Squeeze-out and the protection of minority shareholders

Article 15 of the Takeover Directive vs the EU Treaties and the Charter of Fundamental Rights of the European Union

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ABSTRACT: The position of the minority shareholders can, at times, be a precarious one, particularly if there is a large, controlling majority in the same company. The squeeze-out allows a majority shareholder, in certain conditions, to purchase the minority's shares in the same company, regardless of their will to sell them. This article is aimed at pointing out certain legal shortcomings of the squeeze-out, as it has been introduced into EU Company Law by Directive 2004/25/EC, namely its compatibility with Article 17 of the Charter of Fundamental Rights of the European Union and Article 1 of the Additional Protocol 1 to the European Convention on Human Rights. Throughout this essay, we seek to illustrate how, in our view, the squeeze-out constitutes an encroachment in the right of property. In order to do so, we explored judicial decisions from the European Court of Human Rights, the ECJ and several national courts, as well as their legislations and overall experience with the squeeze-out. In the end, we concluded that the squeeze-out amounts to a form of expropriation, and subject to the same rules. As such it must satisfy, among others, the criteria of being in the "public interest", which in our view, both the legislator and the courts, when it concerns legislation where a fundamental right such as property is overridden, have failed to convincingly

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demonstrate. With this study, we seek to "stoke the fire" in the discussion of the legal conformity of the squeeze-out as a form of expropriation.

Keywords: Takeover Directive; minority shareholders; squeeze-out; property; expropriation

Resumo: A posição dos accionistas minoritários pode por vezes ser precária, principalmente se houver uma grande maioria controladora na mesma empresa. O squeeze-out (em Portugal denominado aquisição tendente ao domínio total) permite que um accionista maioritário, em certas condições, adquira as acções do minoritário na mesma empresa, independentemente de sua vontade de vendê-las. Este trabalho visa apontar as deficiências jurídicas do squeeze-out, tal como foi introduzido no Direito das Sociedades da UE pela Diretiva 2004/25/CE, nomeadamente no que respeita a sua compatibilidade com o artigo 17.º da Carta dos Direitos Fundamentais da União Europeia e Artigo 1.º do Protocolo Adicional 1 à Convenção Europeia dos Direitos do Homem. Ao longo deste ensaio, procuramos ilustrar como, em nossa opinião, o squeeze-out constitui uma usurpação do direito de propriedade. Para o fazer, explorámos as decisões judiciais do Tribunal Europeu dos Direitos do Homem, do TJCE e de vários tribunais nacionais, bem como as suas legislações e experiência geral com o squeeze-out. A final, concluímos que o squeeze-out equivale a uma forma de expropriação, e como tal, deveria encontrar-se sujeito às mesmas regras. Como tal, deve satisfazer, entre outros, os critérios de ser de "interesse público", que, a nosso ver, tanto o legislador como os tribunais, quando se trata de legislação em que um direito fundamental como a propriedade se encontra envolvido, não conseguiram de forma convincente demonstrar. Com este estudo, procuramos revisitar a discussão da conformidade legal do squeeze-out como forma de expropriação.

Palavras-chave: Directiva relativa às ofertas públicas de aquisição; accionistas minoritários; aquisição tendente à maioria total; propriedade; expropriação

1. **Introduction**

The matter of takeovers of companies is a complex one: in any given takeover, there are many interests at stake, be those of the shareholders, the offeror, the company's workers, etc... It is not unusual that a takeover fails in acquiring the entirety of the targeted company's shares, and that is precisely the matter that we shall concern ourselves with: the "squeeze-out" procedure in EU Company Law.

The squeeze-out is a mechanism which allows the majority shareholder to, under certain circumstances, acquire the remaining shares belonging to minority shareholders in the same company, regardless of their will to sell.

The objective of this paper is to determine whether the squeeze-out is compatible with the protection of the right of property enshrined in Article 16 of the Charter of Fundamental Rights of the European Union and Article 1 of the Additional Protocol to the European Convention on Human Rights (ECHR). We will make use of Article 15 of Directive 2004/25/EC of the European Parliament and of the Council of the 21st of April 2004, as it is the most relevant EU-level legislation in this matter.

It is perhaps useful to note that the Charter of Fundamental Rights of the European Union only became binding within the European Union after the entry into force of the Lisbon Treaty, on December 1st, 2009, and postdates the Directive, although it is questionable if this fact is of relevance, given that all of the Member States in the EU were already party to the ECHR and its Protocol 1, prior to 2009.

Throughout this paper, decisions from the European Court of Human Rights (ECtHR) will be made use of, as the Charter of Fundamental Rights of the European Union is largely consistent with the ECHR[1]. hence the rulings of the ECtHR are of great utility, and in some instances "can strengthen the effectiveness of Community law"[2].

We will analyze the concept of squeeze-out, and as the procedure was not an innovation in many EU Member States at the time of the introduction of the Directive[3], we shall briefly delve into the national experiences in some Member States, first at the regulatory level, and later (and in a more extensive manner) into the constitutionality appraisals of each country's Constitutional Courts. In this exercise, we will devote most of the time analyzing the German and Portuguese appreciations of the constitutionality of squeeze-outs when confronted the right to property, although the French and Czech experiences will also be briefly addressed.

The choice of legal orders herein compared is justified by the fact that the German and French schools are dominant in the design of EU Company law, and as such, this article would suffer were they not present. The Czech and Portuguese legal orders were selected due to being a recent member of the EU,

[1] According to the European Commission, "the Charter is consistent with the European Convention on Human Rights adopted in the framework of the Council of Europe: when the Charter contains rights that stem from this Convention, their meaning and scope are the same", in http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

[2] *Commentary of the Charter of Fundamental Rights of the European Union*, June, 2006, EU Network of Independent Experts on Fundamental Rights, pp. 165-166, available online at http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf.

[3] Silja Maul, Danièle Muffat-Jeandet, Joëlle Simon, *Takeover Bids in Europe*, Memento Verlag: Freiburg, 2008, p. 56.

from the ex-Eastern Bloc for the former, and the latter due to its relevant and somewhat unusual jurisprudence in the matter of the squeeze-out, and as such make for interesting inputs which have not yet been widely discussed (at least in the English language).

The concept of property, particularly the ownership of shares, must also be analyzed, as well as the concept of expropriation, for they are key to comprehension of the matter at hand.

Towards the end, we will seek to lend our opinion concerning the compatibility of the squeeze-out, on multiple levels, with the Charter and the ECHR, in the context of the protection of minority shareholders in EU Company Law.

2. **The Concept of Squeeze-out**

A squeeze-out or "freeze-out"[4] is a "transaction in which a shareholder (the majority shareholder) or group of shareholders obtains the entire common-equity interest in a company while the other shareholders (the squeezed-out shareholders) receive fair compensation for their shares"[5]. Essentially, the majority shareholder, usually following a takeover bid (although not necessarily, as squeeze-outs are not exclusive to takeover situations), in which he becomes owner of a determinate percentage of shares[6], "evicts" the remaining shareholders out of the company and thus becomes sole owner of all of the company's shares.

Squeeze-outs occur when one of the shareholders controls a vast majority of the shares in a company, be it by a resolution in a shareholder's meeting or following a takeover. In short, following a takeover bid of for a public limited company's shares in a Member State, the holders of the outstanding shares can be forced into selling their shares to the majority shareholder, even against their will. This is naturally a matter of some controversy since the conflict of

[4] The terms are usually used interchangeably, but there are subtle differences in the concepts, according to M. Ventoruzzo, "Freeze-outs: Comparative Analysis and Transcontinental Reform Proposals", *Virginia Journal of International Law*, 50 (2010), p. 843.

[5] Bryan A. Garner (editor), *Black's Law Dictionary*, 9th Edition, West Publishing: St. Paul, 2009, pp. 737 and 1534 (hereinafter Black's).

[6] The percentage varies according to the jurisdiction, but the value is usually no less than 90% in the majority of countries. Source: *Mandatory offers and squeeze-out comparative table*, Thomson Reuters Practical Law Stakebuilding, available online at https://uk.practicallaw.thomsonreuters.com/1-518-5074?__lrTS=20170429190630004&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1#.

interests between the majority shareholders and the minority shareholders is a fundamental agency problem within the field of Company Law[7].

2.1. ***The squeeze-out in the Member States' legislations***

The squeeze-out is not a new concept in European Company Law: prior to the advent of the Takeover Directive in 2004, it already existed in many EU-member states, and we will briefly mention some EU jurisdictions where the squeeze-out was not a novelty before the Takeover Directive, since the latter only applies in the context of a takeover bid[8].

- **Germany**

The squeeze-out was, and is, present in the Aktiengesetz (AktG) §327a and following[9]. However, the right to squeeze-out the minority shareholders in this paragraph concerns squeeze-outs enacted at the request of a shareholder in a shareholder's meeting, not following a takeover.

