The Florange Law. A "new" power game

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I. Preamble

Neither our topic nor our title were chosen by chance. The topic encompasses issues of company law, corporate governance and capital markets, subjects where João Soares da Silva enjoyed a rare mastery. The title because, in our view, it points to what is really at stake; above all in France, but also in other European countries where, in one way or another, this topic has been on the agenda, as we shall see[1].

However, not least out of caution, we opted for a more practical approach (perhaps that of a legal practitioner), making use not only of the views of legal scholars, but also looking at how market actors, in particular investors and some of the specialist financial press, have reacted to the legislative changes under analysis.

Coincidentally, João Soares da Silva wrote on the "inverse" topic in a brief article titled "*Voting caps* em sociedades cotadas: algumas reflexões", published in 2017[2], where we may read:

> "[O]n the basis of the inclusive nature of the study contained in the 2007 *Report on Proportionality*, the European Commission, in a famous statement by Commissioner Mac Creevy in October 2007, *dropped its crusade* in favour of the one share, one vote principle, of which it had been an ardent defender without however succeeding in demonstrating its superiority, and instead accepted the report's argument to the effect that the free adoption of articles of association offered an appropriate response to the interests in question, provided due primacy was assigned to disclosure and (also accepting the conclusion that the proportionality rule and the one share, one vote principle could be both beneficial and harmful to the company's value and the shareholders' interests, depending on the multiple circumstances of the company itself and its setting) and the market was sufficiently informed of restrictions in those articles and their effects.
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> On the other hand, with the increased prominence or introduction of multiple voting shares for shareholders who hold on to their shares (loyalty shares), there has been increasing recognition, especially

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[1] With the exception of some of the notes, the research considers only writings published or made public up to 31 August 2019. I would like to express my thanks to Francisco Albuquerque Reis, who was involved in the initial research for this article, and most particularly to Paula Santos Valente, for her invaluable help in the writing and review of this text.

[2] JOÃO SOARES DA SILVA, *A Propósito de* Corporate Governance *e de Direito das Sociedades e dos Valores Mobiliários – Escritos Vários*, Coimbra, Almedina, 2018, pp. 100-101. Also in PAULO CÂMARA (ed.), *O Novo Direito dos Valores Mobiliários – I Congresso sobre Valores Mobiliários e Mercados Financeiros*, Coimbra, Almedina, 2017, pp. 91-104.

in France and Italy, of the virtues of breaking with proportionality in favour of stability and the long-term interests of companies (also reflected in legal theory in Portugal), and there has been talk, significantly, of a "disappearing taboo".

The European Commission has joined the trend that identifies the battle against short-termism and the promotion of long-term shareholder engagement as one of today's main concerns, as follows from its *Action Plan on Company Law and Corporate Governance*, adopted in December 2012. This can also be seen in the 2014 draft directive for altering the shareholders' rights directive. This battle has intensified around the world, with authoritative voices in the private sector, such as Warren Buffet, one of the signatories of the document published in 2009 by the Aspen Institute, titled *Overcoming Short-termism*, recommending the design of policies that assigned increased shareholder rights to those who held on to their shares for a minimum period of time".

For me, as well as for all of us, it is a source of regret that João Soares da Silva did not address this topic. He would surely have done so with distinction, eclipsing our own humble efforts.

II. Introduction

The law known as the *Loi Florange*, introduced in France in 2014[3], was drafted in response to a dispute between unions and workers, on the one hand, and Arcelor-Mittal, with registered office in Luxembourg, on the other, in the wake of the multinational's decision to shut down steel works located in the commune of Florange (Moselle), in north-west France.

It grew out of a promise made, in the 2012 electoral campaign, by the then presidential candidate, François Hollande: all companies that employed a workforce of more than a thousand in France (and in Europe) and wished to close down factories or production centres considered to be economically viable should be required to make their best endeavours to find a buyer before doing so.

The law that was eventually passed is much more wide-ranging, as it addresses several other issues in no way connected with the promise made by the then French presidential candidate: doubling of the voting power of shareholders who hold on to shares for a given period of time without interruption, alteration of some of the rules relating to takeover bids, in particular with regard to the admission of certain conditions, and also the duty of neutrality incumbent on the directors of the targeted company, granting of additional powers to the *comité d'entreprise*, and reporting duties.

At the time, and since then (hence the choice of this topic), the impact of these changes and, most especially, the introduction of double voting rights, has been enormous both in France and in certain Western European countries. This series of initiatives associated with or resulting from the approval of this law has led many to question what the real reasons might have been for adopting these legislative measures. We refer, for

[3] Law 2014-384, of 29 March 2014, *JORF* (French Official Gazette) no. 0077, of 1 April 2014.

example, to the investment made by the French State to increase its holding in Renault, in order to avoid shareholders in the car manufacturer from voting to opt out of double voting in that company.

Despite the wide-ranging nature of this law, in this article we set out solely to examine the question and what might be referred to as the controversy surrounding this new double voting rule in France and other European countries, comparable, moreover, to what has been done in the United States.

In Portugal, this topic has been addressed in some detail, albeit from different perspectives, by João Nuno Pinto Vieira dos Santos[4], by Madalena Perestrelo de Oliveira[5] and by Diogo Drago[6], and so this article seeks to propose some additional avenues for reflection on the admission of multiple voting shares in companies with shares admitted for trading on regulated markets (also referred to below as issuers) and some notes flowing from them.

The legal framework is very different from France's. In Portugal, only holdings in public limited companies (*sociedades anónimas*) can be listed on a regulated market[7] and the Companies Code expressly prohibits multiple voting[8].

It might therefore be said that there is no issue here! In Portugal, within the existing legal framework, no provision can be made for multiple voting shares in public limited companies, although, as we shall see, Madalena Perestrelo de Oliveira believes that this legal prohibition does not apply to issuers. But should this framework be maintained? Might it make more sense to impose, as happened in France, or to permit, as happened in Italy and Belgium, and has more recently been proposed in neighbouring Spain, a specific set of rules for issuers?

III. Some international experience.

1. Introduction

Not least through the reactions it has prompted, this French initiative has brought into the public eye a series of opinions which, whilst not those of lawyers, illustrate how market actors, and investors in particular, have assessed these changes to the law. We shall therefore start this overview in France, as it was there that we found the most information on the topic.

[4] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014.

[5] "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-shares*", *Revista de Direito das Sociedades*, year VII (2015), number 2, pp. 435-470.

[6] "*Loyalty shares*: um meio de controlo ou o acentuar de conflitos no seio societário?", *Revista de Direito Comercial*, 2017.

[7] Securities Code, Articles 1, 227 and 229.

[8] Companies Code, Article 384.5.

1. France

Article 7 of Law 2014-384, of 29 March 2014, amended Article L.225-123 of the French Commercial Code[9], which now stipulates that shares admitted to trading on regulated markets and registered ("*inscription nominative*") with the same holder for more than two years will then carry double voting rights ("*droit de vote double*"), save as otherwise established in the Articles of Association by a clause added after the entry into force of the law approving this change.

We would draw attention to three aspects of this amendment to the French Commercial Code:

- shares with double voting rights were already permitted in the French legal system. As we shall see, this was not a new legislative development. What the change in the law brought that was new was to make this mandatory for all shares admitted for trading on regulated markets[10];
- the shares must be registered for at least two years in the name of the same shareholder; and
- companies with shares admitted for trading may amend their articles so as to opt out of double voting, thereby maintaining the principle of one share, one vote.

The French government at the time argued that this change to the law was intended to encourage long-term financial investment, stressing that it was not a protectionist measure, because all shareholders, irrespective of nationality, were covered by the measure[11] and, as such, could amend the articles to opt out of the measure if they so wished[12]. The Minister for the Economy, quoted by the *Financial Times*, was reported to have said that the change was intended to promote long-term investment, reducing turnover in shares, thereby allowing companies to be managed with a view to the long term, adding also that the measure was neither protectionist, because it applied to all shareholders, irrespective of nationality, nor mandatory, because shareholders who disagreed would be free to vote against it.

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[9] The article currently reads as follows:
"Un droit de vote double de celui conféré aux autres actions, eu égard à la quotité de capital social qu'elles représentent, peut être attribué, par les statuts à toutes les actions entièrement libérées pour lesquelles il sera justifié d'une inscription nominative, depuis deux ans au moins, au nom du même actionnaire.
En outre, en cas d'augmentation du capital par incorporation de réserves, bénéfices ou primes d'émission, le droit de vote double peut être conféré, dès leur émission, aux actions nominatives attribuées gratuitement à un actionnaire à raison d'actions anciennes pour lesquelles il bénéficie de ce droit.
Dans les sociétés dont les actions sont admises aux négociations sur un marché réglementé, les droits de vote double prévus au premier alinéa sont de droit, sauf clause contraire des statuts adoptée postérieurement à la promulgation de la loi n° 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle, pour toutes les actions entièrement libérées pour lesquelles il est justifié d'une inscription nominative depuis deux ans au nom du même actionnaire. Il en est de même pour le droit de vote double conféré dès leur émission aux actions nominatives attribuées gratuitement en application du deuxième alinéa".

[10] See PEDRO MAIA, *Função e Funcionamento do Conselho de Administração da Sociedade Anónima*, *Stvdia Ivridica* 62, University of Coimbra, Coimbra Editora, p. 122, note 189, providing a historical overview and a number of references to French legal theory on the matter, and EDUARDO DE MELO LUCAS COELHO, *Direito de Voto dos Accionistas nas Assembleias Gerais das Sociedades Anónimas*, Lisbon, Rei dos Livros, 1987, p. 59, setting out some of the reasons behind these legislative changes.

[11] Apparently, in the original version of the change, double voting was to be reserved only for French shareholders or those which were nationals of other Member States of the European Union or belonging to European Economic Area, which restriction was subsequently eliminated.

[12] Back in 1964, when the introduction of double voting French legal system was originally debated and approved, a distinction was made between shareholders with proven loyalty to the company and speculators, seeking only quick and easy profits; this is referred to by EDUARDO DE MELO LUCAS COELHO, *Direito de Voto dos Accionistas nas Assembleias Gerais das Sociedades Anónimas*, Lisbon, Rei dos Livros, 1987, p. 61.

According to the report from the Economic Affairs Committee of the French National Assembly, this legislative initiative had the following aims:

– to increase the proportion of long-term shareholders in relation to that of short-term shareholders;
– to entrench the position of controlling shareholders, as stable investors with a long-term commitment.

The English financial press, notably the *Financial Times* and *The Economist*, stressed first and foremost that the approval of the *Loi Florange* would allow the French government to obtain funds that it needed without losing influence in around 70 companies in which it was a shareholder. By way of example, in an article of 16 April 2015, the *Financial Times* states that, in the case of GDF Suez (today, Engie), the State could dispose of 1/3 of its holding, retaining the one third of voting power required by law - at the time, ten per cent of that company's share capital would have been worth approximately 5,000,000,000 euros. Engie was one of the issuers, like Renault and Vivendi, that chose not to opt out of multiple voting shares.

Neil Dwane[13], cited by the *Financial Times*, wrote that "*[t]he government is effectively changing the law to create an enhanced share class to protect France so it can influence the way France is governed",* adding that *"this kind of behaviour will detract from the willingness to invest in France. French companies will trade at a discount because people feel there is a higher burden of care required because of the interference from the French government. I think it is important that all shareholders are treated equally"*.

And the *Financial Times*, citing Xavier Huillard, *Chief Executive* of Vinci, further added that "*[t]he only interest of double voting rights is to allow the taking control of companies without having to own a majority of the shares"*.

The Association Nationale des Sociétés par Actions (ANSA) stated publicly that this change in the law would create obstacles, declaring its preference for the system in place prior to the *Loi Florange*.

a) Double voting shares

This legislative change in 2014 did not therefore introduce the possibility of double voting by shares in public limited companies, as this was already possible under the French legal system[14]. However, for shares admitted to trading on regulated markets, the exception became the rule. This was a change from an opt-in to an opt-out system, requiring companies to add a clause to their articles in order to by-pass it.

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[13] Chief Investment Officer for European Equities at Allianz Global Investors, which, in conjunction with another 18 institutional investors, with €2.3 trillion in assets under management at that time, sent a letter to the French government and to France's 40 leading listed corporations, arguing in favour of the "one share, one vote" principle.

