A first approach in the light of the Proposal for a Directive of the Parliament and of the Council on multiple-vote share structures.

Isabel Fernández Torres[*]

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A. Introduction

On December the 7th 2022, the European Commission presented a proposal to reform the Listing Act Package containing a set of measures aimed at making markets more attractive to EU companies and facilitating access to capital for small and medium-sized companies ("SMEs") as well as the development of an effective Capital Markets Union. The overall objective of the Listing Act Package is to introduce technical amendments to the Union's rules seeking at reducing regulatory and compliance costs for companies that wish to list or have already listed. The aim is in some way to streamline the listing process and increase legal certainty, while ensuring an appropriate level of investor protection and market integrity.

The set of proposals contained in the Listing Act are amending i) Regulation (EU) 2017/1129 (the "Prospectus Regulation"); ii) Regulation (EU) No 596/2014 (the "MAR") and iii) Regulation (EU) 600/2014 (MiFIR).[1] Additionally, it includes two other proposals related to two Directives: one amending Directive 2014/65/EU (the "MiFID") and repealing Directive 2001/34/EC of the European Parliament and of the Council (Directive on the admission of securities to official stock exchange listing), which aims to both (i) streamline and clarify listing requirements and (ii) increase research investment in

* Prof. Titular de Derecho Mercantil, Universidad Complutense de Madrid, Núm. Orcid 0000-0003-4814-1120 Isfernan@ucm.es

1 The « Listing act package » *comprises: Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises and repealing Directive 2001/34/EC, Brussels, 7.12.2022, COM(2022) 760 final, 2022/0405 (COD); Proposal for a Directive of the European Parliament and of the Council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market, Brussels, 7.12.2022, COM(2022) 761 final, 2022/0406 (COD); Proposal for a Directive of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises, Brussels, 7.12.2022, COM(2022) 762 final, 2022/0411 (COD).*

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SMEs;[2] and a proposal for a new directive on multiple voting shareholding structures which aims to address the regulatory obstacles that arise in the pre-IPO phase and, in particular, the inequality of opportunity faced by EU companies in choosing appropriate governance structures when going public (COM (2022) 761final, 2022/0406 (COD)).[3]

With regard to the latter, the aim is to make the capital markets more attractive to companies while facilitating access to financing for small and medium-sized enterprises (SMEs) in order to make them less dependent on bank financing. Moreover, the idea is to incentivise growth and innovative companies to list on EU capital markets which are facing regulatory competition from largest global rivals and more developed markets (such as Asian ones).[4] In general terms, the purpose is to improve and simplify current European securities listing regulation to help small and medium-sized enterprises (SMEs) make better use of European trading venues and to eliminate differences between the national laws of the Member States in the area of corporate governance; more specifically, with regard to the distribution of powers within companies.

Some scholars and practioners question the soundness of the proposal for a Directive on multiple voting shares. In fact, they argue that the initiative may contravene the principle of subsidiarity enshrined in Article 5 of the Treaty of the European Union. Furthermore, they consider that differences that do exist between national regulations are the reflection of traditions that, up to now, have been considered relevant to maintain; therefore, it seems that there is no room or need to harmonize issues relating to internal governance structures.[5]

In fact, the debate over whether stock corporations should be provided with multiple voting shares is linked to a classic discussion in the framework of company law: the so-called proportionality principle which is intrinsically related to the attribution of the voting rights and the right to participate in corporate decisions. The justification has traditionally been redirected to the ownership scheme, understanding that both rights are but an immediate consequence of the latter. This is a commonly accepted approach even though empirical studies are not conclusive. Accordingly, equal treatment of shareholders holding shares of the same class has been assumed as a general principle of corporate law.[6]

2 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02001L0034-20070120.

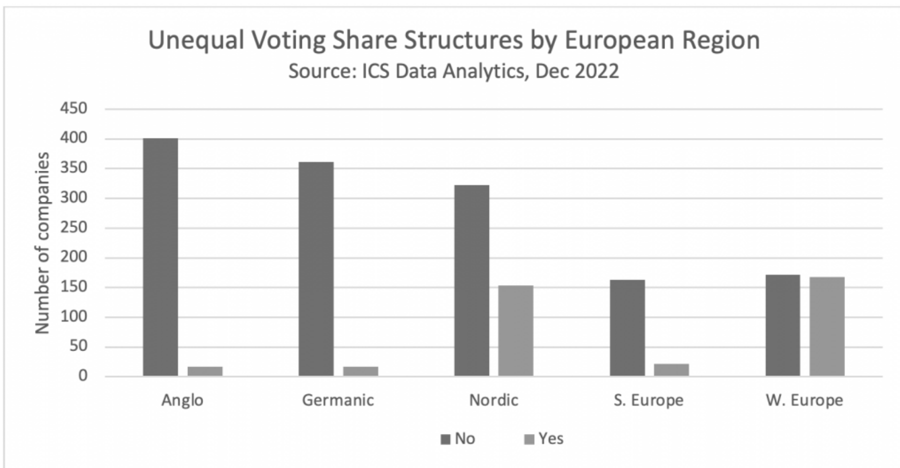
3 Proposal for a Directive of the European Parliament and of the council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0761.

4 Pietrancosta, V.A., Propositions françaises et européennes pour ouvrir le vote multiple aux sociétés entrant en bourse, BJS201q7.

5 Hansen/Thomadakis, Why harmonising multiple voting rights for SMEs may be a bad idea, ECMI Policy Brief nº 36 | April 2023; Hansen, JL 2023, 'A Harmonising Step Too Far: A Comment on the Proposal for a Directive on Multiple Voting Rights in SME', Nordisk Tidsskrift for Selskabsret, vol. 2023, nº 1, pp. 1-14.