In any case, the threshold required to trigger a squeeze-out under the AktG set out by German law at the time was 95% of the company's shares, and still stands today.

In 2002, the German Securities Acquisition and Takeover Act, (Wertpapier-erwerbs-und Übernahmegesetz[10]) came into force, and regulated the takeover procedures in Germany, and was eventually modified to respond to the enactment of Directive 2004/25/EC.

- **France**

In 1992, the French Securities and Exchange Commission, the *Conseil de Bourses de Valeurs* (CBV) formally requested the Minister of Economy to introduce a squeeze-out mechanism in the French system, which came to be, through the Loi n° 93-1444 of the 31st of December 1993 – article 16[11]. The

[7] John Armour, Luca Enriques, Henry Hansmann, and Reinier Kraakman, "The Basic Governance Structure of Public Corporations: The Interests of Shareholders as a Class", *European Corporate Governance Institute Working Papers Series in Law, 2017*, Working Paper 337/2017, p.2

[8] Directive 2004/25/EC of April 21 2004, on takeover bids, O.J L142/12, hereinafter the "Takeover Directive", recital 24.

[9] German Stock Corporation Act (Aktiengesetz), available online in English at http://www.norton-rosefulbright.com/files/german-stock-corporation-act-147035.pdf

[10] Usually shortened to WpÜG.

[11] Loi n°93-1444 of the 31st of December 1993 – article 16, available at https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=88EE622FBE2EE6CFE6FAC286DEEE93C4.tpdila09v_

minimal amount of shares required to enforce the *retrait obligatoire* was set by the French legislator at 95% of the voting rights in the company, and only applied to publicly listed companies. The Monetary and Financial Code of France regulates this matter in its article L433-4[12].

According to the International Bar Association, "France has chosen to adopt the strictest rules provided for by the Directive. (…) France has opted for the 95% minimum threshold in terms of voting rights and share capital ownership, irrespective of the rate of acceptance of the preceding offer"[13]. From this, we gather that France has adopted a high standard of protection of the minority shareholders, in keeping with recital (9) of the Takeover Directive.

• **Portugal**

In Portugal, the squeeze-out, named "*aquisição tendente ao domínio total*", is regulated in article 490 of the Commercial Societies' Code [14], introduced by the Decree-Law 262/86 of September 2nd, and the threshold was 90%. Following the Takeover Directive, the takeover version of the squeeze-out was introduced in the Securities Code's article 194[15], under the name "*aquisição potestativa*".

• **Czech Republic**

Section 220p of the Czech Commercial Code was the first regulation of the squeeze-out in the Czech Republic[16], and the threshold for enactment was 90%[17].

3?cidTexte=JORFTEXT000000684072&idArticle=LEGIARTI000006776366&dateTexte=20170328&categorieLien=id#LEGIARTI000006776366.

[12] Code monétaire et financier, available at https://www.legifrance.gouv.fr/affichCode.do;jsessionid=19C4DF68E75DC2ED87FC38DDC601D6F7.tpdila09v_3?idSectionTA=LEGISCTA000006170495&cidTexte=LEGITEXT000006072026&dateTexte=20170417.

[13] *France – Squeeze-Out Guide, IBA Corporate and M&A Law Committee 2014*, International Bar Association Corporate and M&A Law Committee 2014, p. 6, available at https://www.google.pt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj-_I2a16vTAhVMiiwKHXbyC1cQFggkMAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D50A38E63-2CA7-4CA4-8BDC-8F87AFA5CAF7&usg=AFQjCNFgM0RDLxJGDkXxZepTdIvCk9_leA&bvm=bv.152479541,d.bGg.

[14] Portuguese Commercial Societies Code, Article 490, available online at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=524A0490&nid=524&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo.

[15] Portuguese Securities Code, Article 194, available online at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=450A0194&nid=450&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo.

[16] Czech Commercial Code, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=198074.

[17] For an in-depth analysis of the squeeze-out in the Czech Republic, see Marija Bartl, *Czech Regu-*

The choice of the Czech Republic as an example was not for naught: the introduction of the squeeze-out in the Czech Republic was somewhat controversial[18], and very much worth a brief mention: the Czech Senate considered that the text of the bill that introduced the squeeze-out was unconstitutional, in which we will go deeper into in Chapter 4.

2.2. ***The squeeze-out under the Takeover Directive***

Before the introduction of the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (The Takeover Directive), "the vast majority of the Member States currently provide for a right of a majority shareholder to buy out the minority shareholders. (…) the conditions under which that right may be exercised differ widely"[19]. The most relevant differences in this regard concerned the type of companies for which the right exists, the link or lack thereof to a takeover bid, the minimum thresholds and the determination of the compensation value to the squeezed-out minorities[20].

Prior to the Takeover Directive, there was no EU level regulation in this matter[21], although there were similar instruments enacted prior to the Takeover Directive, such as the Third Company Law Directive on mergers[22]. It is curious to note that in the Proposal for a 13th European Parliament and Council Directive on Company Law concerning takeover bids, in the Commission's text [23], not only is the squeeze-out mechanism not mentioned, but there appears to be considerable emphasis on the protection of minority shareholders[24].

lation of Squeeze Out in Comparative Perspective, Central European University, 2007, available at www.etd.ceu.hu/2008/bartl_marija.pdf.

[18] Ibid. pp. 11-14 covers the political controversy in the Czech Republic concerning this matter.

[19] *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union*, Brussels, 2002, p. 54, available online at Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union, hereinafter "Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union".

[20] Ibid. p.56.

[21] Ibid. p. 11.

[22] Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies, O.J. L 295/36.

[23] Proposal for a 13th European Parliament and Council Directive on company law concerning takeover bids, COM (95) 655 final, (07.02.1996).

[24] Ibid pp. 2-3, 5.

The Takeover Directive in its Article 15 contains the following rule concerning the squeeze-out:

> Article 15
> The right of squeeze-out
>
> 1. Member States shall ensure that, following a bid made to all the holders of the offeree company's securities for all of their securities, paragraphs 2 to 5 apply.
> 2. Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him/her those securities at a fair price. Member States shall introduce that right in one of the following situations:
> (a) where the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights in the offeree company,
> or
> (b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90 % of the offeree company's capital carrying voting rights and 90 % of the voting rights comprised in the bid.
> In the case referred to in (a), Member States may set a higher threshold that may not, however, be higher than 95 % of the capital carrying voting rights and 95 % of the voting rights.
> 3. Member States shall ensure that rules are in force that make it possible to calculate when the threshold is reached.
> Where the offeree company has issued more than one class of securities, Member States may provide that the right of squeeze-out can be exercised only in the class in which the threshold laid down in paragraph 2 has been reached.
> 4. If the offeror wishes to exercise the right of squeeze-out he/she shall do so within three months of the end of the time allowed for acceptance of the bid referred to in Article 7.
> 5. Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash. Member States may provide that cash shall be offered at least as an alternative.
> Following a voluntary bid, in both of the cases referred to in paragraph 2(a) and (b), the consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90 % of the capital carrying voting rights comprised in the bid.
> Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair.

According to the High Level Group of Company Law Experts, "(…) the right of a majority shareholder to buy out the minority shareholders subsequent to a takeover bid can be justified on the following grounds: the presence of minority shareholders after a takeover bid leads to various costs and risks[25], the squeeze-out right makes takeover bids more attractive for potential bidders and may be viewed as a counterpart to the mandatory bid rule, and the squeeze-out right is more efficient than a delisting procedure.The Group notes that property rights are protected at national and international level, but observes that various courts in the Member States have ruled that the squeeze-out right is not to be regarded as incompatible with these protective provisions. The Group holds the view that the sell-out right of minority shareholders following a takeover bid can be justified on the following grounds : the majority shareholder may be tempted to abuse his dominant position after a takeover bid, minority shareholders cannot obtain appropriate compensation by selling their shares in the market if it has become illiquid, the sell-out right is an appropriate mechanism to counter the pressure on shareholders to tender in the takeover bid, and finally the sell-out right is to be regarded as a counterpart for the squeeze-out right"[26].

It may very well be true that there are economic justifications for the existence of the right to squeeze-out minority shareholders[27]: according to some authors, outstanding minority shareholders after a takeover can essentially freeride on the company using their position, and consequently, reducing the interest in a takeover by the offeror[28]. It would appear that the main goal of the squeeze-out rule in the Takeover Directive is to, at least in part, suppress the free-rider issue[29].

