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Re-Politicising Merger Policy: Regulating Foreign Takeovers in Britain and Italy

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Re-Politicising Merger Policy: Regulating Foreign Takeovers in Britain and Italy

Bernardo Rangoni and Mark Thatcher

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Re-Politicising Merger Policy: Regulating Foreign Takeovers in Britain and Italy

Bernardo Rangoni* and Mark Thatcher**

Abstract

While much attention has been given to ‘de-politicisation’, its reversal through ‘re-politicisation’ is also possible. We examine ‘institutional re-politicisation’ - increases in the formal powers and discretion of elected politicians’ - in hard cases - policies for regulating Cross-Border Mergers and Acquisitions (CBMAs), focusing specifically on Britain and Italy. While existing explanations of increased powers and discretion for elected politicians to block or shape overseas takeovers focus on economic vulnerabilities created by the Covid pandemic and security concerns vis-à-vis China, using process tracing and comparison we show that, in both countries, the change of tide towards re-politicisation actually began earlier. We find that it followed specific CBMAs in sectors such as chocolate and dairy products that were contested by political parties from the Right and Left and producer interests, who shared arguments about defending national culture and heritage. The cases suggest there is considerable scope for re-politicisation thanks to a wide coalition that shares arguments based on defending national identity.

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Re-Politicising Merger Policy: Regulating Foreign Takeovers in Britain and Italy¹

1. Introduction

In 2005, there were rumours of a takeover of the French yogurt producer Danone by the American giant Pepsi. A strong debate arose in France about ‘economic patriotism’ and defending national ‘identity’, followed by regulations that allowed the Minister to block takeovers in ‘strategic sectors’. The French stance was widely criticised and seen as an isolated example of French ‘protectionism’ (e.g., Kim 2007; Roberts 2006).² Yet by 2022, 18 European Union (EU) member states – plus the United Kingdom (UK) – had a screening mechanism for foreign direct investment in place, with several others considering the establishment of such regimes.³ National governments have acquired powers to block Cross-Border Mergers and Acquisitions (CBMAs) on grounds of ‘national security’ and through ‘golden powers’ in a long list of industrial sectors.

¹ We thank the anonymous referee for comments on this paper and also comments on earlier versions presented at a workshop at the Scuola Nazionale Superiore in Florence and at the Council for European Studies conference, Lisbon, the PSA conference, York, and the London Public Policy mini-conference organised by UCL, KCL, and LSE in 2022.

² See also e.g. Financial Times 23 September 2005, 12 February 2010.

³ In some cases, such as the Dutch and the British ones, these regimes may even provide for a retroactive effect, reserving to governments the power to scrutinize takeovers signed before the new rules entered into force.

These changes represent ‘institutional re-politicisation’ of cross border mergers and acquisitions as they increase the formal powers of elected politicians. They offer an important example of the reversal of a lengthy and widespread trend of ‘de-politicisation’, which a wide literature has argued has become prevalent in Europe, but especially strong in Britain and in economic governance. While de- and re-politicisation are part of political strategies and can be reversed, the literature has focused on ‘de-politicisation’ that has involved a reduction in national elected politicians debating and deciding policies, with claims of consequent negative effects on interest and support for politics.

Regulation of CBMAs offers an important and hard case for re-politicisation in Europe. It is a crucial part of modern economic governance and has been cited as a key example of the extent of de-politicisation, due to the delegation of strong, exclusive powers to independent competition authorities and strong norms decrying political ‘interference’. Thus far, two central explanations have been put forward for increases in government powers over CBMAs. One is protection of ‘national security’, especially due to rising concerns about China. The other is economic crisis, in particular the economic vulnerabilities created by the Covid pandemic. Yet, at least in France, attempts to re-politicise CBMA regulation began well before current concerns about China or Covid, and for other reasons.

We therefore investigate the reversal of trend towards de-politicisation. We engage in process tracing to identify the actors, coalitions and means of legitimating re-politicisation to overcome the forces for de-politicisation. Our research question is: why did key actors support ‘re-politicisation’ and which coalitions and legitimating discourses did they create to reverse previous de-politicisation? We study two cases: one – Italy – is usually classed as a ‘state

influenced' or 'Mixed Market Economy' (MME) with a weaker state than France, and also offers an example that goes beyond the much-cited French case; the other – the UK – is often used as the archetypical country for 'de-politicisation', sometimes linked to being classed as a 'Liberal Market Economy' (LME), and additionally, having voted to leave the EU in 2016, can aid in consideration of the effects of the EU. Our selection thus offers 'harder cases' for re-politicisation, both within the category of statist or MMEs and more generally, in order to contribute to understanding whether and why 're-politicisation' takes place in Europe.

Our central finding, which is strikingly similar across Italy and the UK, is that the change of tide towards re-politicisation of CBMAs began before recent concerns about China and Covid. It was driven by a surprising coalition of right and centre-left politicians and trade unions and associations, who shared arguments centred on national identity. We identify specific episodes of CBMAs that were prominent in the move towards re-politicisation and took place before the Covid crisis and independently of security concerns about China, often in sectors that were not immediately crucial for security such as chocolates and dairy products, as in France. The coalition and many of their arguments, furthermore, remained prominent in recent moves to re-politicise CBMA regulation.

Thus, without denying the effects of Covid and China, we argue that re-politicisation started for different reasons. We point to a broad coalition across political parties and interests linked together by defence of national identity which is used to legitimate re-politicisation. Hence, we bring in this thus far overlooked factor for explaining the re-politicisation of CBMAs. We then link our findings to the wider literature on de-politicisation, underlining the role of

defence of national identity linked to heritage and culture as well as economic factors. Thus, we seek to contribute both to analyses of CBMA regulation and also to the wider politicisation literature by specifying coalitions and justifications that can sustain re-politicisation.

