



Universiteit
Leiden
The Netherlands

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

Antonaki, I.

Citation

Antonaki, I. (2019, September 3). *Privatisations and golden shares : bridging the gap between the State and the market in the area of free movement of capital in the EU*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/77343>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/77343>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/77343> holds various files of this Leiden University dissertation.

Author: Antonaki, I.

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

Issue Date: 2019-09-03

PART II

Implementation in the context of privatisations
and golden shares

3 | Free movement of capital and privatisations

1 INTRODUCTION

The first two Chapters of this thesis described the regulatory framework governing capital liberalisation at the International and European level. They provided the theoretical framework upon which the normative part of the thesis is based. The latter consists of Chapters 3 and 4, which zoom in on the two case-studies of privatisations and golden shares in the EU and seeks to examine whether the Court in interpreting Article 63 TFEU succeeds in striking a balance between free capital movements and the protection of public interest objectives pursued through State participation in the market.

More precisely, Chapter 3 examines the role that EU law has played in the advancement of privatisation as a multifaceted widespread phenomenon in European economies. Its primary objective is to investigate whether the interpretation of the Treaty provisions in the case law of the Court regarding privatisations allows sufficient room for Member States to protect societal values. In particular, this Chapter 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 – as opposed to Chapter 4 which deals with golden shares, i.e. the special shareholding that a Member State decides to retain once it has privatised an undertaking, thus in the *post*-privatisation phase. In the *pre*-privatisation phase, the decision to nationalise or privatise an undertaking touches upon the determination of the *national property ownership system*, which under Article 345 TFEU remains a national competence. Indeed, Article 345 TFEU, which enshrines the *principle of neutrality*, stipulates that ‘*the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*’. However, despite the proclaimed neutrality of the Treaties in relation to national property ownership systems, the Court has ruled that the decision not to privatise an undertaking constitutes a restriction on the free movement of capital. This interpretation poses limitations on the regulatory autonomy of the Member States and raises concerns regarding the division of competence between the EU and the Member States and the protection of public interest objectives.

In this context, Chapter 3 attempts to identify an interpretative approach that can reconcile the free movement of capital with the exercise of the national

competence to nationalise or privatise undertakings. For this purpose, firstly, it starts with the theoretical controversy surrounding the costs and benefits of privatisation. It argues that although private ownership might appear as economically more efficient than State ownership, economic theory suggests that this is not an open-and-shut case and that the economic efficiency of privatisation depends primarily on the relevant market conditions.¹ What matters most is not whether the ownership is public or private but whether the company operates under a competitive environment.² Privatisation can be beneficial for the society as a whole – and not for some special vested interests – only when it is combined with a comprehensive regulatory framework enforcing competition and information symmetry among market operators.³

Secondly, it seeks to investigate the role of EU law in the promotion of privatisation as an economic policy in the EU. In particular, drawing from the ideological foundations of the European Economic Constitution, it explores and synthesises the suggested interpretations of the principle of neutrality enshrined in Article 345 TFEU and argues that measures touching upon the sensitive competence to nationalise or privatise an undertaking are covered by Article 345 TFEU and, therefore, should be excluded from the scope of capital restrictions. In this way, Article 345 TFEU offers a legal tool which can be used in order to shield public ownership aiming at protecting public interest objectives from market forces.

2 THE THEORETICAL UNDERPINNINGS OF PRIVATISATION

2.1 Definition of privatisation

The question to privatise or not to privatise has always been at the centre of public discourse on State intervention in the market, raising crucial economic, political, social and legal issues. Historically associated with Ronald Reagan and Margaret Thatcher, privatisation has been championed by proponents

* Certain sections of this Chapter are based on the published contribution to the following edited volume: Ilektra Antonaki, 'Free movement of Capital and Privatisation of Public Utilities' in Despina Anagnostopoulou, Lina Papadopoulou, Ioannis Papadopoulos (eds.), *The EU at a Crossroads: Challenges and Perspectives* (Cambridge Scholars Publishing 2016).

1 Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008), p. 2.

2 Ibid.

3 Bruce Greenwald and Joseph Stiglitz, 'Externalities in Economies with Imperfect Information and Incomplete Markets' (1986) 101 *The Quarterly Journal of Economics* 229; David Sappington and Joseph Stiglitz, 'Privatization, Information and Incentives' (1987) 6 *Journal of Policy Analysis and Management* 567.

of *laissez-faire* capitalism as an economic policy leading to increased economic efficiency⁴ and to a significant alleviation of public finances through the use of cash revenues for the purposes of redeeming public debt.⁵ Although the rapid public sector expansion that took place in the 1960s and 1970s was regarded as a major contributor not only to economic growth but also to social and political stability, the general perception of the State's intervention in the market was seriously questioned in the mid-1970s as a result of the oil crises.⁶ The inability of economies to adjust to external prices shocks led to a significant deterioration in macroeconomic performances and part of the blame was laid on the inflexible large public sectors.⁷ In Europe, the *first* and most prominent privatisation wave started in the UK in the 1980s as part of the economic policy followed by Margaret Thatcher.⁸ This privatisation wave marked the beginning of a new era of economic policy and political ideology, commonly referred to as 'neoliberalism'.⁹ A conventional wisdom was developed that private management and ownership was better than public ownership, as it would

-
- 4 Ann P. Bartel and Ann E. Harrison, 'Ownership versus Environment: Disentangling the Sources of Public-Sector Inefficiency' (2005) 87 *The Review of Economics and Statistics* 135; Madanmohan Ghosh and John Whalley, 'State Owned Enterprises, Shirking and Trade Liberalization' (2008) 25 *Economic Modelling* 1206; William L. Megginson and Jeffrey M. Netter, 'From State to Market: A Survey of Empirical Studies on Privatization' (2001) 39 *Journal of Economic Literature* 321; Muiris MacCarthaigh, 'Managing state-owned enterprises in an age of crisis: an analysis of Irish experience' (2011) 32 *Policy Studies* 215; Kathryn L. Dewenter and Paul H. Malatesta, 'State-owned and privately-owned firms: an empirical analysis of profitability, leverage, and labor intensity' (2001) 91 *American Economic Review* 320.
 - 5 Bernardo Bortolotti, Marcella Fantini and Domenico Siniscalco, 'Privatization around the world: evidence from panel data' (2004) 88 *Journal of Public Economics Journal of Public Economics* 305.
 - 6 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (IMF, Occasional Paper No 56, 1988), p. 1.
 - 7 Ibid.
 - 8 William Keegan, *Mrs. Thatcher's Economic Experiment* (Penguin 1984); Leaders, 'Privatisation – The \$9 trillion sale' *The Economist* (11 January 2014); Tony Prosser and Michael Moran, 'Privatization and Regulatory Change: The Case of Great Britain' in Michael Moran and Tony Prosser (eds), *Privatization and Regulatory Change in Europe* (Open University Press 1994), pp. 35-49.
 - 9 The controversial term of neoliberalism is used to describe the epochal shift in political economy from welfare-based *government* to competitiveness-driven *governance*. It is characterised by a number of principles including the view that (i) markets are the only efficient means to allocate scarce resources; (ii) international free trade is desirable; (iii) State intervention is not desirable; and (iv) labour market flexibility is necessary. See Kean Birch and Vlad Mykhnenko, 'Varieties of neoliberalism? Restructuring in large industrially dependent regions across Western and Eastern Europe' (2009) 9 *Journal of Economic Geography* 355, at p. 356 referring to Colin Hay, 'The normalizing role of rationalist assumptions in the institutional embedding of neoliberalism' (2004) 33 *Economy and Society* 500 and Wendy Larner, 'Neo-liberalism: policy, ideology, governmentality' (2000) 63 *Studies in Political Economy* 5.

bring economic efficiency and it would reduce corruption rates.¹⁰ The ideological doctrine of unfettered free market, deregulation, liberalisation and privatisation became the orthodox economic thinking and the drive to cut State intervention soon spread to the rest of Europe at a remarkable rate.¹¹ After the fall of the Berlin Wall and the subsequent decline of Communism in Europe, Central and Eastern European countries experienced the *second* privatisation wave in the form of large privatisation schemes aiming at reducing the large public sectors associated with the former communist regimes and at increasing public revenues.¹² Finally, as a result of the eurocrisis, European states with a high public debt are experiencing the *third* privatisation wave: they have committed to implement an extensive privatisation programme of state-owned assets in a number of key sectors, such as energy, ports, airports, motorways, railways, mining, water supply, waste management, defence industries and real estate assets with a view to reduce the level of public debt and improve public finances.¹³

According to the IMF, privatisation is defined as a *transfer of ownership and control* from the public to the private sector, with particular reference to asset sales.¹⁴ It is therefore equated to total or partial denationalization and it is the opposite of nationalization.¹⁵ Similarly, according to the definition given

10 Joseph Stiglitz, 'Foreword' in Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008), p. IX.

11 Elke Loeffler, Dominik Sobczak and Frankie Hine-Hughes, *Liberalisation and privatisation in the EU – Services of general interest and the roles of the public sector* (Multi-Science Publishing, European Union 2012)

12 Briefing, 'State-owned assets – Setting out the store' *The Economist* (11 January 2014).

13 Member States undergoing economic adjustment programmes have committed to reducing the strain on public finances among others by privatising SOEs. Arguably, the most extensive privatisation programme is currently being undertaken by Greece. In particular, as part of the third economic adjustment programme, Greece has committed to develop and implement a significantly scaled up privatisation programme with improved governance and transparency. An independent fund, managed by the Greek authorities under the supervision of the relevant EU institutions, has been established in order to privatise independently evaluated Greek State assets. At the same time, Greece has committed to adopt a comprehensive legislative framework in order to ensure transparent procedures and adequate asset sale pricing, in accordance with the OECD Principles and Standards on the management of SOEs. The funds that the privatisation programme is expected to yield will be used for (1) the repayment of recapitalisation of banks and other assets; (2) decreasing Greece's debt to GDP ratio; and (3) for investments to boost growth. See Eurosummit, *Euro Summit Statement, Brussels, 12 July 2015* (SN 4070/15, 2015).

14 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 1. In this paper, it is stated that the words 'privatise' and 'privatisation' appeared for the first time in the 1983 edition of the Webster's Ninth New Collegiate Dictionary, where their earliest recorded use is given as being in 1948. However, S.H. Hanke claims responsibility for popularising these words while serving on the U.S. President's Council of Economic Advisers in 1982 and 1982 (*Washington Post*, January 13, 1986).

