest in the study of the subject of proportionality between ownership and control and, more concretely, the 1s1v rule was renewed in Europe by the first Report of the High Level Group of Company Law Experts (usually referred to as the Winter Report because the high level group was led by dutch law scholar Professor Jaap Winter) and by the discussion which surrounded the new proposal for a Takeover Directive which was presented by a Communication by the European Commission dated from 2 October 2002<sup>80</sup>.

The main concern of the High Level Group of Company Law Experts (from hereon, the “High Level Group”), as regards the interaction between the subject analyzed in this section and the market for corporate control is that company arrangements where certain shareholders carry voting rights which are disproportionate to the number of shares they hold in the company can lead to situations where takeover bids are frustrated by minority shareholders (against the will of the majority of shareholders who bear the economic risk of the company): *“If, prior to the bid, the capital and control structures of the company deviate from this principle [one share one vote], the disproportionate control rights can be used, and are likely to be used, to authorize the board to frustrate the bid if the board or the minority shareholder controlling the board wishes to oppose it”*<sup>81</sup>. In order to avoid this, the group proposed that, if a Directive on takeover bids was approved after the report, that Directive should contain a rule providing namely that *“a shareholders meeting called to decide on whether a post-bid defense should be put up against a takeover bid should be held on a re-arranged, proportional basis.”*, and that *“All*

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80 Guido Ferrarini, One Share – One vote: A European Rule?, ECGI Law Working Paper N.º 58/2006, 2, 2006.

81 Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, 28., 2002

*holders of risk bearing capital must have the right to attend such meeting and to be able to exercise votes in proportion to their holding of risk bearing capital*". In other words, the group proposed that to ensure that a takeover bid is not sabotaged by minority shareholder's whose interest is contrary to that of the shareholders who bear the majority of the economic risk associated to the company, company arrangements which have the result of creating a disproportionate distribution between economic risk and control rights should be ignored in shareholders meetings that are summoned to decide on the application of post bid anti-takeover measures<sup>82</sup>. For example, holders of non-voting shares should be able to vote in such meetings, provided that they bear economic risk in the company<sup>83</sup>.

Furthermore the High Level Group also believed that it would be important to adopt a "break-through rule", by which bidders who manage to acquire a significant number of shares in a company should be able to surpass all the mechanisms and structures previously implemented in the same company which could frustrate the effective exercise of proportionate control. In other words, any mechanisms which could limit a successful bidder from effectively acquiring control of the target company should be overridden in post acquisition shareholders meetings. Such mechanisms include voting caps, multiple voting rights, non-voting shares, provisions preventing the exercise of "core control rights" (such as voting on the composition of the board of directors and amending the articles of association of the company), and all similar arrangements<sup>84</sup>.

The suggestions of the High Level Group were criticized in several studies, on several grounds<sup>85</sup>, and, as a result of such critiques, Directive 2004/25/EC - or the European Takeover Directive - was only partially influenced the report<sup>86</sup>.

A first look at the Directive could lead one to think that the ideas of of the High Level Group were adopted without restriction.

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82 Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, 28., 2002

83 *Ibidem*.

84 *Ibidem*, 32 and 33.

85 Guido Ferrarini,, One Share – One vote: A European Rule?, ECGI Law Working Paper N.º 58/2006, 3 and 4, 2006.

86 *Ibidem*, 5.

Article 11/3 of the Directive provides that restrictions on voting rights provided for in the articles of association of a company which is the object of a takeover bid and similar restrictions which originate from agreements between the company and holders of its securities or from agreements between holders of company securities entered into after the adoption of the Directive shall not have any effect on the shareholders meeting which is summoned to decide on the adoption of takeover defense measures. The Article 11/3 also provides that securities which carry multiple voting rights shall only be allowed one vote in the same meeting.

Additionally, Article 11/4 states that these rules shall apply whenever a bidder is successful in acquiring at least 75% of the share capital which carries voting rights, “*at the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members*”. Special rights of shareholders regarding the appointment or removal of board members, when they exist, shall not apply in this general meeting as well.

Article 12, however, turns this provisions into mere optional rules which member-states are free to reject, by stating that “*Member States may reserve the right not to require companies as referred to in Article 1(1) which have their registered offices within their territories to apply Article 9(2) and (3) and/or Article 11*”, provided that “*Where Member States make use of the option provided for in paragraph 1, they shall nevertheless grant companies which have their registered offices within their territories the option, which shall be reversible, of applying Article 9(2) and (3) and/or Article 11, without prejudice to Article 11(7)*”.

Furthermore, the rules of Article 11 shall not apply in the case of golden shares, provided that they are not deemed incompatible with European primary law, pursuant to Article 11/7.