[25] Note that the High Level Group doesn't go to the minimum length of listing at least a few of these(!).
[26] *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union, Brussels, p. 11.*
[27] Mike Burkart and Fausto Panunzi, "Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process", *European Corporate Governance Institute – Working Paper Series in Law*, Working Paper N°. 10/2003, June, 2003, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940, pp. 17-19.
[28] Guido Ferrarini, Klaus J. Hopt, Jaap Winter and Eddy Wymeersch (editors), *Reforming Company and Takeover Law in Europe*, 2004, Oxford University Press: Oxford, p. 782.
[29] Markus Dollinger, *The Fair Squeeze-Out Compensation*, Europaischer Hochschulverlag Gmbh & Co. Kg: Manheim, 2008, pp. 18-20.

However, we do find some internal contradiction[30] within the Commission's reasoning. In a communication to the Parliament and the Council[31], the Commission affirmed, under the heading "*shareholder democracy*", that information must be provided to shareholders and that facilities necessary to make sure that shareholders' rights are respected must be developed, reiterating the consistence of these practices with the OECD Principles of Corporate Governance[32]. However, the same OECD Principles state that "minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders acting either directly or indirectly, and should have effective means of redress[33]." It could also be seen somewhat ironic that the Commission speaks of 'shareholder democracy'. In a democracy, there is the right of the minority to dissent or disagree, while retaining its right to vote, and in this case, the squeeze-out allows the majority shareholder to buy-out eventual dissent from the minority. This hardly seems democratic.

Another contradiction, this time within the Directive itself, lies in recital 9[34], where it is affirmed that minority shareholders, especially after a successful takeover, should be protected, but simultaneously a mechanism is created that allows the majority to expel the same shareholders it claims to protect.

This criticism is not new, and we feel it is of the utmost relevance to quote Mukwiri:

> "Paradoxically, it is at the heart of the Directive to provide protection to minority shareholders, yet for the wider public interest in seeking to keep bids more attractive for potential bidders, property rights of minority shareholders are rendered obsolete. (…) The mere fact that the minority shareholders does not wish

[30] It is noteworthy that this is not the first work to point out internal contradictions within the Takeover Directive. See Christophe Clerc, Fabrice Demarigny, Diego Valiante, Mirzha de Manuel Aramendía, in *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Public Studies, 2012, available online at https://www.ceps.eu/system/files/Takeover%20Bids%20Directive%20book%20-%20Final.pdf, p. 15.

[31] European Commission Communication to the Council and the European Parliament, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM (2003) 284 final (21.05.2003)*

[32] Ibid. p.14.

[33] G20/OECD Principles of Corporate Governance, OECD (2015), OECD Publishing: Paris, available at
http://dx.doi.org/10.1787/9789264236882-en, p. 26.

[34] "Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired".

> to sell his shares is no ground for defeating a compulsory purchase of his shares. (…) thus, fairness in takeovers is all about economics, not law; and the law's intervention is only an economical dimension applied to maintain commercial usage"[35].

Here, there are two options: either the EU legislator staunchly believes that the squeeze-out procedure is a form of protection for minority shareholders, or there is a substantial internal contradiction in its position concerning the protection of the abovementioned minority shareholders.

Concerning the first option, we are of the opinion that, while the free-rider problem may very well exist, it is being blown out of proportion, and used as a pretext to suppress a fundamental right. The right of property, in the hierarchy of fundamental rights, naturally and self-evidently ranks above the right of a majority shareholder in a company to perform a squeeze-out, and if shareholders do not wish to part with their shares, it is their freedom to do so.

We are forced to conclude that, while the Takeover Directive did mandate Member States to protect minority shareholders in Recital 9, it simultaneously created a mechanism which completely overrides the decision of a few minority shareholders in not parting with their property.

We must still address the matter of "fair price" or "fair value" to be paid to the minority shareholders for their shares. The High Level Group divided the fair value of the compensation for a squeeze-out[36] in three categories:

1. "In the first group (Member States where the right to buy out may be exercised only when the capital/voting rights thresholds have been reached by virtue of a public offer), the consideration offered cannot, in most Member States, be lower than the one offered in the takeover bid"[37].
2. "In the second group (Member States where the right to buy out may be exercised when the capital/voting rights thresholds have been reached by virtue of a public offer or otherwise), (…) the consideration to be offered must be determined by experts appointed by a Court. The criteria to be used by these experts are not necessarily clearly stated in the law, but some of these Member States do recognize that, if the right is exercised subsequent to a recent takeover

[35] J. Mukwiri, *Takeovers and European Legal Framework. A British Perspective*, Routledge-Cavendish: Abingdon, 2009, pp. 51-53.
[36] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union…, p. 57.
[37] Ibid.

bid, the consideration offered in that takeover bid should be properly taken into account, in most cases as a minimum"[38].

3. "In the third group (Member States where the threshold is set by reference to the proportion of acceptances of the offer), the majority shareholder normally has the right to acquire the remaining shares in a class on the same terms as those of the offer for that class (by virtue of a rebuttable presumption that these terms are fair if the acceptance threshold has been reached. If the minority shareholder can show that the offer price was not fair, he may demand a court supervised appraisal instead)"[39].

It appears from this that the squeeze-out price has to be somewhat connected to the takeover price: it is used as a reference for the determination of 'fair price'. However, outside the scope of the presumption of fairness contained in paragraph 5 of Article 15 of the Takeover Directive,[40] "the Member States implemented different procedures. In some countries, it is the bidder who establishes the price, in others such as the Netherlands, the court has to take a decision on the appropriate consideration. The valuation methods differ, and there are different requirements regarding the intervention of an independent expert, the control by a supervisory authority and the extent of the judicial supervision"[41].This leads us to conclude that the Directive leaves a vast discretion to the Member States on how to compensate the minority shareholders[42].

However, the underlying idea remains: the takeover price offered is usually considered the lowest fair price possible in a squeeze-out, as it is presumed to be fair in certain circumstances, and as a minimum in others.

Outside of the takeover environment, the so-called "corporate" squeeze-out, there is no reference value for the share price to be paid in a squeeze-out. However, German jurisprudence can be used as an indication towards

[38] Ibid.

[39] Ibid.

[40] "Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash. Member States may provide that cash shall be offered at least as an alternative. Following a voluntary bid, in both of the cases referred to in paragraph 2(a) and (b), the consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90 % of the capital carrying voting rights comprised in the bid. Following a mandatory bid, the consideration offered in the bid shall be presumed to be fair."

[41] Christoph VAN DER ELST; Lientje VAN DEN STEEN, "Balancing the Interests of Minority and Majority Shareholders: A Comparative Analysis of Squeeze-out and Sell-out Rights", *European Company & Financial Law Review*, 2009, (6), Issue 4, p. 438.

[42] Ibid. p. 433.

the determination of the fair price[43]. The Federal Constitutional Court ruled that an average of the market price of the shares should be used as a reference to determine the fair price in a squeeze-out operation[44]. Additionally, the German Federal of Court of Justice explicitly accepted the usage of a 3-month average market share price as a minimum squeeze-out compensation, in the time immediately before the decision of undertaking the squeeze-out is made[45]. On what concerns expert assessment of the share's valuation, "post takeover squeeze-outs (…) generally do not require an expert's assessment, corporate squeeze-outs (…) do"[46].

We can therefore assert that, for non-takeover squeeze-outs, the average market price in the period prior to the squeeze-out decision was deemed by German jurisprudence to be a suitable reference, a trend which seems systematically coherent across the EU.

3. **The concepts of property and expropriation**

Before proceeding any further, it is of the utmost relevance to establish the concept of property, more specifically in what it is concerned when we speak of share ownership and also in the context of the EU Charter and the ECHR.

3.1. *Property under the EU Charter and the ECHR*

The right to property is complex, as the concept is a broad and encompassing one.

According to Black's Law Dictionary, property is "the right to possess, use and enjoy a determinate thing"[47]. In our case, the type of "property" at hand are securities, namely shares in companies after being subject of a successful takeover that are held by minority shareholders.

The ECJ ruled on the range of protection of the right of property, stating that

[43] For a more detailed analysis of the German criteria, see Markus Dollinger, *The Fair Squeeze-Out Compensation*… pp. 13-16.

[44] Peer Zumbansen, German Corporate Law in Constitutional Perspective: The Squeeze-Out Reviewed, *German Law Journal*, Vol. 2, No. 1-2, February, 2001, paragraph 4.

[45] German Federal Court of Justice decision of 12/3/2001, I ZB 15/00, para.38.

[46] Christoph van der Elst; Lientje van den Steen, Balancing the Interests of Minority and Majority Shareholders..., p. 434.

[47] Garner, *Black's*…, p. 1335.

> "(…) the question arises as to whether the guarantees provided in Article 17(1) of the Charter extend to audiovisual broadcasting rights acquired contractually. The protection granted by that article does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic (…), but applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit"[48].