15 *Ibid.*

by the OECD, privatisation is any material transaction by which the State's ultimate *ownership* of corporate entities is reduced.¹⁶ This includes direct divestment by the State, divestment of corporate assets by government-controlled investment vehicles as well as the dilution of state positions in State-owned enterprises by secondary share offerings to the non-state shareholders.¹⁷ It may also include some instances of divestment of subsidiaries by State-owned enterprises, when this is a result of government decisions rather than reflecting purely commercial considerations.¹⁸ The definition of privatisation suggested by the OECD does not encompass the transfer of certain commercial activities from State-owned enterprises to private operators through different forms of public-private partnership such as through concessions, delegated management contracts or leasing.¹⁹ By the same token, the dilution of government control over incorporated entities through cancellation of golden shares, share class unifications or changes to the articles of association are excluded from the definition of privatisation.²⁰ Therefore, the crucial element is the *transfer of corporate assets* from the State to private actors, not the mere transfer of commercial activities.²¹

The method through which privatisation is usually organised depends on the country's characteristics in terms of capital market development and legal infrastructure, the size and nature of the enterprise concerned and the objectives the privatisation seeks to achieve.²² The most common methods of privatisation include (1) Initial Public Offerings in the capital markets; (2) trade sales to strategic investors; (3) management/employee buy-outs; and (4) asset sales, often following the liquidation of the State-owned enterprise concerned.²³

2.2 Difference between privatisation and liberalisation

The term *privatisation* is to be distinguished from that of *liberalisation*. While privatisation refers to the transfer of ownership from the public to the private sector, liberalisation refers to the opening up of a specific market sector to competition. It represents essentially a programme of regulatory changes in

16 OECD, *Privatisation in the 21st Century: Recent Experiences of OECD Countries* (Report on Good Practices, 2009).

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 Stilpon Nestor and Ladan Mahboodi, 'Privatisation of public utilities: the OECD experience' in OECD (ed), *Privatisation, competition and regulation* (OECD 2000), p. 13.

23 *Ibid.*, p. 13.

the direction of moving towards a free-market economy.²⁴ It is true that more often than not market liberalisation goes hand in hand with the privatisation of public assets, as evidenced in Europe in the early 1990s.²⁵ However, this does not mean that the one presupposes the other. In fact, the liberalisation of an economic sector can be effected without prior privatisation. In such a scenario, the public enterprise will continue to exist after the liberalisation, but it will no longer enjoy a monopolistic position in the market. It will have to compete with the new private entrants that will emerge as a result of the introduction of competition to the previously closed market. Conversely, a public monopoly can be privatised without a parallel liberalisation of the relevant market. In that case, the public monopoly is transformed into a private monopoly, which, in the absence of competition, will continue to act under the same monopolistic market conditions. Economic studies suggest that efficiency gains are most likely to result from the privatisation of public monopolies only if this is combined with the liberalisation of the relevant market.²⁶ The transfer of a public monopoly to the private sector, with its monopoly power left intact, may not achieve increased productive or allocative efficiency.²⁷ More importantly, evidence has shown that the privatisation of a previously public monopoly of a network industry, such as the railway system in the UK, may even threaten safety standards through the cutting of resources devoted to the maintenance of such safety standards.²⁸ It is for this reason that the economists of the IMF support the view that economic efficiency and respect for fundamental public interest considerations can only be achieved

-
- 24 John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics*, (Oxford University Press 2009).
- 25 Erika Szyzszak, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing 2007), p. 3; Niamh Dunne, *Competition Law and Economic Regulation – Making and Managing Markets* (Cambridge University Press 2015), p. 149; Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morlino, *International Encyclopedia of Political Science* (SAGE Publications 2011).
- 26 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 2.
- 27 *Ibid.*, p. 2. Productive efficiency occurs when goods and services are produced at the lowest possible cost. To the contrary, allocative efficiency occurs when there is an optimal distribution of goods and services, taking into account consumers' preferences. It refers to a situation where, under conditions of perfect competition, goods and services are allocated between consumers according to the price they are prepared to pay and the price never rises above the marginal cost of production. See Tony Prosser, *The limits of competition law: markets and public services* (Oxford University Press 2005), p. 19 In antitrust law, the notion of 'allocative efficiency' largely coincides with the concept of 'consumer welfare'. See in particular the instrumental works of the two founders of the Chicago School of economic approach in antitrust law Richard Posner, *Antitrust Law* (The University of Chicago Press 2001) and Robert Bork, *Antitrust Paradox* (Simon & Schuster 1993), whose leitmotif is that considerations of allocative efficiency (consumer welfare) alone should guide antitrust policy.
- 28 The main area in which safety concerns have been expressed is regarding the privatisation of railways in the UK, where, after a series of serious accidents, the privatised Railtrack was accused of seriously neglecting safety and of failing to exercise sufficient control over its contracted-out maintenance functions. See Tony Prosser, *The limits of competition law: markets and public services* (Oxford University Press 2005), p. 22.

if privatisation is accompanied by *liberalisation* in order to foster competition and by *regulation* in order to prevent anticompetitive practices and socially disruptive results.²⁹ In the same vein, economists of the OECD underline that privatisation and competition need to be pursued *in tandem*.³⁰ In fact, the consensus position among OECD countries is that a government should not privatise an State owned enterprise before an appropriate regulatory framework has been established.³¹ This appropriate regulatory framework consists of the introduction of a general and a sectorial anti-trust and enforcement mechanism and the creation of independent regulatory agencies.³²

2.3 The case in favour of privatisation

The extensive privatisation schemes that were adopted during the previous decades led to a significant expansion of the scholarly research on the economic and social consequences of privatisation.³³ Today, the existing literature largely confirms that the process of privatisation can generate economic efficiency gains for the previously State-owned enterprises. Privatisation is regarded as a necessary dimension to the internationalisation of the economy.³⁴ The ideological embracement of privatisation is premised exactly on the economic objectives that are being achieved through the process of privatisation. From the standpoint of economic analysis, privatisation is primarily regarded as a means of improving the economic efficiency of enterprises.³⁵ In particular, privatisation limits the scope for corruption, clientelism and political interference in decision making,³⁶ increases managerial incentives by making man-

-
- 29 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 2.
- 30 Stilson Nestor and Ladan Mahboodi, 'Privatisation of public utilities: the OECD experience' in OECD (ed), *Privatisation, competition and regulation* (OECD 2000), p. 18.
- 31 OECD, *Privatisation in the 21st Century: Recent Experiences of OECD Countries* (2009), p. 13.
- 32 *Ibid.*, p. 13.
- 33 Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008); John Vickers and Vincent Wright (eds), *The Politics of Privatisation in Western Europe* (Routledge 2005); Michael Moran and Tony Prosser (eds), *Privatization and Regulatory Change in Europe* (Open University Press 1994); Joseph Stiglitz, *The Economic Role of the State* (Blackwell 1989); Stilson Nestor and Ladan Mahboodi, 'Privatisation of public utilities: the OECD experience' in OECD (ed), *Privatisation, competition and regulation* (OECD 2000); Raj Chari, *Life After Privatization* (Oxford University Press 2015).
- 34 Erika Szyzszak, 'Golden Shares and Market Governance' (2002) 29 *Legal Issues of Economic Integration* 255, p. 258.
- 35 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 6; Olivier Bouin, *The Privatisation in Developing Countries: Reflections on a Panacea* (OECD 1992).
- 36 Joseph Stiglitz notes that even advocates of State ownership, like Greece's socialist prime minister Andreas Papandreu, was aware of the challenges of 'socializing' the SOEs, and in particular the challenge to make them act in accordance with social objectives for the benefit of the society as a whole, and not just serving the interest of their managers and

agers responsible to shareholders who will monitor their performance better than governments and impose the financial discipline of private capital markets.³⁷ This combination of factors can lead to increased economic efficiency of previously State-owned enterprises. An example of a successful privatisation scheme was the one undertaken in the telecommunications sector in the EU. The privatisation of national telecommunications organisations together with the liberalisation of this market and establishment of a robust regulatory framework led to increased economic efficiency of the undertakings concerned, enhanced competition, lower prices for consumers and better customer services.³⁸

The second argument in favour of privatisation relates to its impact on government finances. More precisely, privatisation may lead to a reduction of public deficit, especially if it concerns loss-making enterprises.³⁹ In fact, in cases of governments facing serious liquidity constraints, the financing of fiscal deficits with the privatisation proceeds is perhaps the most obvious objective of privatisation schemes.⁴⁰ In the same vein, governments facing long-lasting debt may use privatisation proceeds in order to reduce public debt.⁴¹ A reduction in public debt leads in turn to a reduction in fiscal deficit through a decline in net interest payments.⁴² This is particularly important for the Member States participating in the Economic and Monetary Union, which presupposes compliance with strict public debt and public deficit criteria. Research has shown that privatisation policies in southern Europe (Spain, Italy, Portugal and Greece) during the 1990s were used by national governments as a short-term economic policy intended to fulfil the convergence criteria in order to allow participation in monetary integration.⁴³ This in turn implied that privatisation schemes might not have been used in order to serve pure economic purposes (such as the economic restructuring and efficiency of the undertakings concerned), but to pursue wider political objectives.⁴⁴

trade unions. See Joseph Stiglitz, 'Foreword' in Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008), p. X.

37 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 6.

38 Viktor Mayer-Schonberger and Mathias Strasser, 'Closer look at telecom deregulation: The european advantage' (1998) 12 *Harvard Journal of Law and Technology* 561.

39 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 6.

40 Stilpon Nestor and Ladan Mahboodi, 'Privatisation of public utilities: the OECD experience' in OECD (ed), *Privatisation, competition and regulation* (OECD 2000), p. 11.

41 Yannis Katsoulakos and Elissavet Likoyanni, *Fiscal and Other Macroeconomic Effects of Privatization* (FEEM Working Paper No 1132002, 2002), p. 19.

42 *Ibid.*, p. 19.

43 Venilde Jeronimo, José Pagán and Gökçe Soydemir, 'Privatization and European Economic and Monetary Union' (2000) 26 *Eastern Economic Journal* 321.

44 *Ibid.*, p. 325.

Furthermore, privatisation has significant benefits for the development of a capital market and a market for corporate control.⁴⁵ More specifically, enterprises can gain access to private sector financing through privatisation and can spur the development of domestic capital markets as a means of channelling savings in the economy.⁴⁶ The British extensive privatisation programme constitutes one of the most successful examples of how privatisation can contribute to the development of equity markets and to the creation of a wide share owning class.⁴⁷ If the public assets in question are attractive also to small investors and middle classes, this can broaden share ownership (ownership diffusion) and foster popular capitalism.⁴⁸

Finally, privatisation may also benefit enterprises that remain within the public sector after the privatisation process, primarily through improvements to existing incentive and control mechanisms.⁴⁹ The remaining public enterprises (not programmed for sale) may be subject to increased corporate governance rigour and may be forced to implement reforms and to modernize their production systems so as to better respond to consumers' demands and to remain competitive in liberalised market.⁵⁰ Furthermore, governments can transfer certain commercial enterprises to the private sector and can focus better on the performance of public enterprises that pursue certain social objectives.

