Privatisations and golden shares : bridging the gap between the State and the market in the area of free movement of capital in the EU

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Introduction

1 Setting the scene: The international debate about capital liberalisation

The role of the State in the functioning of the Market has played a crucial role in the development of the post-war politico-economic reality. It has been the premise upon which economic theories have been developed, Nobel prizes have been awarded (to both proponents and critics), political ideologies have been forged and national and international policies have been conceived and carried out. In our globalised world, the State-Market debate unfolds not only at the national level where the political dynamics are more clearly distinguishable and the stakes more easily defined, but also at the international level, which is characterised by a multilevel institutional framework that promotes *trade* and *capital liberalisation* as the two economic cornerstones intended to boost global economic growth. However, while most economists would agree that *trade liberalisation* contributes significantly to economic growth, the same cannot be argued (at least not with the same intensity) about *capital liberalisation*.[1] To be more precise, although capital liberalisation can contribute to economic efficiency by removing obstacles to international economic transactions and by promoting foreign investment, there is nevertheless a protracted controversy among economists regarding the extent to which capital movements should be liberalised. It is argued that an unfettered capital liberalisation bears significant risks for *financial stability* and *social equality*, which can in turn affect profoundly the economic and social fabric of societies.[2] These risks can be prevented by the implementation and enforcement of a transparent legal framework consisting of measures of prudential supervision and regulation aiming at restricting those capital movements which might threaten public interest objectives.

The relationship between *capital liberalisation* and *social inequality* has been at the heart of the economic and political debate over the role of the State in the

1 Joseph Stiglitz and others, *Stability with Growth: Macroeconomics, Liberalization and Development* (Oxford University Press 2006), pp. 167-168.

2 Andrew Charlton, 'Capital Market Liberalization and Poverty' in José Antonio Ocampo and Joseph Stiglitz (eds), *Capital Market Liberalization and Development* (Oxford University Press 2008), pp. 121-138.

organisation and functioning of the market. The historical origins of this debate are traced back to the Industrial Revolution and the emergence of the modern capitalist economy in the late 18th and early 19th century. In *Das Kapital*,[3] Karl Marx engaged in a critical analysis of the economic system of his time and concluded that the capitalist mode of production and accumulation is based on the annihilation of self-earned private property, in other words the expropriation of the labourer.

Almost a century later, Karl Polanyi laid the foundations of the concept of '*embedded liberalism*' arguing that the economy is not and cannot be autonomous and self-regulated; it is always 'embedded' (i.e. 'planted') in social relations.[4] Disembedding the market from the society cannot be successful because it leads to the commodification of human labour and the natural environment.[5] For Polanyi, *land*, *labour* and *money* are fictitious commodities in the sense that they are not originally produced to be sold on a market. Even if for real commodities the economy is supposed to be self-regulating, the State plays a crucial role in managing the markets of the three fictitious commodities. Especially in relation to the fictitious commodity of money, which is of interest for the purposes of the present thesis, Polanyi argues that the supply of money and credit in modern societies is necessarily shaped by governmental policies and that the State must intervene in adjusting the supply of money and credit to avoid the twin dangers of inflation and deflation.[6]

Although these theories played an instrumental role in the shaping of modern economics, today we have adopted a more balanced approach, one that recognises both the power and the limitations of the markets and accepts the necessity of some State regulatory interventions in the financial markets.[7] The main theoretical controversy now revolves around the *extent* and the *form* these regulatory interventions should take.

Zooming in on the specific question regarding the relationship between capital liberalisation and social inequality, Joseph Stiglitz argues that due to the high macroeconomic volatility of capital flows, capital liberalisation is associated with economic instability, increased likelihood of financial crises and rising levels of income inequality.[8] This is why government intervention in the form

3 Karl Marx, *Capital: A Critique of Political Economy* (Verlag von Otto Meisner 1867).
4 Karl Polanyi, *The Great Transformation* (Beacon Press 1944, 1957, 2001).
5 Ibid, p. xxv.
6 Ibid, p. xxvi.
7 Ibid, p. viii.
8 Jospeh Stiglitz, 'Capital Market Liberalization, Economic Growth and Instability' (2000) 28 *World Development* 1075, at p. 1076.

of certain capital restrictions can mitigate the negative effects that unfettered free movement of capital can have on the economy and the society.[9]

In a similar spirit, in 2014, Thomas Piketty collected and analysed extensive historical and comparative data covering three centuries and more than twenty countries from which he derived a grand theory of capital and inequality.[10] His main conclusion is that accumulated capital grows faster than economic output and wages.[11] This inequality threatens to generate arbitrary and unsustainable inequalities that stir discontent and undermine the meritocratic values upon which democratic societies are (or perhaps should be) based. In order to prevent this soaring inequality, he recommends the imposition of a global progressive annual tax on capital.[12] He concedes that the difficulty in this solution is that it requires a high level of international cooperation and regional political integration. However, he believes that only regional political integration – especially in the European Union – can lead to effective regulation of the globalised patrimonial capitalism of the twenty-first century.[13]

In 2016, eminent economists of the IMF published a revolutionary paper,[14] which, in a rather self-critical spirit, argues that the benefits of *capital account liberalisation* and *austerity* – two main aspects of 'neoliberalism' – such as foreign direct investment and reduction of public debt, have been somewhat overplayed, whereas the costs in terms of lower output, retrenched welfare, higher unemployment and increasing income inequality have been underplayed.[15] As it is aptly observed, 'the increase in inequality engendered by financial openness and austerity might itself undercut growth, the very thing that the neoliberal agenda is ostensibly intent on boosting'.[16]

In the light of the aforementioned recent developments in the field of economic theory, it can be argued that there is a contemporary economic school of thought which departs from an unconditional adherence to unfettered capital liberalisation and is advocating a more restrictive approach regarding international capital flows in order to prevent the risks of financial instability and social inequality. This economic thinking is to some extent embraced also by international economic organisations such as the IMF and the OECD, which,

9 Ibid.
10 Thomas Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014).
11 Ibid p. 571.
12 Ibid p. 515 et seq.
13 Ibid p. 573.
14 Jonathan Ostry, Prakash Loungani and Davide Furceri, 'Neoliberalism: Oversold?' (2016) 53 *Finance & Development* 38.
15 Ibid, p. 40.
16 Ibid, p. 40.

in view of the controversy surrounding the impact of free capital flows on social inequality as well as the inconclusive economic evidence regarding their contributory effect to economic growth, are of the opinion that capital liberalisation improves economic efficiency only if it is complemented by measures of prudential supervision and regulation, sound macroeconomic policies and transparency (see the analysis in Chapter 1).