[14] According to EDUARDO DE MELO LUCAS COELHO, *Direito de Voto dos Accionistas nas Assembleias Gerais das Sociedades Anónimas*, Lisbon, Rei dos Livros, 1987, p. 61, "[...] as follows from the above, double voting is not to be confused with multiple voting. In the first place, because it cannot confer more than two votes on a single share. But above all because all shares that meet the legal requirements for double voting are, in principle, treated on an equal footing, and their holders have the right to claim and enjoy that benefit".

Until the date on which this change to the law was approved, more than half the companies listed in the CAC[15] already made provision, in their articles, for double voting by shareholders who held shares for a period of two years or more, although the transfer of those shares for any reason caused that right to lapse.

Until 1903, multiple voting shares were permitted in France. They were then prohibited until 1933, when they were again authorised subject to certain restrictions: only double voting was permitted and only in the case of shares registered in the name of a given shareholder for a period of no less than two years, provided this was authorised by the articles of the issuer or by its general meeting and, lastly, provided the rule applied to all shareholders[16].

b) Registration in the shareholder's name

A second aspect that we believe should be stressed and where no alteration was made – in other words, where the rule has remained unchanged since 1933 – is the fact that the shareholder, in order to benefit from double voting, must, among other things, have its shares registered (or issued) in its name. In other words, this entails the issuing of "nominative" (registered) shares or registered bearer shares.

This aspect is particularly important for institutional investors, above all from abroad, who, normally, hold shares in issuers through depositaries, which prevents them from benefiting from this rule.

In the course of 2015, several agencies recommended that shareholders in issuers should vote to opt out of double voting, and went as far as to say that, otherwise, shareholders should vote against motions related to authorisations for acts or certain categories of acts, including acts exposed to widespread criticism, the appointment of company officers and the approval of annual accounts.

c) Opt-out

Accordingly, contrary to what might be expected and what, as we shall see, happened in other European jurisdictions, in France, loyalty shares in issuers became the rule (*de droit*, or *de jure*), unless the shareholders resolved to opt out from this by adding a clause to that effect in their articles of association.

According to the *Financial Times*, one of the main beneficiaries of this legislative change was the French industrialist Vincent Bolloré, who saw the votes carried by his shares in Vivendi double. At the general meeting of Vivendi in 2015, a motion tabled to introduce an opt-out clause in the articles garnered a majority of votes, but failed to achieve the necessary qualified majority of two thirds.

Likewise, at Renault, Engie, Veolia and Orange, similar motions failed to achieve the majority needed to amend the articles or else the companies actually accepted the new rules introduced by the change in the law.

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[15] ALLEN & OVERY, "Changes to French takeover rules", available at <www.allen&overy.com/publications/en>.

[16] According to GENEVIÉVE HELLERINGER, of the ESSEC Business School and the University of Oxford, cited in a panel discussion in June 2018 organised by ECGI and the US law firm Jones Day, half of the 40 largest issuers already made provision for double voting shares in their articles, and this percentage rose to 60 per cent when considering the 120 largest issuers.

In contrast, the shareholders of the bank, BNP Paribas, the cosmetics corporation L'Oréal, the property developer Unibail-Rodamco and the construction firm Vinci voted in favour of altering their articles to opt out from the rules instituted by the *Loi Florange*.

Catherine Salmon, executive director of Institutional Shareholder Services[17], cited in an article by Adam Thomson published in 2016 by the *Financial Times*, said that the fact that the French State was a major shareholder in many of the issuers was far from being a coincidence. *"The French state is a big beneficiary of the law because it allows it to reduce its holding in the companies while keeping its voting rights*". And the *Financial Times* adds that *"[t]he French government is under pressure from Brussels to reduce its fiscal deficit to bring it in line with EU rules. It has yet to sell its stakes in its portfolio of 77 companies, which was worth more than 77 billion last April [2016] according to APE[18], the holding company for the state's investment"*. This article ends with the following quotation from Loïc Dessaint[19]: *"it´s a terrible sign for investors because it looks very protective. When you have double-voting rights in place, it is a sign that you don't want to play by market rules"*.

3. Italy

A similar change in the law was made in Italy to make it easier to create loyalty shares, offering long-term investors double voting rights. The Italian legislator did away with a prohibition that had stood for decades and allowed shareholders who held on to their shares for a given period to be awarded increased voting powers (*voto maggiorato*). The aim was to pave the way for, and indeed persuade, the owners of family companies to list their companies on regulated markets, thereby enabling them to raise funds to finance expansion, without losing control[20].

But this process was not uncontroversial. Faced with adverse reaction from investors, the then prime minister, Matteo Renzi, eventually withdrew proposed legislation that would permit "loyalty shares", provided they were approved by a majority of 50 per cent of the votes. In the face of criticism from several sectors to the effect that this change would benefit family shareholders with significant holdings[21], the Italian government dropped its proposal, thereby maintaining the requirement of a qualified majority of 2/3 of the votes, as proposed by Mario Draghi when he was a senior official at the Italian Treasury and seen at the time as a crucial measure to protect minority shareholders.

Marco Ventoruzzo[22] considers that this initiative by the Italian government was a reaction to Chrysler-

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[17] See <www.issgovernance.com>.

[18] Agence de Participations de l'État.

[19] Chief Executive of Proxinvest, consultancy firm founded in 1995. According to its website, it is a *"French independent proxy firm supporting the engagement and proxy analysis process of investors, with the mission to analyse corporate governance practices and resolutions proposed at general meetings of listed firms"*.

[20] Within a short time of the law being changed to permit loyalty shares, countless Italian companies, such as Campari, Amplifon and Astaldi amended their articles to permit added voting rights to be awarded to shares held by long-term shareholders.

[21] More than a hundred investors, including Fidelity, Aviva, Thresdneedle Investments, Schroeders and UBS, sent an open letter to the Italian prime minister expressing their concern at this proposed change in the law.

[22] "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015.

Fiat's decision to relocate to The Netherlands[23]. One of the factors behind that decision was thought to be shares known as MVSs (*multiple voting shares*) being allowed in the Dutch legal system. He argues that with this law, somehow hurriedly approved, other "Italian champions" would no longer have any reason to make a move similar to that made by Chrysler-Fiat. The same author also advanced the hypothesis that this change in the law was also prompted by a desire to make the capital markets more attractive and by a more selfish objective on the part of the State to hold on to control of a number of companies it intended to privatise.

Decreto Legge n. 91/2014 (known as the *decreto competitività*), converted into *Legge n. 116/2014*, amended, as concerns us here, several provisions of the Italian Civil Code, and in particular permitted:

– non-listed companies to issue shares with a maximum of three votes per share, whilst maintaining, in diluted form, the prohibition of issuing shares with limited voting rights which, taken together, represent more than 50 per cent of the issued share capital[24];
– listed companies to issue loyalty shares, awarding double voting rights to shareholders who held on to shares for at least two years, which right lapses on transfer of the shares.

According to Ettore Croci, of Università Cattolica del Sacro Cuore[25], this legislation was intended *(i)* to facilitate the sales of capital in state-owned companies, whilst maintaining control, *(ii)* to encourage family-controlled companies to go public, *(iii)* to discourage short-termism and *(iv)* to reduce the risk of hostile takeovers.

And he added some empirical evidence. Of a number of companies with shares listed on a regulated market, only two have made provision in their articles of association for multiple voting shares and 35 had introduced loyalty shares: 19 in 2015, eight in 2016, 10 in 2017 and, unconfirmed, two in 2018, in most cases family companies, despite the families already having control of the company.

Taking a more practical view, Luca Garavoglia, chairman of Davide Campari-Milano S.p.A.[26], argued that loyalty shares are no more than a device for increasing control and do nothing to make institutional shareholders hold on to their shares for longer. In a company where there is a controlling shareholder, these shares benefit that shareholder because, in some cases, a qualified majority is needed, or else because they enable it to avoid dilution of its position in the event of secondary equity offering. No great benefits can therefore be seen for institutional investors. Moreover, in a company where the capital is dispersed (by which we understand a company without a controlling shareholder), it is not very common to find loyalty shares, insofar as institutional investors prefer to dispose of their holding if the management is not to their liking, as they have no wish to influence the governance of the company. The only exception appears to be activist investors, although he doubts that these are willing to wait two years to secure double voting rights.

[23] Stating that this relocation was effected by means of a reverse merger, in which Chrysler-Fiat was incorporated into Fiat Investments N.V., its own Dutch based subsidiary, briefly outlining how the operation was carried out and providing bibliographical indications for anyone seeking further details.
[24] Art. 2351, § 2, of the Italian Civil Code.
[25] Cited in a panel discussion held in June 2018, organised by ECGI and the US law firm Jones Day.
[26] Who took part in the same panel discussion as Prof. Ettore Croci.

Luca Garavoglia concludes that the discussion should focus on mechanisms that make it possible to increase control over a company and that, from this perspective, there are three reasons for permitting multiple voting shares: they are more transparent than pyramids[27]; they permit all types of securities to be sold to investors provided there is transparency; and some companies will not wish to go public if they are not able to hold onto control through the existence of multiple voting shares.

Marco Ventoruzzo[28] states that the changes made to the Italian Civil Code in relation to MVSs (multiple voting shares) raise countless technical issues, such as the concept of beneficial ownership, pointing specifically to the following:

- the absence of provision in the articles of association, on how these changes should apply to shares with limited voting rights, i.e. shares carrying voting rights on certain matters (such as amendments to the articles) only, or to shares without voting rights;
- whether loyalty shares should be constitute a special class of shares[29], a question of no small relevance because, if they do, they will have the right to vote as a class on decisions that may undermine their rights; the law (we are unable to understand whether this is the same or a subsequent law) then clarified that they are not a specific class of shares, which, according to this Italian academic, does not prevent them from being able to be one;
- in the event of transfer of loyalty shares, the double voting rights are forfeit, but not in the event of transfer as the result of a merger or demerger (save as otherwise established in the articles), which may constitute *fertile ground for elusions*;
- amendment of the articles of association so as to authorise the issuing of loyalty shares does not entitle dissenting shareholders to withdraw from the company[30]. Although some consider that, in the long term, the weakening of the voting rights of those not holding loyalty shares is irrelevant, insofar as all shareholders can potentially enjoy double voting rights, provided, of course, they hold on to their shares for the minimum period, that Italian author considers that, albeit technically correct, it does not fully justify the lack of protection for minority shareholders, who are left as shareholders in a company with reinforced control or holders of shares that may prove more difficult to sell;
- the holding of shares that confer more than 30% of voting rights (one of the thresholds for the respective duty established in Italian law) subjects the holder to the duty to launch a takeover bid for all the other shares, which may raise delicate interpretative and technical issues, in particular with regard to the minimum price of the mandatory bid[31].

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27 Also known as *scatole cinesi* (Chinese boxes).

28 "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015, p. 14.

29 Topic addressed by João Nuno Pinto Vieira dos Santos and Diogo Drago.

30 "*Hanno diritto di recedere, per tutte o parte delle loro azioni, i soci che non hanno concordo alle deliberazioni riguardanti: [...] g) la modificazioni dello statuto concernenti i diritti di voto o di partecipazione*" – Italian Civil Code, Article 2437.

31 Article 107 of the *Testo Unico della Finanza* (*TUF*).

4. The Netherlands

In The Netherlands, public debate on the subject of loyalty shares started when Koniniklijke DSM, N.V.[32] (DSM), whose shares were listed on Euronext Amsterdam, publicly announced its intention to introduce a new form of dividend: a loyalty dividend.

João Nuno Pinto Vieira dos Santos[33] summed up the controversy unleashed by this announcement:

- "[a] bonus of 30% would be paid to shareholders who held bearer shares, voluntarily registered in their name with the company for at least three years. For each additional year, DSM proposed paying a further bonus of 10%";
- "[b]y introducing the loyalty bonus, *DSM* had two aims in view: to offer special returns for long-term shareholders and to encourage more direct communication with shareholders, by learning who they were, as the precondition for the bonus was that the bearer shares should be registered with the company;
- "[a]n investment fund, *Franklin Mutual Advisors*, considered that the loyalty bonus was unreasonable and that it breached the articles of association and the law [...], requesting that the matter be removed from the agenda of the general meeting";
- "[w]hen the company refused, FMA went to court to seek suspension of the proposed measure";
- "[t]he Dutch Appeal Court ruled that the introduction of this dividend could not be put to a vote by shareholders because it breached the principle of equality enshrined in Article 2:92, §1 of the CC [Civil Code], interpreted to the effect that the articles may only create different dividend and *voting* [emphasis added] rules by creating different classes of shares";
- "Advocate-General Timmerman appealed against the court's ruling, in the belief that it would be useful to have a position on the issue analysed through a ruling of the Supreme Court";
- the Supreme Court upheld the position taken by the Advocate-General. The article of the Civil Code in question does not establish that differentiated dividends can only be obtained by creating different classes of shares, but only that such differentiation should be based on provisions in the articles of association stipulating the amounts involved and the terms for award of the dividends, consequently setting aside the ruling under appeal.

