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

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4 Free movement of capital and golden shares

1 Introduction

This Chapter constitues the second component of the normative part of this thesis. It zooms in on the second case-study relating to golden shares in the EU and seeks to investigate whether the interpretation of Article 63 TFEU in the golden shares case law allows room for State participation in the Market for the purposes of protecting public interest objectives and respects the division of competences between the EU and the Member States in the field of corporate governance, whilst at the same time ensuring that Member States do not impose protectionist measures liable to hinder the market access of foreign investors.

The notion of golden shares refers to the special rights that Member States maintain in strategically sensitive privatised companies (telecommunications, electricity and energy production and distribution, postal services, car industries etc.).[1] These special rights allow the State to control changes in ownership and/or veto certain strategic decisions in order to prevent hostile takeovers, to guarantee the provision of services of general interest, to safeguard public security and other public interest objectives.[2] The use of golden shares became a widespread phenomenon in Europe in the 1990s and 2000s. Examples of companies in which Member States established special shareholding (either through national legislation or through the Articles of Association of the companies) included, amongst others, Portugal Telecom, the Italian ENEL, the Spanish Repsol, the French Société Nationale Elf-Aquitaine, the Belgian Société Nationale d'Investissement, the Greek Organisation for Telecommunications, the British Airports Authority, the Dutch KPN and the German Volkswagen.

1 Oxera, *Special rights of public authorities in privatised EU companies: the microeconomic impact* (Report prepared for the European Commission, 2005); Stefan Grundmann and Florian Möslein, 'Golden Shares – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects' (2001-2002) 4 EUREDIA 623.

2 European Commission, *Special rights in privatized companies in the enlarged Union – a decade full of developments* (Commission Staff Working Document, 2005).

The Commission regarded the establishment of special holdings in national champions as an expression of national economic protectionism restricting the free movement of capital in the EU.[3] Fearing that this trend could severely obstruct the functioning of the Internal Market, it initiated a number of infringement proceedings against the Member States with special rights in privatised companies.

The golden shares case law raises important legal, political and economic questions, as it addresses issues that lie at the heart of the fundamental interplay between the State and the Market. The conclusion that can be drawn after more than 20 years of litigation[4] is that golden shares constitute in principle

3 Ibid, p. 5. The concept of 'economic protectionism' implies the 'assertion of selfish interests in defiance of market forces, by those in a position to influence the outcome to that end by legal means', see Jonathan Rickford, 'Protectionism, Capital Freedom and the Internal Market' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism – New Challenges to European Integration* (Oxford University Press 2010), p. 55; Jonathan Rickford, 'Free movement of capital and protectionism after Volkswagen and Viking Line' in Tison and Wymeersch (eds), *Perspectives in Company Law and Financial Regulation – Essays in Honour of Eddy Wymeersch* (Cambridge University Press 2009), p. 62. It is argued that the concept of 'economic protectionism' should be distinguished from the concept of 'economic patriotism'. On the one hand, 'economic protectionism' refers to a political and economic system where national authorities protect the domestic industry from any type of foreign invasion. The State is entitled to organise and operate social and industrial schemes, while avoiding any exposure to international competition. On the other hand, 'economic patriotism' can be conceived as an expression of support and encouragement of national production not only by the State but also by consumers and enterprises. It also refers to those interventionist mechanisms that public authorities put in place in order to maintain control over the decision-making process of strategic companies within national territory. This is what the French call '*patriotisme à la Colbert*', a type of economic interventionism aiming at preserving the sovereign powers (*pouvoirs régaliens*) of the State acting as a 'strategist' *(État stratège)* in order to promote the economic interests of national champions in strategic and sensitive sectors and to protect the national industrial fabric. See Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 296-297 citing also Corinne Boulogne-Yang-Ting, 'Patriotisme économique et mécanismes du droit des societies et boursier' in Georges Virassamy (ed), *Entreprise et patriotisme économique* (L'Harmattan 2008). The term 'economic patriotism' was first used by the former Prime Minister of France, Dominique de Villepin, in his speech on 27 July 2005, in which he warned the US company PepsiCo not to launch a hostile takeover bid for Danone, the publicly owned French foods company. He urged his compatriots to rally behind the concept of 'economic patriotism' to ensure they compete more effectively in a globalizing world. See John Thornhill and Adam Jones, 'De Villepin stands by calls for 'economic patriotism'' *Financial Times* (22 September 2005) <https://www.ft.com/content/028bacac-2b94-11da-995a-00000e2511c8> accessed 01-09-2018. Ever since, the term 'economic patriotism' has played a leading role in the French public discourse and has appeared in many works by scholars and politicians, such as the well-known book published in 2006 by the former MP Bernard Carayon. See Bernard Carayon, *Patriotisme économique, de la guerre à la paix économique* (Editions du Rocher 2006).