2. De-Politicisation and Competition Policy

A broad and growing literature has argued that widespread de-politicisation of national policymaking has occurred in Europe since the 1980s, through elected politicians and politics having reduced capacity to influence policy choices, and then discussed its detrimental implications for politics (for key works see Burnham 2001 and 2014; Flinders and Buller 2006; Hay 2007, 2014). It has identified, among major methods of de-politicisation, the delegation of powers to 'non-majoritarian institutions' such as independent agencies or central banks, legalised rules constraining the powers of politicians, and norms setting limits on the proper realm of political debate and decisions (Flinders and Buller 2006). It has recognised de-politicisation to be a common trend across Europe, though being stronger in certain countries - notably 'liberal market' polities such as the UK - and in certain domains - notably economic governance (e.g. Flinders and Buller 2006; Burnham 2001; Bates *et al.* 2014; Kuzemko 2014; Berry and Lavery 2017). The literature has put forward its wider claims about a relationship between such widespread de-politicisation and equally widespread issues such as anti-politics, political apathy and loss of accountability in democratic politics (Hay 2007, 2014; Fawcett *et al.* 2017).

The national politicisation literature explicitly conceives de-politicisation and re-politicisation as dynamic and fluid, as changes can be contested and reversed (Hay 2007: 79, 81-82, 84; 2014: 293) and pressures for returning to

‘direct governing relationship’ (Flinders and Buller 2006: 296) and ‘making [apparently] unpolitical matters political’ again (Zurn 2019: 977-78) might arise. Indeed, just as de-politicisation is a ‘governing strategy’ that involves ‘arena shifting’ (Burnham 2001: 128, see also 2014; Flinders and Buller 2006: 296; Hay 2007: 91), so too can policy makers choose alternative governing strategies that involve re-politicisation. Yet thus far, the literature has mainly focused on de-politicisation (for exceptions, see Kuzemko 2014; Beveridge and Naumann 2014). A rather distinct literature has looked at politicisation of the EU, and especially the expansion of conflict about European integration (e.g., de Wilde 2011; de Wilde and Zurn 2012; Kriesi 2016), but here we focus on the literature concerning the national level and institutional de- and re-politicisation, notably on the location of powers and discretion.

Competition policy, including the notable example of CBMAs,⁴ has been a particularly strong example of de-politicisation. It is an important domain given its cross-sectoral significance and its central position in the ‘economic constitution’ (Wilks 2010). It offers a prime example of how legal powers of ministers to intervene have been greatly reduced. In Europe, major powers over mergers have been delegated to independent competition authorities at the national level, while larger cross-border mergers are the exclusive competency of the European Commission. These competition authorities are often amongst the institutionally most powerful and independent regulatory bodies (Wilks and Bartle 2002; McGowan and Wilks 1995; Wilks 2010; Guidi 2014, 2016; Bütthe 2007; Bütthe and Swank 2007). De-politicisation of competition policy is argued to have spread even to ‘statist’ countries (Callaghan and Lagneau-Ymonet 2012; Callaghan 2018; Linsi 2020). Indeed,

⁴ Mergers, takeovers, and acquisitions are all treated as synonyms in this paper.

studies comparing corporate governance across distinct ‘varieties of capitalism’ and over time have underlined that a host of legal rules governing takeovers have grown up, progressively limiting the potential involvement and discretion of elected politicians, even in the face of the 2008 crisis (Callaghan 2015a, 2015b, 2018). As a result, major foreign takeovers such as of a national stock exchange have been allowed even in a notoriously protectionist country like France, offering an example of ‘liberal economic patriotism’ in which domestic firms are promoted through openness to overseas firms (Callaghan and Lagneau-Ymonet 2012; Callaghan 2018; cf. Clift and Woll 2013). A major part of such openness has been welcoming overseas mergers and takeovers, which has gone hand in hand with reducing the discretionary powers of elected politicians to protect favoured domestic firms, and instead delegating them to independent competition authorities acting with a legal framework that specifies economic criteria. Equally, powerful discourses and norms have developed, most strongly in the UK but also in other polities, which treat overseas takeovers as desirable ‘foreign investment’ and decry ‘political interference’ (cf. Linsi 2020; Morgan 2012; Callaghan 2015a, 2018; Chwioroth 2009). In short, if over the past decades de-politicisation has become distinctive of policymaking in general, competition policy for CBMAs offers a particularly prominent example.

Yet, current developments are altering the de-politicisation of regulation of CBMAs. Governments around the globe are greatly expanding the range of controls, powers and instruments in the hands of their own ministries. In Europe, on which we concentrate,⁵ an EU framework has become operational in 2020 to coordinate the European Commission and member states in the

⁵ Analogous developments are observed for instance in the US.

screening of FDIs, which include CBMAs.⁶ What is more puzzling still, such a change has been encouraged and welcomed by the EU, until yesterday seen as a champion of neo-liberal ideas centred on competition policy (Thatcher 2013). The Commission has called upon all member states to ‘make full use’ and to set up a ‘fully-fledged’ screening mechanism, should they not have one already (European Commission 2020). As a result, nearly all member states have experienced regulatory changes (European Commission 2021: 8-9), with a shift from foreign takeovers being dealt with by independent competition agencies on legally defined competition grounds to being subject to the discretion of elected politicians based on criteria beyond ‘competition in the market’.

How can we explain such a puzzling, sweeping reversal? An emerging stream of literature has focused explanatory attention primarily on two factors. First, building on the insight that barriers to cross-border mergers may be erected to protect ‘national security’ – a term that can be interpreted in many different ways (Lenihan 2018; Graham and Marchick 2006 for the US), these studies have pointed to the rising fears in Europe – just as in the US – of overseas takeovers, especially by Chinese firms. The same studies, second, have also pointed out that economic crises, such as the contemporary one caused by the Covid pandemic, may trigger protection based on fears of ‘unfair’ competition or market disruption (cf. Wyckaert 2020, Meunier and Mickus 2020; Chan and Meunier 2021).

These two explanatory factors offer a valuable starting point for analysing the re-politicisation of CBMAs: they are *prima facie* convincing, not least because the EU itself openly refers to the protection of ‘collective security’ and ‘a time

⁶ Regulation (EU) 2019/452.

of public health crisis and related economic vulnerability'.⁷ Yet this stream of literature is in its infancy and both of the factors identified are contemporary. Moreover, there is some evidence that other, possibly more deeply rooted factors may have also contributed to the observed reversal of de-politicisation. Further exploration is particularly needed given that the broader de-politicisation literature, whilst in principle accepting the possibility of re-politicisation countertendencies, to date offers very few empirical studies and virtually no generic explanation of how and why re-politicisation might occur.