The right to property is enshrined both in international instruments, such as the European Convention on Human Rights, which will be individually addressed further, the Universal Declaration of Human Rights[49], but also in national constitutions. As Wollenschläger puts it, "The right to property forms part of the constitutional traditions common to the Member States"[50].

As we can see, the idea of a property right is radically anchored in the idea of control, the possibility of exercise of rights by the beneficiary of the right, since "the point of conferring an entitlement arguably is to secure a domain of control, not to guarantee a particular level of welfare or utility[51]."The protection of private property is paramount towards the functioning of a free-market system, as is the EU's internal market, and is deeply intertwined with the rights to choose an occupation, work[52] and to conduct a business[53], connection which has been reinforced by the high level of protection conferred under the multiple instruments[54].

More concretely, where shares as property are concerned, the European Court of Human Rights, in the landmark judgement *Bramelid v. Sweden* has stated that "a company share is a complex thing: certifying that the holder possesses a share in the company, together with the corresponding rights (especially voting rights), it also constitutes, as it were, an indirect claim on company assets. (…) The Commission is therefore of the opinion that, with respect to Article 1 of the First Protocol, the (…) shares held by the applicants

[48] Case C-283/11 *Sky Österreich GmbH v. Österreichischer Rundfunk*, judgement of 22 January 2013, paragraph 34.

[49] Article 17 of the UDHR.

[50] Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing: Oxford, 2014, p.469.

[51] J.L. Coleman, J. Kraus, *Rethinking the Theory of Legal Rights*, 95 *Yale Law Journal* (1986), p. 1339.

[52] Article 15 of the EU Charter.

[53] Article 16 of the EU Charter.

[54] For an in-depth analysis of the right to property, see Theo RG van Banning, *The Human Right to Property*, Intersentia: Antwerpen, 2002.

were indeed "possession", giving rise to a right of ownership [55]." From this, one can conclude that a share is composed of both a social and a property element, and hence falls under Article 1 of the Additional Protocol to the European Convention on Human Rights.

It is also worth mentioning in the interest of precision, that Article 1 explicitly includes legal persons under its scope[56], dissipating any possible doubts as to whether legal persons could invoke this Article or not.

We should also quickly answer the following question: which rights emerge from the ownership of a share in a company? The answer can vary substantially, for not all shares are created equal, but one can extract a nucleus of main rights which are transversal to (almost) all types of shares:

– Right to dividends;
– Right to information;
– Right to vote in shareholder's meetings;
– Ownership of a portion of the company.

Following what was said, we can conclude that ownership of a share is covered by the right of property, falling under the protection of both the Charter and the ECHR, and that the protection of this article extends to relations between private entities.

3.2. *Expropriation under the EU Charter and the ECHR*

Black's defines expropriation as a "governmental taking or modification of an individual's rights"[57], As mentioned before, the EU Charter's protection follows closely the ECHR's, and Article 17 corresponds, and is roughly based on Article 1 of the Additional Protocol to the ECHR[58]. According to both these instruments, three requirements must be fulfilled in order to justify a deprivation of property (expropriation):

[55] ECtHR Case of *Bramelid v. Sweden* (applications 8588/79 8589/79) Decision of the Commission (plenary) of 12th October 1982, p.81 available online at http://hudoc.echr.coe.int/eng#{"appno":["8588/79"]}.
[56] Article 1 – "Every natural or legal person is entitled to the peaceful enjoyment of his possessions…".
[57] Garner, *Black's*… p. 662.
[58] Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights – A Commentary*… pp.465, 468 and 469.

i) Public interest;
ii) Legal precision;
iii) Fair compensation.

Generally, it is safe to affirm that the legislator as well as the courts, have managed to fulfill the second and third requirements when it comes to the squeeze-out: the conditions in which a squeeze-out can be undertaken are satisfactorily defined, and the criteria for determining fair compensation, although not without controversy, is ultimately solvable in court. It is, in our opinion, the first requirement that poses issues. Nonetheless, we will look into all three requirements, and voice our views when deemed worthwhile.

i) Public interest

The presence of public interest is mandatory in cases of expropriation. The ECtHR has held the following:

> "The Court agrees (…) that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest". Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the texts in force employ expressions like "for the public use", no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties"[59].

We cannot accept this reasoning without reservations. The express affirmation of "public interest" both in the Convention and the Charter is not for naught, and the Court's interpretation is treading on *contra legem* interpretation, which is not without its perils. Any form of expropriation has to be very clearly and solidly justified, as the very act of expropriation constitutes an encroachment on the fundamental right to property. Mere statements of public interest in the act of expropriation cannot be admitted as argument for expropriations in favor of private entities[60].

[59] ECtHR Case *James and Others v. United Kingdom* (Application 8793/79) Judgement of 21st of February 1986, para. 40.
[60] In another instance, in the ECtHR Cases of *Katikaridis v. Greece and Tsomtos and Others v. Greece* (Application no. 19385/92) judgement of 24/10/1996, para. 49, available online at http://hudoc.

The ECtHR in another instance rendered a telling decision regarding the concept of "public interest":

> "(…)The notion of "public interest" is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinion in a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation (…)"[61].

In this situation, the Court appears to be between 'a rock and a hard place', in the sense that it has to conciliate the State's sovereignty and right to control property, as well as the right to determine public interest, with the individuals' right to property. In that spirit, the decision appears to be a compromise, through which the Court seeks to assure a minimum core of harmony as to what constitutes public interest, while permitting the national authorities a wide margin of appreciation.

ii) Legal precision

A sufficiently precise and accessible legal platform regulating its conditions and modalities is a key limitation on the right of the State to regulate the use of property[62]. Any state action that has an effect on property has to be anchored in a solid legal background with "sufficient precision and foreseeability"[63]. An interference with property must be sufficiently regulated by law, which requires sufficient precision and foreseeability in domestic law and practice, as the ECtHR put it:

echr.coe.int/eng#{"itemid":["001-58070"]}: the Court ruled that the public benefit or interest cannot be simply affirmed by the State, without offering reasonable explanation.

[61] ECtHR Case of *Pressos Compania Naviera S.A. and others v. Belgium* (Application no. 17849/91) Judgement of 20th of November 1995, para. 37, available online at http://hudoc.echr.coe.int/eng/#{"fulltext":["17849/91"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58056"]}.

[62] Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights – A Commentary*… p.479.

[63] Eu Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union,* p. 167.

> "In the instant case the pre-emption operated arbitrarily and selectively and was scarcely foreseeable, and it was not attended by the basic procedural safeguards. In particular, Article 668 of the General Tax Code, as interpreted up to that time by the Court of Cassation and as applied to the applicant, did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention. A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the underestimation of the price and, consequently, on the Revenue's position – all elements which were lacking in the present case"[64].

iii) Fair compensation

Fair compensation or fair price, is a crucial element under the Charter for an expropriation to be legal, and it is an extremely relevant element in assessing the proportionality in the operation, in the sense that:

> "Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants"[65].

In order for a compensation to be fair, it must be calculated on the basis of present market value, and only in cases of exceptional "considerations of public interest, such as the realization of fundamental institutional or economic reforms or of other measures of promoting social justice, may justify a deviation from the full market value"[66].

The ECtHR has held that, in what concerns the valuation of the expropriated property, that national authorities enjoy a considerable margin of discretion in this matter, but the national authorities' choice of method must not be "manifestly without reasonable foundation"[67]. In *Katikaridis v. Greece* and *Tsomtos and Others v. Greece*, concerning an order to thwart the owners of

[64] ECtHR Case of *Hentrich v. France* (Application 13616/88) judgement of 22nd of September 1994, para. 42.
[65] ECtHR *James and Others v. United Kingdom,* para. 54.
[66] Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, , *The EU Charter of Fundamental Rights – A Commentary*…p. 480.
[67] ECtHR Case of *Lithgow and others v. The United Kingdom* (Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81), judgement of 8/7/1986, para. 122.

expropriated land, Greek law stated that the project linked to the expropriation would be beneficial to the owners, and so, introduced a irrebuttable presumption of benefit, which the court struck down as "manifestly without reasonable foundation"[68].

In this context and considering what was previously stated about fair price in Chapter 2, it seems that the usage of the takeover bid price as a starting point for valuation of the squeezed-out shares is not inadequate.

Concerning the possibility of the squeezed-out minority to demand a judicial appraisal of said shares, in *Bramelid v. Sweden*, the European Commission of Human Rights concluded that the minority shareholders have the right to challenge before the ordinary courts the independent price set by arbitrators, since the compulsory arbitration under Swedish Law did not offer guarantees compatible with Article 6 of the ECHR[69].