2 Scope of the thesis: bridging the gap between the State and the market in the area of free movement of capital in the EU

This new economic thinking that advocates a more restrictive apporach to capital liberalisation has not been reflected at the EU level. In particular, despite the historical compromise between, on the one hand, *laissez-faire* policies and, on the other hand, strategic interventions from the State to protect social objectives upon which the project of European integration was originally constructed, in the post-Maastricht era it seems that economic integration through deregulation has led to the prevalence of the model of *liberal market economies* (as opposed to *coordinated market economies*, see Chapter 4) as the dominant political ideology and economic policy in Europe.[17]

Although in the early days of European integration capital movements were not liberalised completely as a result of the international scepticism regarding their possible contributory effect to financial crises and instability, with the entry into force of the Maastricht Treaty and the introduction of the Economic and Monetary Union, it was decided that the EU would follow the model of unrestricted capital liberalisation in order to facilitate the project of financial integration and the adoption of the euro. Furthermore, it was decided that in order to increase the credibility of the euro as a strong currency at the international level and in order to promote foreign direct investment, the free movement of capital would be applicable not only to Member States but also to third countries.

17 Fritz W. Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy' (2010) 8 *Socio-Economic Review* 211, p. 211. In relation to this general debate, see more broadly: Philip Cerny, *Rethinking World Politics: A Theory of Transnational Neopluralism* (Oxford University Press 2010), p. 139; Kathleen McNamara, *The Currency of Ideas: Monetary Politics in the European Union* (Cornell University Press 1998); Bastiaan Van Apeldoorn, 'The Contradictions of 'Embedded Neoliberalism' and Europe's Multi-level Legitimacy Crisis: The European Project and its Limits' in Jan Drahokoupil, Bastiaan Van Apeldoorn and Laura Horn (eds), *Contradictions and Limits of Neoliberal European Governance: From Lisbon to Lisbon* (Palgrave 2009), p. 24. Drawing from Karl Polanyi, the neologism '*embedded neo-liberalism*' is often employed to describe the post-Maastricht economic system that combines on the one hand, strict budgetary discipline, freedom of capital and primacy of the markets and, on the other hand, some elements of neo-mercantilism and social market economy.

These developments led to the establishment of a rather sophisticated legal framework governing the free movement of capital in the EU, which is characterised to a large extent by a strong commitment to the principle of unrestricted capital flows as a vital feature of the project of economic integration. This is particularly evident in the case law regarding *privatisations* and *golden shares*, where the Court of Justice has adopted a broad interpretation of the notion of 'capital restrictions' under Article 63 TFEU and has treated forms of public ownership and special shareholding of public authorities in privatised undertakings as measures of *economic protectionism* inherently incompatible with the Internal Market.

It is true that Member States have used golden shares as a means of protecting national industries against hostile takeovers from foreign or even domestic competitors. For instance, in the famous *Volkswagen* case (analysed in Chapter 4), the special rights of the Federal State of Germany and the Land of Lower Saxony in Volkswagen effectively prevented the acquisition of total control of the company by the rival automobile industry Porsche.[18] However, the adoption of a very broad interpretation of the notion of 'capital restrictions' under Article 63 TFEU and the treatment of golden shares and forms of public ownership as inherently incompatible with the Internal Market raises significant concerns, firstly, regarding the division of competences between the EU and the Member States in the fields of corporate governance and property ownership systems, and secondly, regarding the protection of public interest objectives.

In relation to the first concern, the establishment of golden shares is a decision, which relates to the choice of the national corporate governance regime, which in turn remains a preserved competence of the Member States. Although such as decision might have an impact on the EU's shared competence on the Internal Market, it cannot be regarded as incompatible with the fundamental freedoms simply because it adheres to a specific model of corporate governance and market economy, especially in the absence of any harmonisation at the EU level. In the same vein, the decision to preserve public ownership in certain undertakings relates to the choice of the national property ownership system, which again remains a national competence and is, in fact, covered by the principle of neutrality enshrined in Article 345 TFEU (analysed in Chapter 3).

In relation to the second concern, it should be noted that golden shares and other types of public ownership sometimes pursue public interest objectives, which are vital for the society as a whole. To use again the *Volkswagen* case as an example, the special rights that the Federal State of Germany and the

18 Wolf-Georg Ringe, 'Case C-112/05, Commission v. Germany ("VW law"), Judgment of the Grand Chamber of 23 October 2007, nyr.' (2008) 45 *Common Market Law Review* 37.

Land of Lower Saxony retained in the privatised automobile industry were intended to pursue the legitimate objective of the protection of workers. Similarly, in strategic privatised undertakings active in the energy sector, the special shareholdings of national public authorities were intended to pursue the legitimate objective of safeguarding security of energy supplies (see the analysis in Chapter 4.).

In this context, this thesis examines, on a first level, the reach of the tentacles of EU Internal Market law and the implications of the golden shares and privatisations case law for the division of competences between the EU and the Member States and the protection of public interest objectives. On a second level, it attempts to address the risks of a very broad interpretation of 'capital restrictions' under Article 63 TFEU by identifying the legal tools under the existing legal framework and the possible modifications in the judicial interpretation of the free movement provisions that will ensure respect for the division of competences between the EU and the Member States in the fields of corporate governance and property ownership and will allow sufficient room for reconciling economic integration with societal values.

In this respect, the thesis puts forward two main suggestions: firstly, the rediscovery of the principle of neutrality under Article 345 TFEU as a legal provision which shields national decisions to maintain public ownership from Internal Market scrutiny and, secondly, the recalibration of the 'capital restrictions' test in the golden shares case law by reference to a *Keck*-inspired notion of 'investment arrangements'. The thesis argues that through this 'velvet revolution' in the context of negative integration, the interpretation of the free movement of capital in the EU can respect the delicate balance of competences between the EU and the Member States and can facilitate a reconciliation of the capital freedom with public interest objectives.

3 Research question and sub-questions

Drawing from the international controversy surrounding the costs and benefits of unfettered capital liberalisation, the thesis starts from the premise that a certain degree of regulation in the area of capital movements is necessary in order to prevent the risk of financial instability, reduce income inequality and protect legitimate social objectives. On the basis of this theoretical claim, it seeks to investigate the overall research question:

> *How can the EU free movement of capital provisions be interpreted so as to allow room for State participation in the market for the purposes of protecting public interest objectives in the context of privatisations and golden shares?*

In order to answer this overall research question, the thesis examines whether the broad interpretation of the free movement of capital by the Court of Justice favours a specific model of market economy and attempts to explore the extent to which the existing legal framework set out in the Treaties offers room for reconciling economic integration with societal values. For this purpose, it analyses the privatisations and golden shares case law as two case-studies and suggests certain adjudicative methods, which could allow Member States to determine their property ownership and corporate governance systems without imposing protectionist obstacles on foreign investment.