45 Yannis Katsoulakos and Elissavet Likoyanni, *Fiscal and Other Macroeconomic Effects of Privatization* (2002), p. 6. In relation to the market for capital control, the authors emphasise that the development of a fully competitive market for capital control may be hindered by the continued state control through partial shareholdings (such as golden shares). For a general overview of the market of corporate control see Charlie Weir, 'The Market for Corporate Control' in Douglas Michael Wright, Donald S. Siegel, Kevin Keasey and Igor Filatotchev (eds), *The Oxford Handbook of Corporate Governance* (Oxford University Press 2013), pp. 329-346.

46 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 6.

47 Bernardo Bortolotti and Valentina Milella, 'Privatization in Western Europe: Stylized Facts, Outcomes, and Open Issues' in Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008), p. 50.

48 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 6; Bernardo Bortolotti and Valentina Milella, 'Privatization in Western Europe: Stylized Facts, Outcomes, and Open Issues' in Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008), p. 60. The authors note that privatisation is politically motivated and can strengthen the electoral power of conservative governments. For instance, in the UK where the Thatcherite privatisations programme was followed by five consecutive victories by the Conservatives. By making equity investment attractive for the middle classes through under-pricing of the public assets, privatisation can create a constituency with an interest in increasing the value of its assets that is therefore averse to the redistribution policies of the left. In this way privatisation can be a rational strategy for raising the probability of electoral success of right-wing market-oriented governments.

49 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 6.

50 Stilpon Nestor and Ladan Mahboodi, 'Privatisation of public utilities: the OECD experience' in OECD (ed), *Privatisation, competition and regulation* (OECD 2000), p. 19.

2.4 The case against privatisation

While privatisation has gained ground as an economic policy that improves economic efficiency of State-owned enterprises, there are still many legitimate economic and non-economic arguments in favour of public ownership or even explicitly against privatisation.

First, public ownership is regarded to be conducive to the attainment of social objectives.⁵¹ In particular, through public ownership of certain enterprises the State can achieve distributional objectives, such as public-service delivery and widespread access to essential goods and services at reasonable and affordable prices for the consumers.⁵² Additionally, public ownership can be used to create employment or to prevent rising unemployment and to combat social inequalities especially in developing countries.⁵³ Conversely, private ownership or the privatisation of public assets has been associated with adverse employment consequences, such as collective redundancies or insecure employment relations,⁵⁴ cutbacks in redistribution and has stirred popular discontent in many countries because of the corruption and cronyism that have stained the reputation of many privatisation processes.⁵⁵ An example of this can be found in the ‘voucher privatisation programs’ (transfer of public assets for free or nominal cost) undertaken by the former Soviet Union and many Eastern European countries that ultimately led to the creation of oligarch-controlled private monopolies.⁵⁶

Furthermore, public ownership can be regarded as a response to the failure of private markets to secure efficient outcomes, particularly in countries with weaker regulatory frameworks or in ‘network industries’ characterised by natural monopoly, such as electricity and gas distribution, water provision and railways.⁵⁷ Natural monopolies have traditionally been perceived as rendering competition undesirable or even unfeasible, as the duplication of the network is economically and environmentally difficult and in some case

-
- 51 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 3.
 52 Ibid, p. 3; OECD, *The Size and Sectoral Distribution of SOEs in OECD and Partner Countries* (OECD Publishing 2014).
 53 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 4.
 54 Ibid, p. 4.
 55 Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008), pp. 1-2.
 56 Jomo Kwame Sundaram, ‘A Critical Review of the Evolving Privatization Debate’ in Gérard Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008), p. 200; John Nellis, *The World Bank, privatization, and enterprise reform in transition economies: a retrospective analysis* (The World Bank Operations Evaluation Department, 2002).
 57 Przemyslaw Kowalski and others, *State-Owned Enterprises, Trade Effects and Policy Implications* (OECD Trade Policy Papers No 147, 2013).

even impossible.⁵⁸ In the absence of competition, a privatisation of a natural monopoly linked to the performance of ‘universal service obligations’ could lead to abuse and distortion of competition, as private monopolists may produce and price at levels which are not socially optimal.⁵⁹ In this respect, the privatisation of British railways is often cited as an example of an unsuccessful privatisation which has led to higher prices for consumers, delays, reduced quality of services as well as lower investment in infrastructure and innovation.⁶⁰

Moreover, the maintenance of State control over sectors considered of ‘strategic’ national interest, such as oil and gas is considered to be another important reason justifying public ownership.⁶¹ Nationalisation of strategic enterprises can act as a safety net to guarantee that the country will not depend on potentially unreliable external sources of supply.⁶²

Finally, public ownership can also be used to foster sectors that are considered economically undesirable and that would not otherwise be developed through private investment: for instance, private investors might be reluctant to finance research and development if the gains are difficult to capitalise on.⁶³ Other examples of services, which are usually provided by the public sector, include defence and police, environmental protection and the public provision of medical care.⁶⁴ In the same vein, many developing countries can benefit from public production in order to develop their infrastructure and their markets, especially in cases where private returns to investment are not sufficiently attractive to private investors.⁶⁵

These arguments explain why, despite ambitious privatisation programmes undertaken in recent decades, many governments nonetheless maintain public ownership in commercial enterprises in strategically sensitive sectors such as electricity and gas, transportation and finance. More precisely, according to a recent OECD report on State-ownership in 34 countries (of which 31 are OECD members), State-owned enterprises value at over USD 2 trillion and employ

58 Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2012), p. 10.

59 Przemyslaw Kowalski, Max Bu"ge, Monika Sztajerowska and Matias Egeland, *State-Owned Enterprises, Trade Effects and Policy Implications* (2013).

60 Editorial, ‘The Guardian view on rail privatisation: going off the tracks’ *The Guardian* (05-12-2017) <<https://www.theguardian.com/commentisfree/2017/dec/05/the-guardian-view-on-rail-privatisation-going-off-the-tracks>> accessed 31-12-2019.

61 OECD, *The Size and Sectoral Distribution of SOEs in OECD and Partner Countries* (OECD Publishing 2014).

62 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 4.

63 Przemyslaw Kowalski, Max Bu"ge, Monika Sztajerowska and Matias Egeland, *State-Owned Enterprises, Trade Effects and Policy Implications* (2013)

64 Richard Hemming and Ali M. Mansoor, *Privatization and Public Enterprises* (1988), p. 3.

65 *Ibid.*, p. 3.

about 6 million people.⁶⁶ Interestingly, the largest SOE sectors in the OECD are found in four European countries: Norway, France, Slovenia and Finland.⁶⁷

3 PRIVATISATION AND EU LAW

This section seeks to investigate the role of EU law in the promotion of privatisation as an economic policy in the EU. For this purpose, first, it examines the politico-economic context regarding privatisation as an economic policy and analyses the impact of the German theory of Ordoliberalism and the French theory of 'service public' on the formation of the European Economic Constitution (Section 3.1). Secondly, turning to the current legal framework, it explores the nature and the interpretations of the principle of neutrality enshrined in Article 345 TFEU (Section 3.2). It is argued that measures touching upon the sensitive competence to nationalise or privatise an undertaking should in principle be covered by Article 345 TFEU and, therefore, excluded from the scope of capital restrictions. In this way, Article 345 TFEU offers a legal tool which can be used in order to shield public ownership aiming at protecting public interest objectives from market forces.

3.1 The politico-economic context: The impact of the German theory of Ordoliberalism and the French theory of 'service public' on the European Economic Constitution

The question of State participation in the market has shaped the political and economic debate in Europe. Since its very creation, the European project has been conceived as an arduous endeavour to achieve a political compromise between different national interests and to strike a balance between market-driven integration and social objectives. The dividing line between public and private sphere in the economy is not drawn uniformly across the EU.⁶⁸ While privatisation has indeed become a widespread phenomenon in all Member States, resulting in major shifts of resources from the public to the private

66 OECD, *The Size and Sectoral Distribution of SOEs in OECD and Partner Countries* (OECD Publishing 2014), p. 7. See also Hans Christiansen, *The Size and Composition of the SOE Sector in OECD Countries* (OECD Corporate Governance Working Papers, No 5, 2011).

67 OECD, *The Size and Sectoral Distribution of SOEs in OECD and Partner Countries* (OECD Publishing 2014).

68 Wolf Sauter and Harm Schepel, *State and Market in European Union Law – The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009), p. 21.

sector, it nevertheless follows different methods in each Member State and leads to different limitations on State participation in the market.⁶⁹

The degree of State participation in the market within individual Member States has been determined by national economic policy objectives. These objectives have often been translated into politico-economic ideologies and have deeply affected not only the market economy systems of the Member States but also the European Economic Constitution.⁷⁰ The European Economic Constitution is broadly described as consisting of the constitutional principles of direct effect and supremacy and of the substantive rules on the Internal Market and Competition Law, complemented by the rules on the Economic and Monetary Union and the Common Commercial Policy.⁷¹ Its content has been inspired primarily by the German Ordoliberal tradition focusing on market liberalisation, private autonomy, economic freedoms, strict adherence to competition rules, fiscal discipline and a diminished public sector.⁷² Although over the years Ordoliberalism might have become diluted through the influence of neo-classic mainstream economics and the difference between Anglo-Saxon and ordoliberal traditions might have become practically ever less visible,⁷³ its historical legacy has at the same time been strengthened.⁷⁴ The Ordoliberal theory or 'the Freiburg school of law and economics',⁷⁵ as

69 Ibid, pp. 19-21.

70 Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27; Christian Joerges, 'The European Economic Constitution and its Transformation Through the Financial Crisis' in Dennis Patterson and Anna So"dersten (eds), *A Companion to European Union law and International Law* (Wiley & Sons 2013); Joseph Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal* 2403; Martin Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 *California Law Review* 537; Wolf Sauter and Harm Schepel, *State and Market in European Union Law – The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009), pp. 11-18; Leontin-Jean Constantinesco, 'La constitution économique de la C.E.E' (1977) 13 *Revue Trimestrielle de Droit Européen* 244; Wolf Sauter and Harm Schepel, *State and Market in European Union Law – The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009), p. 11.

71 Erika Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing 2007), p. 29.

72 Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27, p. 49.