However, according to Alessio Pacces, of Erasmus University Rotterdam[34], DSM never went ahead with the initiative. Referring to the principle in the Dutch legal system whereby shares have equal rights in proportion to their nominal value and that the articles of association may alter this rule, he points out that such alteration is subject to limits: each share must carry at least one vote and shares with different voting rights must have a different nominal value. It is therefore possible to include in the articles any type of dual-class structure, for

[32] See <www.dsm.com>.
[33] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, pp. 17 and 18.
[34] In the same panel discussion in which Prof. Ettore Croci and Mr Luca Garavoglia took part.

example, providing a premium for shares with a lower nominal value (and less votes) to compensate the difference with shares having a higher nominal value (and more votes).

According to this academic, loyalty shares have been introduced through mergers or demergers. The shareholder can register its shares in a loyalty register and, after a given period of time, will be entitled to receive additional (voting) shares, which will however have to be returned, for no compensation, if it seeks to cancel registration of the underlying shares in order to be able to trade them[35].

Lastly, a number of examples were discussed, without the document we consulted presenting any details.

In the case of CNH, the Agnelli reinforced control of the company by introducing loyalty shares, increasing its percentage of voting rights from 34.14 per cent to almost 42 per cent, keeping 14.25 of the cash flow rights. Although all the shareholders were eligible to receive this type of shares, Exor (controlled by the Agnelli family) was the only significant shareholder that received them.

In the case of Ferrari, where, despite the issue of 10 per cent of new shares by public subscription, the Agnelli family's voting power was not diluted, although their cash flow rights were reduced from 14 to 12 per cent, whilst their voting rights remained unchanged, because only Exor and Mr Piero Ferrari made use of the loyalty voting scheme[36].

Similar structures have apparently been used by Altice and Yandex.

Alessio Pacces concludes that, in his opinion, in The Netherlands loyalty shares are simply a device for reinforcing control over a company, insofar as, in practice, only controlling shareholders are eligible to receive them.

5. Belgium

The panel discussion organised by Jones Day and ECGI also looked at the situation in Belgium. Philippe Lambrecht, of the Université Catholique de Louvain, provided a brief historical overview, explaining that the 1807 Commercial Code, inspired by Napoleonic law, already contained exceptions to the one share, one vote principle. This was then liberalised as from 1873. However, the Royal Decree of 1934 banned multiple voting shares, and that prohibition remained in place until recently.

The proposed law brought before Parliament on 6 June 2018 provides for the introduction of loyalty shares in the Belgian legal system and, in particular, in unlisted public limited companies (NV/SA) and in limited liability corporations (BV/SRL) there will be few limitations on the allocation of profits and voting rights.

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[35] The document which we consulted fails to answer a series of questions relating to the structure presented, such as whether new shares are issued or whether the company can use its own shares for this purpose. In the former case, how are they paid up? Out of reserves? And who actually owns the shares, as they have to be returned if the shareholder wishes to transfer the underlying shares? Is this a case of loan for use (*commodatarius*)? A contract with reservation of title?

[36] DIOGO DRAGO, "*Loyalty shares*: um meio de controlo ou o acentuar de conflitos no seio societário?", *Revista de Direito Comercial*, 2017, p. 450.

As for listed companies, only loyalty shares will be permitted, with, in Philippe Lambrecht's view, a twofold aim: to reduce short-termism, rewarding shareholders' loyalty, and to encourage companies to go public. Although this draft law draws inspiration from the corresponding portion of the *Loi Florange*, unlike what happened in France, loyalty shares are not the rule. Nonetheless. under the proposal, the traditional qualified majority of 75 per cent of votes needed to amend the articles of association was reduced (permanently) to two thirds for the adoption of this type of shares and, provisionally, during a six-month transition period from 1 January to 30 June 2020, to a simple majority of votes[37].

In conclusion, he points out that, under this proposed law:

– all shareholders who keep their shares for two or more years will have double voting rights on those shares;
– the period during which they must be held is retroactive as from the date of the amendment of the articles of association permitting this;
– "double voting rights" lapse when the shares are transferred, except by succession, as a result of divorce, by transfer, whether or not for payment, to a person entitled to inherit (*successible*), to companies controlled by the same person or, in the case of joint control, between controlling shareholders, or else in the event of merger or demerger;
– for calculation of the threshold of 30 per cent for the purposes of determining the duty of making a takeover bid, only the number of shares held is counted; loyalty votes are not counted.

Approved in February 2019, the reform of the *Code des Sociétés* took effect on 1 May that year, in different phases. Adopting the one share, one vote principle (Art. 7:51), provided shares represent equal parts of the share capital, but admitting that:

– in unlisted companies (*sociétés non cotées*), the articles may derogate from that principle – Art. 7:52;
– in listed companies (*sociétés cotées*), the articles of association may confer on fully paid up shares, registered over a continuous period of no less than two years in the name of the same shareholder, double voting rights in comparison with the other shares representing the same portion of the share capital. This resolution to amend the articles of association must be approved by 2/3 of the votes cast, in other words, by a majority smaller than necessary as a general rule to amend the articles, which is 3/4 of the votes cast (Art. 7:153).

6. Spain

In Western Europe, Spain is the latest country to follow this trend. On 24 May 2019, the *Ministerio de Economía y Empresa* released a preliminary draft of a law amending some of the provisions of the *Ley de Sociedades de*

[37] According to Philippe Lambert, if the qualified majority is kept at 75 per cent, it will be impossible to provide for loyalty shares in companies which are already listed on an organised market.

Capital (Companies Law)[38] and other legal rules, namely to adapt them (*adaptarlas*) to Directive (EU) 2017/828 of the European Parliament and the Council of 17 May 2017[39].

We considered reproducing parts of the text explaining the reasons for this legislative initiative, but decided against doing so due to their length. But we cannot resist transcribing a number of selected sentences which, in our view, provide a fairly accurate idea of the topics addressed and above all of the justifications given:

– *"las estrategias de inversión cortoplacistas tienden a afectar negativamente al potencial desarrollo sostenible de las sociedades cotizadas";*
– *"la presión por generar y distribuir beneficios financieros en el corto o incluso muy corto plazo, presiona a las direcciones de las empresas cotizadas a centrase excesivamente en los resultados financieros trimestrales";*
– *"en especial, diversos estudios demuestran que las sociedades cotizadas que buscan maximizar sus resultados en el corto plazo suelen invertir menos en I+D+i. Esta menor inversión tiene a su vez una repercusión negativa en el desarrollo futuro de la compañía al afectar a su capacidad de adaptación al mercado, competitividad, posición en los mercados internacionales, etc.";*
– *"otro potencial efecto adverso de las estrategias de inversión cortoplacista radica en que influyen en la sociedad cotizada para que se centre esencialmente en el rendimiento financiero en beneficio exclusivo de sus accionistas";*
– *"las estrategias de inversión a largo plazo integran de forma natural otros objetivos no financieros, como el bienestar de los trabajadores y la protección del medio ambiente, garantizando la sostenibilidad de las empresas en el largo plazo";*
– *"los comportamientos individuales cortoplacistas de muchas empresas cotizadas pueden tener un efecto agregado muy perjudicial sobre el conjunto de la economía";*
– *"en efecto, según numerosos estudios, las políticas de inversión cortoplacistas no sólo afectan a la sostenibilidad y rentabilidad de las empresas individualmente consideradas, sino que también pueden generar riesgos relevantes para la estabilidad de los mercados de capitales y la economía".*

In addition to making the legislative changes needed in the Spanish legal system to transpose Directive 2007/36/EC of the Parliament and the Council, amended by Directive (EU) 2017/828 of the European Parliament and the Council, of 17 May 2017, the legislator seized the opportunity of this new law (*aprovechar esta ley*) to introduce, alongside the said directive, other normative changes in the field of corporate governance and the workings of the markets[40].

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[38] *Real Decreto Legislativo 1/2010, of 2 July.*

[39] Amends Directive 2007/36/EC of the European Parliament and the Council with regard to incentives for long term shareholder engagement.

[40] As far as we have been able to ascertain, at the date of revision of this article, this preliminary draft had not been published. *Real Decreto-ley* 3/2020, of 4 February, partially transposed Directive (EU) 2017/828 of the European Parliament and the Council, of 17 May 2017, but only with regard to the insurance sector, in a far-reaching reform of the legislation applicable to this business sector.

This included the introduction, in companies law, of "*acciones de lealtad*" (loyalty shares) with additional votes, permitting issuers to enshrine these in their articles[41].

In addition to the reasons flowing from the above, the authors of the legislation mention that, with this change, *"el objetivo esencial que se persigue con su introducción es que nuestro régimen societario e, en definitiva, nuestro mercado bursátil ofrezcan las mismas opciones que permiten otras legislaciones europeas, reforzando así su atractivo"*. It should also be noted that the proposed rules are similar to those adopted some years ago in France and Italy, although an express decision by the shareholders is required.

Accordingly, in addition to changes to certain articles, six new articles are also proposed[42] to Real Decreto Legislativo 1/2010, of 2 July (*Ley de Sociedades de Capital*), concerning loyalty shares and putting forward, in short, the following rules:

- the articles of a listed company (*sociedad anónima cotizada*) may be amended to alter the proportion between the nominal value of a share and voting rights, in order to confer an additional vote on each share which is owned by the same shareholder on a continuous basis over two consecutive years (*Article* 527 *ter*);
- the resolution to amend the articles in this way must be approved by *(i)* no less than 2/3 of the capital present or represented at the general meeting, provided shareholders representing 50 per cent or more of the total subscribed capital with voting rights are present *(ii)* 80 per cent of the capital present or represented, if the quorum for holding the meeting is less than 50 per cent, but higher than 25% of the capital; larger majorities may be stipulated in the articles (*Article* 527 *quáter*);
- the additional votes carried by loyalty shares are considered for the purposes of determining *(i)* the quorum for general meetings and majorities needed for resolutions *(ii)* the obligation to give notice of qualifying holdings, and also to determine the duty to launch a takeover bid as provided for in the *Ley del Mercado de Valores* (Securities Market Law) (*Article* 527 *quinquies*);
- elimination of the provisions in the articles of association concerning loyalty shares must comply with quorums and majorities needed for their approval, but, if more than 10 years have elapsed since the amendment that introduced them, the additional votes conferred by loyalty shares shall not be considered in calculating voting rights (*Article* 527 *sexies*);
- the company must keep an additional register, as stipulated in its articles (*Article* 527 *septies*);
- transfer, even free of charge, by the privileged holder of the share carrying that privilege entails forfeit of the additional loyalty voting right as from such transfer. However, unless otherwise established in the articles, this additional loyalty voting right will not be forfeit (therefore benefiting the acquirer of the share carrying it) if transfer takes place *(i)* by succession to the estate of deceased

[41] "Neither under the Law of 1869, nor under the Commercial Code of 1885 was there any provision expressly providing for multiple voting shares. In view of this, legal authorities were divided, although the prevailing view was that such shares were unlawful. Article 38 of the 1951 Law put an end to that debate, prohibiting multiple voting shares, and the same line was taken in Article 50 of the 1989 Law, which likewise bans multiple voting", PEDRO MAIA, *Função e Funcionamento do Conselho de Administração da Sociedade Anónima*, *Stvdia Ivridica* 62, University of Coimbra, Coimbra Editora, p. 125, note 189.

[42] Articles 527 *ter*, 527 *quáter*, 527 *quinquies*, 527 *sexies*, 527 *septies* and 527 *octies.*

persons, *(ii)* as a result of the award of shares to the spouse in the event of dissolution of *sociedad de ganaciales* (joint property)[43], *(iii)* by gift between spouses or persons in an equivalent relationship or between ascendants or descendants, or *(iv)* as a result of the structural changes provided for in *Ley 3/2009, of 3 April* (*Article 527 octies*);

– shares issued free of charge in capital increases, in proportion to the number of loyalty shares held (*Article 527 octies*), also benefit from double voting.

Aurelio Gurrea Martinez has criticised this initiative of the Spanish government, setting out his clear opposition not so much, we believe, to the proposed rules for loyalty shares, but above all to the reasons invoked for introducing them in Spain.