3. Analysing Re-politicisation in Policy for CBMAs in Britain and Italy

The term 'politicisation' is used in different ways - notably between the literature on national policymaking and politics, where we focus, and that on EU politics and European integration. Further, even within the former literature, the notion is broadly defined. Colin Hay and colleagues suggest that politicisation involves issues 'becoming the subject of deliberation, decision making and human agency where previously they were not' (2007: 81). Conversely, de-politicisation is the 'denial of political contingency and the transfer of functions away from elected politicians' (Flinders and Wood 2014: 135; cf. Burnham 2001: 128, 2014: 189), with studies treating de-politicisation in ways that range from formal delegation to non-majoritarian institutions to more discursive approaches such as whether a policy is debated or open to debate by elected politicians or in electoral contests.

⁷ https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157683.pdf (accessed July 2022).

Here, we focus on the formal powers of elected politicians and their discretion in using those powers, a topic that the literature on national politicisation has discussed in terms of the loss of powers of elected politicians. More precisely, we consider ‘institutional re-politicisation’ - additional formal powers for elected politicians that extend their discretion and scope for intervention. For competition policy, we pay particular attention to rules that allow elected politicians greater discretion in decisions, for instance through broad terms or concepts that allow much interpretation, such as grounds that are not tightly legally or economically specified. Our focus is on whether, how and why elected politicians obtain greater powers and discretion. This may involve ‘de-delegation’ – reducing the powers and institutional independence of independent competition agencies (Thatcher *et al.* 2022) – but not necessarily so, as politicians may gain new powers and discretion without necessarily reducing those of the competition authority.

Discourses and individual takeovers, of course, are important and indeed examined insofar as they had consequences for changes in rules. But we do not investigate the effects of rules on individual takeovers, which is a different level of analysis. Nonetheless, we assume that the rules governing CBMAs are likely to be consequential and hence worth studying.

We follow an exploratory and inductive strategy given the absence of detailed, testable hypotheses about re-politicisation either generally or of competition policy specifically. Since we do not only aim at a descriptive analysis but also at explaining why and how re-politicisation of CBMAs has occurred, we examine which actors pressed for de-politicisation, their strategies, coalitions and rationales. We consider different factors that might have led elected politicians to press for re-politicisation, and especially whether other factors

operated before or in addition to the two suggested by the recent literature on protectionism in FDI, namely national security fears linked to China and vulnerabilities triggered by the Covid pandemic. The aim is to track the political process and especially the change of direction from de-politicisation to re-politicisation.

We adopt a qualitative comparative approach, taking two national case studies – the UK and Italy – that reinforce a ‘least likely’ case selection strategy, though for different reasons.⁸ The UK is seen as having experienced a particularly well entrenched de-politicisation, and indeed as epitomising a ‘liberal market’ approach of openness and reduction of discretionary powers of Ministers to block or shape CBMAs (cf. Callaghan 2018). Moreover, after Brexit, Britain offers an example of a major polity in Europe that operates outside EU competition rules and has had greater scope for adopting its own competition rules. For its part, Italy, although often classed as a ‘state influenced’ or MME, is usually seen as having a weaker state which hence has less capacity than France, the ‘usual suspect’ for protectionism. Indeed, the 2005 Pepsi-Danone CBMA has made France an early mover in terms of re-politicisation of merger policy, which has been much studied (Roberts 2006; Callaghan and Lagneau-Ymonet 2012; Clift 2013: 102). Thus, these two countries offer harder cases for re-politicisation than France, albeit in different ways (one as usually classed as an LME in which de-politicisation has been strongest and the other as a state-influenced polity where the state has less capacity to act counter to powerful domestic and international interests). They also allow us to see whether the re-politicisation of CBMAs in France after the Danone case was really an exception. We integrate the comparative method with process tracing, to

⁸ Competition policy already being itself an unlikely case for re-politicisation.

identify the key actors and their strategies and coalitions. In particular, we apply such method to publicly available primary sources of evidence, notably newspaper articles, parliamentary debates, and laws and rules.

4. Re-Politicising Institutions for Regulating Foreign Takeovers in Britain and Italy

Analysing foreign takeovers regulation in Britain and Italy, we find strikingly similar processes and coalitions. In examining when the tide turned against de-politicisation and how, we reveal that in both countries, the currently observed re-politicisation has earlier and more surprising roots than Chinese security concerns or the vulnerability created by the Covid crisis. It followed specific cases that were contested by an unconventional yet distinctive political coalition of the Right, Left and trade unions that used rhetoric about national identity to justify re-politicisation. We now discuss such a change of direction in detail, beginning with the more puzzling case, Britain.

Britain

From the 1980s onwards, rules concerning mergers – including foreign ones – in the UK became increasingly de-politicised. Previously, the Secretary of State for Industry, assisted by the independent Office of Fair Trading (OFT), took decisions over whether to recommend an investigation by the independent Monopolies and Mergers Commission (MMC) and then whether to accept the MMC's recommendations. But in 1984, the then Minister Norman Tebbit affirmed that takeovers were to be referred by the Secretary of State only on competition grounds, rather than others such as industrial strategy or wider 'public interest' ones (Mor and Browning 2018: 11-15). Then under the 2002

Enterprise Act, many of the Minister's discretionary powers were formally ended, so that the MMC decisions were implemented except under very narrow grounds, effectively codifying what had already been established practice in the previous years (Mor and Browning 2018: 11).⁹ As the Minister himself stated, 'There are two core changes to the merger regime. The first is to de-politicise the merger regime by removing Ministers from the vast majority of decisions. The second is to replace the broad public interest test with a competition test'.¹⁰

Yet a decade ago, a change of direction from de- to re-politicisation took place. The starting point was in 2011, when several revisions were made to the 'Takeover Code', the set of rules governing acquisitions.¹¹ Known as 'Cadbury's Law', these regulatory changes directly followed the acquisition in 2009-10 of Cadbury's by Kraft. As shown in Table 1, they effectively marked the beginning of the re-politicisation process, being followed by further changes that increased the powers and discretion of elected politicians. The coalition and arguments used to justify Cadbury's law remained influential in subsequent developments.