It must be restated that, where fairness of the shares' price in a squeeze out context is concerned, as was said above, the price of the takeover has to be the absolute minimum starting point, otherwise the option to sell or not in a takeover would be rendered effectively useless. From an economic point of view, when a shareholder controls 98% of a corporation's capital but needs the 2%, those 2% will necessarily be more valuable to said shareholder. Depriving a shareholder from the possibility of extracting the highest possible amount of profit from these shares runs counter to the logic of a free market economy.

4. **Constitutionality of the squeeze-out in EU Jurisdictions**

This chapter will be devoted to the constitutional conformity of the squeeze-out rule across some EU Member-States.

As it is known, the squeeze-out was generally accepted across the EU[70], but it is nonetheless useful to analyze the national experiences, as some of them bring some interesting nuances in the squeeze-out experience when confronted with the right to property.

The Commission recognizes the conundrum, affirming that the right to property "…is a fundamental right common to all national constitutions. It has been recognized on numerous occasions by the case-law of the Court of

[68] ECtHR Cases of *Katikaridis v. Greece and Tsomtos and Others v. Greece,* para. 49.

[69] ECtHR Case of *Bramelid v Sweden*, Commission Report of 12/12/1983, available at http://hudoc.echr.coe.int/eng#{"appno":["8588/79"]} paragraphs 28-42.

[70] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union… p. 61.

Justice, initially in the *Hauer* judgment (…). The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there"[71].

In keeping with what was stated in the previous chapter, and according to the ECtH[72], national authorities should have a wide margin of appreciation in determining the concept of "public interest", it gives another reason as to why it is useful to (briefly) look into the German, French, Portuguese and Czech experiences, both at doctrinary and judicial levels.

4.1. *Germany*

Germany had the earliest case of judicial constitutionality appraisal of the squeeze-out[73] in 1962, with the case *Feldmülhe Fall*[74], decided before the Federal Constitutional Court. This decision is, to this day, widely quoted and referenced in legal commentaries and judicial decisions, both in Germany and abroad. In it, the Court ruled affirmed that the German Constitution allows the state to legislate in a manner limiting the right to property, but simultaneously, it is mandated to protect private property to the highest possible degree[75].

The Court went on to mention that minority shareholders, at times, have a tendency to become absent in the company's life, having only interest in collecting dividends or obtaining a profit from the sale of the shares. Situations such as this would then legitimize the squeezing-out of said minority. This is what the court calls the 'inner weakness of a share', which existed from the outset of its creation, in the sense that the possibility of a squeeze-out was present at the time of the ownership of the share[76].

[71] European Commission, Explanations relating to the Charter of Fundamental Rights OJ C 303/17, 14/12/2007, p. 23, available online at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007X1214(01)&from=EN.

[72] ECtHR Case of *Pressos Compania Naviera S.A. and others v. Belgium*, para. 37.

[73] The mechanism was not the squeeze-out, but a similar one.

[74] German Federal Constitutional Court, judgement of August 7th, *Feldmühle Fall* (BVerfG, 1 BvL 16/60); NJW 1962, Volume 37, page 1667 and following. Available online at http://www.servat.unibe.ch/dfr/bv014263.html.

[75] Marija Bartl, *Czech Regulation of Squeeze Out in Comparative Perspective*, Central European University, 2007, p. 35.

[76] *Feldmühle Fall* (BVerfG, 1…) §29.

However, this decision is not without its shortcomings: when confronted with the allegation that the squeeze-out amounts to an expropriation (or form thereof), the Court rejected the implication, affirming that the squeeze-out legislation is a general law that concerns the relations between shareholders, and that an expropriation must always come from the State[77].

We join Bartl[78] in her criticism of the decision: this author states that the Court is at "its lowest ebb" in this argument, as the Court does not clearly explain why private law is different to the point that the squeeze-out cannot be configured as a form of expropriation. As the author says, "It seems that all feel it somehow, but cannot give a proper justification of this proposition [79]." One cannot help thinking that the Court allowed itself a logical leap when confronted with the expropriation idea[80]. The reasoning offered by the Court is unsatisfactory in that regard, as it outright dismisses the configuration of the squeeze-out as a form of expropriation, sidestepping the matter, without providing satisfactory legal arguments, and instead relied on a rather vague and unsubstantiated argument to do so.

Another relevant (and more recent) case was the *Moto-Meter* decision[81]. In this case, Moto-Meter was owned by another company in 99% of its shares, and the latter offered in the squeeze-out procedure to pay the residual minority shareholders of Moto-Meter an amount above an estimate established for their shares[82].

The minority shareholders filed an action to contest the decision. Having failed in the ordinary courts, they argued that the squeeze-out violated Article 14 of the German Constitution[83] before the German Federal Constitutional

[77] Ibid. §49.
[78] Marija Bartl, *Czech Regulation*… p. 35.
[79] Ibid.
[80] *Feldmühle Fall* (BVerfG, 1…) §49.
[81] German Federal Constitutional Court, Judgment of 23rd August 2000, Moto-Meter, BVerfG, 1 BvR 68/95, available at http://www.bverfg.de/entscheidungen/rk20000823_1bvr006895.html.
[82] Peer Zumbansen, *German Corporate Law in Constitutional Perspective: The Squeeze-Out Reviewed*… paragraph 11.
[83] Article 14 of the Basic Law for the Federal Republic of Germany reads: "[Property – Inheritance – Expropriation] (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of

Court. In this case, the Court affirmed that "It follows from the basic law that minority shareholders must be protected against the abuse of economic power", [84] but that, "an abuse of economic power cannot be seen merely in the fact that a majority shareholder, with its majority of votes, aims to get rid of his few remaining minority shareholders"[85].

Notwithstanding, the Court decided that the "Moto-Meter minority shareholder could not claim the loss of his membership as the basis of an objection to the squeeze-out"[86].The Court concluded that the majority's right to squeeze-out the minority does not conflict with Article 14 of the Constitution, inasmuch the minority's interests are adequately guaranteed, stressing that their exclusion does not pose constitutional difficulties, provided that adequate compensation is paid to them[87]. In our view, the Court's reasoning is anchored in the idea that a minority shareholder's interest in a company revolves around the value inherent to a company share, a mere capital investment, and as such, the majority has the right to buy-out the minority, since the shareholder's monetary interest is (in the Court's view) satisfied[88].

The view is not without its merits, but it poses issues, as the Court's reasoning is predicated on the premise that the sole interest of a shareholder is the value of the shares, and that may not always be so. A shareholder might have interests in shareholding beyond the profit he may obtain from the shares' dividends or sale. Beyond those potential interests, the fact of the matter is that the evident deprivation of property that the squeeze-out constitutes must be solidly grounded in law that justifies the overriding of a fundamental right.

4.2. *France*

In France, the squeeze-out was ruled by the Cour de Cassation to not be incompatible with Article 1 of the Additional Protocol to the ECHR, in

those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.".

[84] German Federal Constitutional Court, Moto-Meter, BVerfG, 1 BvR 68/95, para. 25.

[85] Ibid.

[86] Peer Zumbansen, *German Corporate Law in Constitutional Perspective: The Squeeze-Out Reviewed*…, paragraph 11.

[87] German Federal Constitutional Court, Judgment of 23rd August 2000, Moto-Meter… para. 17.

[88] Ibid.

a similar fashion to the German Constitutional Court in Moto-Meter[89]. The Court stated that "having found that the transfer of ownership took place under the conditions defined by law, in order to satisfy public interest purposes which it has the right to assess, and which ensure the effective compensation of shareholders obliged to transfer their shares, the court of appeal rightly decided that this compulsory withdrawal was not contrary to the obligations arising from the above-mentioned Convention"[90]. The Court affirms that the legislator has the right to assess the concept of "public interest", but in the end does not offer any conclusive argument towards defining the scope of public interest. The Court merely states that:

> "The obligation for minority shareholders to sell their shares to the majority group stems from an article in the Financial Markets Law regulating the relations between shareholders of companies whose shares are listed on a regulated market and deduces that the transfer of ownership, operated for a price in relation to the value of the property, within a legitimate social and economic framework, is in the public interest even if the community as a whole does not use or would not benefit by itself from the property transferred"[91].

The Court affirms the right of the state to assess public interest, and the squeeze-out is within a "legitimate social and economic framework", and that is "in the public interest", without explaining the said "framework".

According to the Autorité des Marchés Financiers (AMF), the Conseil d'État refused to transmit to the Constitutional Council the constitutional question concerning the *retrait obligatoire*, stating that the legislator had "exercised its competence (...) by setting out in Article L433-1 of the Monetary and Financial Code the general principles applicable to public offer, equality among shareholders and transparency of markets, the AMF is obliged, under the supervision of the judge, to respect (…) the exercise of its regulatory power"[92].

Another factor that drew considerable criticism at the time, was the fact that the *retrait obligatoire* was seen as a form of expropriation by some authors,

[89] Cour de Cassation, Chambre commerciale, 29th of April 1997, 95-15.220, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007038309.