73 The differences between ordoliberalism and classical liberalism were defined by Michel Foucault in 1970 and with the republication of his lectures they have attracted anew scholarly attention. See Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Basingstoke: Palgrave-Macmillan 2008); Josef Hien and Christian Joerges, *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017), p. 2.

74 Josef Hien and Christian Joerges, *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017), p. 2.

75 The most important representatives of Ordoliberalism were the economist Walter Eucken, who is regarded as the 'father of Ordoliberalism', and the lawyer and economist Franz Böhm. Friedrich A. von Hayek tried to bridge the Freiburg School with the neo-liberal Austrian and Chicago Schools by conceptualizing the system of undistorted competition

described in the Ordo Manifesto of 1936,⁷⁶ represents an effort to combine the economic theory of classical liberalism with a strict legal framework which is intended to guarantee and protect the optimal functioning of the market.⁷⁷

In more detail, ordoliberalism opposes any form of State intervention in the economy and considers that the role of the State is limited to safeguarding the economic order through the adoption and strict enforcement of an 'Economic Constitution' (*Wirtschaftsverfassung*).⁷⁸ The Economic Constitution contains a strong normative bias in favour of a liberal market economy and provides a coherent legal framework, which is essential for the protection of the fundamental principle of private autonomy and individual economic freedoms.⁷⁹ Private law is endowed with normative superiority over public intervention and the private law society is endowed with moral superiority over political decision-making procedures.⁸⁰ The role of the Economic Constitution is instrumental in the prevention of concentration of both public and private economic power through the prohibition of monopolies, cartels, State planning, and corporatism.⁸¹ Therefore, its mission is both to shield the economy from abuses of political power and to protect the political system from succumbing to economic interests.⁸²

At the same time, however, the project of European integration has been also influenced by the French theory of 'service public', which has contributed significantly to the formation and consolidation of the concept of 'social market economy' as an overarching principle underpinning the European project and reinforcing the social component of market integration.⁸³ This theory ('service

and thus introduced a re-orientation of ordoliberalism which is known as 'neo-ordoliberalism'. See Friedrich A. von Hayek, *Der Wettbewerb als Entdeckungsverfahren* (Kiel 1968); Josef Hien and Christian Joerges, *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing 2017), p. 3; Manfred Streit, 'Economic Order, Private Law and Public Policy: The Freiburg School of Law and Economics in Perspective' (1992) 148 *Journal of International and Theoretical Economics* 675.

76 Franz Böhm, Walter Eucken and Hans Großmann-Dörth, 'Palgrave Macmillan UK' in Alan Peacock and Hans Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (1989).

77 Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27, p. 47.

78 *Ibid.*, p. 46.

79 *Ibid.*, p. 46.

80 Wolf Sauter and Harm Schepel, *State and Market in European Union Law – The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009), p. 15.

81 *Ibid.*, p. 14.

82 *Ibid.*, p. 14.

83 There is an abundant French literature on the theory of 'service public' under French administrative law. See, for instance, the following representative accounts (some of them with an EU-dimension as well): Emmanuel Cadeau, Didier Linotte and Raphaël Romi, *Droit*

public à la française’) constitutes the foundation of French administrative law and is widely regarded as ‘a defining element of French political philosophy and an icon of national identity’.⁸⁴ The emergence of this theory coincides with the progress of political liberalism and the development of solidaristic ideologies.⁸⁵ Its origins lie in the works of the eminent French legal scholar Léon Duguit (1859-1928), principal representative of the ‘*École de Bordeaux*’ (or ‘*École du service public*’).⁸⁶ According to Duguit, the concept of ‘service public’ encompasses ‘every activity whose fulfilment must be reassured, regulated and controlled by the government, because the fulfilment of this activity is indispensable to the realisation and development of the social interdependence, and it is of such nature that it can only be realised completely by the intervention of the governing force’.⁸⁷ The State’s *raison d’être* is to

du service public (LexisNexis 2014); Didier Linotte and Raphaël Romi, *Droit public économique* (LexisNexis 2012); Jean-Paul Valette, *Le service public à la française* (Paris: Ellipses 2000); Jacques Chevallier, *Le service public* (Paris: PUF [1987] 2008); Stéphane Braconnier, *Droit des services publics* (Paris: PUF 2007); Claudine Desrieux, ‘La gestion contractuelle des services publics: Une critique de l’approche par les droits de propriété’ (2007) 59 *Revue économique* 451; Marceau Long, ‘Service public et réalités économiques du XIXe siècle au droit communautaire’ (2001) *Revue française de droit administratif* (RFDA) 1161; Didier Linotte and Raphaël Romi, *Services publics et droit public économique* (LexisNexis 2001); Robert Kovar, ‘Droit communautaire et service public’ (1996) *Revue trimestrielle de Droit Européen* (RTD Eur) 215; Jean-Marie Pontier, ‘Sur la conception française du service public’ (1996) *Recueil Dalloz Sirey* 9; Marceau Long, ‘Service public, services publics: déclin ou renouveau?’ (1995) *Revue française de droit administratif* (RFDA) 497; Michel Bazex, ‘L’appréhension des services publics par le droit communautaire’ (1995) *Revue française de droit administratif* (RFDA) 295; Philippe Jourdan, ‘La formation du concept de service public’ (1987) *Revue du droit public et de la science politique en France et à l’étranger* 99; Nicole Belloubet-Frier, ‘Service public et droit communautaire’ (1994) *Actualité juridique du droit administratif* (AJDA) 270.

84 Wolf Sauter and Harm Schepel, *State and Market in European Union Law – The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009), p. 16.

85 Marceau Long, ‘Service public, services publics: déclin ou renouveau?’ (1995) *Revue française de droit administratif* (RFDA) 497; Jean-Philippe Colson and Pascale Idoux, *Droit Public Économique* (L.G.D.J. 2008), p. 94. The term ‘solidaristic ideologies’ refers here to ideologies based on the value of social solidarity as opposed to ‘individualistic ideologies’ based on the value of individual freedom. For a more comprehensive analysis, see Hartley Dean, *Social Policy* (Polity Press 2012), p. 22.

86 In Duguit’s view, the State was not a mythical Sovereign inherently superior to all its subjects, but merely a group of people engaged in ‘public service’, the activity constituting and legitimising the existence and the exercise of State power. Some of his influential works include: Léon Duguit, *Traité de droit constitutionnel* (Paris: De Boccard [1911] 1930); Léon Duguit, *Souveraineté et liberté, Leçons faites à l’Université Columbia (New-York) en 1920-1921* (Librairie F. Alcan 1921); Léon Duguit, ‘Des fonctions de l’Etat moderne: étude de sociologie juridique’ (1894) *Revue internationale de sociologie* 161; Léon Duguit, *L’État, le droit objectif et la loi positive* (Paris: Dalloz [1901] 2003); Léon Duguit, *Les transformations du droit public* (Hachette Livre BNF [1913] 2014).

87 Personal translation of the original French text: ‘[...]C’est toute activité dont l’accomplissement doit être assuré, réglé et contrôlé par les gouvernants, parce que l’accomplissement de cette activité est indispensable à la réalisation et au développement

perform the tasks necessary for the promotion of 'social interdependence'.⁸⁸ This means that governmental power derives from the duty of the State to provide its citizens with the necessary public services.⁸⁹ Accordingly, the idea of 'service public' both legitimises and limits the exercise of public power.⁹⁰ '*Le service public est le fondement et la limite du pouvoir gouvernemental*'.⁹¹

Within the framework of the theory of 'service public', public intervention in order to pursue objectives in the *general interest* (a notion which inextricably linked to the concept of 'service public') is elevated to a higher order compared to private law mechanisms for the protection of individual rights and freedoms. At the same time, the functioning of the 'service public' is governed by the fundamental principles of equality, continuity and adaptability (*égalité, continuité et adaptabilité*).⁹² These three principles constitute the famous '*lois de Rolland*'⁹³ and have been recognised by the French *Conseil Constitutionnel* as '*exigences du service public*' or as principles governing '*le bon fonctionnement du service public*'.⁹⁴

Within the category of activities that constitute 'services publics', there is a further distinction between '*services publics constitutionnels*' and '*services publics industriels et commerciaux*'.⁹⁵ According to the French *Conseil Constitutionnel*, the '*services publics constitutionnels*' correspond to the functions of sovereignty (such as national defence, police, foreign affairs or justice⁹⁶) and cannot be subject to privatisation.⁹⁷ To the contrary, the '*services publics industriels et commerciaux*' can in principle be subject to privatisation.⁹⁸ However, there

de l'interdépendance sociale, et qu'elle est de telle nature qu'elle ne peut être réalisé complètement que par l'intervention de la force gouvernementale'. Léon Duguit, *Traité de droit constitutionnel* (Paris: De Boccard [1911] 1930), II, p. 55.

88 Wolf Sauter and Harm Schepel, *State and Market in European Union Law – The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009), p. 16, referring to the writings of Léon Duguit.

89 *Ibid.*, p. 16.

90 *Ibid.*, p. 16.

91 Léon Duguit, *Traité de droit constitutionnel* (Paris: De Boccard [1911] 1930), II, p. 62.

92 Jean-Philippe Colson and Pascale Idoux, *Droit Public Économique* (L.G.D.J. 2008), p. 147.

93 Louis Rolland, *Précis de droit administratif* (Dalloz 1933), p. 17.

94 Décision n° 2003-480 DC du 31 juillet 2003 *Loi relative à l'archéologie préventive*, ECLI:FR:CC:2003:2003480DC (Conseil Constitutionnel); Décision n° 2002-460 DC du 22 août 2002 *Loi d'orientation et de programmation pour la sécurité intérieure*, ECLI:FR:CC:2002:2002460DC (Conseil Constitutionnel).

95 Nicole Belloubet-Frier, 'Service public et droit communautaire' (1994) *Actualité juridique du droit administratif* (AJDA) 270.

96 Nicolas Thirion, 'Existe-t-il des limites juridiques à la privatisation des entreprises publiques?' (2002) *XVI Revue internationale de droit économique* 627, p. 646.

97 Décision n° 86-207 DC du 26 juin 1986 *Loi autorisant le Gouvernement à prendre diverses mesures d'ordre économique et social*, ECLI:FR:CC:1986:86207DC (Conseil Constitutionnel).

98 Nicole Belloubet-Frier, 'Service public et droit communautaire' (1994) *Actualité juridique du droit administratif* (AJDA) 270.

are certain activities falling in the latter category, such as the supply of energy, which could potentially have serious implications for the national security.⁹⁹ The privatisation of these activities raises important issues relating not only to the economic efficiency of the undertakings concerned, but also to strategic national interests. Therefore, the legality of such privatisation is a multidimensional question, which requires a complex legal analysis of the nature of the activities concerned and the possible reconciliation of the various conflicting interests.