The acquisition of Cadbury's did not concern security issues vis-à-vis China, but rather an American company targeting a British chocolate producer! Nor did we find evidence in parliamentary debates or newspaper articles of

⁹ The Enterprise Act 2002, in particular, had confined the grounds for political intervention to national security and media plurality; amid the 2008 financial crisis, these were extended to financial stability.

¹⁰ House of Commons Standing Committee B 2002, cc. 293-294.

¹¹ These notably required bidders to make a formal offer within 28 days of expressing their interest, or withdraw; demanded more information about bidders' intentions on the target company and its employees after the acquisition, especially in terms of jobs and assets; provided for greater employee consultation on the bid; and prohibited most deal protection measures, such as 'inducement fees' that are lost if the deal falls through.

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references to economic crises, even though the 2008 financial crisis had only recently erupted. Instead, the evidence is replete with issues of identity, notably in terms of heritage, as well as economic arguments.

Trade unions opposed the takeover. However, Unite's Deputy Secretary General Jack Dromey framed the takeover around nationality lines. He argued to the Business and Enterprise Parliamentary Committee (then transformed into the Business, Innovation and Skills, BIS, Committee) that foreign owners such as Tata always place domestic interests first, thus advocating to 'make it harder for foreign buyers to acquire British companies, so that companies can't just come along in this predatory way'.¹² One issue was concern about potential job losses. But he also pointed to identity in terms of national heritage. Thus Mr Dromey underlined how Cadbury was a 'world class British success story [...] part of our national heritage, with an admirable record of philanthropy'.¹³ The union insisted that, if the takeover went through, the control of this 'iconic' company would move from the UK to Illinois, with all important decisions no longer being taken by 'people who understand the Cadbury heritage'.¹⁴

However, a rather unusual alliance then formed, as it was not the Left that first picked up the unions' concerns, but Right-wing politicians, at that time in the Opposition. They shared arguments about national identity. Thus the Conservative Chairman of the House of Commons Business and Skills (BIS) Committee, Peter Luff, drew a parallel with the previous takeover of Rowntree by Nestlé and identified these as 'good, iconic brands'. A local Conservative Councillor, Nigel Dawkins, was extreme: 'if we had 10 Cadbury's it wouldn't

¹² The Guardian 13 January 2010; Birmingham Post 17 December 2009.

¹³ The Guardian 13 January 2010.

¹⁴ Birmingham Post 17 December 2009.

matter. Sell one to the Yanks and one to the Chinese. But we've only got one'.¹⁵ Thereafter, under pressure from the unions and the Conservative Party as well as from MPs for Birmingham from his own party, the Labour Under-Secretary of State for BIS Ian Lucas eventually converged on identity arguments:

We know of course that the company has a long and distinguished history. It has enormous civic achievements that have transformed lives and communities, and we recognise that the Cadbury family were social as well as chocolate pioneers. George Cadbury's decision to buy the 120 acres of land close to his works in Birmingham led to the creation of the model village with its own social security programme. George was always very explicit about his purpose there to ameliorate the condition of the working class and labouring population. [...] Cadbury is a long-established company with a committed work force that are performing well. It is a significant business with an extraordinary heritage and many stakeholders [...]. Kraft needs to make its plans clearer. Kraft has made encouraging noises about its respect for Cadbury's brands, heritage and people.¹⁶

Although the acquisition went through, Kraft's reversal of its initial indications led to regulatory changes. Within days of signing the deal, Kraft closed a Cadbury's factory moving production to Poland at the cost of 400 jobs, despite having indicated that the plant would remain.¹⁷ At a hearing of the BIS Committee, Kraft was lambasted and forced to make an apology and to promise not to close any more factories in the UK for at least two years. Trade

¹⁵ The Observer 24 January 2010.

¹⁶ House of Commons 2010, vol. 504.

¹⁷ The Evening Standard 12 February 2010.

unions used the hearing to call for the introduction of a 'Cadbury's Law', aimed at 'preventing hostile takeovers of British companies which would not be in the national interest'.¹⁸ At the request of the Labour Business Secretary Lord Peter Mandelson, a cross-party group of MPs in the BIS Committee conducted an inquiry, which welcomed the review of the Code. Mr Luff, its Conservative Chair, commented that Kraft's acquisition had rightly opened a debate on how takeovers in the UK are conducted, a debate that had to continue urgently.¹⁹ The BIS Committee's report thus 'encourage[d] our successor Committee to take up where we have left off and conduct a detailed inquiry into these important issues,' concluding that 'It is time to reconsider many aspects of corporate governance'.²⁰

Indeed, only a few years later, the Takeover Code was further amended, under the Conservative-led government.²¹ The triggering event in this case was the rumoured acquisition of AstraZeneca by Pfizer. In this episode, too, the 2008 financial crisis was not mentioned, nor did the deal concern defence and a Chinese buyer, but rather, an American firm buying the British-based pharmaceuticals company. By contrast, identity issues continued to play a significant role and were taken up by a broad coalition.

As in the Cadbury takeover, MPs of all political colours – including Conservatives – appealed to the image of success of AstraZeneca and what it symbolized for the whole country. The Labour MP Michael Meacher identified AstraZeneca as 'a key national champion in the key pharmaceutical section in which Britain is a world leader', while from the government side, the Liberal

¹⁸ Financial Times 16 March 2010.

¹⁹ Financial Times 6 April 2010.

²⁰ House of Commons 2010, vol. 234.

²¹ Namely strengthening the enforceability of commitments made by the bidder.