This academic[44] argues not only that Spain does not have a short-termism problem - the vast majority of listed companies have controlling shareholders (normally families or the State) - but also that loyalty shares do not add to the long-term commitment of minority shareholders[45]. He also argues that this measure is not desirable for corporate governance or for the efficiency, development, liquidity and competitiveness of the capital markets[46].

In his view, the real reasons for this change to the law may stem from *(i)* ignorance and the implications of loyalty shares in countries like Spain, where there are controlling shareholders, a high risk of tunnelling[47] and no short-termism problem, *(ii)* the tendency of many legislators to copy the laws of other countries, without examining the grounds and the purpose of the rules in a given legal, economic and institutional context, as happened in France and Italy with loyalty shares or in other countries as regards the rules on takeover bids, and *(iii)* willingness to allow certain lobbies to satisfy their ambition to perpetuate their control over large listed companies.

He also adds that the new rules will increase the risk of opportunistic behaviour by insiders in Spanish companies, causing foreign investors to lose confidence, and thereby damaging the funding of business and development of the capital markets in Spain.

He concludes that the Spanish legislator should not permit loyalty shares in listed issuers, and at most should follow the example of other countries in permitting multiple voting shares in unlisted companies that are seeking to go public. In this way, the founding/controlling shareholders will only have an incentive to adopt loyalty shares when they believe, and manage to convince investors, that the possible costs of these shares in

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[43] Equivalent in Portugal to community of acquired property.

[44] "*Un análisis crítico sobre la posibilidad de permitir las acciones de lealtad en las sociedades cotizadas españolas*", *Working Paper Series 4/2019*, Instituto Iberoamericano de Derecho y Finanzas.

[45] Loyalty shares benefit majority shareholders and minority shareholders equally, and so do not increase the relative power of the latter, meaning that the incentives for minority shareholders to engage in the governance of a company will not be altered by the introduction of loyalty shares.

[46] "*La duplicación del voto convertirá en accionistas más poderosos a los – ya de por sí – todopoderosos accionistas de control que existen en la mayoría de las sociedades cotizadas españolas*" ("Un análisis crítico sobre la posibilidad de permitir las acciones de lealtad en las sociedades cotizadas españolas", *Working Paper Series 4/2019*, Instituto Iberoamericano de Derecho y Finanzas).

[47] The term originated in the Czech Republic and is used to describe "expropriation" of the minority shareholders as a result of transferring assets and results solely for the benefit of the controlling shareholder(s), as if they were removed through a tunnel. SIMON JOHNSON, RAFAEL LA PORTA, FLORENCIO LOPEZ-DE-SILANES e ANDREI SHLEIFER, "Tunneling", *Working Paper Series, Working Paper 7523*, February 2000, National Bureau of Economic Research.

terms of entrenching control of the company and the possible risk of opportunism in relation to minority shareholders are outweighed by the possible benefits from a hypothetical increase in the company's value in the long term.

Seeking to present the other side of the argument, Amanda Cohen Benchetrit, a specialist commercial magistrate and adviser to the Spanish Ministry of Justice, speaking at a conference in Madrid[48], referred precisely to the introduction of loyalty shares in Spanish company law, saying that, in theory, this mechanism *(i)* promotes shareholder stability, *(ii)* encourages fresh funding, *(iii)* works in favour of efficient re-financing and *(iv)* tends to ensure greater economic/stock market stability, because prices are less volatile. She added that it avoids large business groups decamping from the country, in a clear allusion to the Chrysler-Fiat case[49].

7. Germany

> "The crisis that followed the First World War, bringing devaluation of the mark and runaway inflation, undoubtedly made German companies prime targets for foreign takeovers. However, the wide use of multiple voting shares responded robustly to this need."[50]

However, with the publication of the *Aktiengesetz* in 1937, multiple voting shares were banned, and this prohibition is maintained in legislation today. According to Eduardo de Melo Lucas Coelho, "[i]t was argued that in the era of international capital trading, multiple voting was not especially important as a defence against foreign assaults, insofar as family influence over family companies could also be protected by a number of instruments"[51].

8. United Kingdom

In the United Kingdom, it is generally permissible for articles of association to provide for weighted votes, whether in general, as the result of certain events or on the basis of particular matters.

However, the general dislike by regulators, including the Financial Conduct Authority, and by institutional investors for split voting rights has in practice prevented the use of dual-class share structures[52][53].

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48 By FIDE – Fundación para la Investigación sobre el Derecho y la Empresa, on 2 July 2019, chaired by José Amérigo (*Secretario-geral Técnico* at the Spanish Ministry of Justice), in which Aurelio Gurrea Martínez also took part. Consultation of the summary prepared by Alberto Fernández Matía.

49 Our translation.

50 PEDRO MAIA, *Função e Funcionamento do Conselho de Administração da Sociedade Anónima*, *Stvdia Ivridica* 62, University of Coimbra, Coimbra Editora, p. 123, nota 189.

51 EDUARDO DE MELO LUCAS COELHO, *Direito de Voto dos Accionistas nas Assembleias Gerais das Sociedades Anónimas*, Lisbon, Rei dos Livros, 1987, pp. 65 *et seq.*. However, as the author explains further on, "the Federal Parliament did not approve this part of the draft, considering that the public interest may require preservation of controlling relations in a company, although the pursuit of this interest should not depend on the company's free will, but on public authority" and approved instead "the creation of multiple votes in future with exceptional authorisation from the administrative authorities".

52 LUCIAN A. BEBCHUCK and KOBI KASTIEL, “The Untenable Case for Perpetual Dual-Class Stock”, *Virginia Law Review*, volume 103 (June, 2017), number 4, p. 599.

53 During the 2015 general election campaign, suggestions were aired for changing the takeover laws.

UK Premium Listing Principle 3 (*FCA Handbook LR* 7.2.1A) establishes that "*all equity shares in a class that has been admitted to premium listing must carry an equal number of votes on any shareholder vote"*. The regulators would therefore have to change their position for companies with shares listed in this market to be able to adopt weighted voting rights.

In 2012, a football club, Manchester United, listed its shares on the New York Stock Exchange (NYSE), and not in London, in order to use a dual-class share structure[54].

9. United States

In September 2014, *The Economist* wrote that, "*for the New York Stock Exchange (NYSE), the listing of Alibaba, a giant Chinese e-commerce website, seems like a triumph. Amid all the excitement about whether the IPO would prove the world's biggest, another of is striking features has been largely forgotten: shareholders will have little control over how the firm is run"*.

According to this article, shares in Alibaba were only admitted to trading on the NYSE because the Hong Kong stock market – "*a more natural home – insists that shareholders have a say over management in keeping with their stake"*.

According to the prospectus, all shares in Alibaba have the same rights. However, a set number of 30 managers, including the then chairman, Mr Jack Ma, control the appointment of most of the places on the board. They can also take decisions with which the shareholders do not agree, such as "*compensation, management succession, acquisition strategy, and [our] business and financial strategy"*. According to Alibaba, "*this structure is needed to preserve the firm's culture"*.

In the US, the general principle is that of one share, one vote, and this is followed by a majority of issuers. Such restrictions as exist stem not so much from State or federal law (according to Marco Ventoruzzo, these are not significant), but above all from the rules on admission to trading.

In the early twentieth century, multiple voting shares were frequently used. However, possibly as a result of the depression, criticism of this type of instrument grew considerably. From 1926 onwards, NYSE ceased to list companies that issued non-voting shares; in late 1970, less than forty listed companies had *dual class shares*[55]. For almost six decades, the NYSE held that the one share, one vote principle was part of its "*long-standing commitment to encourage high standards of corporate democracy [...] and accountability to shareholders"*[56].

However, according to Marco Ventoruzzo[57], the competition between NYSE and Amex, on the one hand, and the more libertarian Nasdaq, on the other, which had less limitations on non-application of the one share,

[54] The respective prospectus stated that each Class A ordinary share carried one vote and each Class B ordinary share carried 10 votes.
[55] MARCO VENTORUZZO, "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015.
[56] LUCIAN A. BEBCHUCK and KOBI KASTIEL, "The Untenable Case for Perpetual Dual-Class Stock", *Virginia Law Review*, volume 103 (June, 2017), number 4.
[57] "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015, p. 4.

one vote principle, meant that certain large issuers, apparently including General Motors, started to complain, threatening to transfer the trading of their shares to Nasdaq. So NYSE and Amex had no alternative but to give in to this competitive pressure (which is expressly admitted between countries, as we saw, in Spain) and seek authorisation from the Securities and Exchange Commission (SEC) to change their listing rules and admit dual class shares.

Apparently, the SEC, disappointed with this rule change, in 1988 approved Rule 19c-4 prohibiting the admission to trading or trading of securities where the issuer had taken any steps "*that would* "*have the effect of nullifying, restricting, or disparately reducing the per share voting rights of holders on an outstanding class or classes of common stock*"[58]. The Business Roundtable[59] went to court to have that decision reversed. The court upheld the request and struck down the rule, considering that this was a matter that related to the internal life of a company, and so lay outside the scope of powers of the SEC[60].

Despite that judicial ruling, an agreement was eventually reached and NYSE ended up by reintroducing its ban on dual class shares, but this time with a number of exceptions: multiple voting shares could be issued prior to an initial public offering and maintained after its conclusion, in other words, when the shares were already admitted to trading.

This is what has happened with countless US corporations, such as Google, Facebook, Estée Lauder, Hershey, Ralph Lauren, Tyson Foods, Berkshire Hathaway, Comcast, AMC, Uber, LinkedIn, Trip Advisor, Groupon, News Corp, Viacom, Alphabet and Nike, to name but a few. Ford Motor Company introduced them back in 1940; it still has them today.

According to Thomas Bourveau, François Brochet and Alexandre Garel[61], in the United States in 2017, one fifth of issuers made provision in their by-laws for dual class shares with unequal voting rights. For example, they cite, as the great argument presented by Facebook or Alphabet to justify this disparity, that they offer their managers/founders additional powers to maximise the long-term value of the company[62].

In 2004, at the time of Google's initial public offering, in a letter to investors[63] signed by Larry Page and Sergey Brin, we may read "*in the transition to public ownership, we have set up a corporate structure that will make it harder for outside parties to take over or influence Google. [...] This structure, called a dual class voting structure, is described elsewhere in this prospectus. The Class A common stock we are offering has one vote per share, while the Class B common stock held by many current shareholders has 10 votes per share"*. And a little further on, *"[a] fter the IPO, Sergey, Eric and I will control 37.6% of the voting power of Google,*

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[58] "In Practice: Retaining Control Post-IPO", KATHLEEN WELLS and ASHLEY WAGNER, *The Recorder*, February 2011.

[59] According to its website – <https://www.businessroundtable.org> –, this is "*an association of chief executive officers of America's leading companies working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy*".

[60] For more details, see LUCIAN A. BEBCHUCK and KOBI KASTIEL, "The Untenable Case for Perpetual Dual-Class Stock", *Virginia Law Review*, volume 103 (June, 2017), number 4, pp. 585-631, to pp. 596 *et seq.*.

[61] "The Effect of Tenure-Based Voting Rights on Stock Market Attractiveness: Evidence from the Florange Act", available at <https://ssrn.com/abstract=3324237>.

[62] This article is particularly interesting for its detailed analysis of the impact of the *Loi Florange* on listed companies in France, analysing, between 2012 and 2016, the behaviour of 258 companies, excluding those admitted to trading after 2012 and those that ceased to be admitted before the end of 2016, using several market metrics, and also for its extensive bibliographical references.

[63] "2004 Founders' IPO Letter, from the S-1 Registration Statement", available at <https:// abc.xyz/investor/founders-letters/2004-ipo-letter/>.

and the executive management team and directors as a group will control 61.4% of the voting power. New investors will fully share in Google's long term economic future but will have little ability to influence its strategic decisions through their voting rights". And lastly, *"[f]rom the point of view of long term success in advancing a company's core values, we believe this structure has clearly been an advantage*[64]*. [...] We believe the stability afforded by the dual class structure will enable us to retain our unique culture and continue to attract and retain talented people who are Google's life blood. [...] Google therefore has a responsibility to the world. The dual class structure helps ensure that this responsibility is met"*.