[90] Ibid.

[91] Ibid.

[92] *Rapport Annuel 2011*, Autorité des marchés financiers, p. 114, available online at http://www.amf-france.org/Publications/Rapports-annuels/Rapports-annuels-de-l-AMF/annee_2010-2014.html?docId=workspace%3A%2F%2FSpacesStore%2Fb93d5de1-3bc4-49a3-a38e-770be6a6d2b2.

and additionally, its introduction into French legislation was not preceded by a more adequate and thorough parliamentary discussion[93].

A very curious and recent decision by the Cour de Cassation stated that public persons could be squeezed-out of their position in private companies under article 433-4 of the Code monétaire et financier[94], which evokes the idea of a reversed squeeze-out, and seems unusual, in our view.

4.3. *Portugal*

In Portugal, the constitutionality of the "*aquisição de domínio total*" was subject of both judicial and, to a lesser extent, doctrinal dispute for some years, as there were multiple decisions by different courts in opposing directions. The Portuguese Constitution provides in its Article 62 for the protection of the right to property[95].

Some Portuguese doctrine equated the squeeze-out with an expropriation, affirming that it amounted to "… a veritable act of expropriation for private use, not subordinated to the general rules that govern them [expropriations], a forced transmission of shares that, by sheer will of the dominant majority, permits the ownership of the shares of small shareholders to pass to him [the dominant majority shareholder]"[96].

The Portuguese Supreme Court (STJ) ruled in 1997[97] that the squeeze-out was unconstitutional: in that decision, the court stated that despite the right to property not being an absolute right, in the sense that it can be derogated, restricted or limited, those limitations can only be imposed if legitimately justified on other constitutionally protected rights[98].

One of the most interesting passages of this decision reads as follows:

[93] Christophe Leroy, *Le retrait obligatoire ou l'expropriation des actionnaires minoritaires à la suite d'une offre publique de retrait*, available online at http://chrisleroy.free.fr/retrait.htm, paragraph 2.

[94] Cour de Cassation, Cass. Com. 21st of January 2014, in Bulletin d'information n° 800 du 15 avril 2014, arrêt number 701, available at https://www.courdecassation.fr/IMG/pdf/bicc_800.pdf.

[95] Article 62 of the Portuguese Constitution: "1. Everyone is guaranteed the right to private property and to the transmission thereof in life or upon death, in accordance with the Constitution. 2. Requisitions and expropriations in the public interest may only be undertaken on a legal basis and upon payment of just compensation."

[96] João Labareda, *Das acções das sociedades anónimas*, AAFDL: Lisbon, 1988, p. 276.

[97] STJ decision of 2/10/97, Case nº 695/96 – 2nd section, in Sumários de Acórdãos, 1997, Secções Cíveis, pp. 489-490, available at www.stj.pt/ficheiros/jurisp-sumarios/civel/sumarios-civel-1997.pdf (our translation from the original Portuguese).

[98] Ibid. paras. I to IV.

> "The rights to property, private initiative and equality, not being absolute rights, are human values in themselves, and not merely expressions of something that can arbitrarily, discriminatorily, unevenly, disproportionately or inadequately replaced or excluded in lieu of money or other assets by the sole initiative of the majority shareholder over the minority"[99].

According to the STJ, the "corporate group" logic alone does not justify, nor it should justify, the suppression of the above-mentioned constitutional rights[100]. Moreover, *en passant*, the Court said that the capital volumes held by the shareholders should not be the sole criterion to permit the enactment of a squeeze-out[101]. The decision, although somewhat lacking in economic analysis, provided a refreshing outlook into the squeeze-out. Unconstrained by the fact that many foreign judicial bodies had decided in favor of the compatibility of the squeeze-out with the right to property, the Portuguese Supreme Court (STJ) rendered a spirited rights-based approach, which was uncommon for a superior court in any EU Member State at the time.

Following this decision, the Portuguese Ombudsman requested that the Constitutional Court[102] pronounce itself in this matter, as to whether or not Article 490 of the Commercial Societies Code was unconstitutional.

The Constitutional Court affirmed that the ownership of a share is a form of "mediated property", in the sense that it the ownership is shaped by the corporate organization in itself, with its virtues and vices, susceptible to the corporate dynamics[103]. The Court states that the expectations of a shareholder in a public limited liability company, when in owning shares in such a venture, are inherently circumscribed by the nature of the share in itself, and as such, said limitations on this type of property are not constitutionally inadmissible[104].

The Court ultimately ruled in favor of its constitutionality, in a 6 to 3 decision, where the dissenting minority affirmed that the squeeze-out was organically unconstitutional[105].

[99] Ibid. para. VI.

[100] Ibid. para. IX.

[101] Ibid. para. XI.

[102] The Portuguese Constitutional Court operates outside the regular jurisdiction, and its main competence is the appreciation of constitutionality of the legislation

[103] Portuguese Constitutional Court decision number 491/02, available online at http://www.tribunalconstitucional.pt/tc/acordaos/20020491.html.

[104] Ibid.

[105] Essentially, the dissenting minority held that the right to squeeze-out minority shareholders interfered with the fundamental right to property, and as such, the law that implemented it should have been authorized by Parliament, which it wasn't.

Following this decision, one of the most reputed Portuguese experts in Company Law published a brief commentary on the Constitutional's Court's decision, where he stated that:

> "Companies – at least limited liability corporations and public limited liability corporations – are guided by a principle of "sufficiency of the majority": its "will" is defined by the mere majority of expressed votes inherent to the shares. The rule in article 490 of the Commercial Societies Code is a manifestation of that principle. It is no more violent than other manifestations of the same principle, namely the regulation on the liquidation of companies"[106].

This commentary currently reflects the opinion of the majority of experts concerning on the legality of the squeeze-out in Portugal, although we feel inclined to disagree with the last sentence, concerning the "violence" of the squeeze-out, and its comparison to a liquidation. When one liquidates a company, its "game over" for everyone. Assets are divided by the shareholders in proportion of their participation in the company. When one engages in a squeeze-out, its "game over" only for the squeeze-out party.

4.4. *Czech Republic*

As was mentioned before, there was some controversy in the introduction of the squeeze out in the Czech legislation.

The Czech Constitutional Court has ruled on the matter of the constitutionality of the squeeze-out[107] and ultimately concluded in favor of it. The Court, however, recognized that "legal regulation of a forced buy-out of securities is not, and not only in terms of the process of introducing it into the Commercial Code and amending it, an example of a legal regulation that does not raise a number of questions of a constitutional nature"[108], thus acknowledging the delicate issue that the squeeze-out creates.

[106] Rui Pinto Duarte, "Constitucionalidade da Aquisição Potestativa de Acções Tendente ao Domínio Total – Anotação ao Acórdão do Tribunal Constitucional nº 491/02", *Jurisprudência Constitucional*, nº 1 January-March 2004, AATRIC – Associação dos Assessores do Tribunal Constitucional: Lisbon, 2004 p.49.

[107] Czech Constitutional Court decision of 2008/03/27 – Pl.ÚS 56/05, available online at http://www.usoud.cz/en/decisions/20080327-plus-5605-squeeze-out-1/.

[108] Ibid. para 84.

The court considered that the loss of membership in a company cannot be equated with membership in other kinds of associations such as political parties, religious associations or trade unions[109], which is certainly a fair assessment. The Court stated that "…if a shareholder owns 90% of a company's shares, the influence of the remaining shareholders on the company's operation is negligible, and their opportunity to participate in basic decisions about the company's direction is illusory" [110].

In what concerns public interest, the Court affirmed that, since the squeeze-out is an "economically-based" procedure, the consideration of public interest is not the same as in the cases of expropriation[111]. In keeping with that, the court reasoned that "the public interest is manifested in the principal [sic] of a market economy and freedom to do business in a different manner, and is exercised through different means, including the creation of suitable legal conditions for the functioning of corporations" [112]. This defense of the squeeze-out, as in being in public interest, still does not adequately establish a nexus between depriving minority shareholders of their property and public interest.

The problem with this decision is that, in multiple instances, it sort of 'vilifies' minority shareholders[113], and to make matters worse, said vilification is hypothetical, as the issues posed by the minority, in the Courts configuration, are frequently preceded by expressions such as "if"[114] or "may"[115], and not based on actual examples. For instance, at a certain point, the Court affirms that "the right to an explanation and the obligation to inform may complicate the principal shareholder's strategic decisions"[116], which, in our opinion, gives an impression of bias of the Court in favor of the squeeze-out: the Court is overly problematizing one of the key rights of shareholders, which one can consider a twisted argument. In the Court's defense, its argumentation is little more than an echo of the High Level Group of Company Law Experts Report[117].