6 Enriques, Luca/Hansmann, Henry/Kraakman, Reinier, The anatomy of corporate law: a comparative and functional Approach, Oxford University Press, 2009, p. 96; Mucciarelli, Federico M., Equal Treatment of

Although there seems to be a certain consensus among scholars that the (pseudo-)principle of proportionality is the one that suits better with the characteristics of European companies, this doesn´t mean that rules modifying it (e.g., shares without voting rights) cannot be introduced within the admissible limits of each legal system. In fact, the study launched by the European Commission on the principle of proportionality on May 18, 2007 showed that it is common to find control enhanced mechanisms in every Member State. Deviations from the principle of proportionality can result either in an increase in the power of the minority or in an increase in the power of the controlling shareholders (in the case of plurality voting shares and loyalty shares).



Source: Dual Class Share Structures: The European Experience, February 2023.

The 2007 Report on the proportionality principle already pointed out that 20% of US companies had dual class shares, while only a few jurisdictions had recognized loyalty shares. Over time, loyalty shares have been admitted in several countries: Finland, Sweden, United Kingdom, Belgium, Switzerland, France, Italy and, more recently, although limited to listed companies, in Spain. The legal silence has also led to their admission in practice in the Netherlands.

Both instruments, dual class shares and loyalty shares, seek to reinforce the power of shareholders, in many cases, controlling shareholders. However, they operate differently and their ultimate objectives differ substantially. Thus, while loyalty shares grant additional enhanced voting rights to those (all) shareholders who keep their shares in their portfolio for an extended period of time, the so-called "loyalty period", seeking long-term involvement and sustainability, dual class shares aim to ensure that the controlling

Shareholders and European Union Law – Case Note on the Decision 'Audiolux' of the European Court of Justice, European Company and Financial Law Review, nº. 1, 2010, p. 158 and in particular, p. 163.

shareholder(s) retain their decision-making power (over time) once they are listed on a market.

However, dual class shares are not so common in Europe. These consist of incorporating different categories of shares (generally a dual structure): class B shares, held by founding partners and managers with multiple voting rights, and class A shares, which would be traded on the market. In recent years, the use of multiple voting rights has increased in countries where they were not prohibited and a more positive and a new-found acceptance of more expansive multiple voting rights is taking the lead.

Germany, a jurisdiction that opted for an strict proportionality principle (as well as Austria and Switzerland), presented last April a proposal -the Zukunftsfinanzierungsgesetz, ZuFinG- which includes the so-called dual-class shares; the legislative proposal is justified by the need to make German trading centers more attractive to investors compared to the American or Dutch ones (by modernising and digitalizasing the capital market).[7]

In France, since the 2019 Pacte Law, multiple voting shares are admitted for non-listed companies only, but views expressed by certain parties involved (such as issuers) may favour the listing of certain companies.[8]

UK is even reconsidering the traditional ban on dual-class shares existing in the London Stock Exchange (LSE).[9]

The current proposal recognizes the establishment -throughout the European Union- of multiple voting shares for companies applying for admission to trading on an SME growth market. Although shares with multiple voting rights are recognized in the United States and in many European Member States for listed companies (such as the Netherlands, Finland, for example), in others they are prohibited (Spain, for example). Amongst Member States that do allow multiple voting right share structures there are divergences as to the maximum allowed voting rights ratio. Whilst multiple voting rights allow founders to keep control over their business [it is worth noting that loss of control is usually considered the main reason for staying private], they may also make it easier for owners to extract private benefits to the detriment of investors, for instance by engaging in related-party transactions. This and other problems associated with multiple voting

7 https://www.bundesfinanzministerium.de/Content/EN/Downloads/Financial-Markets/key-points-financing-for-the-future-act.pdf?__blob=publicationFile&v=2.

8 « Issuers: The Choice of Paris » Report of Paris EUROPLACE’s Working Group On the attractiveness of the Paris Financial Center for Issuers, Paris, 29 th June, 2021, https://www.paris-europlace.com/global/gene/link.php?doc_id=21083&fg=1.
EuropeanIssuers’ Position Paper on the Proposal for a Directive on Multiple-Vote Share Structures in companies that seek admission to trading on an SME growth market, March 2023, https://www.europeanissuers.eu/position-papers.

9 Reddy, Bobby, From Dual-Class Shares-Lite to Full Fat: The FCA’s Potential About-Turn on Dual-Class Shares, 20 th June 2023, https://blogs.law.ox.ac.uk/oblb/blog-post/2023/06/dual-class-shares-lite-full-fat-fcas-potential-about-turn-dual-class-shares.

rights has led some countries to introduce multiple voting rights provided that sunset clauses accompany these classes of shares.

The debate over whether stock corporations should be provided with multiple voting shares has never been more alive as it is today. This article is structured as follows: after an examination of the US legal system and different European regulatory approaches (Section II), we will discuss the benefits and the downsides of dual-class share structures (Section III) to finally focus on the new Proposal on multiple vote shares structures (Section IV).

B. A comparative view of Multiple Voting Rights

I. The US experience

Despite the frequent use of dual-class shares in the US, their existence and regulation has evolved over the years and has been subject of several amendments and different approaches. For a long time, the rule "one share-one vote" was one of the structures that US corporations´ could adopt. But it wasn´t the only system allowed. Nevertheless, the rule has traditionally been considered one of the basic pillars (a cornerstone) of the regulation of corporate law.[10]

Anyway, a distinction between listed and unlisted companies needs to be mentioned. Whereas for unlisted companies the choice is a matter of the articles of association, for listed companies regulation is strongly connected to US capital markets and therefore to the listing rules.