4 Case C-58/99 *Commission v Italy (golden shares – ENI/Telecom Italia)*; Case C-309/99 *Wouters and others*; Case C-483/99 *Commission v France (golden shares – Sociéte Nationale Elf-Aquitaine)*; Case C-503/99 *Commission v Belgium (golden shares)*; Case C-463/00 *Commission v Spain (golden shares)*; Case C-98/01 *Commission v UK (golden shares)*; Case C-174/04 *Commission*

a *restriction* on the free movement of capital because of their *dissuasive* effect on investment. However, they may be justified on grounds of legitimate objectives in the public interest if the State provides sufficient evidence that the measures at issue comply with a proportionality test, which, in addition to the suitability and the necessity components, assesses also the compliance with the procedural requirements of the principle legal certainty.[5] Therefore, just like with the other freedoms, the Court is confronted with the challenge of striking a fair balance between economic freedom (here in the form of foreign direct or portfolio investments in privatised companies) and public interest objectives pursued through certain forms of State intervention in the market. Only here the implications of its rulings are far more profound, as they affect the structure and the organisation of national corporate governance systems, one of the core aspects of national economic policy and one of the main factors determining the type of capitalism established at national level.

The present chapter seeks to assess the far-reaching implications of the golden shares case law not only for the corporate governance systems of the Member States and the organisation of their industrial policies, but also for the broader discussion about the division of competences between the EU and the Member States. In order to do so, it first examines the theoretical controversy surrounding special rights in privatised companies from a corporate governance perspective (combining political economy with socio-legal theory) (Chapter 4, Section 2) and then turns to the specific legal issues arising from the case law of the Court of Justice (Chapter 4, Section 3). It argues that the golden shares case law has been characterised by an admittedly rigorous application of the rules on the free movement of capital, which in most cases does not allow Member States to maintain special shareholding over privatised companies. By prioritising the interests of foreign investors, the Court favours the constitutional foundations and institutional arrangements of *liberal market economies*[6]

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v Italy (golden shares); Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*; Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*; Joined cases C-463/04 and C-464/04 *Federconsumatori (AEM/Edison)*; Case C-274/06 *Commission v Spain (golden shares)*; Case C-207/07 *Commission v Spain (golden shares in the energy sector)*; Case C-326/07 *Commission v Italy (golden shares)*; Case C-543/08 *Commission v Portugal (golden shares – EDP)*; Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*; Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*; Case C-244/11 *Commission v Greece (golden shares)*; Case C-95/12 *Commission v Germany (golden shares – Volkswagen II)*.

5 So far only on one occasion did the Court find that the contested special rights were justified by public interest requirements and were also consistent with the principles of proportionality and legal certainty and that was in Case C-503/99 *Commission v Belgium (golden shares)*.

6 The structural bias of negative integration in favour of liberal market economies as opposed to social market economies has been thoroughly addressed by eminent scholars of the Max Planck Institute for the Study of Societies; see Fritz W. Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy' (2010) 8

(as opposed to the ones of *coordinated market economies*) and promotes a company law regime that endorses *the principle of proportionality between ownership and control* and *the principle of shareholders' primacy*.[7] This in turn might lead to an erosion of the *varieties of capitalism* that exist in Europe and to a *judicially driven convergence* into a specific model of market economy, which might give rise to concerns regarding the respect of the division of competences between the EU and the Member States. For this reason, this Chapter argues that the Court should adopt a more restrictive (*Keck*-inspired) interpretation of the concept of 'capital restrictions' in order to delineate in a more consistent way the scope of 'capital restrictions' and allow room for State participation in the market.

2 Understanding the theoretical controversy surrounding golden shares

In order to evaluate the interpretation of Article 63 TFEU in the golden shares case law and its implications for the corporate governance regime of the Member States, it is necessary first to introduce and understand the theoretical controversy surrounding golden shares. In this regard, this section introduces the definition of golden shares (section 2.1) and explains why golden shares constitute control enhancing mechanisms (section 2.2) deviating from the principle of proportionality between ownership and control (section 2.3). Subsequently, it introduces the influential theory of varieties of capitalims, upon which the distinction between liberal and coordinated market economies is based (section 2.4)

Socio-Economic Review 211; Martin Höpner and Armin Schäfer, *Integration among unequals: How the heterogeneity of European varieties of capitalism shapes the social and democratic potential of the EU* (MPIfG Discussion Paper, No 12/5 Cologne, Max Planck Institute for the Study of Societies, 2012); Martin Höpner and Armin Schäfer, *A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe* (2007); Martin Höpner and Armin Schäfer, 'Embeddedness and Regional Integration. Waiting for Polanyi in a Hayekian Setting' (2012) 66 International Organization 429. In his recent opinion in *AGET Iraklis*, Advocate General Wahl stated – in the very first paragraph – that the 'European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit'. This rather sweeping statement seems to disregard the reference to 'social market economy' in Art. 3 TEU. See *Opinion of Advocate General Wahl in Case C-201/15 AGET Iraklis*, para 1.