It is also interesting to highlight that the Court at a certain point concedes that the requirements for a squeeze-out and an expropriation are "analogous"

[109] Ibid. paras 51-52.
[110] Ibid. para 52.
[111] Ibid. para 56.
[112] Ibid.
[113] Ibid. paras. 51-52.
[114] Ibid. para. 53.
[115] Ibid. in this paragraph, the Court uses the word "may" in this context 3 times.
[116] Ibid. para 52.
[117] Ibid. para 51; Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union… p. 61.

[118]. Another interesting passage is when the Court affirms that "share ownership is tied to a certain risk"[119], and that "…a shareholder must accept that this is an investment which is essentially tied to the right to conduct business (and only then with the freedom of association), and thus also with business risk…"[120]. This reasoning is somewhat skewed. While it is true that shareholding entails risk, that risk consists of the loss of value due to the failure of the company, or whatever external reason that causes a share to lose its value, and not the risk of being squeezed-out. One certainly cannot use business risk as an argument to legitimize a squeeze-out.

4.5. *Hypothetical example*

Following the national appraisals of constitutionality of the squeeze-out, we shall take the opportunity to give a brief hypothetical example of our own to illustrate a case where a squeeze-out may constitute a grave injustice: Say shareholder A, together with other people, decide to create a company to develop a certain economic activity. Sometime later in the future, the company, now very successful, goes public and is listed in the stock-market, and all initial shareholders but A sell their position in a takeover bid somewhere along the line, launched by B. If the B happens to have enough shares to squeeze-out the founding shareholder, he can simply evict A, the founder of the company, regardless of his will. Cases like these are not impossible, and in many instances, the shareholder may also be employed by his own company, which adds to the injustice that the squeeze-out could generate in this case.

5. **The legal soundness of the Squeeze-out**

Now that we have examined the concepts of squeeze-out, property and expropriation, the time is ripe for an evaluation of whether or not the squeeze-out is a form of expropriation for private purposes, and thus, compatible with the protection of private property. In this chapter, we are going to present a number of arguments which, in our view, demonstrate (or attempt to) the lack of compatibility of the squeeze-out with EU law.

[118] Ibid., para. 53.
[119] Ibid., para. 66.
[120] Ibid.

5.1. *The squeeze-out as a form of expropriation*

We have seen that most judicial authorities, from national Constitutional Courts, to the ECtHR, tend to accept the squeeze-out as legal[121], and reject the configuration of the squeeze-out as an expropriation[122], albeit unconvincingly [123]. However, one cannot help but notice that the vast majority of these Courts, when confronted with the matter of public interest, usually use evasive and dismissive argumentation, and frequently quote each other or the High Level Group of Company Experts Report, as we have pointed out throughout this endeavor.

Another reason why we can construct the squeeze-out as an expropriation lies in the commercial registry. The State, when confronted by an offeror fulfilling the requirements for a squeeze-out, performs an alteration in the commercial registry entry concerning the share ownership in that company, transferring the squeeze-out minority's shares to the offeror, without the consent of the owner(s)[124]. In doing this, the State is using its *ius imperii,* effectively expropriating someone, in favor of another private entity.

As such, we hold that the squeeze-out amounts to an expropriation for private purposes, in which the State plays a key role in making the operation possible.

5.2. *Plurality as an underlying principle of Company Law*

The genesis of the concept of "company" is a contract between a multitude of persons (physical or legal). It originates from a bilateral or multilateral contract, idea which is reinforced by the fact that in several countries, to incorporate a

[121] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union… p. 61 "The ability of one party to enforce the acquisition of the shares of another represents a significant infringement of the latter's vested rights."

[122] Although the Czech Constitutional Court did mention that, "However, if the state permits a forced buy-out of the shares of a certain group of corporate shareholders by another shareholder in a legally regulated manner, that regulation must meet criteria that are analogous, although not identical to the case of expropriation, because it is not a matter of expropriation." Czech Constitutional Court decision of 2008/03/27 – Pl.ÚS 56/05, para. 53.

[123] *Feldmühle Fall* (BVerfG, 1…) §49.

[124] Businesswire: BERU AG: Squeeze-out Registered in the Commercial Register, 30/9/2009, available online at http://www.businesswire.com/news/home/20090930006275/en/BERU-AG-Squeeze-out-Registered-Commercial-Register. Here we have an example of the state's role in the squeeze-out.

public limited company, a plurality of founding shareholders is required [125]. It could be seen as somewhat contradictory to demand a plurality of shareholders to create a company, while simultaneously having a rule that allows the majority shareholder to buy-out other shareholders regardless of their will.

The entire idea behind the existence of companies is predicated in the pooling of resources by a plurality of persons, as we can see in Black's Law Dictionary:

- "'company' 1. A corporation – or, less commonly, an association, partnership or union – that carriers on a commercial or industrial enterprise. 2. A corporation, partnership, association, joint-stock company, trust, fund, or organized group of persons, whether incorporated or not(…)"[126].
- "'corporation' *n.* An entity(…) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; group or succession of persons established in accordance with legal rules into a legal or juristic person (…)"[127].

These two definitions have about them an inherent and inescapable sense of plurality: companies, at least in their genesis, were conceived having more than one shareholder, and to some, the squeeze-out can seem somewhat unnatural.

Let us put aside the law for a second and turn to etymology: the word "company", in the English language, derives from Old French, "*compagnie*", meaning "society", "friendship, "intimacy, "body of soldiers"[128], which in turn derives from the Late Latin "*companio*", literally "breadfellow", "messmate". In French, the words "*societé*", derived from the Latin "*societas*", which means "*association*", "*reunion*", "*community*"[129]. For both the Portuguese and Spanish languages, the root of the word "company" in the respective idioms is the same as their English and French counterparts[130]. As we can see, even etymologically

[125] For example, to form a public limited liability company, under the Portuguese Commercial Societies Code article 273: "The '*sociedade anónima'* cannot be constituted by a number of shareholders inferior to five, except when there is legal dispensation."

[126] Blacks, p. 318.

[127] Blacks, p. 391.

[128] Lesley Brown (editor), *The new Shorter Oxford English Dictionary on Historical Principles,* Clarendon Press: Oxford, 1993, volume I, A-M, p. 457.

[129] Alain Rey and Josette Rey-Debove (editors), *Le Nouveau Petit Robert 1 – Dictionnaire alphabétique et analogique de la langue française*, Dictionnaires Le Robert – SEJER: Paris, 2009, pp. 2383-2384.

[130] In Spanish, "sociedad", in Portuguese, "sociedade".

speaking, the word cannot escape the fact that its origin itself is built on the idea of a plurality of people. Being so, one can conclude that the squeeze-out may come off as foreign mechanism within the system of Company Law, in the logic that it is designed to extinguish a principal characteristic of Company Law, which is the plurality of a company. Even in the wording of Company Law statutes and codes the prevailing idea is plurality: "the shareholders", "the partners", the very verbalization of the law conveys an idea of plurality underneath the idea of Company Law.

This is not to say, of course, that single-shareholder companies cannot or should not exist: they do, in multiple jurisdictions, and it is very often useful for many (usually smaller) businesses. However, this deviation of the general idea that a company requires a plurality of members is precisely that: a deviation. Principles always have exceptions, and the existence of single-shareholder companies *ab initio* will be one of those.

Evidently, this argument alone is not convincing, nor it is meant to be: this is a conceptual exercise, in which the object is to highlight the inherent idea of plurality within a company, one that as far as our research has shown, had not been done yet in this context, and is helpful in offering a simpler, even if less than orthodox view of the issue of the squeeze-out. This particular exercise is not about determining whether or not the squeeze-out breaches the law, but more of an attempt to provide another perspective on the issue, by highlighting the idea that companies are plural creatures in its genesis, and as such, approached with that in mind.

5.3. *Hypothetical issues and over problematization in the genesis of the rule*

The squeeze-out essentially removes minority shareholders in favor of the majority shareholder. It also represents an encroachment in the fundamental right to property, albeit justified, according to most judicial authorities[131]. The Report of the High Level Group of Company Law Experts justifies the squeeze-out on hypothetical situations of them causing issues to the carrying out of business within the company, as we have said before [132]. In fact, it is not certain that minority shareholders are more prone to abuse their position after a takeover than before one. As Sjåfjell states, "if the acquisition changes the control structure from dispersed to blockheld, then, of course, there could be a

[131] Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union… p. 61-62.
[132] Ibid. pp. 60-61.

danger of private benefits of control being extracted by the new blockholder, at the expense of the other shareholders"[133].

As we said, some courts over problematize the presence of minority shareholders, as was the case with the Czech Constitutional Court,[134] recurrently using hypothetical examples rather than factual ones. The Court affirms that "the right to an explanation and the obligation to inform may complicate the principal shareholder's strategic decisions"[135].