This optional nature of the break-through rule was arguably the result of political compromise, as normally occurs with

European law<sup>87</sup>, and, because of it, by 2007 only a very reduced number of member-states had opted-in<sup>88</sup>.

## 2. Theory and empirical observations of 1s1v

An extensive analysis of the literature which studies the one share one vote rule from an economic efficiency point of view has been made by Renée Adams and Daniel Ferreira (2007)<sup>89</sup>, according to whom it is difficult to prove empirically that a disproportionate relation between ownership and control is economically inefficient<sup>90</sup>.

The authors mention that the idea that one share one vote is a desirable rule predominates in the literature which analyzes the subject. Such literature considers that situations where ownership and control are not proportionate can lead to a broad array of negative outcomes, ranging from distorted investment decisions to underdeveloped capital markets and lack of economic growth<sup>91</sup>. The authors also refer, however, that there are several studies which argue for the existence of benefits in concentrated control of business groups, namely through the use of control enhancing mechanisms<sup>92</sup>.

Regardless of the fact that studies exist arguing both ways, it seems that control enhancing mechanisms are widely employed, at least in the European Union. A good reference for grasping how widespread the use of this mechanisms is in European Union companies is the external study commissioned by the European Commission on the subject, which was conducted by Institutional Investor Services and Shearman & Sterling<sup>93</sup>. According to this study, 44% of the sample of 464 companies from 16 countries employes at

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87 Koen Geens and Carl Clotten, One Share – One Vote: Fairness, Efficiency and (the Case for) EU Harmonisation Revisited, *The European Company Law Action Plan Revisited. Reassessment of the 2003 priorities of the European Commission*,

88 Report on the implementation of the Directive of Takeover Bids, SEC (2007) 268, 21 February 2007, pp. 7-8.

89 *Ibidem*.

90 Renée Adams and Daniel Ferreira, One Share, One Vote: The Empirical Evidence, ECGI Finance Working Paper N.º 177/2007, 2, 2007.

91 R. Morck, D Wolfenzon and B. Yeung, Corporate Governance, economic entrenchment and growth, *Journal of Economic Literature* 43, 657-722. in Renée Adams and Daniel Ferreira, One Share, One Vote: The Empirical Evidence, ECGI Finance Working Paper N.º 177/2007, 1, 2007.

92 Renée Adams and Daniel Ferreira, One Share, One Vote: The Empirical Evidence, ECGI Finance Working Paper N.º 177/2007, 2, 2007.

93 Proportionality between ownership and control in EU listed companies: External study commissioned by the European Commission, 2007.

least one control enhancing mechanism, such as differential voting rights, shareholders agreements, ownership pyramids, cross-equity links and voting caps<sup>94</sup>. The study also documented that ownership pyramids are the most widely employed control enhancing mechanism in the sample of firms and that in different countries the use of certain control enhancing mechanisms is more prevalent than in others<sup>95</sup>.

There have been few attempts to explain why certain companies – or their controlling shareholders – make decisions which will have the effect of separating ownership from control, which in part can be attributed to practical difficulties<sup>96</sup>. Consequently, not much is known about the determinants of this decisions. According to Renée Adams and Daniel Ferreira (2007), there is some evidence that the desire to protect private benefits of control in tightly held companies – especially family owned companies – is a strong reason for the utilization of mechanisms such as dual-class shares. In other words, there is some evidence that control enhancing mechanisms such as dual-class shares are sometimes employed by owners of companies with tight ownership structures, who wish to recur to capital markets for their financing needs but do not want to be affected by the dilution of control rights which would result from an ordinary issue<sup>97</sup>. Additionally, the authors consider that there is some evidence which suggests that dual-class shares are sometimes used as a cheaper financing alternative to private equity, which generally carries a higher cost of capital<sup>98</sup>.

Of higher importance than this question is the theoretical question of why deviations from the one share one vote can be inefficient from an economic point of view.

There are two main arguments against deviations from the one share one vote rule. The first of this arguments is that control enhancing mechanisms can lead to inefficient business decisions

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94 *Ibidem*, 24.

95 *Ibidem*, 25-81.

96 Renée Adams and Daniel Ferreira, One Share, One Vote: The Empirical Evidence, ECGI Finance Working Paper N.º 177/2007, 9, 2007.

97 *Ibidem*.

98 *Ibidem*.

(some of which are caused by the entrenchment of owners-managers or controlling shareholders) while the second is that control enhancing mechanisms are undesirable because they can lead to an inefficient allocation of control in takeover bids<sup>99</sup>.