The selection of the two case-studies of privatisations and golden shares is based on the fact that they concern two national competences (the choice of *property ownership* and *corporate governance systems*) in the exercise of which the State can act not only as a *regulator* but also as a *market participant* operating under market conditions together with other private market participants. The degree of State participation in the market in those two competences affects profoundly the organisation of the national industrial policy and the identity of the national market economy system.

It should be clarified at the outset that golden shares presuppose the implementation of a privatisation scheme and as such the two case studies are inextricably linked. However, the distinction between privatisations and golden shares followed in this thesis is based on a *temporal* element which affects significantly the legal issues under consideration: the first case study focuses on the *pre*-privatisation phase and the role that EU law plays in the decision of a national government to privatise or nationalise an undertaking; the second case-study focuses on the *post*-privatisation phase and we examine the compatibility of golden shares (i.e. the special shareholding established *after* privatisation) with EU law. In the *pre*-privatisation phase, the decision to nationalise or privatise an undertaking touches upon the determination of the *national property ownership system*, whereas in the *post*-privatisation phase the decision to retain special rights in strategic privatised undertakings determines the shaping of the *national corporate governance system*.

However, both the *property ownership* and the *corporate governance* system constitute two sensitive national competences, which affect the industrial policies of the Member States and determine the degree of State intervention in the market. Ultimately, they both relate to the question whether the control of undertakings remains in public or private hands, which in turn represents the paradigm of the clash between the State and the market. Therefore, a legal study seeking to explore a possible reconciliation of capital liberalisation with State participation on the market in the EU must examine the case law on privatisations and golden shares in order to identify the legal parameters that

need to be changed in order to strike a fair balance between the free movement of capital and public interest objectives.

It should be noted that this thesis does not look at taxation. Although arguably taxation represents the lion's share of the case law on the free movement of capital, it nevertheless remains beyond the thematic scope of the present study, as when exercising its competence to impose taxation, the State acts as a regulator and not as a market participant. For this reason, taxation is excluded from the normative analysis of the thesis (Chapters 3 and 4). It is nevertheless included in the general descriptive analysis of the current legal framework governing the free movement of capital in the EU (Chapter 2), in order to demonstrate that although in principle the Court advocates the abolition of all capital restrictions in relation to taxation, it is nevertheless more willing to accept certain derogations in view of the principle of tax sovereignty and territoriality.

The thesis attempts to answer the overall research question gradually by addressing several sub-questions in each chapter:

Chapter 1
- How is capital liberalisation defined?
- Is there conclusive economic evidence that capital liberalisation contributes to economic growth?
- What is the legal framework governing capital liberalisation at the international level?

Chapter 2
- Why did the free movement of capital have a slower evolution compared to the other freedoms?
- What is the relationship between the free movement of capital and the other fundamental freedoms?
- What are the unique features of the free movement of capital?
- Is the strikingly broad interpretation of capital restrictions somehow counterbalanced by a more flexible justification/proportionality regime?

Chapter 3
- What is the EU legal framework regarding privatisations?
- How is Article 345 TFEU interpreted in the context of privatisations and golden shares?
- Should Article 345 TFEU be interpreted as an exemption from the scope of the free movement of capital or as a justification for capital restrictions?

Chapter 4

- What are golden shares?
- Why are golden shares so controversial?
- Is it possible and/or desirable to grant horizontal effect to Article 63 TFEU?
- Does the golden shares case law allow enough room for Member States to justify the restrictions imposed by the special holding they retain in privatised undertakings?
- What is the proportionality assessment adopted by the Court in the golden shares case law? Is it appropriate?
- Is there a need to delineate the scope of 'capital restrictions' in a more consistent way through the introduction of a *Keck*-inspired approach in the golden shares case law?

4 Academic relevance and method

Liberalising capital movements is of vital importance, not only for the achievement of the Internal Market, but also for the realisation of the Economic and Monetary Union.[19] Yet, in comparison with the other fundamental freedoms, the free movement of capital followed a slow historical development. The reason of this slow historical development was most probably the international post-war scepticism about free capital flows, which, due to their high volatility, were associated with increased risk of financial instability.

The adoption of the Maastricht Treaty, the introduction of the new Treaty provision on capital (Article 73b(1) EC, today Article 63 TFEU) and the recognition of its direct effect by the Court of Justice[20] accelerated the evolution of the capital freedom and provided a new impetus for legal scholarship, which for a long time had remained stagnant. The free movement of capital started attracting significant scholarly attention among European academics, practitioners and policy analysts and gradually developed into a fully-fledged freedom of the EU's Internal Market. In the last two decades, the case law of the Court on the free movement of capital has increased exponentially and has offered a great opportunity for the academic community to delve into sensitive legal issues touching upon core sovereign competences such as taxation, property ownership and corporate governance, which for a long time had remained beyond the reach of market integration.

19 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 518.

20 Joined cases C-163/94, C-165/94 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*, ECLI:EU:C:1995:451, para 41.

The by now profuse case law on the free movement of capital has the unique feature that it covers a wide range of financial instruments and transactions. This has led to the development of different lines of case law within the area of the free movement of capital relating to various topics, such as taxation, purchase of real estate, inheritances, charities and donations, foreign direct investment etc. Each of these categories can be regarded as *self-standing lines of case law*, in which the Court develops a distinct legal reasoning based on the intricacies and specificities of each category. The existence of multiple lines of case law should not be regarded as a fragmentation in the jurisprudential approach of the Court, but rather as a legally sound method of treating divergent thematic categories, which nevertheless fall within the broader scope of the free movement of capital.