5.4. *Freedom of contract*

The typical position of a minority shareholder in, particularly in listed companies, is to either collect possible dividends that the company distributes, or to make a profit from the sale of his position. Hence, it is frequent in this type of shareholders to hold diversified investments in multiple companies[136]. We have briefly addressed this matter of risk previously[137], but it is useful to quote Sjåfjell in this matter:

> "Whether the market is more or less liquid at the point when the individual shareholder desires exit, or whether the particular company's shares are easier or harder to sell, is part of the risk involved in investing in shares – a risk that is taken with the aim of making higher profits than through safer and more predictable investments. Whether the individual shareholder sells at a profit or a loss is hardly something that should, or can, be regulated at a European level, and ensuring the same level of profit is actually not possible"[138].

The imposition of a "fair price" by a third party in its appraisal of expropriated property is, in our view, tolerable or justifiable when said expropriation is in favor of the State, given that the State gets to determine public interest. However, when said expropriation is in favor of a private entity, it seems that there could be a breach of the freedom of contract of the deprived party. Many decisions state that the minority shareholders in these cases have little to no influence

[133] Beate Sjåfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law*, Kluwer Law International BV: The Netherlands, 2009, p. 435.
[134] Czech Constitutional Court decision of 2008/03/27 – Pl.ÚS 56/05, paras. 51-53.
[135] Ibid. para 52.
[136] Ibid., p. 437.
[137] See Czech Constitutional Court decision of 2008/03/27 – Pl.ÚS 56/05, para. 66.
[138] Beate Sjåfjell, *Towards a Sustainable European Company Law*…, p. 435.

in the company decisions-making process[139]. If the minority's influence is so little, why then squeeze them out? Because of hypothetical situations where they may cause issues? They will surely not block a quorum, as the majority's shares[140] put him beyond any minimum threshold for a meeting. It is odd the insistence in "purging" existing shareholders from the company, since they are no more than mere investors, interested not in the management of the company, but in the possible profit that may emerge from their position as shareholders. If the argument to remove the minority shareholders is that it allows the majority shareholder to maximize profits that could be earned from the company, then the majority should offer to pay the value that the minority shareholders are willing to sell their shares at.

Also, the squeeze-out procedure favors the majority immensely, in the sense that if the majority succeeds to overcome the threshold for enacting the squeeze-out (at least 90% or 95%), the outstanding shares held by the minority are necessarily more valuable for the offeror, and the squeeze-out procedure can strip a minority shareholder from a greater profit than he would enjoy, should the compensation value be the same as was offered in the takeover bid.

As Emberland states, "(…) it would be meaningless to disconnect the Convention's democratic model from core values of a capitalist system since it embraces the value system of the liberal state, in which the company as protagonist of private enterprise, has a natural place"[141]. Moreover, the European Court of Justice, in *Alrosa Company Ltd v Commission of the European Communities*, affirmed that "The principle of a free market economy in which there is freedom of competition, enshrined in Article 4(1) EC, and contractual freedom, enshrined in the laws of the Member States and already recognized by Community law, are of fundamental importance in the Community legal order"[142].

The squeeze-out effectively defeats the underlying idea of investing in a company, since the purchase of shares creates a right that persists until "voluntary exit"[143], or liquidation of the company. In keeping with the foregoing rationale, the squeeze-out could be seen as a mechanism which completely disregards the

[139] Czech Constitutional Court decision of 2008/03/27 – Pl.ÚS 56/05, para. 52.

[140] Never less than 90% or 95%, since if the majority does not have at least that percentage of the voting rights, the squeeze-out is not possible.

[141] Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press: Oxford, 2006, p. 42.

[142] European Court of Justice Case T-170/06 – *Alrosa v Commission*, Judgement of 11/7/2007, paragraph 49.

[143] Brenda Hannigan, "Altering the Articles to Allow for Compulsory Transfer—Dragging Minority Shareholders to a Reluctant Exit", *Journal of Business Law*, 2007, p.471.

minority shareholders' will to enter into a contract to sell his shares or not, and can result in losses of income for the squeezed-out minority.

5.5. *The potential anti-competitive effect of the squeeze-out*

The European Union's policy concerning industry is also rooted in the idea of favoring initiative particularly through SME's, and in allowing for squeeze-outs, effectively facilitating the removal of market actors, is somewhat counterproductive towards the goal of boosting SME's[144]. The squeeze-out can be seen as a form of "company Darwinism", where the largest shareholders simply "evict" shareholders (that may have been shareholders in that company for longer than the majority). Bartl also draws similar considerations, affirming that the squeeze-out simply permits the majority shareholder to deprive the minority of profits[145].

Theoretically speaking, one of the requirements of perfect competition is the existence of many buyers and sellers, where market power does not exist[146]. In the logic that the underlying idea of the Internal Market is to aspire to perfect competition[147], it is somewhat contradictory to allow for a rule that facilitates the reduction of market actors. In that regard, one may say that the squeeze-out rule is perhaps inconsistent. By facilitating the acquisition of the entirety of the shares in a given company, the legislator is effectively allowing for the reduction of independent economic agents, and in theory, could have anticompetitive effects. However, we will reserve a more thorough economic analysis for a later date, as currently there is insufficient data to ascertain or effectively gauge this potential anticompetitive effect.

[144] Article 173(1) of the Treaty on the Functioning of the European Union: "1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings".

[145] Marija Bartl, *Czech Regulation of Squeeze Out in Comparative Perspective*, p. 84.

[146] Steven Durlauf and Lawrence Blume, *The New Palgrove Dictionary of Economics*, Palgrave Mac-Millan: Hampshire, 2008, vol. 6, pp. 354-362.

[147] Article 3(3) of the Treaty on European Union: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, (…)"; Protocol (No 4) to the Treaty on European Union, article 2: "The ESCB shall act in accordance with the principle of an open market economy with free competition…".

6. **Conclusion**

In keeping with what was said in the Introduction, now we must lend our opinion on the compatibility of the squeeze-out with EU Company Law.

The European Union created a free internal market, and in a free market, economic operators have the freedom to make their own decisions, and minority shareholders as economic operators have the right to decide when to buy or sell their shares as they see fit, ideally, when maximum profit is achieved. A legal mechanism that allows a dominant shareholder to acquire the minority's shares without their consent is nothing but alien to the principle of free market.

The vast majority of the legal opinions and jurisprudence have upheld the squeeze-out. However, it is healthy from time to time to question some established concepts, in order to spark discussion, so that the concept may evolve as well, lest the legal study on the concept becomes a mere echo chamber. We concur that "the acceptance of the squeeze-out right in Company Law is in effect promotion of capitalism at the cost of protection of minority shareholders where such minority does not wish to give its shareholding. It is a naïve law's response to commercial demands and reality"[148].

In our view, the legal argumentation put forth in defense of the squeeze-out when confronted with the right to property, particularly by the High Level Group of Company Law Experts, is wanting, as it relies far too much on economic arguments, and not enough on legal reasoning, namely in what concerns the compatibility of the squeeze-out with the fundamental right to property. The same was said over the course of this thesis of the arguments put forth by many of judicial authorities. We believe that the protection of private property was largely dismissed when the legality of the squeeze-out is discussed.

The *Bramelid* precedent, which clearly affirmed that share ownership is covered by Article 1 of the Additional Protocol to the ECHR, and as such, protects said shareholding from the deprivation of property except under the conditions which it is admissible. In this regard, one cannot help viewing the squeeze-out as akin of expropriation, as recognized by the Czech Constitutional Court, and as such, subject to the rules applicable to expropriation.

As we mentioned, legal precision and adequate compensation have been satisfactorily developed in what concerns the squeeze-out as a form of expropriation, but public interest remains an issue, for as we said throughout the thesis, the argumentation for the squeeze-out being in public interest is subpar and uncompelling, and in our view, unable to justify the deprivation of property that a squeeze-out constitutes.

[148] J. Mukwiri, *Takeovers and European Legal Framework. A British Perspective*… p. 73.

It would be interesting to see a challenge to a squeeze-out operation based on the ideas hereby put forth, in order to better test the legal soundness of the squeeze-out before a court.

Any minority shareholder should strive for questioning of the legality of the squeeze-out rule, as we believe that it is eminently unfair, and is tendentially designed to favor large conglomerates, at the expense of small/ mid-size investors.

Ultimately, one's opinion on the legality of the squeeze-out will necessarily be predicated on one's conception of public interest. Thus, while there may be some sound economic reasoning behind the squeeze-out, so far, no legal argument put forth has been convincing enough to justify such an encroachment in one's right of property.

In our view, the legality of the squeeze-out seems to boil down to a political choice, between favoring the occurrence of takeovers or protecting the position of minority shareholders and their right to property.

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