3.2 The legal framework: The principle of neutrality under Article 345 TFEU

The legal framework regarding privatisations in the EU covers two grids of primary law provisions: the Treaty provisions on the fundamental freedoms governing the content of privatisations (especially Article 49, 56 and 63 TFEU) and the Treaty provisions on state aid governing the procedure of privatisations (Article 107 TFEU).¹⁰⁰ At the same time, this framework is complemented by sector-specific secondary legislation (such as energy, telecommunications, postal services etc.) covering important aspects of the liberalisation process.

The aforementioned legal framework is based on the fundamental provision of Article 345 TFEU, which stipulates that 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. This provision establishes the *principle of neutrality* of the Treaties with respect

⁹⁹ Ibid.

¹⁰⁰ The Commission has published a Staff Working Document providing guidance on state aid-compliant financing, restructuring and privatisation of SOEs, according to which public authorities involved in economic transactions concerning SOEs should act in accordance with the well-established Market Economy Investor Principle (MEIP) test, which in a privatisation context translates into the Market Economy Vendor Principle (MEVP) test. The application of the MEVP test in the context of a privatisation entails that when a Member State is selling an SOE, it must in principle behave as a market economy vendor, seeking to maximise the revenues or minimise the loss from the sale. If the Member State does not respect this principle, the privatisation process may involve a foregoing of State resources to the benefit of the buyer or the privatised company, which presumably constitutes state aid. The safest way for a government to ensure that its actions are state aid-compliant is to effect the envisaged privatisation by means of an Initial Public Offer (IPO) or sale of shares on the stock exchange. By opting for this method, the government is presumed to behave as a market economy vendor, as the sale price will be the market price defined by the stock exchange. This in turn means that no prior notification to the Commission is required. See European Commission, *Commission Staff Working Document, Guidance Paper on state-aid-compliant financing, restructuring and privatisation of State-owned enterprises* (Brussels, swd(2012) 14 final, 2012).

to the property ownership systems of the Member States.¹⁰¹ The ‘agnosticism’ in relation to the regime of ownership means that the mere fact that an economic activity is carried out by public or private undertakings is not contrary to the Treaties.¹⁰² Consequently, the Treaties, in principle, do not preclude the nationalisation¹⁰³ or privatisation of undertakings.¹⁰⁴ In formal terms, Article 345 TFEU protects the competence of the Member States to choose between public or private ownership systems.¹⁰⁵ This allows Member States to organise independently their national economies, giving thus room for a harmonious coexistence of *varieties of capitalism* in Europe.

The symbolic and perhaps enigmatic nature of this provision has given rise to various interpretations. In his annotation on the *Essent* case,¹⁰⁶ Pieter Van Cleynenbreugel distinguished two interpretations of Article 345 TFEU: (1) the *shield* interpretation according to which Article 345 TFEU completely shields or exempts the property ownership rules from the Court’s internal market scrutiny and (2) the *sword* interpretation according to which Article 345 TFEU does not mean that national property ownership choices are not subject to the fundamental rules of the Treaty.¹⁰⁷ The present section builds on and further develops this distinction. In particular, it is argued here that one could distinguish three different interpretative approaches in relation to this nebulous provision corresponding to three different degrees of State participation in

101 Robert Kovar, ‘Nationalisations–privatisations et droit communautaire’ in Jürgen Schwarze (ed), *Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty: Contributions to an International Colloquium of the European University Institute held in Florence on 14–15 May 1987* (Nomos 1988), p. 97.

102 Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2011), p. 1073.

103 Case 6-64 *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66, p. 598.

104 Case C-244/11 *Commission v Greece (golden shares)*, para 17.

105 For a comprehensive overview of Article 345 TFEU see: Pieter Van Cleynenbreugel, ‘No privatisation in the service of fair competition? Article 345 TFEU and the EU market-state balance after *Essent*’ (2014) 39 *European Law Review* 264; Bram Akkermans and Eveline Ramaekers, ‘Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations’ (2010) 16 *European Law Journal* 292; Fernando Losada Fraga and others, ‘Property and European Integration: Dimensions of Article 345 TFEU’ (2012) 148 *Tidskrift utgiven av Juridiska föreningen i Finland* 203; Wouter Devroe, ‘Privatizations and Community Law: Neutrality Versus Policy’ (1997) 34 *Common Market Law Review* 267; Robert Kovar, ‘Nationalisations–privatisations et droit communautaire’ in Schwarze (ed), *Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty: Contributions to an International Colloquium of the European University Institute held in Florence on 14–15 May 1987* (Nomos 1988); Thomas Papadopoulos, ‘Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era: A Discussion after *Commission v. Greece*’ (2015) 12 *European Company and Financial Law Review* 1.

106 Joined cases C-105/12 to C-107/12 *Essent NV*.

107 Pieter Van Cleynenbreugel, ‘No privatisation in the service of fair competition? Article 345 TFEU and the EU market-state balance after *Essent*’ (2014) 39 *European Law Review* 264.

the market: (1) the 'maximalist shield' interpretation; (2) the 'reductionist shield' interpretation and (3) the 'sword' interpretation.

3.2.1 *The 'maximalist shield' interpretation*

The 'maximalist shield' interpretation was expressed by Advocate General Ruiz-Jarabo Colomer in his Opinion in the first generation of golden shares cases.¹⁰⁸ The cases concerned restrictions in the acquisition of shares imposed by legislative provisions that conferred special rights to Portugal, France and Belgium in privatised undertakings active primarily in the energy sector.¹⁰⁹

In his Opinion, Advocate General Colomer first underlined the historic importance of Article 345 TFEU, noting that it was the only provision of the Treaty to be directly inspired by the Schuman Declaration of 9 May 1950. Its position in Part Seven of the TFEU devoted to 'General and Final Provisions' and its forceful and unconditional expression 'in no way' reinforced its 'specific nature and symbolic importance'.¹¹⁰ However, exactly due to this symbolic importance, the interpretation of Article 345 TFEU was an intricate legal exercise. The Advocate General suggested that a purely *literal* interpretation would not be appropriate, as its terms were rather imprecise and the expression 'system of property ownership' was not a legal but an economic concept.¹¹¹ Because of its programmatic nature, only a *historical* and *teleological* interpretative approach could ensure its effectiveness.

In this regard, the *travaux préparatoires* of the Treaty demonstrated that the aim of Article 345 TFEU was to declare the neutrality of the Treaty with respect to the ownership of the undertakings in the economic sense, i.e. *as means of production*. Thus, the expression 'system of property ownership' contained in Article 345 TFEU refers not to the civil rules concerning property relations but to *any* interventionist measure which allows the State to contribute to the organisation of the national economy.¹¹² This includes not only rules, which

108 Case C-309/99 *Wouters and others*; Case C-483/99 *Commission v France (golden shares – Société Nationale Elf-Aquitaine)*; Case C-503/99 *Commission v Belgium (golden shares)*.

109 The Portuguese legislation imposed a cap on foreign investment and an authorisation procedure for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level; similarly the French legislation imposed an authorisation procedure of the acquisition of shares exceeding certain limits as well as an opposition procedure regarding corporate decisions to transfer or use as security the majority of the capital of four subsidiaries of Société Nationale Elf-Aquitaine; and finally, the Belgian legislation provided an opposition procedure with respect to certain management decisions regarding the transfer of strategic assets or decisions contrary to the country's energy policy.

110 *Opinion of Advocate General Colomer in Cases C-367/98, C-483/99 and C-503/99 Commission v Belgium, Commission v France and Commission v Portugal*, ECLI:EU:C:2001:369, paras 43-45.

111 *Ibid*, para 47.

112 *Ibid*, paras 54-56.

determine the public or private ownership status of undertakings, but also rules on special rights ('golden shares') that Member States retain in privatised strategically important undertakings, as public interventionist means of implementing national economic-policy objectives.¹¹³ This reasoning echoed the common-sense maxim invoked by the Spanish Government '*he who is able to do the most, can also do the least*' (*argumentum a maiore ad minus*).¹¹⁴

In this way, Advocate General Colomer endorsed a 'maximalist shield' interpretative approach of Article 345 TFEU, which in principle *shields* national measures regarding the property ownership systems of undertakings as means of production from the Treaty provisions on the four freedoms. However, he explained that Article 345 TFEU 'does not detract from application of the fundamental rules of the Treaty', in particular the prohibition of discrimination on grounds of nationality.¹¹⁵ What Article 345 TFEU implies is that measures regarding the property ownership of undertakings 'are not considered to be per se as incompatible with the Treaty: they are covered by the presumption of validity conferred on them by the legitimacy of Article [345 TFEU]'.¹¹⁶ He furthermore emphasised that

'the various ways of organising undertakings that are subject to certain form of public supervision, are not, viewed in the abstract, contrary to the Treaty. Their compliance with the fundamental principles of Community law must be assessed specifically, by means of a case-by-case examination of the nature and mode of the operation of the legal situation at issue [...]'.¹¹⁷

On the basis of the aforementioned considerations, he concluded that

'the special prerogatives of the public authorities with which the present infringement proceedings are concerned constitute rules governing public intervention in the activities of certain undertakings, with the aim of imposing economic-policy objectives, and that they are on the same footing as forms of ownership of the undertakings whose organisation is a matter for the Member States by virtue of Article [345 TFEU]. The existence of such rules is not in itself contrary to the fundamental freedoms established by the Treaty, although the specific manner in which they are applied may indeed be so'.¹¹⁸

Therefore, he proposed that the Commission's action should be dismissed.¹¹⁹

113 Ibid, paras 61 and 91.

114 Ibid, para 66.

115 Ibid, para 67.

116 Ibid.

117 Ibid, para 90.

118 Ibid, para 91.

119 Ibid, para 92.

The 'maximalist shield' interpretation excludes any national measure which affects the property ownership system of undertakings from the scope of the fundamental freedoms as a matter of principle. However, it requires a second assessment of the application of the contested measure in a concrete case, which might then restrict one of the fundamental freedoms. This two-fold test seems to have very little practical value, since although the *existence* of a measure might be exempted from the scope of the fundamental freedoms, its *application* must nevertheless be reviewed under the Treaty provisions.

3.2.2 The 'reductionist shield' interpretation

Contrary to Advocate General Colomer, the Commission was of the opinion that Article 345 TFEU was not relevant to 'golden shares', since they did not concern the public or private ownership system of a company, but rather certain rights and powers relating to the distribution of property ownership of that company between private persons.¹²⁰ The rationale behind this argument is that once the Member State has proceeded to privatisation, it must ensure that the privatised undertaking functions in full accordance with the principles of a liberal market economy. Therefore, in the Commission's view, 'golden shares' are not covered by the presumption of validity of Article 345 TFEU.