Marco Ventoruzzo[65] explains as follows how what he calls multiple voting shares are normally issued in the United States:

- "*generally two classes of shares are issued: A shares, with one vote per share similar to* "*ordinary*" *or* "*common*" *shares in Europe;*
- *and B shares, which grant more votes per share (often 10);*
- *B shares are issued to all shareholders as a dividend;*
- *however, if a shareholder transfers B shares to a third party, the voting privileges are lost (often transfers to heirs of the original holders – founders of the corporation – allow to maintain the special voting privileges);*
- *the consequence is that in a few weeks B shares and their multiple votes concentrate in the hands of shareholders interested in control and with a long-term perspective, while institutional and retail investors, who obviously trade the shares, lose almost immediately the super-voting rights*".

According to the article titled "*Out of Control*", published in September 2014 by *The Economist*, 55 per cent of companies listed on the stock exchanges of the United States and identified in the MSCI global data based awarded disproportionate rights to some of their shareholders[66].

However, motivated by the effects of quarterly results, short-sellers and high frequency trading (expressions among those used in the proposed legislation in Spain), which divert attention from efforts to create long-term business, a group of Silicon Valley investors recently obtained authorisation from the SEC to operate a new exchange, the Long-Term Stock Exchange (LTSE), based in San Francisco, California[67] –, which is intended to offer stability to venturers and more value to small investors. According to Zoran Perkov, chief executive, "*our vision: A new way of being public for companies that aim to build their businesses, advance their visions and generate value for decades to come"*. According to its website, this securities exchange should be up and running by the end of this year.

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[64] Pointing to the examples of The New York Times Company, The Washington Post Company, The Dow Jones and Berkshire Hathaway.

[65] "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015, p. 5.

[66] According to an article in the same publication in May 2019, entitled "Uber's listing and a new stock exchange may herald change", the total number of listed companies in the US represents around half the number of listed companies in 1996, when the number peaked.

[67] See <www.longtermstockexchange.com>.

Apparently, according to Thomas Bourveau, François Brochet and Alexandre Garel[68], the rule at LTSE will be tenure voting, understood as a system that assigns greater voting power to shares held for longer.

10. Brazil and South America

In Brazil, the one share, one vote rule has existed since 1940[69] , thereby preserving proportionality between capital invested and control of the company[70]. However, it is possible under the Brazilian legal system to limit the number of votes per shareholders - Article 110, § 1, of the Law on Companies by Shares -, which, in the view of Francisco Müssnich[71], represents "the 'upside-down' negation of one share, one vote".

However, in late 2017, legislation had been proposed to alter the award of multiple voting, within certain limits, to a single class of shares.

Elsewhere in South America, Argentina, Nicaragua and Paraguay (with an upper limit of five votes) permit multiple voting shares. In contrast, Bolivia, Chile, Colombia (with some exceptions), Costa Rica, Ecuador, Peru, Uruguay and Venezuela (where certain cases appear to have got past the registration authorities) do not permit multiple voting shares[72].

11. Portugal

As already stated, this topic has been addressed by João Nuno Pinto Vieira dos Santos, by Madalena Perestrelo de Oliveira and by Diogo Drago, and we therefore refer to their work for a deeper and more detailed analysis of this matter.

As was the case in other European countries (France, Italy) and still is in Spain, although it may be changing in the short term, Portugal does not permit multiple voting in public limited companies[73].

According to Paulo Olavo Cunha, cited by João Nuno Pinto Vieira dos Santos[74], "a privileged vote would undermine proportionality between voting rights and share capital; in other words, a shareholder with the same capital as another would have double or triple the votes, exerting a far greater influence".

As explained by João Nuno Pinto Vieira dos Santos, "in companies by quota shares, double voting is justified by the aim of conferring political dominance at the general meeting on the respective holder without requiring a corresponding investment effort in subscribing to the share capital; this may be very useful for

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[68] "The Effect of Tenure-Based Voting Rights on Stock Market Attractiveness: Evidence from the Florange Act", available at <https://ssrn.com/abstract=3324237>. 2.

[69] Decree-Law 2.627, reproduced in Article 110 § 2, of the Companies by Shares Act (Law 6.404/1076).

[70] FRANCISCO MÜSSNICH, "Voto Plural: Quebrando Paradigmas", *Valor Econômico*, 15 December 2017.

[71] "Voto Plural: Quebrando Paradigmas", *Valor Econômico*, 15 December 2017. According to this author, the rule prevents "creeping acquisition of control", as was observed many years ago in Lojas Americanas, a public limited company whose controlling shares were available on the stock exchange and which ended up being gradually acquired by Banco de Investimentos Garantia, controlled by Jorge Paulo Lemann and his partners.

[72] Information kindly provided by Francisco Müssnich, founding partner in BMA (Barbosa, Müssnich, Aragão), one of Brazil's leading and most prestigious law firms.

[73] Under Article 384.5 of the Companies Code.

[74] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 29.

avoiding deadlocks in certain resolutions, and for increasing the voting power of minorities, encouraging the formation of resistance minorities". Referring to Pinto Furtado and Raúl Ventura, he considers that, "[i]n public limited companies (*sociedades anónimas*), because they have a large number of shareholders, this method is held to potentially cause serious distortions"[75].

Pointing out that multiple voting was previously permitted in public limited companies, but currently banned under the Companies Code, he considers that "Portuguese law only allows loyalty dividends and loyalty shares that confer the right to warrants", going on to conclude that the introduction of double voting loyalty shares would be "a very powerful instrument for boosting the influence of long-term shareholders".

But he adds, with interest for this subject, that:

– as it is the shareholders who have the greatest interest in maximising the value of the company, their voting power should coincide with the value of their holding;
- any departures from this principle create a discrepancy between the financial interest and voting power, enabling shareholders to serve their personal interests to the detriment of appreciation of the company's value;
– it does not encourage enterprise, because business venturers may lose control of the company, which discourages them from investing.

For his part, Diogo Drago[76] considers that there is nothing "to prevent a company, under the *lex privata* on which its articles are based, from being able to reward the loyalty of all or just some of its shareholders[77] or in relation to a given class of shares (in a public limited company)".

It is therefore his view that a public limited company may make provision for loyalty shares as special rights awarded to the shareholder who subscribes them, subject, however, to the rule established in Article 24 of the Companies Code, but excluding application of Article 384.5 of the same Code. In other words, a public limited company cannot assign multiple voting rights to its shareholders, but may reward them with a loyalty bonus.

Madalena Perestrelo de Oliveira addresses the topic from another perspective, in an article entitled "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-Shares*"[78]. Whilst pointing out that the "one share, one vote rule has remained uncontested for public limited companies in Portugal", she questions whether this rule can be transposed to listed public companies[79], insofar as it was not designed with these companies in mind, arguing, in short, that:

– the one share, one vote principle has ceased to apply to issuer companies, rendering the prohibition

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[75] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 30.
[76] "*Loyalty shares*: um meio de controlo ou o acentuar de conflitos no seio societário?", *Revista de Direito Comercial*, Porto, 2017, p. 434.
[77] But only in companies by quota shares, in an effort to preserve the loyalty of that shareholder in particular.
[78] *Revista de Direito das Sociedades*, year VII (2015), number 2, pp. 435-470.
[79] Defining as public companies whose shares are admitted to trading on a regulated market.

of multiple voting in public limited companies (apparently also applicable to listed companies) an obsolete and merely formal rule;

- the *raison d'être* of this principle is entirely divorced from the reality of the capital markets, where a separation prevails between ownership and exercise of voting rights, as shown by the growing use of proxy advisors;
- Article 384.5 of the Companies Code must be interpreted restrictively, to the effect that the prohibition of providing for multiple voting in the articles of association does not apply to issuers;
- Article 24 of the same code allows double voting rights to be assigned to classes of shares and to be transferred with them;
- introduction of share classes with multiple voting rights during the lifetime of a company must comply with the general rules on amendments to the articles of association;
- the issuing of privileged shares in a company where previously only ordinary shares existed does not upset the balance of power relations between shareholders, insofar as all shareholders are entitled to preferential rights in the same proportion to their holding;
- in the case of companies where other classes of shares with special rights already existed, this must entail additional approval (by simple majority) in a special general meeting of the holders of shares in the classes indirectly prejudiced by the decision;
- if this new class of shares is created by the issue of shares for cash subscription, the shareholders will have preferential rights, which ensures that the potential dilution of their holding is accompanied by a compensatory measure allowing them to prevent it;
- the principle of equal treatment of shareholders means that all shareholders must have the opportunity to access special rights, commensurate to their holding in the company;
- admitting that Article 384.5 of the Companies Code applies to issuer companies, it functions only as a limit on classes of shares and loyalty shares that do not fit within the concept of "special right" for the purposes of Article 24 of that code, insofar as loyalty shares may be granted to all and any shareholder that owns shares without interruption for a given period of time;
- Article 384.5 of the Companies Code must be interpreted restrictively to the effect of setting a limit on the permission established in Article 24 of the same code;
- in other words, it is prohibited in unlisted companies to establish multiple voting, but in listed companies that rule only functions as a limit on the creation of classes of shares with special rights, in other words, it does not permit the creation of classes of shares with multiple votes;
- as loyalty shares do not enshrine special rights, because multiple voting applies to all long-term shareholders, Article 24 of the Companies Code does not apply and, for this reason, those shares lie outside the scope of application of Article 384.5 of the same code.

Lastly, Eduardo de Melo Lucas Coelho[80] limits himself to asserting the prohibition for the future contained in Article 384.5 of the Companies Code, focussing his attention on the transitional rules established in Article 531 of the same code.

IV. Some reflections.

1. From the brief and limited historical overview of this subject it follows that, having started out as an initiative freely undertaken by entrepreneur shareholders concerned about keeping control of their companies or defending them against potential takeovers by foreign investors (it would not have the same impact if the investors were not foreign), multiple voting shares have gradually been prohibited around the world as a result of abuses that have been detected. In some cases the ban is absolute, while in others exceptions are allowed.

With a number of minor adjustments here and there - in particular in France and Italy, where these shares have proved more resistant to efforts to eliminate them -, the matter has suddenly regained traction as a result of a decision to close a steelworks in France, as if it offered a miracle cure that responded to the overriding and urgent need to save the real economy (*visant à reconquérir l'économie réelle*) in that country, or else to save the securities exchanges and the wider economy from the ills of short-termism, which the Spanish legislator took such pains to enumerate.

But is that really the case?

2. Our own limited research has raised a number of issues, the analysis of which may be helpful in understanding why, how and with what aims some of these legislative initiatives were undertaken. We may therefore ask:

– what did the legislator do?
– what did it seek to achieve?
– was the form chosen for the legislative initiative the right one for the proclaimed goal?

Given that, in jurisdictions such as France, Italy and even Belgium, multiple voting was already permitted in listed and unlisted companies, the main aim of these legislative interventions was to permit or facilitate the adoption of multiple voting shares by issuer companies.

In France - where, we may recall, the articles of more than half the companies in the CAC index already provided for double voting for shareholders who held on to their shares for a minimum period of two years - what is noteworthy is the "aggressive stance" taken by the legislator. By adopting an opt-out system, the French government clearly wished to impose this mechanism, leaving a narrow door for issuers to opt out, by means of an amendment to the articles, approval of which was subject to a qualified majority.

[80] *Direito de Voto dos Accionistas nas Assembleias Gerais das Sociedades Anónimas*, Lisbon, Rei dos Livros, 1987, pp. 69 and 70.

In contrast, Italy and Belgium maintained rules which we would describe as normal, in other words, that permitted double voting shares but left it to the issuer companies to take the initiative, i.e. a company wishing to introduce them would have to make the necessary and appropriate amendment to its articles of association.

In Italy, the government also tried to lower the majority needed for this purpose, reducing, on an exceptional basis, the quorum for adopting resolutions to a simple majority, instead of a qualified majority, in order to facilitate adoption of double voting shares. However, pressure from investors and the market in general appears to have forced the government to step back and maintain the qualified majority needed to amend the articles of association.

However, in Belgium - without any significant reactions having being observed for or against -, the draft law, which has since been approved, requires a smaller qualified majority (2/3 instead of that was until then[81] the normal 3/4 of votes cast[82]) for adoption of double voting. We can see no justification for this lower requirement. If for any other amendment of the articles of association of a listed company, whatever it might be (and there will be some that will have little or no impact on the principle of equal treatment of shareholders), a quorum for adopting resolutions of 75 per cent of the votes cast is required, to reduce that quorum for an amendment with such a significant impact, such as for the introduction of loyalty shares, leaves dissenting minority shareholders unprotected.