The absence of a mandatory rule together with the New York Stock Exchange requirements that did not allow list companies with dual-class shares, favored the rise of the proportionality principle, with just a few companies incorporating -from the early 1900's-dual-class structures. The financial crisis of the 1920s and 1930s led to a substantial reduction in the use of structures that altered the one-share one-vote principle.[11] In 1926, the NYSE adopted a one share one vote rule that prohibited dual class listings.[12] The situation remained unchanged until the 1980s, when the escalation of hostile takeovers led to a concern of companies vulnerability and the need for reinforcing protection mechanisms.[13] From 1985 to 1994, the initial public offerings (IPOs) of firms with multiple classes of shares were legally forbidden on the NYSE. It then became clear that a more liberal approach -like the ones followed by the NASDAQ and AMEX, where

10 Clark, Robert C., Corporate Law, Little, Brown, 1986, p. 361; Easterbrook, Frank H./Fischel, Daniel R., The economic structure of corporate law, Cambridge/London, 1996, p. 88.

11 Bainbridge, Stephen M., Corporation Law and Economics, Nueva York, 2002, p. 454 and The scope of the SEC´s Authority over Shareholder Voting Rights, UCLA School of Law Research Paper, 2007, p. 5; Ringe, Wolf-Georg, Deviations from Ownership-Control Proportionality-Economic Protectionism Revisited", in Company Law and Economic Protectionism, cap. 10, p. 225.

12 Fisch, Jill E./Solomon, Steven Davidoff, *Dual Class Stock,* ECGI, Law Working Paper 715/2023, June 2023.

13 Bainbridge, Stephen M., Corporation Law and Economics, Nueva York, 2002, p. 454.

some companies where migrating- was needed. Against this backdrop, the NYSE -in an attempt to stem a wave of hostile takeover bids and fearful of the risk of losing its leadership- applied to the SEC for authorization to modify their listing requirements by allowing dual-class share structures.[14] Unexpectedly, the SEC adopted Rule 19c-4 which prohibited dual class recapitalizations (although not IPOs with dual class structures). The DC Circuit Court of Appeals (Business Roundtable v. SEC 12 June 1990) invalidated the Rule 19c-4 (found out "in excess of the Commission´s authority"), enabling use of dual class structures to expand.[15]

More recently, last April 2023, the Dow Jones S&P Index announced the modification of its listing criteria regarding dual-class companies, allowing their inclusion in the S&P 1500 and its component index.[16]

II. The non-US experience

There is a tough regulatory competition to attract initial public offerings (IPOs) that has led many stock exchanges in the Asia Pacific Region to allow dual-class listing. The Singapore Exchange (SGX), the Stock Exchange of Hong Kong (HKEX), the Shanghai's Science Technology and Innovation Board (STAR Market), the Shenzhen Stock Exchange (SZSE) and Tokyo have revised their regulatory framework to allow companies to go public with dual-class shares where certain requirements are fulfilled.[17] In 2019, India revised its approach to dual-class structures too.[18] Somehow we might consider that dual class structures are gaining attraction in this Asian Pacific Region.

The history of dual-class shares in the UK has shifted from a generally permissive environment as stated in *Bushell v Faith (*1970) that companies may validly introduce weight-

14 Bainbridge, Stephen M., Corporation Law and Economics, Nueva York, 2002, p. 576; Ventoruzzo, Marco, I "Listing standards" nell'esperienza statunitense, AGE, vol. 1, 2002, p. 342; Ringe, Wolf-Georg, "Deviations from Ownership-Control Proportionality-Economic Protectionism Revisited", in Company Law and Economic Protectionism, cap. 10, p. 225; FischeL, Daniel R., Organized Exchanges and the Regulation of Dual Class Common Stock, 54 University of Chicago Law Review 119, 1987, pp. 136-140; Gordon, Jefrey N., Ties that Bond: Duel Class Common Stock and the Problem of Shareholder Choice, California Law Review, nº 76, 1988, p. 4.

15 Fisch, Jill E./Solomon, Steven Davidoff, Dual Class Stock, ECGI, Law Working Paper 715/2023, June 2023.

16 Wilson Sonsini Goodrich & Rosati, "S&P Dow Jones Indices Opens Door for Multi-Class Share Companies", JDSupra, Apr. 21, 2023, https://www.jdsupra.com/legalnews/s-p-dow-jones-indices-opens-door-for-3292064/.

17 CFA Institute, Dual-class shares: the good, the bad, and the ugly, a review of the debate surrounding dual-class shares and their emergence in Asia Pacific, 2018. https://www.cfainstitute.org/-/media/documents/survey/apac-dual-class-shares-survey-report.ashx. Egan, Thormas J./Thompson, James/Wong, Ivy, Bell, Marck, The revival of dual class shares, 2020. https://www.bakermckenzie.com/-/media/files/insight/publications/2020/03/the-revival-of-dual-class-shares.pdf.

18 SEBI approved a framework for the issuance of DVRs, on 27th June 2019: https://cbcl.nliu.ac.in/company-law/indias-differential-voting-right-structure-a-futile-attempt-to-change-corporate-framework/.
Section 43(a)(ii) of the Companies Act permits companies to issue equity shares with differential rights in terms of dividend, voting, or other aspects. These shares are commonly referred to as DVR shares. DVR shares can be categorized into two types: 'Superior Voting Right' shares, which grant voting rights beyond the conventional 'one share, one vote' principle, and 'Inferior/Fractional Voting Right' shares.
https://www.sebi.gov.in/sebi_data/meetingfiles/aug-2019/1565346231044_1.pdf.

ed voting rights in their bylaws as long as the alteration of the articles of association is in the best interest of the company and that "there are grounds on which reasonable men could come to the same decision"; in such cases, courts will uphold the alteration.[19] But there are some limits to the Courts ruling: i) unreasonable decisions; ii) where there is evidence of bad faith.[20] Those arguments are vague and might confer scarce protection on minority shareholders.