Democrat Dr Julian Huppert and the Secretary of State for BIS Vincent Cable talked of 'key sectors where we are global leaders', 'great British science' and 'scientific leadership based in Cambridge'. Equally, the Conservative George Freeman explained that the strong support for the UK's life science strategy and its ground-breaking steps would help to ensure a move to 'Cambridge, England, not Cambridge, Massachusetts', and Lord Christopher Tugendhat recalled that 'we have seen too many great and successful British companies disappear'.²²

Politicians built on and made an explicit link with the previous Cadbury-Kraft affair. 'The last experience we had, with Cadbury and Kraft, was that, just a week after promising to keep the Somerdale factory near Bristol open, Cadbury backtracked and closed the plant', Lord McFall of Alcluith recalled. The BIS Secretary of State Vincent Cable recognized that 'one example that we have in front of us of what to avoid is what happened in the Kraft-Cadbury merger'.²³

Although Pfizer eventually withdrew its bid, the 'Pfizer-AstraZeneca incident' - to use the words of Conservative Lord Tugendhat -²⁴ stimulated a further revision of the Takeover Code. Reflecting on foreign ownership of UK assets, Lord Simon Haskel concluded that 'Brands are an important national asset. Many have a national identity'. Evoking how the French yogurt maker Danone had been protected from an attempted takeover by the Swiss food group Nestlé, Viscount Hanworth returned to the Cadbury-Kraft takeover, suggesting that the French would never have allowed it.²⁵

²² House of Commons 2014, vol. 580; House of Lords 2014, vol. 754.

²³ House of Commons 2014, vol. 580.

²⁴ House of Lords 2014a, vol. 754.

²⁵ House of Lords 2015, vol. 767.

The unconventional coalition between the Right and trade-unions centred on identity questions operated again in a third, more recent episode. As in the previous instances, no reference was made to crises, and if the relevance of the target company – GKN – for security issues is open to debate (Fingleton 2018), the buyer – Melrose – was not Chinese. But as with the previous examples, GKN was defended from the purchase on grounds of its supposed long national history and status.

Thus for instance, Conservative MP Rachel Maclean stressed that ‘GKN has a 250-year history and has played a significant part in the manufacturing heritage of the midlands for many years, since it was established as an ironworks in 1759’.²⁶ Equally, the Labour’s position of opposing the merger was, similarly to that of the unions, on grounds of protecting national heritage. Mr Dromey, the life-long trade unionist who had previously been involved in Cadbury-Kraft as Unite’s Deputy Secretary General, argued in his new position as Labour MP that ‘GKN is an iconic engineering company, a British success story with a history stretching back over 259 years [...] it’s British as the royal family’. Supported by other MPs and current senior representatives of Unite,²⁷ Mr Dromey concluded that ‘this country is proud of GKN, and the last thing we want to see is for GKN, that great British engineering icon, to become history’.²⁸

Although the specific deal went through, debates on it and all the previously described episodes explicitly contributed to the 2021 National Security and

²⁶ House of Commons 2018, vol. 637.

²⁷ See e.g. <https://www.unitetheunion.org/news-events/news/2018/march/unite-on-melrose-bid-for-gkn-government-last-minute-move-too-little-too-late-and-assurances-may-not-even-be-enforceable/> (accessed July 2022).

²⁸ House of Commons 2018, vol. 637.

Investment Act, which greatly re-politicised British merger policy.²⁹ Entered into force in 2022, it has created a new standalone foreign investment review regime, separate from and layered onto the existing competition authority. It is situated within the Department for Business, Energy and Industrial Strategy (BEIS, evolution of the BIS) and requires mandatory ministerial approval for acquisitions in 17 areas of the economy, stretching well beyond defence.³⁰

In contrast to the previous regulatory changes discussed, the 2021 Act was explicitly justified by security concerns, particularly vis-à-vis China, as well as the pandemic.³¹ But the coalition pushing for such re-politicisation remained the same. Thus the Bill was introduced to Parliament by Conservative Secretary of State for BEIS Alok Sharma, who claimed that ‘hostile actors should be in no doubt – there is no backdoor to the UK’.³² He built on the help of Conservative Business Minister Lord Martin Callanan,³³ and more broadly on the Green and White Papers published under the previous Conservative government led by Theresa May.³⁴

²⁹ The Act extended amendments that in 2018 and 2020 had already lowered the thresholds for Secretary of State’s intervention in six key defence areas, and incorporated a 2020 amendment allowing political intervention in public health emergencies.

³⁰ The areas are civil nuclear, communications, data infrastructure, defence, energy, transport, artificial intelligence, autonomous robotics, computing hardware, cryptographic authentication, advanced materials, quantum technologies, engineering biology, critical suppliers to government, critical suppliers to emergency services, military or dual-use technologies, satellite and space technologies.

In addition, it can be applied voluntarily, in some instances retroactively (!) in other areas (National Security and Investment Act 2021).

³¹ National Security and Investment Bill.

³² The Guardian 11 November 2020.

³³ National Security and Investment Bill.

³⁴ Available at: <https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review> and <https://www.gov.uk/government/consultations/national-security-and-investment-proposed-reforms> (accessed July 2022).

The Act was supported by trade unions and the Labour Party. One example was Lord Woodley, now a Labour MP who had previously been workers' representative at Vauxhall Motors in Ellesmere Port, a shop steward and convener, the last general secretary of Britain's most famous union - the Transport and General Workers' Union, and a creator of the union Unite.³⁵ Labours, too, supported the Bill, with MP Stephen Kinnock for example claiming that 'For 10 years successive Conservative governments have been profoundly naïve and complacent about our national security and our strategic national assets, leaving our home-grown businesses at the mercy of hostile takeovers. The effects of the pandemic have compounded these problems'.³⁶

Furthermore, the 'biggest shake up of the UK's national security investment screening powers for 20 years' – to use the words of Conservative Business Minister Lord Callanan,³⁷ explicitly built on the previous, identity-loaded episodes. As the shadow Secretary of State for BIS Edward Miliband stated:

These are not Christmas tree baubles that I have suddenly raised now. In 2010, there was the issue of the Kraft takeover of Cadbury. In 2014, there was the threatened takeover by Pfizer of AstraZeneca that had deep implications for our science base. I have felt for a decade that our legislation is not fit for purpose.³⁸

In sum, as summarised in Table 1, the dramatic changes witnessed by the archetypal LME of the UK in the regulation of foreign takeovers have deeper

³⁵ House of Lords 2021, vol. 809.

³⁶ <https://labour.org.uk/press/labour-pushes-ministers-to-strengthen-national-security-and-protect-uk-businesses/> (accessed July 2022).

³⁷ Financial Times 20 December 2021.

³⁸ House of Commons 2020, vol. 684.

roots than security vis-à-vis China and the pandemic crisis. Identity questions played an important role in the reversal from de- to re-politicisation, allowing the formation of broad and unconventional coalitions, notably between trade unions and the Right. We now proceed to analyse the Italian case, uncovering remarkably similar findings.