The literature on the free movement of capital has followed to a great extent the categorisation of the case law. There is of course important input on the general legal issues arising from the free movement of capital (such as direct effect, scope, justifications, proportionality, significance of the capital freedom for the functioning of the Internal Market and the Economic and Monetary Union, relationship with the other freedoms, third-country dimension etc.).[21] But at the same time, there are scholarly contributions that focus exclusively on the interaction between free movement of capital and taxation,[22] academic

21 Jonh Usher, 'The Evolution of the Free Movement of Capital' (2007) 31 *Fordhman International Law Journal* 1533; Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011); Arie Landsmeer, 'Movement of Capital and Other Freedoms' (2001) 28 *Legal Issues of Economic Integration* 57; Steve Peers, 'Free Movement of Capital: Learning lessons or slipping on spilt milk?' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002); Leo Flynn, 'Free movement of capital' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2017), p. 447; Leo Flynn, 'Freedom to Fund?: The Effects of the Internal Market Rules, With Particular Emphasis on Free Movement of Capital' in Ulla Neergaard, Erika Szyszczak, Johan Willem van de Gronden and Markus Krajewski (eds), *Social services of general interest in the EU* (Spinger 2013); Leo Flynn, 'Coming of Age: The Free Movement of Capital Case Law 1993-2002' (2002) 39 *Common Market Law Review* 773; Thomas Horsley, 'The Concept of an Obstacle to intra-EU Capital Movements in EU Law' in Niamh Nic Shuibhne and Laurence W. Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (Oxford Univesrity Press 2012); Philippe Vigneron and others, *Libre circulation des personnes et des capitaux. Rapprochement des legislations* (Les éditions de l' Université de Bruxelles 2006), p. 167; Philippe Partsch, 'Articles 56-60 CE' in Isabelle Pingel (ed), *Rome à Lisbonne: Commentaire article par article des traités UE et CE* (Dalloz 2010), p. 492; Olivier Blin, 'Capitaux' in Denys Simon and Sylvaine Poillot Peruzzetto (eds), *Répertoire de Droit Européen* (Dalloz 2016).

22 Steffen Ganghof and Philipp Genschel, 'Taxation and Democracy in the EU' (2008) 15 *Journal of European Public Policy* 58; Steffen Ganghof, *The Politics of Income Taxation* (ECPR Press 2006); Martha O'Brien, 'Taxation and the Third Country Dimension of Free Movement of Capital in EU Law: The ECJ's Rulings and Unresolved Issues' (2008) 6 *British Tax Review* 628; Axel Cordewener, Georg W. Kofler and Clemens Philipp Schindler, 'Free Movement

papers analysing extensively the controversial golden shares case law[23] and

of Capital, Third Country Relationships and National Tax Law: An Emerging Issue before the ECJ' (2007) 47 *European Taxation* 107; Axel Cordewener, Georg W. Kofler and Clemens Philipp Schindler, 'Free Movement of Capital and Third Countries: Exploring the Outer Boundaries with Lasertec, A and B and Holböck' (2007) 47 *European Taxation* 371; Thomas Horsley, 'Death, Taxes, and (Targeted) Judicial Dynamism – The Free Movement of Capital in EU Law' in Antony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), pp. 784-808; Werner Haslehner, '"Consistency" and Fundamental Freesoms: The Case of Direct Taxation' (2013) 50 *Common Market Law Review* 737; Jukka Snell, 'Non-Discriminatory Tax Obstacles in Community Law' (2007) 56 *International and Comparative Law Quarterly* 339; Ryan Murphy, 'Why does tax have to be so taxing? The court revisits the Franked Investment Income litigation (Case Comment)' (2013) 38 *European Law Review* 695; Ryan Murphy, 'Why does tax have to be so taxing? The court revisits the Franked Investment Income litigation' (2013) 38 *European Law Review* 695; Brady Gordon, 'Tax competition and harmonisation under EU law: economic realities and legal rules' (2014) 39 *European Law Review* pp. 790; Axel Cordewener, Georg Kofler and Servaas Van Thiel, 'The Clash Between European Freedoms and National Direct Tax Law: Public Interest Defences Available to the Member States' (2009) 46 *Common Market Law Review* 1951

23 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 *Common Market Law Review* 97; Stefan Grundmann and Florian Möslein, 'Golden Shares – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects' (2001-2002) 4 *EUREDIA* 623; Wolf-Georg Ringe, 'Case C-112/05, Commission v. Germany ("VW law"), Judgment of the Grand Chamber of 23 October 2007, nyr.' (2008) 45 Common Market Law Review 37; Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 *Cambridge Law Journal* 378; Wolf-Georg Ringe, 'Is Volkswagen the New Centros? Free movement of Capital's Impact on Company Law' in Dan Prentice and Arad Reisberg (eds), *Corporate Finance Law in the UK and EU* (Oxford University Press 2011); Peer Zumbansen and Daniel Saam, 'The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism' (2007) 8 *German Law Journal;* Florian Sanders, 'Case C-112/05, European Commission v. Federal Rebublic of Germany: The Volkswagen Case and Art. 56 EC – A Proper Result, Yet Also a Missed Opportunity?' (2007-2008) 14 *Columbia Journal of European Law* 359; Gert-Jan Vossestein, 'Volkswagen: the State of Affairs of Golden Shares, General Company Law and European Free Movement of Capital – A discussion of Case C-112/05 Commission v Germany of 23.10.2007' (2008) 5 *European Company and Financial Law Review* 115; Jonathan Rickford, 'Free movement of capital and protectionism after Volkswagen and Viking Line' in Michel Tison and Eddy Wymeersch (eds), *Perspectives in Company Law and Financial Regulation – Essays in Honour of Eddy Wymeersch* (Cambridge University Press 2009); Jonathan Rickford, 'Protectionism, Capital Freedom and the Internal Market' in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism – New Challenges to European Integration* (Oxford University Press 2010); Florian Möslein, 'Compliance with ECJ judgments vs. compatibility with EU law – Free movement of capital issues unresolved after the second ruling on the Volkswagen law: Commission v. Germany' (2015) 52 *Common Market Law Review* 801; Jonathan Mukwiri, 'Free movement of capital and takeovers: a case-study of the tension between primary and secondary EU legislation' (2013) 38 *European Law Review* 829; Mads Andenas, Tilmann Gütt and Matthias Pannier, ''Free Movement of Capital and National Company Law' (2005) 16 *European Business Law Review* 757; Nadia Gaydarska and Stephan Rammeloo, 'The legality of the "golden share" under EC law' (2009) 5 *Maastricht Working Papers Faculty of Law;* Stephan Rammeloo, 'Past, Present (and Future?) of the German Volkswagengesetz under the EC Treaty' (2007) 4 *European Company Law* 118; Victoria Cherevach and Bas Megens, 'Commission of the

other works that explore the field of foreign direct investment (and portfolio investment) from the perspective of the free movement of capital in the EU comparing it often with the international trade and investment regime.[24]

However, despite the constantly growing literature on the free movement of capital, what is missing is a comprehensive account of the evolution of capital liberalisation at the European level in comparison with the relevant developments at the International level. The present thesis aspires to fill this gap and to provide a thorough analysis of the International and the European legal framework governing the free movement of capital.