In the early 2010s, this permissive approach came to an end and dual-class share structures were formally prohibited on the premium tier, the Main Market of the London Stock Exchange, and in 2014 where listed companies were required to have the one share one vote structure.[21] However, in December 2021, and once again in an attempt to attract investors, growth and innovative companies, the FCA revised the listing rules in order to permit companies with "specified weighted voting rights shares" to list on the premium tier. In fact, this reform is just part of a wider one undertook by HM Treasury Chair Jonathan Hill seeking competitiveness of the London Stock Exchange in general (maybe fearing the consequences of Brexit, too). Dual-class share structures were introduced even though restrictive conditions were attached to them. To start with, weighted voting rights shares structures may only endure for 5 years after the company has listed on the LSE premier tier; moreover, an insider possessing enhanced-voting rights can only exercise those rights on a resolution to remove that person from the board, unless there is a change of control of the company, in which case those rights can be exercised on all matters.[22]

As for continental Europe, an increasing number of European countries have used and are using control enhanced mechanisms with unequal voting rights, mainly in the form of "loyalty shares". France is really a front runner as far as loyalty shares are concerned. French Law provides a system of double voting rights for loyal shareholders in listed and non-listed companies set-out (currently) in section L. 225-123 of the Code de Commerce (amended by the Act of 29 march 2014, L num. 2014-384, "Loi Florange"). Loyalty voting rights are now the default option in listed companies (opt-out system which requires a

19 Fisch, Jill E./Solomon, Steven Davidoff, Dual Class Stock, ECGI, Law Working Paper 715/2023, June 2023.

20 Fisch, Jill E./Solomon, Steven Davidoff, Dual Class Stock, ECGI, Law Working Paper 715/2023, June 2023.

21 In the premium tier greater corporate governance standards are applied. In 2014, in response to certain abuses by controlling shareholders, the Listing Rules sourcebook was amended introducing two new principles that listed companies should comply with. Essentially the new principles prescribed pure-One share one vote on the premium-tier by requiring (i) all equity shares in a class to carry an equal number of votes, and (ii) the aggregate voting rights of each class of premium-listed shares to be broadly proportionate to the relative equity interests of each class in the company. Reddy, Bobby V., Finding the British google: relaxing the prohibition of dual-class stock from the premium-tier of the London stock exchange, Published online by Cambridge University Press: 19 June 2020, https://www.cambridge.org/core/journals/cambridge-law-journal/article/finding-the-british-google-relaxing-the-prohibition-of-dualclass-stock-from-the-premiumtier-of-the-london-stock-exchange/3D2E2F2CCFBF653D3151F7B2AC6E681F.

22 Reddy, Bobby V., The UK and Dual-Class Stock-Lite – Is It Really Even Better Than the Real Thing? (March 15, 2023). Theoretical Inquiries in Law - Under Review, University of Cambridge Faculty of Law Research Paper No. 18/2023, Available at SSRN: https://ssrn.com/abstract=4436612.

two-thirds majority of the shareholders' meeting), whereas in non-listed companies, as before the amendment of the Code de commerce, an *ad hoc* provision is required in the Company bylaws. Shareholders are provided with a double voting right (and no more than that) if they have continuously held the shares for at least two years.[23]

Italy introduced loyalty voting rights by Act of 11 August 2014 as a response to the move of Fiat to the Netherlands where the relevant concept, on the one hand, does not have a specific legal basis, on the other hand, it is not expressively prohibited.[24] The reform required, for its implementation, the removal of the pre-existing limitations that used to make illegal multiple voting rights shares. As a result, the amended article 2351(4) of the Italian Civil Code enables private companies to issue multiple voting rights shares whereas listed companies are only entitled to use loyalty shares (article 127 *quinquies* del Testo Unico della Finanza (hereinafter, TUF), introduced by the legislative Decree 3, 24 January 2015). The Decree at stake has introduced the *"voto maggiorato"* or "beefed-up vote" for public companies: "the bylaws may specify that increased voting rights may be attributed up to a maximum of two votes, for each share belonging to the same shareholder for a consecutive period of at least twenty-four months starting from the date of registration"[25] in a specific register kept by the issuer.[26]

In Spain, unexpectedly, the amendment of the Law transposing the Directive 828/2017, introduced loyalty shares for listed companies. Spanish Law provides for a system of double voting rights for "loyal" shareholders only in listed companies set out in current art. 527 *ter* of the Ley de Sociedades de Capital. The Company must opt-in the system in its articles of association, which requires a special majority (articles, 527 *quater* y 527 *sexies*). The loyalty voting rights regime works as follows. Shareholders are granted one additional vote (no more) per share, provided that they have been continuously holding the shares for at least two years. Shareholders must register the shares in their name with the company concerned if they wish to qualify (article 527 *septies*). Instead, it is worth noting that multiple voting shares could be and can be used for a special type of private Company, Sociedades de Responsabilidad Limitada, as stated in article 188.1 LSC and in article 184 Reglamento del Registro Mercantil.

In the Netherlands, the concept and main characteristics of unequal voting rights has been addressed by the judiciary. In its judgment of 14 December 2007 (DSM Case), the Dutch Supreme Court stated that article 2:92(1) does not contain a prohibition *per se*

23 Valuet, Jean Paul, "Le droit de vote des actionnaires en AG : le droit de vote double", Droit des sociétés 2014.

24 Santoro, Augusto/Palma, Ciro di/Guarneri, Paolo/Capogrosso, Alessandro, "Deviation from the «One Share-One Vote» Principle in Italy: Recent Developments-Multiple Voting Rights Shares and Loyalty Shares", Hein online, Papers, Bocconi Legal, 2015; *Ventoruzzo*, M. "The disappearing taboo of multiple voting shares: regulatory responses to the migration of Chrysler-Fiat", ECGI, Law Working Paper, 2015.

25 Busani, Angelo/ Sagliocca, Marco, Le azioni non si contano, ma si 'pesano': superato il principio one share on vote con l'introduzione delle azioni a voto plurimo e a voto maggiorato, Le Società, 2014, p. 1058.