Table 1. Re-politicisation of foreign takeovers regulation in Britain

| Regulatory change | Key coalition | Key argument |
|--|-----------------------------|---|
| 2011 revision to Takeover Code ('Cadbury's Law') | Right and unions, plus Left | Identity |
| 2014 revision to Takeover Code | Right and Left | Identity |
| 2021 National Security and Investment Act | Right and unions, plus Left | Security vis-à-vis China and Covid pandemic |

Italy

Italy was no exception to the common de-politicisation trend of mergers policy. Although usually classified as a MME or 'state-influenced' economy with the state playing a direct and overt role in economic governance, here too, there was substantial de-politicisation of takeovers regulation from the 1990s onwards. The largest cross-border mergers became the exclusive domain of the European Commission under EU law, notably the Merger Regulation of 1989.³⁹ But also at the national level, decision-making became increasingly based on competition criteria by the independent *Autorità Garante della Concorrenza e*

³⁹ Council Regulation (EEC) No 4064/89 of 21 December 1989 (*and subsequent amendments*).

del Mercato (AGCM), established in 1990. Moreover, while during the 1990s Italy had sought to ensure that the Treasury could still control takeovers of partially privatised companies in which it no longer held majority shares,⁴⁰ such 'golden shares' were repeatedly subject to infringement proceedings by the European Commission and decisions of the European Court of Justice that these provisions were illegal because they violated free movement of capital. Under pressure from the EU, the powers and discretion of Ministers to create and use golden shares were thus reduced by legal changes in 1999-2000 and then in 2003 (Alvaro and Ciccaglioni 2012: 33-34; Alvaro *et al.* 2019: 7-15). Indeed, from the 1990s also Italian governments generally accepted overseas takeovers and sometimes even encouraged them, including in very sensitive sectors such as banking and communications.

Yet the trend towards de-politicisation began to reverse a decade ago, with the establishment in 2012 of a 'golden powers' framework by the Right government led by Silvio Berlusconi, which empowered ministers to accept, condition or veto foreign takeovers in an initially circumscribed list of sectors.⁴¹ This was explicitly associated with the defence of '*italianità*'⁴² – maintaining national ownership of assets and firms – as well as the extension of the remit of the main state-owned Italian investment bank.⁴³ Silvio Berlusconi had made the defence of '*italianità*' an issue in the 2008 election concerning selling Alitalia to foreign

⁴⁰ Namely in defence, transport, telecommunications, energy, and other public services (Law Decree n. 332/1994).

⁴¹ Specifically defence and national security, energy, transport, and communications sectors (Law Decree n. 21/2012).

⁴² Camera 2012, n. 619; Senato 2012, n. 719.

⁴³ Specifically, provisions for the 'Cassa Depositi e Prestiti' (CDP) to acquire shares in companies of 'relevant national interest', such as those operating in the sectors of defence, security, infrastructures, transport, communications, energy, insurances and financial intermediation, research and innovation of high technological content, and public services (Law Decree n. 34/2011).

buyers, but despite his victory, he did not alter the legal framework. Rather than rumours about a takeover by either Lufthansa or Air France – KLM of the flag carrier and largest airline of Italy in 2008, change came with the acquisition of the dairy producer Parmalat by the French company Lactalis in 2011.⁴⁴

Shortly after Lactalis had started buying stakes in Parmalat that would have allowed it to select most of the company's board members, the Right-wing Silvio Berlusconi government issued an urgent decree that exceptionally allowed Parmalat to postpone the scheduled re-appointments to the company board. But it went much further. Making explicit reference to Parmalat, the government authorised the Minister of Economy and Finance to develop and activate instruments of financing and capitalisation to acquire stakes in companies of 'national interest'.⁴⁵ An article was immediately added to a law decree that extended the mandate of the state-owned Italian investment bank, the Cassa Depositi e Prestiti (CDP), so that 'it could acquire shares in firms of national interest, understood in terms of strategic sectors, occupational levels, turnovers or effects on the country's economic and productive system'.⁴⁶ As illustrated in Table 2, the 2012 reforms marked the turning point from de- to re-politicisation of CBMA's regulation in Italy, notably by giving ministers new 'golden powers'.

The Parmalat-Lactalis takeover was far from security concerns vis-à-vis China, concerning instead dairy products and a French buyer. Nor were references made in the reform debates to the 2008 economic crisis, despite it being very recent. In contrast, national identity issues combined with economic ones

⁴⁴ Camera 2011, n. 473, 2012, n. 619.

⁴⁵ Camera 2011, n. 473; *Il Sole 24 Ore* 31 March 2011.

⁴⁶ *Il Sole 24 Ore* 31 March 2011.

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allowed the moulding of an unconventional coalition which played a key role in the change of direction from de- to re-politicisation. The efforts by the Finance Minister Giulio Tremonti to develop rules to protect Italian firms from foreign takeovers and to favour an alternative domestic 'white knight' won support from other Right-wing politicians. Within the People of Freedom party to which Tremonti belonged, the Minister for Economic Development Paolo Romani advocated an Italian initiative.⁴⁷ Outside of it, Northern League's leader Umberto Bossi repeatedly declared that 'Parmalat does not go to the French, it remains in Italy'.⁴⁸ Identity arguments intertwined with economics ones, given that 'Parmalat represents not only a brand of the Made in Italy known all over the world, but also 25% of the Italian production of milk'. The Right-wing Minister for Agriculture Saverio Romano, therefore, declared himself ready for whatever it takes 'to guarantee that the company remains Italian'.⁴⁹

Trade unions backed Right-wing politicians. The Secretary general of Cgil Susanna Camusso, for example, argued that the overseas sales of the 'excellence of our production activities - ranging from Bulgari to Parmalat - puts us before a serious lack of attention of Italian industrial policy'. On the same lines, Cisl's secretary Raffaele Bonanni considered 'important to work to ensure that there are entrepreneurs of the Italian agri-food to acquire Parmalat, seeing 'risks for the employees and the country, which would not lose an ordinary company but a firm that has made the image of Italy in many agri-food markets in the world'.⁵⁰

⁴⁷ Il Sole 24 Ore 23 March 2011.