At the same time, this thesis seeks to make a further contribution to the academic literature on the capital freedom by combining three distinct but inextricably linked legal methods in order to answer the research question. In particular, the thesis combines firstly, a *doctrinal legal analysis* of the legal framework on capital liberalisation at the International and the European level and the case law of the Court of Justice on privatisations and golden shares; secondly, a *law in context analysis*, aiming at illustrating the importance of relevant economic theories and concepts of political economy theory underpinning the ongoing debate regarding the economic and social asymmetry of European integration;[25] and thirdly a *normative legal analysis* suggesting changes in the

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European Communities v Federal Republic of Germany Case C-112/05 – The VW Law Case; Some Critical Comments' (2009) 16 *Maastricht Journal of European and Comparative Law* 370; Erika Szyszczak, 'Golden Shares and Market Governance' (2002) 29 *Legal Issues of Economic Integration* 255; Jaron Van Bekkum, 'Golden Shares: A New Approach' (2010) 7 *European Company Law* 13; Andrea Biondi, 'When the State is the Owner – Some Further Comments on the Court of Justice 'Golden Shares' Strategy' in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press 2010); Harm Schepel, 'Of Capitalist Nostalgia and Financialisation: Shareholder Primacy in the Court of Justice' in Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Hart Publishing 2014); Nicola Ruccia, 'The New and Shy Approach of the Court of Justice Concerning Golden Shares' (2013) 24 *European Business Law Review* 275;

24 Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (Oxford University Press 2009); Frank G. Barry, *The internationalisation of production in Europe: case studies of foreign direct investment in old and new EU member states* (European Investment Bank 2004); Frank S. Benyon, *Direct Investment, National Champions and EU Treaty Freedoms From Maastricht to Lisbon* (Hart Publishing 2010); Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011); Marc Bungenberg and Jo¨rn Griebel, *International investment law and EU law* (Springer 2011); Marise Cremona, 'The External Dimension of the Internal Market' in (eds), (Oxford:)' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing 2002).

25 Fritz W. Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy' (2010) 8 Socio-Economic Review 211; Fritz W. Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review* 173; Martin Höpner and Armin Schäfer, *A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe* (Max Planck Institute for the Study of Societies, MPIfG

interpretation of the free movement of capital provisions that can create room for State participation in the market. In this way, the thesis aspires to contribute to the broader academic debate regarding the appropriate institutions and legal arrangements that are necessary in order to achieve economic growth and social justice in Europe.

5 Negative integration versus positive integration

It should be noted that this thesis focuses exclusively on negative integration, as both the legal analysis as well as the recommendations relate to the interpretation of the Treaty provisions on the free movement of capital by the European Court of Justice. To the contrary, the thesis does not examine any secondary legislation nor does it attempt to address the broader concerns about the division of competences and the protection of public interest objectives by means of positive integration. Therefore, it is to be distinguished from previous legal research on golden shares, which proposes the adoption of harmonising measures as a means of promoting the legitimate considerations pursued by golden shares, whilst ensuring compliance with the fundamental freedoms.[26]

In the field of positive integration, the European Commission has attempted to address some of the Member States concerns in relation to third-country investment by submitting a Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union.[27] This

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Discussion Paper 07/04, 2007); Martin Höpner and Armin Schäfer, 'Embeddedness and Regional Integration. Waiting for Polanyi in a Hayekian Setting' (2012) 66 *International Organization* 429; Paulette Kurzer, *Markets and Moral Regulation: Cultural Changes in the European Union* (Cambridge University Press 2001); Roger Liddle, 'The European Social Model and the ECJ' (2008) 4 *Social Europe Journal* 27; Jonh Monks, 'European Court of Justice (ECJ) and Social Europe: A Divorce Based on Irreconcilable Differences?' (2008) 4 *Social Europe Journal* 22; James A. Caporaso and Sidney Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63 *International Organization* 593; Martin Rhodes, 'Defending the Social Contract: The EU Between Global Constraints and Domestic Imperatives' in David Hine and Hussein Kassim (eds), *Beyond the Market: The EU and National Social Policy* (Routledge 1998), pp. 36-59; Thomas Faist, 'Social Citizenship in the European Union: Nested Membership' (2001) 39 *Journal of Common Market Studies* 37; Maurizio Ferrera, 'European Integration and National Social Citizenship: Changing Boundaries, New Structuring?' (2003) 36 *Comparative Political Studies* 611; Maurizio Ferrera, Anton Hemmerijck and Martin Rhodes, *The Future of Social Europe: Recasting Work and Welfare in the New Economy – Report prepared for the Portuguese Presidency of the EU* (Celta Editoria 2000).

26 Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015).

27 European Commission, *Proposal for a Regulation of the European Parliament and the Council establishing a framework for screening of foreign direct investments into the European Union* ({SWD(2017) 297 final}, 2017).

Proposal was the policy response to the public reaction that was triggered as a result of a series of takeovers of European companies active in sensitive technological sectors by third country investors with strong ties to their home governments. The objective of this Proposal is to establish a framework for the Member States, and in certain cases the European Commission (when a foreign direct investment may affect projects of Union interest, such as Galileo, Horizon 2020, Trans-European Transport Network or Trans-European Networks for Energy), to screen foreign direct investment on the grounds of security or public order. The scope of this proposed Regulation is limited to 'foreign direct investment', which means that it covers only investments from *third countries* seeking to establish or maintain *lasting and direct* links with undertakings carrying out an economic activity in the Member States (i.e. not portfolio investments). Additionally, the proposed Regulation operates on a voluntary basis in the sense that it does not impose an obligation on Member States to adopt or maintain a screening mechanism for foreign direct investment. Rather its objective is to create an enabling framework for Member States that already have or wish to adopt a screening mechanism and to ensure that any such mechanism meets some basic requirements such as the possibility of judicial redress of decisions, non-discrimination between different third countries and transparency.