26 See art. 143 *quater,* "Reglamento Consob", approuved 19 th december 2014, Cap III-bis, maggiorazione del diritto di voto.

and therefore loyalty dividends are permissible as long as they do not contravene the general principle of equal treatment of shareholders as laid down in the second paragraph of article 2:92 of the Dutch Civil Code.[27] That is, shareholders who are in the same position have to be treated in the same way.[28] In 2013 as a result of the merger between Fiat Industrial and the US company CNH Global, the newly created Dutch company (dual listed on the New York and Milan stock exchanges) introduced a dual loyalty voting scheme. The validity of the measure was out of question. On 1 August 2014, Fiat SpA did the same on the occasion of its merger with Chrysler, while effectively moving its statutory seat (registered office) to the Netherlands.

However, in the 2020 ruling of Mediaset, The Dutch Court of Appeal invalidated a loyalty share structure for the first time, concluding that the scheme in that case "served only to ensure absolute control... to the unjustified detriment of the position of [minority shareholders]".[29]

In turn, European Courts have considered that the so-called "golden shares" are but a variant of dual-class shares since they provide the holders (tipically the State) with a *de facto* right of veto over certain corporate decisions. Member States have been sued in many cases for the implementation of them.[30] Although it should be noted that golden shares constitute an effective investment screening mechanism for the protection of EU strategic privatized companies from dubious and hostile foreign direct investments during the COVID-19 crisis.

However, golden shares are not the subject of this paper and we will not dwell on them.

C. Benefits and Downsides of dual-class shares

Despite the revision of regulations around the world, regulators and policymakers should be careful when assessing foreign studies and regulatory models. The question is not

27 Lennarts, Marie Louse/Koppert-Van Beek, Monique, "Loyalty Dividend and the EC Principles of Equal Treatment of Shareholders", European Company Law 5, 2008, pp. 173, 173–175.

28 Loyalty schemes are subject to the principle of equal treatment; therefore, in certain circumstances, a measure causing unequal treatment of shareholders may be permissible, provided that (i) there is a purpose objectively justifying such unequal treatment; (ii) this measure provides a fair means of achieving that purpose; (iii) the relevant measure is necessary to achieve that purpose; (iv) the unequal treatment is proportionate to that purpose; and (v) it is provided for in the company's articles of association. Fernández Torres, Isabel, Loyalty Shares: an International Perspective. A Suitable Instrument to Fight Short Termism?, ECFR 4, 2022, pp. 573 y sigs.

29 Loyens & Loeff, Trend Report Recent developments in Dutch loyalty share schemes, 2020, https://www.loyensloeff.com/globalassets/02.-publications-pdf/01.-internal/2020/trend-report-loyalty-schemes-in-the-netherlands.pdf.

30 The European Court of Justice has reached several judgments confirming that in most cases the measures are infringements of the Treaty freedom of capital movement. In the first judgment, Commission v Republic of Italy in 2000, the European Court of Justice found that, by adopting the 1994 Law on Privatisation and Decree Laws on ENI and Telecom Italia, Italy had failed to fulfil its Treaty obligations (Case C-58/99). In 2003, the European Court of Justice ruled against legal arrangements in Spain that required prior authorisation for certain decisions of the board of directors, including merger or break-up of the privatised companies (Case C-436/00).

whether companies should be allowed to go public with dual-class share structures (heavily debated), but whether dual-class shares should comply with the goals and, if so, under which conditions should they be admitted, taking into *account* the particular features of a country. In order to make the best choice, benefits and perils of dual-class shares should be known. For the most part, opponents of dual-class shares claim that such structures breach "corporate democracy"[31] and exacerbate agency costs.[32] For the proponents, control enhanced mechanisms provide for stability of the ownership structure and consequently, the implementation of more solid long-term policies aligned to the corporate interest.[33]

I. Benefits associated with the use of dual-class shares

Several arguments support the use of dual-class shares. First of all, it has been generally understood that dual-class structures may incentivise to take companies public as the risk -and the fear- of losing control disappears or, at least, is highly reduced.[34] That is, dual-class shares structures protect founders from the pressure of the market (although, as we will see, this might have perverse effects too).

Going public means raising funds and this may highly contribute to develop and expand business and, therefore, to create jobs and wealth.[35] As soon as a company is listed, information asymmetries are reduced and, as a consequence, investors may be willing to invest in new and innovative companies as markets will provide higher returns.[36] This can contribute to the growth of the company and ultimately to the market itself.

By retaining decision-making power, founders will not only be able to see their projects developed on the terms they deem appropriate, but the value associated with the development of the project itself will also benefit other investors and, ultimately, the market.

31 Fernández Torres, Isabel, Loyalty Shares: an International Perspective. A Suitable Instrument to Fight Short Termism?, ECFR 4, 2022, pp. 573,.

32 Pajuste, Anete "Determinants and Consequences of the Unification of Dual-class Shares", European Central Bank Working Series, 2005, 10, footnote 10; Dimitrov, Valentin/Jain, Prem C. "Recapitalization of one class of common stock into dual-class: Growth and long-run stock returns", Journal of Corporate finance, 2006, pp. 3-43.

33 Alvaro, Simone/Ciavarella, Angela/D'Eramo, Doina/Linciano,Nadia, La deviazione dal principio "un'azione–un voto" e le azioni a voto multiplo, Quaderni giuridici, CONSOB, 2014, pp. 33-39.