However, when it comes to *stricto sensu* property ownership rules, the Commission purports to remain reverently neutral: it 'has always scrupulously ensured neutrality in its dealings with different forms of ownership'¹²¹ and 'has nothing to say on whether companies responsible for providing general interest services should be public or private and is therefore not requiring privatisation'.¹²²

This view was also defended by Advocate General Jääskinen in the *Essent* case,¹²³ which is perhaps the most important case regarding the relationship between free movement of capital and the principle of neutrality under Article 345 TFEU. Before delving into the interpretation of Article 345 TFEU suggested by Advocate General Jääskinen, it is necessary to provide a brief summary of the factual background of the case.

120 Case C-503/99 *Commission v Belgium (golden shares)*, paras 41-42.

121 European Commission, *Bulletin of the European Commission* (No 7/8, Vol 24, 1991), Section 1.2.75.

122 European Commission, *Services of General Interest in Europe* (OJ C281/3, 1996), p. 5.

123 *Opinion of Advocate General Jääskinen in Joined cases C-105/12 to C-107/12 Staat der Nederlanden v Essent NV*, ECLI:EU:C:2013:242.

In the *Essent* case, the Court was called upon to appraise the compatibility of the Dutch legislation concerning ownership unbundling of energy suppliers and distributors with the free movement of capital under Article 63 TFEU. The request for a preliminary ruling was made by the Hoge Raad der Nederlanden in proceedings between the Staat der Nederlanden and four companies active in the generation/production, supply and trade of electricity and gas in the Netherlands (Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV). The national provisions at issue imposed three prohibitions: first, the ‘*prohibition of privatisation*’ (the prohibition of the sale to private investors of shares held in the electricity and gas distribution system operators active in the Netherlands); second, the ‘*group prohibition*’ (the prohibition of any ownership or control links between, on the one hand, companies which are members of the same group as an operator of such distribution systems and, on the other, companies which are members of the same group as an undertaking which generates/produces, supplies or trades in electricity or gas in the Netherlands); and third, ‘*the prohibition of unrelated activities*’ (the prohibition of engagement by such an operator and by the group of which it is a member in transactions or activities which may adversely affect the operation of the system concerned).

This legislation was adopted with the view to transpose the Second Energy Package,¹²⁴ which imposed the obligation of *legal unbundling* between on the one hand transmission and distribution networks and on the other hand the commercial activities of electricity and gas companies (production and supply of energy). However, the prohibitions imposed by the Dutch legislation (particularly the group prohibition and the prohibition of unrelated activities) amounted to an *ownership unbundling* and as such they went beyond what was required under the Second Energy Package in force at that time. The *ownership unbundling* was only introduced with the Third Energy Package,¹²⁵ which

124 ‘Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC’ (2003) *OJ L 176*, 15/07/2003, pp. 37-56; ‘Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC’ (2003) *OJ L 176*, 15/07/2003, pp. 57-78; ‘Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity’ (2003) *OJ L 176*, 15/07/2003, pp. 1-10; ‘Regulation (EC) No 1775/2005 on conditions for access to the natural gas transmission networks’ (2005) *OJ L 289*, 03/11/2005, pp. 1-13.

125 ‘Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC’ (2009) *OJ L 211*, 14/08/2009, pp. 55-93; ‘Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC’ (2009) *OJ L 211*, 14/08/2009, pp. 94-136; ‘Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators’ (2009) *OJ L 211*, 14/08/2009, pp. 1-14; ‘Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003’ (2009) *OJ L 211*, 14/08/2009, pp. 15-35; ‘Regulation (EC) No 715/2009 on conditions for access to the natural gas

was, however, not applicable *ratione temporis*.¹²⁶ Nevertheless, the Dutch government decided to impose an ownership unbundling of the distribution networks considering that the form of ownership unbundling was most appropriate to pursue the objective of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets and to prevent distortions of competition.¹²⁷

The question of the relationship between the free movement of capital under Article 63 TFEU and the principle of neutrality under Article 345 TFEU arose in relation to the prohibition of privatisation. In particular, the Dutch government argued that the prohibition of privatisation constituted a body of rules governing the system of property ownership within the meaning of Article 345 TFEU. Therefore, the prohibition of privatisation was excluded from the scope of application of Internal Market rules. In other words, according to the Dutch government, by virtue of the presumption of validity under Article 345 TFEU, the prohibition of privatisation escaped the scrutiny of the rules on free movement of capital.¹²⁸

In his Opinion, Advocate General Jääskinen distinguished the situation at issue from the 'golden shares' case law.¹²⁹ More precisely, he explained that 'golden shares' could only exist in *already privatised* companies. Thus, the granting of 'golden shares' to the State *presupposes prior privatisation* of the companies concerned. As the State has already exercised its sovereign right in favour of privatisation, the privileged treatment it retains for itself within an essentially *private* property ownership system is not exempted from the Treaty provisions on fundamental freedoms. However, in the case at hand, the Netherlands had not applied a privatisation policy. To the contrary, the national legislation at issue established a *prohibition of privatisation* of the energy distributor system operators. This prohibition was flowing *ineluctably* from the public ownership of the Dutch energy distribution system and as such it was covered by the presumption of validity of Article 345 TFEU.¹³⁰ To the extent that this prohibition constituted an *intrinsic consequence* of the ownership system chosen by the Netherlands, it could not be regarded as an obstacle to the free movement

transmission networks and repealing Regulation (EC) No 1775/2005' (2009) OJ L 211, 14/08/2009, pp. 36-54.

126 For the sake of completeness, it should be noted that the Third Energy Package only introduces the ownership unbundling between the *transmission* networks and the production/supply of energy. The ownership unbundling of the energy *distribution* networks pursued by the Dutch legislation is still not required by EU law.

127 Joined cases C-105/12 to C-107/12 *Essent NV*, para 49.

128 *Ibid*, para 24.

129 *Opinion of AG Jääskinen in Joined cases C-105/12 to C-107/12 Essent*, para 46.

130 *Ibid*, para 49.

of capital in so far as this system is not discriminatory. On the other hand, any restrictive *indirect consequences* other than those directly and inevitably stemming from the public or private system of ownership were to be subject to the fundamental freedoms of the Treaty.¹³¹ This distinction between, on the one hand, *intrinsic/direct/inevitable* consequences of the property ownership system of a Member State and, on the other hand, *indirect* consequences were instrumental in his interpretative approach. The first were to be covered by the presumption of validity under Article 345 TFEU, whereas the latter were to be subject to the scrutiny of the free movement provisions.

Thus, the Commission together with Advocate General Jääskinen adopted the 'reductionist shield' interpretation of Article 345 TFEU, according to which Article 345 TFEU creates a shield against internal market scrutiny only with respect to measures *intrinsically* connected with the ownership system established in a Member State (such as a prohibition of privatisation), but not with respect to measures that only *indirectly* relate to that ownership system (such as golden shares). This interpretative approach is methodologically consistent, as it protects the fundamental right of Member States to opt for either a private or public ownership status of undertakings whilst at the same time subjecting State privileges (golden shares) to the internal market scrutiny.

3.2.3 The 'sword' interpretation

However, the 'reductionist shield' interpretation was not accepted by the Court. Contrary to Advocate General Jääskinen and the Commission, the Court adopted the third interpretative approach – the 'sword' interpretation of Article 345 TFEU – which corresponds to the least possible degree of State intervention in the market. In the words of Pieter Van Cleynenbreugel, 'rather than creating a shield against internal market scrutiny, Article 345 TFEU neutrality should be interpreted as providing a sword to establish an even more refined balance between economic freedom and state intervention in the market'.¹³² While recognising the *competence* of the Member States to determine their property ownership systems, the Court subjects the *exercise* of this competence to the rules of the Internal Market. Following this classic *mantra*, the Court rejects the presumption of validity under Article 345 TFEU in both the 'golden shares' case law and in the *Essent* case on the prohibition of privatisation, ruling that this provision merely signifies that each Member State may organise as it

131 *Ibid*, para 42.

132 Pieter Van Cleynenbreugel, 'No privatisation in the service of fair competition? Article 345 TFEU and the EU market-state balance after *Essent*' (2014) 39 *European Law Review* 264, p. 265.

thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty.¹³³

In general, Article 345 TFEU has been construed *narrowly* so as not to prevent the application of fundamental rules of the Treaties. In *Fearon*, the Court ruled that

[...] although [Article 345 TFEU] does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment'.¹³⁴

The narrow scope of Article 345 TFEU has also been recognised in the field of intellectual property rights. In particular, it has been established that this provision 'does not exclude any influence whatever of Community law on the exercise of national industrial property rights'¹³⁵ and 'cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the common market as provided for and regulated by the Treaty'.¹³⁶ Thus, although the system of property ownership continues to be a national competence under Article 345 TFEU, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty.¹³⁷

In the same vein, in *Opinion 2/15 on the Singapore Agreement*, the Court rejected the argument of the Council and the Member States that certain provisions of the envisaged agreement fell within the competence of the Member States alone in the field of property law.¹³⁸ It held that although Article 345 TFEU expresses the neutrality of the EU in relation to the rules existing in Member States governing the system of property ownership, it does not mean that those rules are not subject to the fundamental rules of the EU.¹³⁹ The Court explained that the specific provision of the Singapore Agreement did not contain any commitment relating to the rules in Member States governing the

133 Case C-309/99 *Wouters and others*, para 28; Case C-483/99 *Commission v France (golden shares – Société Nationale Elf-Aquitaine)*, para 23; Case C-503/99 *Commission v Belgium (golden shares)*, para 22.

134 Case 182/83 *Robert Fearon & Company Limited v Irish Land Commission*, ECLI:EU:C:1984:335, para 7.

135 Joined cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, ECLI:EU:C:1966:41, p. 345.

136 Case C-30/90 *Commission v UK*, ECLI:EU:C:1992:74, para 18.

137 Case C-302/97 *Konle*, para 38; Case C-309/99 *Wouters and others*, para 48; Case C-300/01 *Doris Salzmann*, ECLI:EU:C:2003:283, para 39; Case C-452/01 *Margarethe Ospelt*, para 24.

138 *Opinion 2/15*, para 106.