⁴⁸ Il Sole 24 Ore 26 March 2011, 27 March 2011.

⁴⁹ <https://www.linkiesta.it/2011/03/su-parmalat-e-altro-di-italianita-ce-ne-persino-troppa/> (accessed January 2023).

⁵⁰ Il Sole 24 Ore 18 March 2011.

Equally, associations representing local producers (Fedagri-Confcooperative) and farmers (Coldiretti) worried that while a national project could guarantee the whole Italian value chain from farmers to final consumers, Lactalis could penalise Italian producers by buying milk abroad and only then commercialising it through Parmalat.⁵¹ Large Italian companies such as Granarolo and Ferrero also declared themselves sympathetic to a national 'plan B' to counter the French one, depicting the former as a long-term industrial project and contrasting it with the latter, one where 'multinationals buy milk where it costs less, leave the company Italian in the name only, and take away jobs from the value chain'.⁵² Indeed, Coldiretti's President Sergio Marini argued before the Parliament that defending the *italianità* of Parmalat should also mean Italian milk and agriculture, rather than only the Italian brand per se.⁵³

Although ultimately unsuccessful in 'defending' Parmalat from Lactalis, the government's initiative, which as seen had the much broader ambition of defending all companies of national interest from foreign buyers, did explicitly contribute to the establishment of the golden powers.⁵⁴ It did so thanks to the support of a wide coalition of Right-wing elected politicians and representatives of national and local suppliers, which were brought together to defend the *italianità* of firms. This identity notion continued to influence subsequent regulatory changes.

⁵¹ Italia Oggi 30 April 2011.

⁵² Corriere della Sera 1 March 2011; Il Sole 24 Ore 23 March 2011.

⁵³ <https://www.sivempveneto.it/parmalat-marini-qla-difesa-del-marchio-significhi-italianita-del-latteq/> (accessed January 2023).

⁵⁴ Camera 2012, n. 619; Senato 2012, n. 719.

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A few years after the creation of the golden powers framework in the aftermath of the Parmalat takeover, in 2017, the scope of the legal framework and thus of the ministerial powers embedded therein was extended to additional sectors,⁵⁵ while at the same time introducing further obligations for buyers.⁵⁶ These regulatory changes were introduced by the centre-Left government led by Paolo Gentiloni using urgency provisions. But they were not justified through security concerns vis-à-vis China or economic vulnerabilities associated with crises. Instead, they stemmed from the rumoured intention of Vivendi to acquire full control of Telecom Italia, with national identities pitted against foreign ones - in this case, French. As stated by the then Right-wing MP Senerella Fucksia,

The only real urgency of the government has been to exert the golden power over Telecom Italia. Unfortunately the *Bel Paese* has become land of conquest for foreign investors. Our best companies, those which made us famous in the world (also thanks to the *made in Italy brand*, which is the world's third most important), are too often no longer our property. [...] Certainly the looming presence of Vivendi, now the largest shareholder of Telecom, has been decisive for the issuance of this law decree.⁵⁷

⁵⁵ Namely to 'high technological intensity' sectors, which include critical infrastructures such as data management and storage as well as financial infrastructures (e.g., stock exchanges); critical technologies such as artificial intelligence, robotics, semiconductors, dual use technologies, network security, nuclear and aerospace technology; security of supply of critical input; and access or capacity to control sensitive information.

⁵⁶ It was introduced the obligation, for buyers acquiring shares of at least 10%, to communicate the aims pursued with the takeover, how this is going to be financially supported, and whether the initial acquisition is intended to progress until taking control of the target firm (Law Decree n. 148/2017).

⁵⁷ Senato 2017, n. 908.

The move was welcomed by the unions, which not only asked an immediate discussion on the future of a company employing 50,000 people and controlled by a foreign firm.⁵⁸ They also called for a return of the company under 'stable public control' (via the CDP), re-launching its 'natural mission of guiding the infrastructural development of the sector, coherently with the country's industrial policy'.⁵⁹

Only two years later, a coalition government bringing together an odd couple - League and Five Star Movement - further extended the golden powers.⁶⁰ The extension of government powers continued under the following coalition government of the Five Star movement and centre-Left parties.⁶¹ Thus in 2020, it legislated for an extension of the powers for ministers to approve, veto and condition foreign takeovers to a long list of areas which, as in the British 2021 National Security and Investment Act, is by no means confined to classical definitions of security.⁶²

⁵⁸ <https://www.corrierecomunicazioni.it/cyber-security/golden-power-garante-security-nei-board-tim-sparkle-e-telsy/> (accessed January 2023).

⁵⁹ <https://www.corrierecomunicazioni.it/industria-4-0/tim-sindacati-destinare-a-capitalizzazione-le-risorse-per-open-fiber/> (accessed January 2023); Reuters 28 September 2017.

⁶⁰ To broadband telecommunications with 5G technology (Law Decree n. 22/2019).

⁶¹ Adding cybersecurity (Law Decree n. 105/2019).

⁶² The areas are those indicated by the EU FDI screening legislation (EU Regulation n. 2019/452), namely: critical physical or virtual infrastructure, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, sensitive facilities, land and real estate crucial for use of such infrastructure; critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, nanotechnologies and biotechnologies; supply of critical inputs, including energy or raw materials, and food security; access to sensitive information, including personal data, or ability to control such information; freedom and pluralism of media.

Temporarily, these rules also apply to buyers from other European countries, and lower from 10% to 5% the threshold above which buyers may be required to clarify the objectives pursued with the acquisition, how it is going to be financed, and whether it will progress until achievement of control (Law Decree n. 23/2020).