34 Bebchuk, Lucian/KastieL, Kobi, The perils of Pinterest's dual-class structure, Harvard Law School Forum on Corporate Governance and Financial Regulation, 2019, https://corpgov.law.harvard.edu/2019/04/10/the-perils-of-pinterests-dual-class-structure/; Bebchuk, Lucian/Kastiel, Kobi, The perils of Lyft's dual-class structure, Harvard Law School Forum on Corporate Governance and Financial Regulation, 2019, https://corpgov.law.harvard.edu/2019/04/03/the-perils-of-lyfts-dual-class-structure/; Banerjee, Suman, Dual-class share issues and mitigating the costs of Corporate Democracy, Working Paper, 2005; Banerjee, Suman/Masulis, Ronald W., Ownership, Investment and governance: the costs and benefits of dual class shares, ECGI Finance Working Paper, February 2013; Bebchuck, Lucian Arye, A rent protection theory of corporate ownership and control, The National Bureau of Economic Research, Working Paper 7203, 1999; Grinapell, Adi, "Dual-Class Stock Structure and Firm Innovation", 25 Stan. J.L. Bus. & Fin, 2020, p. 82.

35 Goshen, Zohar/Hamdani, Assaf, "Corporate Control and Idiosyncratic Vision", 125 Yale L.J., 2016, pp. 565-67.

36 Goshen, Zohar/Hamdani, Assaf, "Corporate Control and Idiosyncratic Vision", 125 Yale L.J., 2016, pp. 560, 560, 565-67.

Allowing founders to retain control encourages them to go public and this not only reduces the cost of capital but provides, at the same time, investment opportunities. To put it in other words, founders create value.

But adequate financing can also promote the long-term sustainability of companies by reducing the pressure on them to meet very short-term targets or returns.[37] Nor should it be forgotten that market forces encourage the company's founders to choose efficient corporate governance structures at the time of IPO. That is, investors will have no interest in buying shares in a company whose insiders keep control with a minority position (or will buy shares at a lower price). Ultimately, the success or failure of the IPO depends on the managers' ability to generate confidence in the market; confidence that the gains associated with the project will far outweigh the costs of having opted dual-class share structures.

If those are the benefits of dual-class shares and if they fulfil similar goals associated to the use of other mechanisms that allow the separation of cash flow rights and control rights, why should dual-class shares be banned?

II. Downsides of Dual-class share structures

The use of dual-class share structures entails certain risks and effects that need to be taken into account. It is worth noting that, in general, control enhanced mechanisms may increase agency costs between insiders (directors, controlling shareholders) and outsiders (mainly minority investor shareholders).[38] The controlling shareholder may be tempted to pursue private interests to the detriment of the interest of the company.[39] Everything will depend on the private benefits that insiders can extract from control. If those are extremely high they will be tempted to carry out operations that might be harmful for the company but beneficial from a personal perspective. Somehow dual-class shares allow managers and controllers to be entrenched, isolated from the market and will maintain control regardless the results. In other words, the use of dual-class share structures may create moral hazard due to the fact that, founders will enjoy private benefits of control but will not fully internalize the costs associated with value-destroying decisions.[40]

The presence of a controlling shareholder reduces the likelihood of takeovers. The dual-class share structures rule may encourage the controlling shareholder to hold undisputed

37 Fischel, Daniel R. “Organized Exchanges and the Regulation of Dual Class Common Stock”, 54 U. Chi. L. Rev. 119, 1987, pp. 137-38.

38 Bebchuck, Lucian, A rent protection theory of corporate ownership and control, NBER Working Paper nº 7203, 1999, https://www.nber.org/papers/w7203; Yan, Min, A control accountability Analysis of dual-class shares (DCS) structures, 45 Del. J. Corp. L., 1, 2020, p. 11.

39 Jensen, Michael C./Meckling, Willian H., Theory of the firm: managerial behaviour agency costs and capital structure, Journal of Financial Economics, vol. 3, 1976, pp. 305-360; Burkart, M., Lee, S., One share-one vote: the theory, Review of finance, vol. 12, 2008, pp. 1-49; Spolidoro, Marco S., Il voto plurimo: i sistemi europei, Rivista delle societa, 2015.

40 Bebchuk, Lucian/Kastiel, Kobi, The perils of small-minority controllers, Georget Law J 107, 2019 pp. 1453-1514 y en, The untenable case for dual-class stock, Va Law Rev 103, 2017, pp. 583–631.

power which, in practice, shields him from changes of control. Moreover, the presence of a controlling shareholder reduces the chances of the company being subject to a takeover bid. In short, there is a danger of falling into a certain immobility derived not only from this power of control, but also because there may be a lack of incentives to improve, optimise and promote. And, ultimately, this may entail an opportunity cost for investors and for the market as a whole.

On the other hand, the use of control enhanced mechanisms requires that minority investors are adequately protected, because although they can always sell their shares on the market and thus recover their investment, their exit may indirectly affect the market by making it less attractive overall. An appropriate balance must be struck between maintaining control by the founders and making the investment attractive to potential investors. If this is achieved, the market will develop and become attractive to potential future investors, ensuring the success of further listings.[41]

It should also be borne in mind that activist investor may be more reluctant to invest in companies with dual-class share structures, considering that their power or influence in decision-making will be moderate. In this sense, shareholder activism can serve as a spur to the market and to the companies themselves, promoting the adoption of new strategies, driving projects. Activism can fulfil a monitoring function in the market on the one hand and, on the other, they can reduce agency problems and increase value.[42]

Institutional Investors have been at the forefront of the campaign against dual-class share structures and often they have claimed and support "one share one vote" principle.[43] Even though, lately, noticing the evolution and certain acceptance of dual-class share structures, they have advocate for time-based sunset provisions rather than bans.[44]

According to the 2012 study led by Institutional Shareholder Services, US companies with dual-class share structures are characterised by lower performance, show signs of weak internal control, and have fewer independent directors on their boards.[45] Managers will be more likely to engage in shareholder value-destroying transactions, acquisitions and capital expenditures contribute less to shareholder value.

Indeed, companies with dual-class share structures tend to have fewer institutional investors and fewer long-term investors. Empirical evidence shows that when companies

41 Gurrea Martínez, Aurelio, Should securities regulators allow companies going public with dual-class shares? Oxford Business Law Blog, 2018, https://blogs.law.ox.ac.uk/business-law-blog/blog/2018/01/should-securities-regulators-allow-companies-going-public-dual-class.