139 *Ibid*, para 107.

system of property ownership.¹⁴⁰ It sought solely to make any nationalization or expropriation decisions subject to limits which are intended to guarantee investors that such a decision will be adopted under equitable conditions and in compliance with general principles and fundamental rights, in particular with the principle of non-discrimination.¹⁴¹ Therefore, it reflected the simple fact that, whilst the Member States remain free to exercise their competences regarding property law and to amend accordingly the rules governing the system of property ownership, they are nonetheless not absolved from compliance with those principles and fundamental rights.¹⁴² In this way, the Court exported the internal market rationale to the field of common commercial policy of the EU.

Similarly, in the *Essent* case, the Court, while recognising that the prohibition of privatisation of distributor system operators fell within the scope of Article 345 TFEU, it nonetheless held that this did not exclude the application of the free movement of capital enshrined in Article 63 TFEU.¹⁴³ Such a prohibition constituted an ‘impediment’ for the purposes of Article 63 TFEU since, first, it was liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital¹⁴⁴ and, secondly, it constituted an obstacle to the raising of capital by the undertakings concerned, since the acquisition of shares was being restricted.¹⁴⁵

3.2.4 Assessment of the three interpretations

3.2.4.1 Criticism of the ‘sword’ interpretation and the legal consistency of the ‘reductionist shield’ interpretation

The sword interpretation is arguably susceptible to criticism, as it is liable to render Article 345 TFEU devoid of any meaning whatsoever. Some commentators have argued that the dismissal of Article 345 TFEU as irrelevant ‘signifies a bias in favour of Community law competence to assess the compatibility

140 Ibid.

141 Ibid.

142 Ibid.

143 Joined cases C-105/12 to C-107/12 *Essent NV*, para 37.

144 Ibid, para 41.

145 Ibid, para 42. It is interesting to note that in the national proceedings *Eneco* challenged only the group prohibition, not the prohibition of privatisation as such. Therefore, when the case was brought back to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the latter refrained from ruling on the compatibility of the prohibition of privatisation with Article 63 TFEU. Rather, it focused its analysis on the group prohibition and found that although the latter constituted a restriction on the free movement of capital, it was nevertheless justified by overriding reasons in the public interest. See *De Staat der Nederlanden/Eneco Holding N.V.*, ECLI:NL:HR:2015:1728 (Hoge Raad).

of all Member State action and economic policy against the Community norms'.¹⁴⁶ The presumption of neutrality under Article 345 TFEU has been transformed into 'a presumption of illegality of State intervention in the market'.¹⁴⁷

However, the fact that Article 345 TFEU is a symbolic provision does not mean that it is deprived of any legal content. Its symbolic importance lies in the fact that it reflects the fundamental compromise between State and market that was achieved in the post-war construction of Europe. To deprive Member States of the possibility to opt for a public ownership system could be regarded as amounting to an overt endorsement of the neoclassical economic model despite the proclaimed principle of neutrality of the Treaties. It could in fact be interpreted as meaning that the mere fact that the State owns shares in a company is a restriction on the free movement of capital.¹⁴⁸

While it is true that the European Economic Constitution favours economic freedoms, deregulation and trade liberalisation, it nonetheless respects the competence and the discretion of the Member States to choose between public and private property. And as the EU is an international organisation governed by the fundamental principle of conferral of powers,¹⁴⁹ respect for the division of competences between the Member States and the EU is of paramount importance for the harmonious coexistence of various actors with conflicting interests and the smooth and constructive evolution of the European project. The role of the judiciary in this sensitive division of competences is all the more crucial, especially in light of the fact that there is no secondary legislation in relation to privatisations, and therefore the interpretative approach of the Court regarding Article 345 TFEU has far-reaching implications for the economic systems of the Member States.

Consequently, it is suggested here that the most legally consistent interpretation of Article 345 TFEU is the '*reductionist shield*' interpretation. Measures *intrinsically* connected with the ownership system established in a Member State (such as a prohibition of privatisation) should be shielded against internal market scrutiny, whereas measures that only *indirectly* relate to that ownership system (such as golden shares) should in principle be subject to the Treaty provisions

146 Erika Szyszczak, 'Golden Shares and Market Governance' (2002) 29 *Legal Issues of Economic Integration* 255, p. 279.

147 Erika Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing 2007), p. 14.

148 Jukka Snell, 'Economic Justifications and the Role of the State' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016), p. 25.

149 Arts. 3 (6), 4 (1), 5 (1)-(2) and 13 (2) TEU.

on the fundamental freedom (especially the free movement of capital) if they fulfil the conditions of capital restrictions, which are explained in Chapter 4.

3.2.4.2 *The compromise: the use of Article 345 TFEU as a justification*

Aware of the sensitive nature of the case and the possible consequences of its judgement, the Court tried to moderate its approach: with an enigmatic and ambiguous language it implicitly accepted that Article 345 TFEU could be used as a *justification* ground for restrictions on capital movements. Even though in earlier case law it had explicitly excluded the possibility of invoking Article 345 TFEU in order to justify a restriction on the free movement of capital,¹⁵⁰ it nonetheless explained that:

'[t]hat does not however mean that the interest underlying the choice of the legislature in relation to the rules on the public or private ownership of the electricity or gas distribution system operator may not be taken into consideration as an overriding reason in the public interest'.¹⁵¹

The Court emphasised that the *Essent* case should be clearly distinguished from the golden shares case law, as the former related to '*an absolute prohibition of privatisation*', whereas the latter '*concerned restrictions created by privileges which the Member States attached to their position as a shareholder in a privatised undertaking*'.¹⁵² For these reasons, the Court held that:

'the reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU constitute factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital'.¹⁵³

This reasoning seems somehow artificial and creates an arguably unnecessary fragmentation in the use of justifications in the free movement case law. The Court does not provide an adequate explanation as to why Article 345 TFEU can be used as a justification in case of a prohibition of privatisation, but cannot be used as such in the golden shares case law. Indeed, one might wonder what is the distinguishing factor that renders possible the use of Article 345 TFEU as a justification in the first scenario, but not in the second. Perhaps

150 Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*, para 64.

151 Joined cases C-105/12 to C-107/12 *Essent NV*, para 53.

152 *Ibid*, para 54.

153 *Ibid*, para 55. It should be noted that with respect to the other two prohibitions, the Court acknowledged that the objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets, and to prevent distortions of competition could be regarded as overriding reasons in the public interest justifying restrictions on the free movement of capital.

the rationale behind this rather perplexing differentiation is the same as the rationale used by the Commission and Advocate General Jääskinen in the 'reductionist shield' interpretation: a prohibition of privatisation amounts to a *direct* and *inevitable* consequence of the choice of property ownership system, whereas golden shares presuppose the privatisation of strategic undertakings, which means that the Member State has already exercised its competence regarding property ownership systems and has opted for a model that favours private ownership. Within the framework of a private ownership model, the State, in its capacity as a shareholder, must reverently respect the rules of the game and must not avail itself of special prerogatives in the management of the company that could deter foreign investors.

However, it should be reminded that this approach focused on a prior step, namely that of whether the national measure *falls within the scope of the free movement of capital*. In that regard, the Commission and Advocate General Jääskinen argued that a prohibition of privatisation benefits from the presumption of validity under Article 345 TFEU and thus escapes Internal Market scrutiny, whereas golden shares remain subject to Internal Market scrutiny. Nevertheless, despite its objective appeal, this approach was rejected by the Court in relation to the question of whether the measure falls within the scope of free movement rules, only to be later accepted in relation to the question whether the national measure was justified under Article 345 TFEU. It seems that the Court chose to adopt this reasoning in order to remain loyal to the traditional Internal Market approach that dictates first, that the four freedoms must be interpreted widely, whereas exceptions must be construed narrowly and secondly, that although a measure might fall within the competence of the Member States, the *exercise* of that competence must be in accordance with the free movement provisions (although arguably a prohibition of privatisation such as the one in *Essent* refers to the *existence* of the national competence to opt for a public ownership system, rather than the *exercise* of that competence). But the fact still remains that retaining golden shares in privatised undertakings can be regarded as equivalent to a reduced form of public ownership. If this view is adopted, then the differentiated approach in the use of Article 345 TFEU as a justification seems rather inconsistent and not entirely convincing.

Furthermore, the use of Article 345 TFEU as a justification raises another important issue: it might be regarded as opening the door for the use of *economic considerations* for the purpose of justifying restrictions on the fundamental freedoms. According to settled case law, *purely economic grounds cannot serve as justification for obstacles prohibited by the Treaty*.¹⁵⁴ This 'economic rule' was

154 Case C-398/95 *SETTG*, paras 22-23; Case C-35/98 *Verkooijen*, para 47-48; Case C-309/99 *Wouters and others*, para 52; Case C-201/15 *AGET Iraklis*, para 72.

established as early as in 1961 in *Commission v Italy (pork meat)* concerning an Italian rule suspending imports of certain pork-related products from other Member States, where the Court held that Article 36 TFEU is 'directed to eventualities of a non-economic kind'.¹⁵⁵ The rationale of this rule was that the Internal Market, as the cornerstone of the EU, would be seriously undermined if protectionist measures were allowed.¹⁵⁶ Thus, the original target of the general rule prohibiting economic justifications were protectionist measures.

Since then, the 'economic rule' has evolved and has been somewhat attenuated by subsequent case law, most notably by the *Campus Oil* judgment, in which the Court introduced an important qualification: a restriction on free movement is lawful whenever a measure is based equally on economic grounds and on grounds which are admissible under the Treaty.¹⁵⁷ This is known as the 'further purpose' doctrine, under which it is exceptionally possible to justify protectionist measures if, apart from their economic objective, they pursue simultaneously another non-economic objective.¹⁵⁸ Thus, in *Campus Oil*, the Court found that the Irish legislation requiring importers of refined petroleum products to purchase certain products from a state-owned refinery was justified on grounds of public security. It held that:

'petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them'.¹⁵⁹

In light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security.¹⁶⁰ As long as the measure in question pursues an objective that falls within the ambit of one of the derogation grounds provided for under the Treaty (such as public security), the fact that it might also pursue economic considerations cannot exclude the application of the public interest justification in question.¹⁶¹

155 Case 7-61 *Commission v Italy (pork)*, ECLI:EU:C:1961:31 at 329.

156 Peter Oliver, 'When, if ever, can restrictions on free movement be justified on economic grounds' (2016) 41 *European Law Review* 147.

157 Case 72/83 *Campus Oil*, paras 35-36.

158 Sue Arrowsmith, 'Rethinking the approach to economic justifications under the EU's free movement rules' (2015) 68 *Current Legal Problems* 307, p. 320.

159 Case 72/83 *Campus Oil*, para 34.

160 *Ibid*, para 35.

161 *Ibid*, para 36.