Although this proposed Regulation raises controversial legal issues (such as the choice of Article 207 TFEU as the legal basis provision, the exclusion of portfolio investments, the definition of security and public order, possible overlapping with Article 21 of the EU Merger Regulation, the impact of the Opinion of the Court on the Singapore Agreement etc.), it nevertheless shows the Commission's acknowledgment that foreign direct investment can be detrimental for security and public order and the commitment of the Union to address Member States concerns regarding the protection of European undertakings from hostile takeovers from third-country investors. In this sense, this proposed Regulation could be regarded as a first step towards what Houet described as '*European economic patriotism*'.[28] Houet argues that the only possible avenue for Member States to protect their national industries is to regard them as European industries and to replace the concept of '*national economic patriotism*' with the concept of '*European economic patriotism*' based on a '*European citizenship conscience*', a common European defense policy and the pursuit of European large-scale cross-border projects.[29] He goes so far as to suggest that the '*European economic patriotism*' will form the normative basis for the creation of a '*golden share of the Union*' through the adoption of a Regulation which would establish a special mechanism under which an independent Committee would supervise third-country investments in Euro-

28 Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 297.
29 Ibid, p. 342.

pean companies and would prevent acquisitions in strategic sectors which could threaten public policy or public security.[30]

Houet's proposal is certainly novel and interesting, as it attempts to promote a supranational approach aiming at developing, on the one hand, a strong common commercial policy in order to attract foreign capital and, on the other hand, a legal framework that would protect public interest objectives against threats from third-country investors. This approach reflects to a large degree the rationale and the policy considerations of the aforementioned Proposal of the Commission.

However, as appealing as this idea might seem, the concept of '*European economic patriotism*' fails to acknowledge the fierce competition that exists not only between 'European companies' and third-country companies, but also – and perhaps more importantly – among European companies themselves. The market for corporate control in Europe is still largely national and although in specific cases a European investor might be more welcome compared to a third country one (for instance, a Greek company might be more willing to give in to a German takeover than a Chinese one), the fact still remains that economic patriotism remains largely a national concept and Member States are very reluctant to surrender control of their 'national champions' to either European or third-country competitors. National governments will continue to protect their strategic sectors just like foreign investors will continue to strive to acquire control over the most profitable companies. The role of EU law is to ensure that foreign investment is not hindered whilst at the same time the right of the Member States to regulate their corporate governance systems and to protect their legitimate objectives is respected. It's a delicate balance, but the history of internal market adjudication has shown that it is not impossible to be achieved.

In this context, the thesis argues that this delicate balance can be better achieved by means of negative integration. There is no pressing need to adopt secondary legislation on this matter and there is certainly no need to adopt any formal amendment of the Treaties. In fact, it is argued that the two main concerns raised by the privatisations and golden shares case law, i.e. the respect of the division of competences between the EU and the Member States in the fields of corporate governance and property ownership system and the reconciliation of the capital freedom with social objectives can be addressed in a more effective way in the context of negative integration and, in particular, through the rediscovery of the principle of neutrality under Article 345 TFEU and the recalibration of the 'capital restrictions' test under Article 63 TFEU.

30 Ibid, p. 382.

6 Societal relevance

The protection of public interest objectives in the privatisations and golden shares case law relates to the broader discussion about the so-called 'social deficit' in Europe and the fundamental clash between economic freedoms and social values, which constitutes the overarching theme of this thesis. The discussion about the 'social deficit' of the EU has attracted anew significant scholarly attention in the aftermath of the eurocrisis.[31] Indeed, the debate regarding the strengthening of the social dimension of the European integration project has grown even more in scale as a result of the disrupting social and economic effects of the austerity policies that were adopted as a response to the financial crisis in Southern Europe. In particular, in the aftermath of the crisis, the need to protect public interest objectives against unfettered market forces has become pressing and has mobilised support for projects aiming at reinforcing the social component of the EU, such as the recent initiative of the Commission for a European Pillar of Social Rights.[32]

In this context, the overarching theme of the present thesis is the delicate balancing exercise between economic freedoms and social values, especially in times of ideological contestation over the social face of Europe. For this purpose, the thesis draws from the theoretical underpinning of 'social market economy' enshrined in Article 3 (3) TEU and attempts to provide a normative assessment of the clash between economic and social objectives in the field of free movement of capital.

It is true that originally the European Economic Community was founded as an international organisation aiming at establishing strong trade links between its Member States and creating a common market in which the four factors of production (goods, workers, services and capital) could circulate freely. At that time, little (if any) emphasis was given on social policies, which remained

31 Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); Claire Kilpatrick, 'Are the bailout measures immune to EU Social challenge because they are not EU Law?' (2014) 10 *European Constitutional Law Review* 393; Anastasia Poulou, 'Financial assistance conditionality and human rights protection: What is the role of the EU Charter of Fundamental Rights?' (2017) 54 *Common Market Law Review* 991; Bruno De Witte and Claire Kilpatrick, 'A comparative framing of fundamental rights challenges to social crisis measures in the Eurozone' (2014) 1 *European Journal of Social Law* 2; Alicia Hinarejos, 'Changes to Economic and Monetary Union and Their Effects on Social Policy' (2016) 32 *The International Journal of Comparative Labour Law and Industrial Relations* 231.

32 European Commission, *Recommendation on the European Pillar of Social Rights* (C(2017) 2600 final, 2017); European Commission, *Communication of 26 April 2017 establishing a European Pillar of Social Rights* (COM(2017) 250 final, 2017); Sacha Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14 *European Constitutional Law Review* 210

a competence of the Member States.[33] It was thought that social progress could be achieved through economic integration and the few social provisions of the Treaty of Rome 'merely served to "chaperon" the establishment of the common market'.[34] Today, six decades after the entry into force of the Treaty of Rome, the EU has arguably still limited competences in relation to social policies.

However, throughout these years, with every amendment of the Treaty new social objectives and competences were introduced,[35] the most prominent one being the inclusion of the objective of 'social market economy' in Article 3 (3) TEU with the Lisbon revision. The explicit reference to a 'highly competitive social market economy' constitutes a solemn proclamation and confirmation of a political pledge to strengthen the social dimension of the project of European integration.[36] It marks a new stage in the process of European economic integration and encapsulates the fundamental coexistence of a market economy with free competition and social justice. There are more and more judicial references and scholarly contributions regarding its content and its role in the formation of a new type of European economic model with a clear social dimension.[37] It is argued that the social market economy does not lie halfway between State and market, but represents a qualitatively different approach.[38] It is used to describe a market system organised by a comprehensive and well-structured regulatory framework, which clearly defines the boundaries of competition and actively promotes social justice through redistributive

33 Koen Lenaerts and Petra Foubert, 'Social Rights in the Case-Law of the European Court of Justice: The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law' (2001) 28 *Legal Issues of Economic Integration* 267, p. 267.