42 Fernández Torres, Isabel, Las loyalty shares: cortoplacismo contra activismo accionarial, Marcial Pons, 2017.

43 See, Council of Institutional Investors, CII Weighs in on Dual-Class Shares and SPACs with European Commission, 17 th february 2022.
https://www.cii.org/files/EU%20Dual%20Class%20SPAC%20Consultation%20final%20posted.pdf.

44 Fisch, Jill E./Solomon, Steven Davidoff, The problem of sunsets, 2019.

45 ISS y IRRC, Controlled companies in the Standard & Poors 1500: A ten year performance and risk review, 2010.

opt for the one share one vote principle, institutional investors increase their positions and stock prices rise.[46]

The underperformance of companies with perpetual dual-class shares has also been shown in an empirical study conducted by the former Commissioner of SEC, Professor Robert J. Jackson, Jr..[47]

Several Institutional Investors have asked the NYSE to ban the listing of companies with multiple voting shares. In fact, the proxy advisor ISS has recently recommended to vote against the appointment of directors in companies with dual-class shares.[48] Thus, while acknowledging that dual structures may be introduced with a view to improving certain governance issues, it has stressed out that equal treatment is a key element of governance.[49]

Be that as it may, and although it is not appropriate to go into this in detail now, we have already had the opportunity some time ago to express our views on the benefits associated with responsible activism. It does not seem appropriate, nor is there any basis for considering that all activism is bad or that all activism leads to short-termism, or that this is always and in any case bad.[50] We must not forget the risk that founders (who hold a percentage of the capital that is not necessarily large, although it does give them decision-making power) adopt decisions that do not seek sustainability over time, taking excessive risks (moral Hazard)[51].

D. The European Proposal on multiple voting rights

I. One-size-fits-all approach: the new dilemma

Despite the differences between continents and even within European Member States and a certain acceptance in the Asian Pacific region, unequal voting rights are still controversial at least in Europe. Risk and perils have been pointed out, however the EU put forth a proposal as part of the Listing Act Package explicitly to permit differential

46 State Board of Administration -Florida, Dual-class shares, Does management really need such protection?, 2010.

47 Jackson, Robert J., Perpetual dual-class stock: the case against Corporate Royalty, US Securities and Exchange Commission, 2018.
https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty. Gurrea Martínez, Aurelio, Theory, Evidence, and Policy on Dual-Class Shares: A Country-Specific Response to a Global Debate, European Business Organization Law Review 22, 2021.

48 Institutional Shareholder Services, United States Proxy Voting Guidelines Benchmark Policy Recommendations, Dec. 13, 2022, https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=1.
Fisch, Jill E./Solomon, Steven Davidoff, The Problem of Sunsets, 99 B.U. L. Rev. 1057, 2019, p. 1075.

49 Institutional Shareholder Services, “Proposed ISS Benchmark Policy Changes for 2023”, https://www.issgovernance.com/file/policy/2022/2023-Benchmark-Policy-Changes-For-Comment.pdf.

50 Bebchuk, Lucian/Brav, Alon/Jiang, Wei, The long-term effects of hedge fund activism, Columbia Law Rev 115(5), 2015, pp. 1085–1155. Fernández Torres, Isabel, Las loyalty shares: cortoplacismo contra activismo accionarial, Marcial Pons, 2017.

51 Bebchuk, Lucian/Kastiel Kobi, *The perils of small-minority controllers*, Georget Law J 107, 2019, pp. 1453-1514.

voting for Small and medium-sized companies that are candidates to listing on a Small and Medium-sized Growth Market (SME GM).

The EC Proposal establishes a minimum regulation with the aim of achieving a primary goal: to make the markets more attractive. Harmonisation isn´t the goal, instead the proposal seeks for flexibility and efficiency therefore the European Commission choose to harmonise as little as possible.[52] To this end, firstly, it not only recognises that companies will have the right to adopt multiple voting structures, but also expressly states that Member States may not prevent the admission to trading on a growing SME market on the grounds that they have dual-class share structures (see Article 4 of the Proposal).

Despite the fact that this is not expressly stated in the Proposal, dual-class share structures imply the recognition of at least two different classes of shares. Nevertheless, the Proposal doesn´t specify the maximum number of votes attached to the shares.

The EC Proposal is prudent as it limits the scope of the reform in various ways. First of all, the Proposal applies only to companies seeking for admission to an SME GM (markets that do not exist in every Member State). The terms in which dual-class shares are designed might be substantially redefined within the European Parliament. The draft Report on the Proposal of the Committee on Economic and Monetary Affairs dated June 14 2023,[53] could bring significant changes and even question the usefulness or the future of the reform.

It might be of interest to point out the main amendments contained in the draft Report. To begin with, it foresees that the scope of the directive will no longer be limited to emerging or growth markets. It will be extended to regulated markets (see Amendment 1). In a first approach, this could be even welcomed as some Member States do not have such GM markets. But for those Member States that already authorise multiple voting structures in their regulated markets, limiting their application to GM markets would pose additional and new problems. Thus, the Proposal establish some regulatory constraints that do not exist nor apply in regulated markets. Aside from the fact that this would contradict the spirit of the principle of regulatory proportionality which should drive the reform it would poses additional problems derived from the coexistence of two different regulations.

In fact, the reform would lead to stringent conditions for the use of multiple voting structures. As stated in the Draft Report, a fixed ratio of multiple voting rights would be imposed ("can only range from a ratio of one to two to a ratio of one to five").

52 The proposal is undoubtedly the result of a compromise between the positions of the various Commission services concerned. While the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, which originated the proposal in the framework of the Capital Markets Union for which it is responsible, advocated a liberal approach, based solely on the development of the internal market (Article 114 TFEU), the need to reform company law allowed the Directorate-General for Justice and Consumers to use its harmonisation powers in this area (Article 50 TFEU) to introduce some restrictions.