In recent case law, the Court has further developed the approach followed in *Campus Oil* and has expanded even more the 'further purpose' doctrine so as to cover not only objectives with an economic dimension which fall within the ambit of one of the Treaty derogations, but also objectives with an economic dimension which fall within the ambit of an overriding reason in the public interest. In particular, in *AGET Iraklis*, the Court acknowledged that 'considerations connected with the maintenance of employment may, under certain circumstances and conditions, be acceptable justifications'.¹⁶² These considerations include the 'protection of workers' recognised as an overriding reason in the public interest¹⁶³ as well as 'the encouragement of employment and recruitment which, being designed in particular to reduce unemployment, constitutes a legitimate aim of social policy'.¹⁶⁴ Drawing from this ruling, in a recent case concerning the reprivatisation of the Portuguese airline TAP, Advocate General Campos Sánchez-Bordona explained that the 'economic rule'

'does not mean that the Court of Justice is impervious to Member States' economic interests when these are put forward as grounds for hindering freedom of establishment in pursuit of a legitimate social policy objective'.¹⁶⁵

In his paper on the use of economic objectives as justifications, Peter Oliver¹⁶⁶ discusses the evolution of the case law and the departure from the strict application of the 'economic rule' in the following fields: the financial balance of social and healthcare systems,¹⁶⁷ higher education,¹⁶⁸ the cohesion of the tax system¹⁶⁹ and social protection.¹⁷⁰ He notes that economic exceptions

162 Case C-201/15 *AGET Iraklis*, para 75.

163 *Ibid*, para 73.

164 *Ibid*, para 74.

165 *Opinion of Advocate General Campos Sánchez-Bordona in Case C-563/17 Associação Peço a Palavra*, ECLI:EU:C:2018:937, para 95

166 Peter Oliver, 'When, if ever, can restrictions on free movement be justified on economic grounds' (2016) 41 *European Law Review* 147.

167 Case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen*, ECLI:EU:C:2001:404, paras 74, 79 and 106; Case C-158/96 *Kohll v Union des Caisses de Maladie*, para 50; Case C-120/95 *Decker v Caisse de Maladie des Employés Privés*, par 39; Case C-512/08 *Commission v France (medical equipment)*, ECLI:EU:C:2010:579, para 42; Case C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, ECLI:EU:C:2003:270, para 73.

168 *Opinion of AG Jacobs in Case C-147/03 Commission v Austria (conditions of access to university education)*, ECLI:EU:C:2005:40, para 32; Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, ECLI:EU:C:2005:169, para 56; Case C-20/12 *Elodie Giersch and Others v État du Grand-Duché de Luxembourg*, ECLI:EU:C:2013:411, paras 51-56.

169 Case 823/79 *Criminal proceedings against Giovanni Carciati*, ECLI:EU:C:1980:230, paras 9-10; Case C-478/98 *Commission v Belgium*, paras 37-39; Case C-318/07 *Persche*, para 52.

which are expressly provided for by the Treaty, such as the right of non-economically active citizens to reside in another Member State under Article 21 TFEU or services of general economic interest under Article 106 TFEU, are excluded from the scope of his inquiry as they are inherent in the Treaty. This means that economic considerations expressly provided for by the Treaty are not caught by the 'economic' rule, as the Treaty itself allows their use as justification grounds by the Member States. By the same token, the same could be argued for Article 65 (1) (b) TFEU, which allows Member States to take all requisite measures to prevent infringements of national law and regulation in the field of taxation (see the analysis in Chapter 2, Section 3.5.1.1.1).

The same could be argued with respect to Article 345 TFEU. Indeed, the property ownership systems of the Member States necessarily entail economic considerations, which in principle cannot be used as justification grounds according to the 'economic rule'. However, the fact that this is an explicit provision of the Treaty renders the 'economic rule' inapplicable. Therefore, Article 345 TFEU can be used as a justification ground despite the fact that it inevitably serves economic interests. Furthermore, the choice of national property ownership system does not only pursue economic objectives, but also other objectives of a non-economic nature that could perhaps fall within the scope of the Treaty derogations. Accordingly, on the basis of the 'further purpose' doctrine, Article 345 could be used as a justification ground. This was in essence the approach that was implicitly chosen in *Essent*, where the Court ruled that reasons underlying the choice of a public ownership system under Article 345 TFEU could be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital resulting from an absolute prohibition of privatisation.

It should be acknowledged that the approach that was ultimately chosen by the Court in the *Essent* case appears to be an important *compromise* aiming to strike a delicate balance between the fundamental freedoms and the public ownership of undertakings intended to safeguard public interest objectives. The departure from a strict application of the 'economic' rule was perhaps inevitable in light of the fact that there are certain economic objectives which

170 Case C-346/06 *Dirk Ruffert v Land Niedersachsen*, ECLI:EU:C:2008:189, para 37-43; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets afdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809, para 1007; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772, paras 76-77. Peter Oliver notes that despite the fact that the right to take collective action was enshrined in the Charter, the fact still remains that the argument of the trade unions was 'economic' in nature, even though it was framed in fundamental rights terms. See Peter Oliver, 'When, if ever, can restrictions on free movement be justified on economic grounds' (2016) 41 *European Law Review* 147, p. 167.

are so inextricably linked with or dictated by social objectives that they cannot be separated from each other. Thus, the use of Article 345 TFEU as a justification for the restriction imposed on the free movement of capital by the prohibition of privatisation can be regarded as a recognition by the Court of the exceptionally sensitive nature of the political choice between public and private ownership and as an effort to mitigate the profound consequences of a possible deprivation of Article 345 TFEU of any legal meaning.

However, the distinction between the use of Article 345 TFEU as an *exemption* from the scope of capital restrictions as opposed to the use of Article 345 TFEU as a *justification* is of paramount importance and can have significant consequences for the outcome of the case. This is because in the first scenario the national measure is excluded altogether from internal market scrutiny, whereas in the second scenario the measure constitutes a restriction which then needs to be balanced against the conflicting public interest objective subject to a strict proportionality assessment. From a legal consistency perspective, a measure such as a prohibition of privatisation touches upon the *essence* of the national competence to opt for a public ownership system and, therefore, should be excluded from the scope of the Internal Market provisions according to the '*reductionist shield*' interpretation, which is regarded here as the most consistent from a legal perspective. Furthermore, although in *Essent* the use of Article 345 TFEU as a justification ultimately resulted in a compromise between the fundamental freedoms and the national competence to determine the property ownership system, it is not guaranteed that the same outcome will be reached in future cases. In fact, in the recent *Associação Peço a Palavra* case regarding the tender specifications of the reprivatisation scheme of the Portuguese airline TAP, Advocate General Campos Sánchez-Bordona seems to follow the golden shares approach under which Article 345 TFEU can neither exclude a measure from the scope of the fundamental freedoms nor justify a restriction on them.¹⁷¹ It remains to be seen whether the Court will follow his reasoning.

4 CONCLUSION OF CHAPTER 3

Privatisation is a particularly complex economic policy issue which involves different stakeholders and conflicting economic and societal interests that need to be reconciled. Some argue that privatisation should be a priority for national governments, as it brings significant efficiency gains and reduces the level of public debt, while some others believe that privatisation is not always desirable especially when it comes to public utilities that are essential for the society as a whole and networks industries where it is difficult or even im-

171 *Opinion of Advocate General Campos Sánchez-Bordona in Case C-563/17 Associação Peço a Palavra*, para 46.

possible to achieve well-functioning competitive markets. In light of the inconclusive economic evidence, the OECD does not take a position in favour or against the public ownership of enterprises. However, it emphasises that a State that owns enterprises should ensure that these enterprises have committed to high standards of corporate governance and operate within an effective legal and regulatory framework establishing a level playing field between State-owned enterprises and other companies.¹⁷² At the same time, the predominant view and the consensus position among OECD countries is that a government should not privatise a State-owned enterprise before an appropriate regulatory framework for the privatised entity has been established.¹⁷³ Indeed, privatisation may not yield the expected efficiency gains and may in fact lead to distortions of competition and concessions to government-friendly private interests¹⁷⁴ if it is not combined with a transparent and adequate competition system backed by effective enforcement mechanisms.

At the EU level, this Chapter argues that the social dimension of Europe can be strengthened by the rediscovery of Article 345 TFEU, a provision which enshrines the principle of neutrality in relation to the property ownership of the Member States. In particular, the inclusion of this provision ensures that the Treaty itself does not take an ideological stance regarding the public or private ownership of enterprises operating in the Member States. However, its nebulous wording has given rise to different interpretations of its meaning: (1) the 'maximalist shield' interpretation; (2) the 'reductionist shield' interpretation and (3) the 'sword' interpretation. In the *Essent* case regarding the prohibition of privatisation of the Dutch energy distribution network operators, the Court opted for the 'sword' interpretation thereby establishing that national rules relating to the property ownership of the Member States cannot be excluded from Internal Market scrutiny. This thesis takes issue with the 'sword interpretation' and argues that a prohibition of privatisation is the *quintessence* of a measure touching upon the sensitive national competence to determine the national property ownership system, which is covered by the principle of neutrality under Article 345 TFEU. Therefore, it should be excluded from the scope of capital restrictions. In other words, it is argued here that the most consistent interpretation of Article 345 TFEU from a legal perspective is the 'reductionist shield' interpretation, according to which, for measures intrinsically linked with the national property ownership system, Article 345 TFEU should have been used as an exemption, not as a derogation from Article 63 TFEU.

172 OECD, *Privatisation in the 21st Century: Recent Experiences of OECD Countries* (2009), p. 3.

173 *Ibid.*, p. 13.

174 George Pagoulatos, 'The Politics of Privatisation: Redrawing the Public-Private Boundary' (2005) 28 *Western European Politics* 358, at p. 372.

However, notwithstanding the objections that one might have regarding the legal consistency of the Court's reasoning in *Essent*, it should be acknowledged that, in light of the politically sensitive nature of the case, the Court tried to mitigate the effects of its judgment by ruling that the reasons underlying the choice of a public ownership system under Article 345 TFEU could be used as a justification for the capital restriction imposed by the prohibition of privatisation. This can be regarded as a compromise aiming at reconciling capital liberalisation with public interest objectives. The underlying rationale of the legal reasoning in *Essent* is the acknowledgment that in certain sensitive sectors public ownership can protect essential social objectives, which would otherwise be threatened by market forces. This is linked to the overarching theme of this thesis, which is the fundamental clash between economic freedoms and social values and the efforts to strengthen the social component of the European edifice and achieve a 'social market economy', as enshrined in Article 3 (3) TEU. The next and final Chapter attempts to identify legal tools to achieve the same reconciliation in the *post-privatisation* phase, i.e. when the Member States decide to retain golden shares in privatised companies.