34 Ibid.

35 Ibid.

36 Apart from Article 3 (3) TEU, the Treaty provisions shaping the frame of Social Europe include also amongst others the social clause contained in Article 9 TFEU, the environmental clause contained in Article 11 TFEU, the group of provisions forming the framework for the services of general economic interest (Article 14 TFEU, Article 106 (2) TFEU, Protocol 26 and Article 36 of the Charter), the Social Policy Title of the TFEU (Article 151-161 TFEU) as well as the Charter of Fundamental Rights.

37 Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis,* ECLI:EU:C:2016:972, para 76; Case T-57/11 *Castelnou Energía v Commission,* ECLI:EU:T:2014:1021, para 211; Case T-565/08 *Corsica Ferries France v Commission,* ECLI:EU:T:2012:415, para 82; Loïc Azoulai, 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization' (2008) 45 *Common Market Law Review* 1335; Dragana Damjanovic, 'The EU market rules as social market rules: Why the EU can be a social market economy' (2013) 50 *Common Market Law Review* 1685; Delia Ferri and Mel Marquis, 'Inroads to Social Inclusion in Europe's Social Market Economy: The Case of State Aid Supporting Employment of Workers with Disabilities' (2011) 4 *European Journal of Legal Studies* 38; Floris De Witte, 'The architecture of the EU's social market economy' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgal Publishing 2017).

38 Joel Krieger (ed), *The Oxford Companion to Politics of the World* (Oxford University Press 2001).

policies.[39] It is 'a regulative policy which aims to combine, on the basis of a competitive economy, free initiative and social progress'.[40]

It is not only academic commentators who have analysed the meaning and the significance of the social provisions of the Treaties. These provisions were also recently referred to by the Court in the case *AGET Iraklis*,[41] in which the Court was asked to appraise the compatibility of the Greek legislation imposing a system of administrative authorisation in case of collective redundancies with Directive 98/29[42] and the freedom of establishment under Article 49 TFEU. The case concerned a dispute between AGET Iraklis, a limited liability company active in the manufacturing, distribution and marketing of cement, and the Minister of Employment, Social Security and Social Solidarity of Greece concerning the decision of the latter to reject a scheme of collective redundancies envisaged by the company as part of an organisational restructuring plan. In its judgment, the Court held that the Greek legislation imposed a restriction on the freedom of establishment, in so far as it reduced considerably, or even eliminated, the ability of economic operators to adjust their economic activity and effect collective dismissals.[43] However, it stressed that the objectives of the protection of workers and the encouragement of employment and recruitment constituted overriding reasons in the public interest capable of justifying restrictions on the fundamental freedoms.[44] The Court made further reference to the social provisions of the Treaties (Article 3 (3) TEU, Article 151 TFEU, Article 147 TFEU and Article 9 TFEU) in order to reinforce the view that the European Union has not only an economic but also a social purpose and that the economic freedoms must always be balanced against the objectives pursued by social policy.[45]

Similarly, in *Opinion 2/15 on the Free Trade Agreement between the EU and the Republic of Singapore*,[46] the Court made reference to Articles 9 and 11 TFEU

39 Ibid.

40 Alfred Müller-Armack, 'The Meaning of the Social Market Economy' in Alan T. Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan 1989), p. 83.

41 Case C-201/15 *AGET Iraklis*.

42 'Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies' (1998) *OJ L 225, 12.8.1998, p. 16-21.*

43 Case C-201/15 *AGET Iraklis*, paras 54-57.

44 Ibid, paras 73-74.

45 Ibid, paras 76-78. For the novel elements and the significance of this judgment, see the annotations: Ilektra Antonaki, 'Collective redundancies in Greece: AGET Iraklis' (2017) 54 *Common Market Law Review* 1513; Menelaos Markakis, 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 AGET Iraklis' (2017) 13 *European Constitutional Law Review* 724.

46 *Opinion 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore,* 16 May 2017.

in order to strengthen the novel argument that the objective of sustainable development forms an integral part of the common commercial policy, upon which the EU has exclusive competence under Article 3 (1) (e) TFEU.[47] The Court underlined the importance of the second sentence of Article 207 (1) TFEU, read in conjunction with Article 21 (3) TEU and Article 205 TFEU, that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.[48] Those principles and objectives are specified in Article 21 (1) and (2) TEU and, as stated in Article 21 (2) (f) TEU, relate *inter alia* to sustainable development linked to preservation and improvement of the quality of the environment and the sustainable management of global natural resources.[49] The Court clarified that the exclusive competence of the EU referred to in Article 3 (1) (e) TFEU could not be exercised in order to regulate the levels of social and environmental protection in the Parties' respective territory.[50] However, the envisaged agreement with Singapore was not intended to regulate the levels of social and environmental protection in the Parties' respective territory but to govern trade between the EU and the Republic of Singapore by making the liberalisation of that trade subject to the conditions that the Parties comply with their international obligations concerning social protection of workers and environmental protection.[51]

The increasing jurisprudential references to the objective of a 'social market economy' indicate an effort to strengthen the social dimension of the EU. In this context, this thesis draws from the theoretical underpinnings of 'social market economy' and attempts to explore the changes in the interpretation of Article 63 TFEU that can bridge the gap between the State and the market in order to allow Member States to participate in the market for the purposes of pursuing public interest objectives.

7 Structure of the thesis

The argumentation of the thesis develops in four different stages reflected in four distinct chapters. In a nutshell, the first two chapters establish the theoretical framework upon which the thesis is based and provide a detailed *descriptive* analysis of the International and the European regime on the free movement of capital (Part I). The other two chapters contain a *normative* analysis of the legal issues arising from privatisations and golden shares, the two case-studies

47 Ibid, paras 146-148.
48 Ibid, para 142.
49 Ibid, para 142.
50 Ibid, para 164
51 Ibid, para 166.

of this thesis, and suggest concrete changes in the existing legal framework in order to reconcile capital liberalisation with State participation in the market (Part II).

In more detail, Chapter 1 opens the scene with an introduction to the concept of capital liberalisation, a politically fraught issue, laden with ideological overtones, which has attracted significant scholarly attention from a wide spectrum of disciplines, varying from economists and political scientists to historians and lawyers. Particular emphasis is given on the protracted theoretical controversy surrounding the contribution of capital liberalisation to global economic growth. On the one hand, *neoclassical economic theory* suggests that the free movement of capital can contribute to economic efficiency, higher economic growth, better allocation of investment and rising living standards for many countries. On the other hand, the *Keynesian school* points to the lack of robust scientific evidence proving a correlation between capital liberalisation and economic growth. To the contrary, it claims that free capital flows have been associated with financial instability, increased likelihood of financial crises and rising levels of income inequality. The IMF and the OECD follow a midway path, according to which capital liberalisation improves economic efficiency and promotes global economic growth if it is complemented by measures of prudential supervision and regulation, sound macroeconomic policies and transparency.