53 https://www.europarl.europa.eu/doceo/document/ECON-PR-749139_EN.pdf.

Additionally, a fixed limit of 10 years would be imposed on the lifetime of multiple voting rights. Moreover, some of the additional restrictions that the Commission had envisaged on an optional basis would become mandatory (for example, the adoption of certain resolutions of the general meeting requiring a qualified majority or some regarding the ratification in separate votes; or the "requirement to ensure that enhanced voting rights cannot be used to block the adoption of resolutions aimed at preventing, reducing or eliminating adverse impacts related to the operations of the company concerned on human rights or the environment").

The text also includes a series of safeguards to protect minority shareholders in order to achieve fair and non-discriminatory treatment. Firstly, the decision to opt for a dual structure and any subsequent modification will require an agreement of the General Shareholders' Meeting adopted by a reinforced majority (article 5 of the Proposal). Inspired by the Anglo-Saxon model discussed above, the Proposal foresees that Member States should recognise either a "maximum weighted voting ratio" or, alternatively, a restriction on the exercise of the additional voting rights attached to those shares to vote on those matters requiring a resolution of the General Meeting adopted by an enhanced majority.

To conclude, the requirements as set in the Draft Report, would tighten the conditions of use, would bring more constraints instead of providing flexibility. Perhaps this is the reason why a country such as Germany has decided to introduce the dual-class share structures under conditions adapted to its local companies and markets. Anyway the current situation is leading Europe to a regulatory arbitrage rather than a primary goal that should be to reduce intra-European regulatory competition.

II. Dual-class shares safeguards

As mentioned before, the Proposal is cautious as she establishes safeguards for the use of multiple voting rights either at the time of their adoption or during their lifetime. In particular, the Proposal refers to the so-called "sunset clauses" or termination clauses in the event of: transfer of these shares to a third party, expiry of a certain term, or the occurrence of an extraordinary circumstance (article 5.2 Proposal). These clauses have traditionally been understood as a necessary tool to limit the dangers or risks associated with the use of these mechanisms. They are thus understood to be an instrument that allows a balance to be struck between a total prohibition or, conversely, their use without any limitation.

It should be understood that the termination clauses constitute a key element within the dual-class share structures, so that their modification (either in the sense of extending or reducing their scope or extension) will require the appropriate agreement of the General Meeting in the terms indicated above. However, the Proposal suggests several inquiries. To begin with, one might wonder if it would be possible to compensate shareholders who

decide to sell the shares (with multiple voting rights) before the expiry date agreed in the termination clause. Furthermore, would such a provision violate the principle of equal treatment? Indeed, this could be elements that would be worth considering.

In the USA, the Courts have admitted modifications of the features of the multiple voting rights during their lifetime. However, North American scholars have not hesitated to point out certain difficulties; in particular, it has been questioned whether the extension of the dual-class share structures would entail a complete revision of the scheme and, therefore, of the former scheme and, if so, what would be the standard or criterion for decision.

Article 5.2 (d) of the Proposal states that additional requirements may be included to ensure that multiple voting rights cannot be used "to block decision-making by the general meeting of shareholders aimed at preventing, reducing or eliminating adverse effects on human rights and the environment related to the company's activities".

Undoubtedly one of the most relevant measures of the Proposal concerns the transparency to which companies incorporating dual-class structures are subject. Companies must make publicly available information concerning: i) the capital structure with an indication of the different classes of shares (rights, obligations, percentage of capital, voting rights attached to each of them); ii) any restrictions on the transfer of shares; iii) the identity of the holders of any securities carrying special control rights; iv) restrictions on voting rights; v) the identity of the holders of shares with multiple voting rights. Transparency obligations must, in any case, be properly coordinated with data protection rules. In any case, the provision contained in the Proposal for a Directive in relation to natural persons, for whom it is stipulated that only their full name must be included, does not seem sufficient.

E. Conclusion

The question we should ask ourselves is whether we can really consider that European companies aren´t competitive enough and, in such case, why. This way it could be easier to adopt the necessary measures.

Dual-class share structures are neither good nor bad *per se*. It depends on their use and on the markets, companies and their capital structures. In this sense, the European Commission should analyze in depth European markets and companies and see if we can steel consider that they belong to the so-called “blockholder system”.

It is worth noting that dual-class share structures are just one enhanced control mechanism among others admitted in the legal systems of many countries around us: preference shares, non-voting shares, pyramid structures... If this is so, should they be banned? What is certain is that these dual-class structures are subject to a much greater transparency regime than that attributed to other scenarios such as pyramid structures. As we have pointed out, few countries lean a strict proportionality principle; on the contrary, must

European member states admit mechanisms which, to a greater or lesser extent, alter the one share-one vote principle.

Control enhanced mechanisms allow the founders or the controlling shareholder to maintain control by making a smaller investment, but that allows to use the difference to make other investments and diversify its portfolio and reduce the risks derived from concentration; likewise, dual structures can be positive in cases of information asymmetry or in the face of short-term shareholders, thus favouring the sustainability of the company.

Notwithstanding the above, some empirical studies show that the value of companies decreases as they incorporate dual voting structures. Other studies show that companies that incorporate dual voting structures have a lower share price value than their counterparts after the IPO and that this difference persists 5 years later. In short, studies agree that dual-class structures lead to a loss of value. Some recent work, however, highlights that companies with multiple voting rights increase their value in the longer term. In the same vein, Ahn, Fisch, Patatoukas and Solomon created a new governance-based index, the Dual-Index, composed of companies with dual voting structures and compared their results with those of several benchmark indices, concluding that these companies created value in their early years.

Lastly, a key point on the implementation on multiple voting shares are the "sunset clauses". How they end up being designed is the keystone; in this sense, considering the UK regulation might be an option.