It may of course be argued that, if they are opposed to the change, the shareholders may sell their shares, probably for below their listed price, when the decision is announced to call the general meeting for that purpose, or when such a meeting is called, but we are left with the feeling that this measure has a negative impact on the trading value of the shares. This justification seems to us to be weak, at best, whatever the scenario or the reason. A shareholder acquired shares in the capital of a listed company within a given legal framework and was accordingly prepared to accept decisions that may be contrary to its interests within the terms of that legal framework. Much less when the aim is to encourage shareholders to remain in listed companies in the long term, the first step is to deprive 9.4 per cent of the votes present or represented at the general meeting that approves the introduction of loyalty shares of any possibility of action. All the more because, as we shall see, there is no other legal mechanism to protect the interests of minority shareholders, e.g. the right of withdrawal, as enjoyed by shareholders in Portugal when the registered office is moved to another country[83].

It is clear that the legislator's premise may be that this change to the articles of association is beneficial for minority shareholders and so they have no reason to be against it, as their interests will be perfectly aligned. From the market reactions (very limited, it is true), there does not appear to be any type of alignment, rather the contrary. We have only seen opinions that disagree with the measure.

3. As justification for this legislative change, we have seen several arguments: promotion of long-term

[81] The rule of a 2/3 qualified majority has taken effect, replacing the 75 per cent rule previously in force.
[82] Requiring, at the first call, no less than half the share capital to be present or represented. At the second call, no minimum quorum is required.
[83] Article 3.5 of the Companies Code.

investment, reducing share turnover so as to allow companies to be managed with a long term view, making it possible for the owners of family companies to go public, enabling them to raise capital to fund expansion, reducing short-termism, promoting the listing of new companies, increasing investment in R&D, reducing the risk of hostile takeovers[84], permitting issuers to pursue aims which are not solely financial, such as employee welfare and environmental protection, ensuring the long-term sustainability of companies, reducing the negative impact on the economy and, lastly, reducing the risks to stability of the capital markets and to the economy. This is to name but a few.

Madalena Perestrelo de Oliveira[85] has written that "the big problem of the capital markets is the duration of investments, which results from the aspiration of institutional investors to attract ever more investors, and to this end to seek to present the most impressive results in the very short term. The consequences of this bias, favouring short-termism, may be summarised in three effects: loss of investment opportunities, greater risks and shying away from planning and innovation".

Whilst not disagreeing with the "diagnosis", we have doubts as to whether loyalty shares are the right "treatment". Or, at least, the only "treatment".

Of all the justifications presented, only one truly appears to make sense: to create an environment that encourages new companies, especially family firms, to go public, by applying to have their shares traded on a regulated market. Although adoption of the American system of multiple voting shares might be a feasible alternative, with its own advantages and drawbacks.

The rest smack of excuses, some of them opportunistic or crowd-pleasing, to justify intervention by the legislator.

Whilst, in the early twentieth century, legislative changes were grounded in efforts to protect the public interest (putting an end to abuses arising from the lack of legal regulations), we fail to see in these recent legislative changes as regards loyalty shares anything that protects that interest.

In Italy, it appears to have been a hurried reaction to the Chrysler-Fiat episode and, to an extent, justification is found for the legislative change and the attempt to reduce the quorum for passing resolutions to introduce a loyalty shares provision in the articles of association. This was swiftly abandoned in the face of pressure from investors and, as far as we can see, there were no calls from family shareholders with significant holdings in listed companies for the company to hold out against that pressure.

In the case of Spain we can point to a series of clichés, without empirical substance, that were paraded as grounds for legislative interference.

To a certain extent, it is in France, although where a much more radical solution was adopted insofar as

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[84] We must confess hostility to this idea: hostile takeovers? Hostile to whom? To the shareholders, who are able to reject them? Or perhaps to the board of directors of the issuer? Who take what interests into account? Their own? Or those of the company? And, in this case, how should we define the interests of the listed company? Are they the same as those of the shareholders? In this case, might the board of directors have no cause for concern, because it is precisely the shareholders who will decide on the success of the bid, by accepting or rejecting it? Or those of other parties involved, workers or suppliers of the company in question? And in this case, are these interests sufficient to classify the bid as hostile?

[85] "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-shares*", *Revista de Direito das Sociedades*, year VII (2015), number 2, pp. 461-462.

it imposes these rules on issuers, that the justification appears real, albeit indirectly. The French State wished to protect its holdings in listed companies, whilst at the same time creating a framework in which it could scale down its holding, by selling shares, without losing voting power, and consequently its ability to influence those companies[86].

4. Another question that we regard as important is to what extent the doubling of votes is the right way to attract long-term investors. As if that voting power is what investors accused of short-termism were seeking. Of course, this solution may be seen in two ways:

- speculative investors and institutional investors always take a short-term view, so there is nothing that will make them change their minds;
- it is necessary to lay the foundations for attracting other investors (neither institutional nor speculative), interested in keeping their shares in the long term (so more than two years) and thereby to combat the short-termism of those speculative or institutional investors.

It follows from the first hypothesis that the doubling of voting rights after two years is sufficient to dampen the short-term appetites of speculative and short-term investors. It follows from the second that an opposing current will counter those appetites and that the new entries to the stock market will attract new investors and permit the boards to manage the company with a view to its long-term interests.

However, in both cases, the factor that makes a difference is the doubling of voting rights. This is the distinctive factor which, in the view of the French, Italian, Belgian or Spanish legislators, will change behaviour.

Frankly, we are not convinced. We may recall the number of French listed companies whose articles of association already provided for double voting as a reward for long-term investment. In Portugal, we have witnessed the absence of any intervention by the representatives of institutional investors at the general meetings of issuer companies. How many people have taken part or witnessed meetings of issuer companies at which a number of shareholder representatives have their laps full of the credentials of a great many shareholders, and then limit themselves to abstaining or voting against the majority on resolutions, as a way of evading liability for any adverse consequences of voting in favour of the motions? These motions recurrently include those for approval of the report and accounts, allocation of profits or assessment of the company's directors and auditors.

On the other hand, this measure means that investors must agree to register the shares directly in their own name. We have seen that many have no wish to do so and we do not believe that a doubling of voting rights is sufficient argument or incentive for them to change their minds. Not least because, in most cases, it seems to us (we stress, *seems*) that they prefer not to have the responsibility that exercising voting rights entails.

For example, this is what recently appears to have happened at EDP – Energias de Portugal, S.A.. Targeted by a takeover bid from the largest shareholder, which was late in being registered because of the countless administrative authorisations required, as a result of the company in question being present in several

86 The case of the purchase of shares in Renault is, we believe, an example of precisely this.

jurisdictions, and in particular in the USA, that takeover bid was contested by a fund managed by Elliot Management Corporation which, in a letter to EDP's supervisory board, expressed its opposition to the takeover bid. This hedge fund[87] acquired 2.2925 per cent of the share capital of EDP after the launch of the takeover bid, allowing it to add an item to the order of business at the annual general meeting, which effectively derailed the bid.

The financial capacity of these investors is such that they are able, overnight, to acquire significant holdings in issuer companies, with a view in all cases to a financial gain on their investment, or, to put it more crudely, to making money. And the more money they have, the more money they earn (and sometimes lose).

There are even those who consider that there is a serious risk of investors of this type - any type of funds managed by management firms such as Elliot Management Corporation (investment funds, pension funds, in short, institutional investors) – becoming the leading shareholders of the largest listed companies. Low interest rates, a drastic reduction in the ability of traditional banks to act as shareholders in issuer companies, and the lack of alternative investments have worked in favour of these vehicles, which have unrivalled financial capacity, comparable to that of some sovereign states and actually greater than that of many.

5. But might this be the only solution? To what extent will altering the balance of power by allocating a larger number of votes contribute to curtailing short-termism? Or to increasing the R&D budget? Is the board of directors of the issuer company likely to stop feeling pressure from shareholders to deliver short-term results, or will it know or infer that, with loyalty shares, they are not interested in short-term profits, thereby allowing it to concentrate its attentions on the mid-term and not on immediate gain?

If that is the case, the solution will only have its desired effect during the first two years after the adoption of loyalty shares. After that period, speculative investors and institutional investors will again apply pressure to obtain short-term profits. But they would be countered by long-term investors who, attracted by having an additional say on management matters (double voting), would defeat any motions by those malevolent investors.

As if pressure was applied, at the general meeting, by exercising voting rights!

Larry Fink[88], in the annual letter sent since 2012 to companies in which BlackRock owns holdings[89], notes that "*unnerved by fundamental economic changes and the failure of government to provide lasting solutions, society is increasingly looking to companies, both public and private, to address pressing social and economic issues".* And he adds that "*purpose is not the sole pursuit of profits but the animating force for achieving them. [...] Profits are in no way inconsistent with purpose – in fact, profits and purpose are inextricably linked. Profits are essential if a company is to effectively serve all of its stakeholders over time – not only shareholders, but also employees, customers, and communities"*.

87 A wide-ranging term normally used to describe an alternative investment entity designed to protect investment portfolios from market uncertainties, meaning that, unlike other funds, they are normally able to invest in any type of asset (currencies, real estate, unlisted equities, etc.), as they are not subject to such restrictive regulations.
88 Chairman and CEO of BlackRock, currently the largest asset manager. In June 2019, it had 6.84 trillion US dollars in assets under management.
89 See <www.blackrock.com>.

It might be merely cosmetic, but it is nonetheless impressive, for both its initiative and content, as it looks to us more than just public relations speak, or pressure to obtain immediate financial gains. But let us not be mistaken: as an asset manager, that is or should be his principal concern. What is impressive is his conviction as to the influence on the boards of issuer companies in which BlackRock (or the funds under its management) has holdings. If the interests are not in the least aligned with the goals described in that message, BlackRock purely and simply reduces its investment or pulls out altogether. That simple. And voting rights are utterly irrelevant to all this. It is the weight and the financial capacity of these asset managers that make the difference. This is a recent paradigm which, we believe, will only grow in importance.

6. We found few references to alternatives to double voting shares for pursuing the aims delineated by the legislators in several countries. Examples of these might be increasing the dividends distributable to shareholders who held on to their shares for a given period, as a way of offsetting short-termism. This was introduced in France in the 1990s, with shareholders required to hold shares for at least two years, and in Italy, in 2010, with a minimum ownership period of one year. However, in both cases, a series of other limitations could be identified, as pointed out by João Nuno Pinto Vieira dos Santos[90], such as limitations on the total value of the additional dividend distributed or on the percentage of the share capital owned by the shareholder, in order to qualify for the additional dividend.

According to this author, in France, back in the 1990s, several French companies – Air Liquide, De Dietrich and Siparex – added clauses to their articles of association permitting the award of a loyalty bonus to shareholders who kept their shares for two years, "a process designed to build shareholder loyalty so that the company could be managed with a view to the long term, to distinguish loyal shareholders who deserve to be rewarded recompensed for showing a greater concern for performance than for capital gains, from speculators, and lastly to keep tabs on evolution of their body of shareholders, thanks to the development of registered accounts"[91-92].

Let us look, albeit briefly, at the case of Michelin. In 1991, following its acquisition for 1.5 billion US dollars of Uniroyal Goodrich, Michelin was left with a debt of 810 million US dollars, which weakened its balance sheet. In view of its losses in the previous year (4.8 billion US dollars), and despite having suspended dividend payments, Michelin decided to issue loyalty shares, in the form of warrants, with a maturity of four years, carrying a loyalty bonus attributable to all shareholders who kept their shares for a period of two years, on two conditions:

- the warrant could only be exercised by shareholders who held on to their shares for a continuous period of two years; and
- they would have to exercise the corresponding right[93].

[90] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 11.
[91] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 15.
[92] The same measure was apparently later implemented by Lafarge and by L'Oréal Finance.
[93] MADALENA PERESTRELO DE OLIVEIRA, "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-shares*", *Revista de Direito das Sociedades*, year VII (2015), number 2, p. 463, and PATRICK BOLTON

Although in the distant past, these initiatives were not enough to convince the French legislator who, more than 20 years on, felt that fresh changes were needed to encourage long-term interest in shareholders in issuer companies.

7. Of the four legislative initiatives referred to, that in Spain, perhaps because it is the most recent, might well be the most complete, regulating issues overlooked elsewhere[94]. One of the aspects that in our view merits attention is the question of whether loyalty shares should constitute a class of shares, although we found no reference to this in the draft legislation in Spain.

In France, the legislator appears not to have taken a position, and so legal theorists have understood, albeit not unanimously, that this is not so, insofar as the rules on loyalty shares are constantly redefined. But there appears to be no consensus[95]. For this reason, both in Italy (Article 127 *quinquies, TUF*), and in Belgium (Art. 7:53, § 3), the legislator approved an express rule.