After examining the ideological controversies surrounding the costs and benefits of capital liberalisation, Chapter 1 turns to the non-linear historical evolution of capital liberalisation at the international level, focusing particularly on the Gold Standard of the 'first age of globalization' and the Bretton Woods system. Subsequently, it examines the current legal framework regarding capital liberalisation, which is embedded in a regime of multilevel regulation based on the principle of State sovereignty in capital transfer matters. It is emphasised that apart from Article VI of the IMF Agreement, which allows national governments to adopt capital controls thus implicitly recognising that the free movement of capital remains a national competence, other attempts to promote and facilitate capital liberalisation have not yet found concrete reflection in general international law. Notable exceptions are found in Regional Free Trade Agreements and Bilateral Investment Treaties, which promote capital liberalisation through the expansion of foreign direct investment, as well as in the OECD Code of Liberalisation of Capital Movements.

In Chapter 2, the focus shifts to the free movement of capital in the EU. Contrary to the rather fragmented regime at the international level, at the European level there is a sophisticated legal framework on the free movement of capital, which is regarded as a necessary prerequisite not only for the completion of the Internal Market but also for the establishment and the proper functioning

of the Economic and Monetary Union. This legal framework is further developed and strengthened by the creation of the Capital Markets Union and the Banking Union, the two recent initiatives of the European Commission aiming at accelerating financial integration in the EU. However, despite its crucial role in the completion of financial integration in the EU, the free movement of capital has followed a slow historical development when compared to the other freedoms. Chapter 2 examines this historical development, focusing on the early refusal of the Court to recognise the direct effect of the Treaty provision on free movement of capital, the subsequent adoption of Directive 88/361 which brought about full liberalisation of capital movements, the advent of the Maastricht Treaty and the final recognition of the direct effect of the capital freedom in *Sanz de Lera*.

Turning to the current European legal framework, Chapter 2 carries out a doctrinal legal analysis of the main legal issues arising from the interpretation of the free movement of capital, i.e. the scope of the capital freedom, the relationship with the other freedoms, the direct effect of Article 63 TFEU, the restrictions prohibited under Article 63 TFEU, the Treaty-based and case law-made derogations and finally, the proportionality assessment conducted by the Court. In this context, particular emphasis is given on the *erga omnes effect* of Article 63 TFEU, i.e. the fact that it applies to not only to Member States but also to third countries. The expanded territorial scope is perhaps the most salient feature which distinguishes the free movement of capital from the other freedoms and elevates it to a whole different level, rendering it a potential gateway through which extra-EU investors can approach and ultimately access the EU's Internal Market. At the same time, Chapter 2 analyses extensively the strikingly broad interpretation of the scope of 'capital restrictions', which covers a wide variety of measures, such as golden shares, authorisation requirements, residence requirements for investments in real estate, foreign currency arrangements in mortgages or other financial credits, nationality requirements in relation to dividend or corporate taxation etc. However, it is emphasised that the strikingly broad interpretation of the scope of capital restrictions is somehow counterbalanced by the wide range of derogations that can be invoked by Member States in order to justify these restrictions. Finally, Chapter 2 explores the proportionality assessment, which in the capital case law is complemented by a requirement of compliance with the principle of legal certainty.

Chapter 3 turns to the case study of privatisations and attempts to explore the role that EU law has played on the advancement of privatisation as a national economic policy. In order to address this question, the Chapter first embarks upon a theoretical analysis of the economic, political and social debate about the costs and benefits of privatisation. Secondly, it seeks to investigate role that EU law plays in the decision of a national government to privatise

or nationalise an undertaking. This is a politically sensitive issue, which has become again topical because of the extensive privatisation schemes recently undertaken by the Member States affected by the eurocrisis in an effort to reduce the level of their public debt. In order to do so, firstly, it attempts to explore the ideological foundations of the European Economic Constitution, focusing particularly on German Ordoliberalism and the counter-movement of the French theory of *service public*. Secondly, it examines on the legal framework and in particular the different interpretations of the principle of neutrality enshrined in Article 345 TFEU and the significant role that this provision can play in safeguarding the discretion of the Member States to determine their property ownership systems.

The theoretical analysis of the free movement of capital in the EU culminates in Chapter 4, which addresses the controversial legal issues arising from the second case-study, i.e. the golden shares case law. The use of golden shares in strategically sensitive privatised undertakings (in the energy sector, telecommunications, postal services, airports, car industries etc.) is a widespread phenomenon in Europe, which has given rise to a long-running litigation between the Commission and the Member States before the Court of Justice. The establishment of special shareholding in national privatised champions is perceived as an expression of economic protectionism and as a threat or a hindrance to the emergence of a fully competitive market for corporate control. The Court has adopted a rigorous application of the free movement of capital, ruling in all but one case that golden shares constitute capital restrictions due to their *deterrent* effect on foreign investment.

Chapter 4 attempts to assess the far-reaching implications of the golden shares case law for the corporate governance systems of the Member States and the overall organisation and development of their industrial policies. In order to do so, it introduces the theoretical controversy surrounding the function of special rights as Control Enhancing Mechanisms derogating from the principle of proportionality between ownership and control and then focuses on the thorny legal issues arising from the golden shares case law of the Court of Justice. In particular, firstly, it investigates the possibility of granting horizontal direct effect to Article 63 TFEU; secondly, it provides an overview of the public interest objectives invoked (unsuccessfully) by the Member States in order to justify their golden shares as well as the 'procedural proportionality' assessment applied by the Court; and thirdly, it examines critically the strikingly broad interpretation of 'capital restrictions' and suggests a refined *Keck*-inspired test in order to delineate in a more consistent manner the scope of 'capital restrictions.

Finally, the Conclusion brings together the all the pieces of the thesis and summarises its main findings. It concludes that the judicial endorsement of

a very broad interpretation of 'capital restrictions' limits significantly the competence of the Member States to determine their corporate governace and property ownership systems and to protect public interest objectives. Therefore, it reiterates the two main modifications suggested by this thesis, i.e. the rediscovery of the principle of neutrality under Article 345 TFEU as a legal provision which shields national decisions to maintain public ownership in undertakings from Internal Market scrutiny; and the recalibration of the 'capital restrictions' test in the golden shares case law by reference to a Keck-inspired notion of 'investment arrangements'.