On one hand control enhancing mechanisms can lead to inefficient business decisions because they facilitate situations where shareholders may extract private benefits of control without having to bear the proportional cost that such private benefits carry to the company<sup>100</sup>. On the other hand control enhancing mechanisms can affect control transactions and lead to inefficient outcomes because they allow bidders who are value decreasing, i.e. bidders who will cause the devaluation of company equity, to acquire control.

Additionally, it has also been referred that the use of mechanisms which deviate from the one share one vote rule can increase the cost of capital, in the sense that rational outside investors would only be willing to acquire shares in the companies where they exist at a discount<sup>101</sup>. There is a small objection to this argument, which is that if control enhancing mechanisms were not possible certain shareholders of tightly owned companies would be forced to find other alternatives to finance their businesses, as they would not be allowed to recur to company markets without relinquishing part of their control rights<sup>102</sup>.

### 3. Contributions from the analysis of state owned enterprises

We believe that the existing literature on privatizations and state owned enterprises can provide interesting contributions to the one share one vote discussion, when golden shares are considered. Mary M. Shirley and Patrick Walsh<sup>103</sup>, for example, have analyzed a series of studies on subject of whether private ownership is preferable to public ownership. In their study the authors consider that “*two sets*

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99 Koen Geens and Carl Clottens, One Share – One Vote: Fairness, Efficiency and /the Case for) EU Harmonisation Revisited, The European Company Law Action Plan Revisited. Reassessment of the 2003 priorities of the European Commission, 12, 2003.

100 *Ibidem*.

101 *Ibidem*, 29.

102 *Ibidem*, 30.

103 Mary M. Shirley and Patrick Walsh (2001), Public versus Private Ownership: The Current State of the Debate, World Bank Policy Research Working Paper No. 2420

*of assumptions” can be used to analyze the behavior of governments as regards state owned enterprises: “One expects political markets to work efficiently, such that rational governments have incentives to maximize social welfare. The other assumes that political markets are inefficient, and that government actors, such as bureaucrats or legislators, are able to maximize their own utility – in the form of votes, income or favors in ways that subvert the common good”<sup>104</sup>.*

Even if one assumes that governments are not corrupt, consumers have more voting power than producers and thus governments have an incentive to intervene and skew the distribution of welfare towards consumers<sup>105</sup>. Following the same logic, it is not hard to imagine that governments may also use their influence in privatized companies to promote decisions that appeal voters. For example, governments could use their influence in privatized companies to promote employment, by approving projects which will require the creation of jobs – even if such projects carry more risk than what is usual for the company - or disapproving decisions which will result in the extinction of labour posts – even would economically rational for the company to do so.

Things are obviously worse in the case of self-interested governments. In this case, it is not hard to conceive that politicians can make use of governmental influence in companies for a broad array of selfish purposes<sup>106</sup>. Although most, if not all studies which analyze the subject of self-interested governments and state owned enterprises referred to corrupt dictatorships and developing nations, even in the European Union and industrialized countries politics can be obscure and political favor can play a big role in democracy. As such, it would not be hard to imagine, for example, that a government may use appointment rights to nominate loyal supporters to the board of directors of a privatized company, in detriment of more qualified managers.

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104 *Ibidem*, 14.

105 *Ibidem*, 19.

106 *Ibidem* 20-27.

## **Conclusions**

As we mentioned throughout this study, our objective was not to develop an extensive analysis of the subjects we addressed but rather to make an attempt to demonstrate that golden shares, the one share one vote rule and certain areas of economic theory overlap.

As was demonstrated above, several decisions by the ECJ have already considered that golden shares are not admissible, mostly because the ECJ considered that special rights can deter investors from acquiring shares in companies where they exist.

That line of reasoning merits an analysis of the subject of proportionality between ownership and control. Indeed, if the ECJ considers that prospective shareholders may keep from acquiring shares in privatized companies it is, at least in great part, because special rights allow governments to enjoy control rights which far exceed their economic interest in companies with golden shares.

As was mentioned above, the one share one vote rule has been extensively discussed by scholars of several fields. Although most studies on the subject argue that the lack of proportion between ownership and control is inefficient, there remain some arguments on the contrary.

This issue, as such, would gain from being analyzed under the light of the existing economic literature on the subject of state owned enterprises and privatizations.

Currently, only one golden share decision found that special rights were acceptable. Although this allows us to draw some conclusions, it still leaves us in a state of uncertainty, as it remains difficult to predict in what circumstances may a golden share be considered acceptable. If legal scholars and economists were to study this issue from the point of view of the economic theory of state owned enterprises and privatizations, perhaps new insights could be obtained on the subject and we could take a step further into having a better knowledge of which special rights arrangements are acceptable and which are not.

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ECJ Decision C-463/04 and 464/04

ECJ Decision C-274/06

ECJ Decision C-207/07

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