This is not a minor issue, because, if they are deemed to constitute a class of shares, any change that may negatively affect their rights will have first to be approved by the shareholders owning shares of this class. This is what would have happened in Italy – Article 2376 of the Italian Civil Code – had the Italian law not clarified that double voting shares are not deemed to constitute a class of shares[96]. João Nuno Pinto Vieira dos Santos writes that these "shares will not be considered a special class because the benefit does not arise from an intrinsic characteristic of the share, but from the duration of its ownership, i.e. this is a benefit attributed to the holder of the share, and therefore not one that circulates with the share"[97].

As pointed out by João Nuno Pinto Vieira dos Santos[98], under Portuguese company law, would we be dealing with a special right? We should recall that this is a matter for debate in French legal theory and that, in Italy, Belgium and in the preliminary draft of the Spanish legislation - prudently, moreover[99] – the shares benefiting from this special right do not constitute a class of shares. Adding the following: "[...] as special rights in public limited companies are attributed to a class of shares and not to particular shareholders, we wish to establish whether loyalty shares may constitute a class of shares, insofar as shares carrying equal rights form a class"[100]. And he adds, in the part of the greatest interest for our present purposes, that, in view of the rules established in Article 24.4. of the Companies Code, "there appears to be an incompatibility between the *intuitu personae* character of loyalty shares and the rules on classes of shares".

(Columbia University) and FRÉDÉRIC SAMAMA (SWF Research Initiative and Amundi), "Loyalty Shares: Rewarding Long Term Investors", *Journal of Applied Corporate Finance*, volume 25, number 3, 2013, p. 43.

[94] To this effect, JOÃO NUNO PINTO VIEIRA DOS SANTOS, *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 11, stating that "[t]he delay in legislating in Italy appears to have been beneficial, insofar as the Italian rules on loyalty shares (Art. 127 *quarter,* TUF) are much more thorough than those in France".

[95] See the authorities cited by JOÃO NUNO PINTO VIEIRA DOS SANTOS, *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 12, footnote 26.

[96] Article 127 – *quinquies, TUF*.

[97] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 12.

[98] *Acções de Lealdade. A Primazia dos Interesses da Estabilidade a Longo Prazo da Empresa Social*, Porto, 2014, p. 22.

[99] Insofar as the debate is avoided, but to the clear detriment of the rights of minority shareholders.

[100] Companies Code, Article 302.2.

In his assessment of the legal rules on double voting shares in France, Paulo Olavo Cunha[101] concludes that "the holders of these shares form a class of shareholders, and this is not a class of shares".

For his part, Diogo Drago[102] sees no obstacle to "the *possibility* of a public limited company regarding these shares [loyalty shares] as special rights conferred on the shareholder who subscribed them: provided they consist of prerogatives that are granted in addition to the shareholder's rights arising from the law or the articles, due simply to his standing as shareholder in a public limited company. They will therefore be subject to the rules established in Article 24 of the Portuguese Companies Code".

Lastly, Madalena Perestrelo de Oliveira[103] – who, we may recall, considers that Article 384.5 of the Companies Code should be interpreted restrictively to the effect that the prohibition of establishing multiple voting in the articles of association does not apply to issuer companies - argues that "double voting rights may be attributed to classes of shares and transferred with those shares".

8. The granting of double voting for certain shareholders may have the consequence of exceeding the threshold for the duty to launch a takeover bid. Neither in France[104], nor in Italy did the legislator make any specific provision in this regard. The shareholder will accordingly have no alternative but to dispose of enough shares to bring its holding to below that threshold. According to Madalena Perestrelo de Oliveira[105], prior to the *Loi Florange*, "there were two solutions: *(i)* either to convert some of the registered shares to bearer shares (thereby reducing the percentage of votes), *(ii)* or to sell part of the holding. As things now stand, the rules have created another way of evading the duty to launch a takeover bid, in cases where a shareholder who was already above the relevant threshold at the date when the law took effect, decides to sell some of its shares and, two years later, again exceeds the threshold due to the award of double voting rights, but without exceeding the percentage of votes it had upon the entry into force of the *Loi Florange*".

In Italy, Article 107 *TUF* was amended in 2014, but provided for no exception. A shareholder with votes representing more than 30 per cent of the voting rights must launch a takeover bid for all the other shares whose votes are not imputed to him, which may raise delicate questions, in particular with regard to the price for which that bid should be made[106].

In Spain, the proposed legislation expressly establishes that the additional loyalty votes (*los votos adicionales por lealtad*) will be considered for the purposes of the obligation to notify significant holdings established in Article 540 and the obligation to submit (*formular*) a takeover bid as provided for in the *Ley del*

[101] *Os Direitos Especiais nas Sociedades Anónimas: as Acções Privilegiadas*, Coimbra, Almedina, 1993, p. 67, cited by JOÃO NUNO PINTO VIEIRA DOS SANTOS.
[102] "*Loyalty Shares*: um meio de controlo ou o acentuar de conflitos no seio societário", *Revista de Direito Comercial*, p. 435.
[103] "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-shares*", *Revista de Direito das Sociedades*, year VII (2015), number 2, pp. 452-453.
[104] As far as we are able to understand, the French legislator appears to have approved a series of transitional rules on the attribution of votes resulting from the entry into force of the law introducing loyalty shares in excess of the 30 per cent threshold or that exceeded that threshold within two years of the law's approval.
[105] "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-shares*", *Revista de Direito das Sociedades*, year VII (2015), number 2, pp. 441.
[106] MARCO VENTORUZZO, "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015, p. 15.

Mercado de Valores (Securities Market Law). No provision, however, is made to the general rules, and so, for the purposes of the duty to launch a takeover bid, loyalty votes are counted in the same way as other votes.

9. In Italy, the amendment of the articles of association of a company in order to introduce double voting shares raised the question of the withdrawal of shareholders who dissented from the winning proposal. Article 127 *quinquies*, paragraph 3, *TUF* expressly states that this change does not entitle dissenting shareholders to the appraisal right or the right of withdrawal, under the terms of Article 2437.1 *g)* of the Italian Civil Code. According to Marco Ventoruzzo[107], some authors in Italy consider that this "weakening" of shareholders who do not hold their shares for the period entitling them to more votes ends up being irrelevant, because this right is available to all shareholders, provided of course they hold on to their shares for the period necessary for that purpose. But Ventorruzo is doubtful whether this explanation justifies the protection of minority shareholders who vote against an amendment to the articles introducing multiple voting, as a result of which they become the shareholders of a company which may fall under the control or another company or other shareholders and in a situation which may therefore make it difficult to sell their shares.

He adds that this question can be turned on its head. In other words, should dissenting shareholders be allowed appraisal or withdrawals rights, when loyalty shares are eliminated? He argues that they should, because that decision undermines the rights of investors, long-term shareholders. All the more so if we consider that loyalty shares are not a special class of shares, not having therefore, voting rights, and it thus being a measure that may undermine their rights. Appraisal rights would therefore be a way of protecting their rights.

In Spain, the proposed legislation intended to introduce loyalty shares contains no specific provision on this matter (neither for the amendment to the articles designed to permit double voting shares, nor for elimination of that provision). However, 10 years after their adoption, the additional votes carried by those shares are not considered for determining the quota and majorities needed to legitimate an amendment to the articles of association intended to eliminate these additional voting rights[108].

10. The *Loi Florange* establishes that "[i]n the event of capitalisation of reserves, double voting rights may be conferred, as from issue, to the registered shares allocated free of charge to a shareholder already benefiting from that right (Article L225-123 of the *Code de Commerce*)»[109-110].

In Spain, the draft law contains a similar provision, stipulating that additional loyalty votes will automatically be carried by shares allotted free of charge as the result of a capital increase.

Belgian law - Article 7:53, § 1[er]. – contains a provision with the same purpose, as does the Italian law (127 *sexies*, paragraph 2, *TUF*). But the Italian rules go a little further, because they include not only capital

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[107] "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015, p. 15.

[108] Article 527 *sexies*.

[109] MADALENA PERESTRELO DE OLIVEIRA, "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-shares*", *Revista de Direito das Sociedades*, year VII (2015), number 2, p. 441.

[110] "[...] *Il en est de même pour le droit de vote double conféré dès leur émission aux actions nominatives attribuées gratuitement en application du deuxième alinéa*".

increases through capitalisation of reserves, as stated, but also capital increases where preferential rights are awarded to all shareholders or where the issue results from a merger or demerger.

Both as a result of share issues through capitalisation of reserves, which accounts for most cases, and, also in Italy, in the case of capital increases through fresh subscriptions where shareholders have preferential rights, it is possible to raise the question of the transfer of the corresponding capitalisation or subscription rights. Are there any limits to their transfer? It is our view, in principle, that there should not be, but how then to regulate transfer of double voting rights, if such exists? Are they transferred if the acquirer already enjoyed that privilege in relation to shares he already holds, and not transferred in other cases? How is this to be controlled?

11. The special right of double voting is attributed not to shares, but rather to their holder, if it holds on to the shares for a continuous period normally of no less than two years. Accordingly, in principle, upon transfer of the shares (or their conversion into bearer shares), the acquirer does not "receive" that double voting right, which is therefore and thereby extinguished upon such transfer. As a consequence, the shares lose "their" double voting status.

In Spain, according to the draft legislation, those are the planned rules, although exceptions are envisaged, which can be precluded by provisions of the articles of association of the issuer company in the event of:

– succession to the estate of deceased persons;
– dissolution of marriage with community of acquired property (*sociedad de gananciales*)[111];
– gift between spouses, persons in an equivalent relationship (*personas ligadas por análoga relación de afectividad*), or between ascendants and descendants;
– structural changes to the company - we may assume these to be merger or demerger - as established in *Ley* 3/2009, of 3 April (*sobre modificaciones estructurales de las sociedades mercantiles*).

French law – Article L225-124 of the *Code de Commerce* – envisages similar rules.

As does Belgian law (Article 7:53, § 2), which appears to be more thorough, as it also includes, in the list of exceptions, transfer of shares between companies under joint control or under the joint control of the same controlling shareholders, among other cases. In these cases, the change in control extinguishes the double voting rights, unless that loss of control is in favour of a spouse or the persons entitled to inherit from a shareholder.

The same is true in Italy – 127 *quinquies*, paragraph 3, *TUF* –, but, as Marco Ventoruzzo points out[112], the rules established by the Italian legislator are not entirely issue-free. In effect, in view of the rules established in that article of the TUF, if a shareholder holding shares with double voting rights transfers them to a company to pay up a holding that is has subscribed, it forfeits that right; however, if the shareholder holding that privilege is the controlling or sole shareholder of the company receiving the shares, this is not entirely comprehensible.

[111] In Portugal, as noted above, equivalent to community of acquired property.
[112] "The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat", ECGI, *Law Working Paper* no. 288/2015, March 2015, p. 15.

IV. Closing Notes

1. From this brief observation of the rules in force in several countries, in particular in Europe, concerning the recent introduction of double voting loyalty shares and, very briefly, multiple voting shares, a number of conclusions or avenues emerge which may, on the one hand, help us to understand why the legislators took this step and, on the other hand, to assess whether it would make sense in Portugal to introduce loyalty votes in companies with shares traded on regulated markets.

We would have liked to have been able to examine, in slightly more detail, the rules on dual class shares, fairly popular in the United States, particularly in certain sectors, as well as what are called L-shares, as these would provide a useful comparison with the rules of double voting loyalty shares.

2. Given time constraints in this research, we may note that, following on from adoption of the *Loi Florange*, other countries, as we have seen, have felt the need to adopt similar rules, to promote their capital markets and facilitate the "listing of family firms", as appears to be the case in Italy, perhaps nudged by the Chrysler-Fiat "case", or in Spain, prompted by a sudden concern about short-termism.

The *Loi Florange* envisages a series of legislative measures *"visant à reconquérir l'économie réelle"*, amending several provisions of the Labour Code[113] and the Commercial Code, in particular by introducing loyalty shares. Insofar as this note is concerned, what surprised us was the introduction of the opt-out rule, i.e. that the rules applied to all companies with shares admitted to trading, unless the shareholders, at the general meeting, resolved otherwise. Although our research has only touched the surface, this was the only case we discovered.