Such an extension of ministerial powers was supported by the main farmers association as well as trade unions. Coldiretti's President Ettore Prandini commented that 'The national agri-food heritage is to be safeguarded, after around three out of the main four historical brands have ended up in foreign hands and are often exploited to sell products that have no longer anything of Italian'. 'It is necessary to reverse the past trend', Mr Prandini argued.⁶³ 'The Coronavirus emergency [...] is raising awareness of the strategic value of food', suggested Coldiretti's President,⁶⁴ also highlighting the importance of governmental intervention to avoid Chinese acquisitions of firms strategic for 'food sovereignty'.⁶⁵ Unions have remained part of the coalition supporting golden powers. Thus for instance, Slc Cgil, Fistel Cisl and Uilcom Uil welcomed the possible use of such powers, to avoid job losses that could have resulted from a possible takeover of Tim by the American fund KRR. Their call for a return of public control has found the support of politicians of different colours, first and foremost the Right-wing party Fratelli d'Italia, which emphasised the importance of safeguarding digital sovereignty.⁶⁶ Indeed, the contemporary re-politicisation of the rules on foreign takeovers was explicitly justified in the light of the pandemic crisis⁶⁷ as well as concerns over (digital) security, especially vis-à-vis China.⁶⁸

Paradoxically, the current golden powers have widened the scope of governmental intervention even compared to the previous golden shares

⁶³ Il Valore Italiano 6 April 2020.

⁶⁴ Il Valore Italiano 6 April 2020.

⁶⁵ <https://www.coldiretti.it/economia/cina-il-decreto-draghi-salva-i-semi-italiani-con-il-golden-power> (accessed July 2022).

⁶⁶ <https://www.key4biz.it/tim-kkr-giorgetti-se-ci-sara-opa-si-valutera-golden-power-per-i-sindacati-ce-un-rischio-alitalia/384355/> (accessed January 2023).

⁶⁷ Law Decree n. 23/2020.

⁶⁸ Law Decree n. 22/2019; Law Decree n. 105/2019.

which Italy was forced to abandon, as the existing framework is not necessarily confined to still partially state-owned companies, as it was the case with golden shares. Against all the odds, foreign takeovers re-politicisation continued under the government led by Mario Draghi,⁶⁹ despite the fact that he was the senior official at the Treasury in the early 1990s promoting privatisation as part of a strategy to aid liberalisation, as well as his own reputation as a strong supporter of competition. Less surprisingly, such re-politicisation is now proceeding under the Right-wing government led by Giorgia Meloni, which has just established a ministry for 'food sovereignty' and eased funding to support strategic companies that are denied the possibility of selling shares to foreigners.⁷⁰

As summarised in Table 2, the regulatory changes that in 2019-2020 have greatly expanded elected politicians' capacity to intervene on takeovers in a myriad of areas and on grounds well beyond competition criteria have, as their very foundation, the establishment of the golden powers framework in 2012. But rather than being driven by security concerns relating to China or Covid-related considerations, these foundations were built through identity-centred processes bringing together unusually broad coalitions, including an unfamiliar alliance of local suppliers and Right-wing elected politicians.

⁶⁹ Who for example has, in a decision much welcomed by Coldiretti but opposed by both firms, recently used the golden powers to 'save' from a Chinese acquisition an Italian food firm (Il Punto Coldiretti 27 October 2021).

⁷⁰ La Repubblica 29 December 2022.

Table 2. Re-politicisation of foreign takeovers regulation in Italy

| Regulatory change | Key coalition | Key argument |
|--|---|---|
| 2012 creation of golden powers | Right, unions and producer associations | Identity |
| 2017 extension of golden powers | Left, Right and unions | Identity |
| 2019-20 further extension of golden powers | Right, Left and producer associations | Security vis-à-vis China and Covid pandemic |

5. Conclusion

By formally granting greater powers and discretion to elected politicians in governing foreign takeovers, national governments have reversed the de-politicisation trend that had been dominant throughout the past decades. By tracing and comparing these processes, we have found that in both Britain and Italy, the change in direction from de-politicisation towards re-politicisation happened well before 2020. We offer arguments about the coalitions and justifications that can favour re-politicisation. In particular, we note that re-politicisation of the regulation of overseas takeovers was supported by a broad and sometimes unusual coalition, encompassing political parties of the Right as well as the Left, and also producer groups, such as trade unions and producer associations. They shared rationales based on national identity – and its defence against foreigners.

The wider implications of this finding are three-fold. First, we contribute to the emerging literature attempting to explain the protectionist turn in foreign direct investment screening mechanisms recently observed both within and beyond Europe. Thus far, such work has focused most attention on security concerns vis-à-vis China and on the economic vulnerabilities created by the pandemic (Lenihan 2018; Graham and Marchick 2006; Wyckaert 2020, Meunier and Mickus 2020; Chan and Meunier 2021). Yet our analysis suggests that these explanations must be complemented by other factors linked to identity politics. Indeed, we have shown that questions of protecting ‘national’ assets and success stories took place well before Covid, and that at their root, these debates did not concern Chinese investments in the security domain, but Western acquisitions in the chocolate and dairy sectors!

Second, our descriptive findings contribute to the literature on economic patriotism (e.g., Callaghan and Lagneau-Ymonet 2012; Callaghan 2018; cf. Clift and Woll 2013). We suggest a trend that runs counter to claims that CBMAs governance has become increasingly de-politicised across both time and space. Indeed, we argue for a view of France as a forerunner, not an exception, of the spread of a ‘conservative’ form of ‘economic patriotism’ (Clift and Woll 2013) that involves greater direct political controls over overseas entry.

Finally, we contribute to the wider and growing literature on the de-politicisation of policymaking that especially since the 1980s has pervaded a broad array of advanced democracies (Hay 2007; Flinders and Buller 2006; Fawcett *et al.* 2017). Our argument is that such de-politicisation can and has been reversed. The case of competition policy suggests that re-politicisation can occur even in core areas of economic policy that have been analysed as those most subject to de-politicisation. Equally, re-politicisation can take place in a

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country such as the UK, usually seen as a 'Liberal Market Economy' subject to the greatest de-politicisation. It can also occur in 'state influenced' or Mixed Market Economies - not just in the 'usual suspect' of France but also polities where the state has been seen as weak and subject to de-politicisation, such as Italy. It has taken place under governments of Right and Left, and in EU member states as well as a recent non-EU state.

Regulation of overseas mergers and acquisitions is of course only one case, albeit an important one. Hence re-politicisation and the coalitions and rationales for it should be explored in other domains. Equally, it would be valuable to look at other countries. However, the conclusions from our case studies suggest considerable scope for re-politicisation driven by broad cross-class and cross-party coalitions sharing positions of defending national 'identities'.

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