It is clear, as we have seen, that this topic was not unknown in France - at the time, half of the largest companies with shares admitted to trading already provided for double voting shares - and it may even be argued that this legislative initiative was the natural culmination of a process of evolution intended to promote long-term financial investment, as the government at the time appeared to argue. However, from the different reactions to the law, some of which we have referred to, something else appears to have been at play. It is speculated that this was a cheap and expeditious way for the French State to reinforce its position in companies in which it owned holdings, such as Orange, Air France[114], Safran, Engie and Renault[115]. In the French car manufacturer, as holder of shares representing 15 per cent of the share capital, the State stood to double its voting rights[116], whilst Nissan, for example, Renault's partner in a joint venture that was hugely successful for

[113] The French Constitutional Court has ruled some of the provisions of the *Loi Florange* to be unconstitutional (notification obligations incumbent on employers, breach of property rights and the freedom of enterprise, breach of the principles of necessity and proportionality of punishments) and upheld the constitutionality of others (*Décision nº 2014-692 DC, du 27 mars 2014*).

[114] Similarly to what happened at Renault, the French State, which at the time owned shares in the capital of Air France-KLM, acquired shares representing more than 1.7 per cent, in order to prevent it from opting out. At the time, Emmanuel Macron was already Minister of the Economy and Industry.

[115] As we have seen, the French State apparently sold these additional shares it had acquired by the end of 2015, after ensuring that Renault's shareholders would not vote in favour of opting out.

[116] On 22 April 2015, the Agence des Participations de l'État announced that it had increased its holding in Renault to 20 per cent,

both manufacturers, held the same percentage of shares, but without voting rights.

At the time of the approval of this law, Emmanuel Macron[117] had been deputy secretary-general to the Presidency of the Republic since 2012 and one of the main advisers to François Hollande, having later been appointed Minister of the Economy and Industry in August 2014, four months after the approval of the *Loi Florange*[118].

3. Whatever the underlying reasons in France, Italy, Belgium and Spain, we have found no indication that the legislation was driven or prompted by requests or demands from the market or groups of shareholders. In The Netherlands (somewhat in the Anglo-Saxon tradition), the initiative came not from the legislature, but solely from the courts, in order to settle disputes arising from the introduction in articles of association of provision for shares carrying additional dividends. And in Germany, since 1937, which prohibited them, and in the United Kingdom, due to pressure from investors and the market rules, there are no double voting shares in issuers with shares admitted to premium listing.

In the United States, as moreover is frequently the case with regard to shares carrying more than one vote, the story has been the other way around. The market was free to accept them or not - NYSE had not accepted than for six decades -, but competition between stock exchanges and the appetite of certain issuers for shares with this characteristic led to changes, albeit without any legislative intervention. This, as we have seen, actually became fairly popular among issuers in certain sectors of the economy.

In Brazil, the one share, one vote principle prevails, although there has been movement towards a degree of change.

In the European countries where legislation has been mooted to admit and regulate loyalty shares, several reasons have been presented for this intervention, in greater or lesser detail, as referred to more than once above. To promote long-term financial investment. To persuade the shareholders of family companies to list these companies on organised markets. To reduce short-term investment, rewarding shareholder loyalty.

But does the legislation actually achieve any of this?

The preamble to the Spanish legislation makes reference to several studies pointing to the detrimental effects of short-term investment. But it does not follow from this that offering more votes to those holding shares in issuers for a given minimum period will ward off short-term investors. The fact is that this effect might be achieved in one of two ways, or even in both.

On the one hand, by conferring more votes on potentially loyal shareholders (understood at those who

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stating that "*[c]ette opération marque à la fois la volonté de l'État de défendre ses intérêts en tant qu'actionnaire, en pesant en faveur de l'instauration de droits de vote double dans la gouvernance de Renault, et le caractère stratégique qu'il attache à sa participation au capital de cette grande entreprise industrielle*". This operation was apparently put together in four days, with Deutsche Bank as financial consultant, as the general meeting had been called for 30 April, thereby securing a blocking minority for the French State.

117 From September 2008 (after working as a tax inspector) to 2012, Emmanuel Macron worked at Rothschild & Cie Banque, becoming a partner in 2010.

118 It is speculated that Carlos Ghosn fell from grace as a result of this confrontation, because he knew that the Japanese would never accept a merger with Renault or agree to Nissan being controlled by a foreign state, even if indirectly or by proxy. He had no wish therefore to go ahead with a merger of Renault and Nissan, a plan that was supported by the French government and Emmanuel Macron: "*prenez le contrôle de Nissan et fusionnez*" are the words attributed at the time to the now French president.

hold shares for a minimum period of two years), these shareholders will protect the company - by exercising their voting rights - from the ill effects of those short-term investors. But how? By voting against the distribution of dividends? By voting in favour of retaining the directors? By voting against a proposal for dividend distribution tabled by short-term shareholders? To what extent is this additional voting power necessary or useful for protecting the company? Do they re-elect or decide not to dismiss the board that manages the company with a view to the long term and which, for this reason, does not propose distribution of dividends as demanded by "short-term" shareholders?

On the other hand, by offering more votes, the legislator hopes to reward short-term investors for the loyalty they show by remaining shareholders for a minimum period of time.

If the first seems to us naive, insofar as it will be of little practical use, the second appears to be far from able to achieve its desired purpose. This is because it assumes that short-term investors are sensitive to voting rights, that this is something they value. But to us this seems rather less than obvious.

Financial investors, investment funds, hedge funds, vulture funds, automated trading platforms designed for high-frequency trading[119] and even institutional investors invest to obtain a return. In money! Not in votes. It is our view that they have no interest whatsoever in securing control of the listed company or having an active voice, albeit indirectly, in its management. What they do want is to maximise the return on their investment in the shortest time possible. For this purpose, voting rights may not even be relevant. We should look, moreover, to what is happening in the US, in particular in listed tech corporations (but not only these), where, as we have said, multiple voting shares are concentrated in the hands of a small number of shareholders, meaning they are beyond the reach of the market and, therefore, those shareholders - who nonetheless still invest; in other words, buy and sell shares.

The financial capacity of some of these funds is absolutely extraordinary. For this reason alone, we believe that this system goes half way to achieving the desired outcomes. We may recall the incursion by Elliot Management Corporation into the share capital of EDP – Energias de Portugal, S.A., buying up 2.2925 of the shares, or the annual letter from BlackRock to the companies in which funds under its management own holdings. With that financial muscle, combined with tactics such as short selling, these are “opponents” that command respect. The only changes that these investors seek are those that lead - or that they believe may lead - to growth (or reduction) in the value of the shares in the issuer in which they invested (or are going to invest).

But it can still be argued that it offers another tool; that it will bring some benefit in countering short-termism. We do not demur. But all things considered, it appears rather inefficient and, above all, it opens the door to the defence of other interests - we may point to the intervention of the French State in Renault or Air France or that of Mr Vincent Bolloré in Vivendi –, not necessarily aligned with those of the issuer company or those of the other shareholders. It is admitted, nevertheless, that these cases occurred only in France, as a result of the opt-out rule, which was not enshrined in Italy, Belgium or, more recently, in the proposals in Spain.

[119] Which in some markets represents around 80 per cent of total trading.

4. French legislation brought far-reaching changes to the rules, while the game was in progress. Having examined the examples of Italy, Belgium and Spain, what stands out is not so much the existence of double voting shares (in France, they had actually existed for years and were used in a significant number of companies), but the new rules applicable to issuers. We refer, of course, to the opt-out rule. This had nothing to do with the events in Florange. It does nothing to defend the interests of the workforce of ArcelorMittal. It is in no way related to promises made by the then presidential candidate and future president François Hollande. But it points significantly to moves to bolster the position of the French State as shareholder in France's largest listed companies. It greatly suggests that it had a precise aim in view: that of maintaining control of Renault and Air France, without having to increase the State's holding proportionally (the bloc of shares in Renault purchased prior to the general meeting called to resolve on opting out was sold that same year, likewise pointing to the motive we mention).

And irrespective of whether all this was intentional, it may still prove useful in addressing the growing holdings of institutional investors, in particular investment funds, as we have stated, helped by the every greater receptiveness of traditional leading shareholders in these companies, above all families, and by a financial capability that currently only certain States can stand up to, although in all cases with burden of having to provide political justification for any increase in their holdings.

And in Portugal? In Portugal, there would necessarily have to be legislative change, in view of the prohibition contained in the Companies Code, despite the fact that Madalena Perestrelo de Oliveira[120] considers that this prohibition does not apply to issuers. She also argues that L-shares could be an appropriate technique for warding off the dangers of short-term investment, "in the context of the Portuguese market where the free float is very low, meaning that the usefulness of L-warrants is limited, we believe that the ideal model will be to grant multiple voting L-shares, although, of course, the strategy to be adopted depends on the goals that the company intends to pursue".

So far, at least, neither the various participants in the capital markets nor the respective regulator have felt the need to address and study this matter and, possibly, issue regulations, if the need for them is confirmed, despite the three references to this in the published legal doctrine. There does not appear to be a perception that, with such an instrument, it would be possible to promote the capital markets, convincing companies and their shareholders to go public. Or that this would achieve a curtailment of short-term investment.

And if such a perception emerges, we believe that steps should be taken only after careful reflection. Partly as the result of economic cycles, the globalisation of economies and, consequently, of investments, and of the size of the Portuguese economy, the number of listed companies continues to dwindle. To approve changes to the law just because other countries have taken this route - or, as Spain appears to have done, to keep the country's "legislation" competitive with that of other European jurisdictions - might be a good source of motivation, but it would be a poor reason to do so. Because of the size of our country, and all the consequences this entails, any legislative change that might be considered with this end in view should take this aspect, among

[120] "Direito de voto nas sociedades cotadas: da admissibilidade de categorias de acções com direito de voto plural às *L-shares*", *Revista de Direito das Sociedades*, year VII (2015), number 2, pp. 463-464.

others, into consideration.

This is the case, for example, with The Netherlands. It is clearly not because of the language[121] that investors and companies – we may point to the number of companies which have relocated to that country – choose that jurisdiction to base their companies. Such as the Chrysler-Fiat case and the Italian government's belated reaction. Or that of CNH and Ferrari, as mentioned. Contrary to what many in Portugal (above all, politicians, commentators and journalists) have and continue to argue, it is not for "tax reasons" or "to save on taxes". With the entry into force of Directive 2011/96/EU of the Council, of 30 November 2011, on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, the distribution of dividends between companies of different Member States (provided they own a given holding in the capital of the other) is exempt from tax. As a result, under this framework, the fact that the head office is located in Portugal or any other country of the European Union is absolutely neutral. Some of the noise that this topic has generated, and which can still occasionally be heard, albeit less vehemently, displays little more than ignorance, to put it kindly[122].

Instead, it is because of the flexibility that commercial law (company law, in particular) permits. Because of legislative stability, especially in taxation matters. Because of legal certainty and the consistency in the workings of the courts and in their rulings[123].

As João Soares da Silva pointed out, "[...] increasingly serious attention is today paid to voices calling for a neutral approach in legislation, permitting shareholders in each company to choose freely their own degree of contestability"[124].

We believe this is the road to follow. The shareholders in each issuer company should choose their own model, within certain parameters and provided the market is sufficiently informed of the restrictions and their effects.

This would be a topic - yet another - on which João Soares da Silva would offer a fundamental and decisive contribution. As he did so often in the course of his remarkable professional life.

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[121] Indeed, it is one of the main difficulties, although at first sight this might not be understood, because English is perfectly accepted as a working language. But when working in this language, we have more than once come across differences of detail - but significant - between the working version and the official text in Dutch – e.g. in the articles of association of a company.

[122] The same is true for individual shareholders who are resident for tax purposes in Portugal. The amount of tax paid is the same. But the tax collected by the Portuguese State is lower, in keeping with the double taxation agreement between the two countries, insofar as the tax withheld at source in The Netherlands is a tax credit in Portugal. Accordingly, the dividends received from a company based in The Netherlands by a taxpayer resident in Portugal will be subject to deduction at source in The Netherlands, normally at the rate of 10 per cent (under that agreement) and at the rate of 28 per cent in Portugal. But the amount paid in The Netherlands is a tax credit in Portugal. So the taxpayer is taxed at the rate of 28 per cent, but Portugal only collects the amount corresponding to 18 per cent.

[123] The litigation relating to Yukos is one of the best known examples.

[124] *A Propósito de* Corporate Governance *e de Direito das Sociedades e dos Valores Mobiliários – Escritos Vários*, Coimbra, Almedina, 2018, p. 103. Also in PAULO CÂMARA (ed.), *O Novo Direito dos Valores Mobiliários – I Congresso sobre Valores Mobiliários e Mercados Financeiros*, Coimbra, Almedina, 2017, pp. 91-104.