7 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97. See also Martha O'Brien, 'Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, judgment of the Court of Justice (Grand Chamber) of 3 October 2006' (2007) 44 Common Market Law Review 1483, p. 260, who criticises the Court for being 'very strict in its refusal to allow Member States to exercise control over ownership of shares, voting rights and management decision-making in private companies through golden share mechanisms'.

2.1 Definition of golden shares

Golden shares are a variety of *priority shares* in which the beneficiary is a public authority. They are defined as the special rights that governments retain in privatised companies, especially the ones considered 'national champions' ('Crown Jewels'), in order to pursue certain public interests objectives or to determine the industrial policy of the national economy.[8] These special rights usually take the form of: (1) a cap on the level of foreign investment, (2) a cap or a prior authorisation procedure for foreign investment and voting rights above certain thresholds, (3) exclusive veto rights on strategic corporate management decisions (such as the winding-up, merger or de-merger of the undertaking, the disposal of certain assets, significant changes to the constitution or the articles of association of the company etc.) and (4) the power to appoint members of the company's Board of Directors. They are set up by governments regardless of their holdings (they might have minority stake or no participation at all in the company) in order to prevent takeovers primarily from foreign companies or to prevent the management of the company from taking actions that are not in line with the national government policy for the sector in which they operate.[9] These special rights are laid down either in *national legislation* (it can be either a *framework law* accompanied by *decree-laws* adopted for the purposes of large privatisation schemes or an *ad hoc company-specific legislation*) or in private instruments such as the *Articles of Association* of a company.[10]

2.2 Golden shares as Control Enhancing Mechanisms

According to corporate governance theory, golden shares belong to the broader category of *Control Enhancing Mechanisms*. These are institutional arrangements (i.e. created by the company itself) introducing a discrepancy in the relation between financial ownership (shareholding) and voting power (voting rights).[11] This means that through these institutional arrangements a shareholder can increase his control over the management of the company without holding a proportional stake of equity.[12] Control Enhancing Mechanisms include a wide variety of mechanisms such as shares with multiple voting rights, shares with loyalty schemes that may increase their voting rights, non-voting shares (with or without preference), participating bonds, voting rights

8 European Commission, *Special rights in privatized companies in the enlarged Union – a decade full of developments* (2005).
9 Ibid.
10 Ibid.
11 European Commission, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies* (Commission Staff Working Document, 2007), p. 10.
12 Ibid, p. 10.

ceilings, priority shares, golden shares,[13] pyramid structures, depository certificates of shares sponsored by the company, supermajority requirements, ownership ceilings, share transfer restrictions, staggered/classified board of directors provisions etc.[14]

A study that was conducted by ISS Europe, Shearman and Sterling and the European Corporate Governance Institute in 2007 at the request of the European Commission (as part of its Action Plan for Modernising Company Law and enhancing Corporate Governance in the European Union[15]) showed that Control Enhancing Mechanisms are relatively common across the EU.[16] Of all the 464 European companies considered, 44% had one or more corporate Control Enhancing Mechanisms (or other alternative mechanisms).[17] The countries with the highest proportion of companies featuring at least one of these mechanisms were France, Sweden, Spain, Hungary and Belgium.[18]

2.3 The principle of proportionality between ownership and control

The reason why Control Enhancing Mechanisms have attracted institutional and scholarly attention is because they constitute an important deviation from *the principle of proportionality between ownership and control*. This principle (often referred to as *'one share-one vote' principle*) implies that any shareholder should own the same fraction of cash flow rights and voting rights.[19] In other words, according to the principle of proportionality between ownership and control, the number of votes should correspond to the number of shares that a shareholder holds in the company's share capital. This principle is said to promote

13 It should be noted that golden shares are regarded as CEMs only when they are created by the company itself (i.e. when they are enshrined in the company's Articles of Association or in a shareholders' agreement).

14 European Commission, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies* (2007), p. 10.

15 European Commission, *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward* (Communication from the Commission to the Council and the European Parliament, 2003).

16 European Commission, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies* (2007), p. 4.

17 Ibid, p. 4.

18 Ibid, p. 4.

19 OECD, *Lack of Proportionality Between Ownership and Control: Overview and Issues for Discussion* (OECD Steering Group on Corporate Governance, 2007), p. 6. See also George Psarakis, 'One Share – One Vote and the Case for a Harmonised Capital Structure' (2008) 19 *European Business Law Review* 709; Guido Ferrarini, 'One Share – One Vote: A European Rule?' (2006) 3 *European Company and Financial Law Review* 147.

'shareholder democracy',[20] a somewhat delusive notion referring to the decision-making process in a corporation which is based on the amount of *each shareholder's capital contribution* (not the number of shareholders), as opposed to democracy as a political system, which is based on the premise of free elections in which *every citizen* has one vote, irrespective of his background, income or sex.[21]

The theoretical debate on *the principle of proportionality between ownership and control* centres on the potential problems arising from the separation of ownership and control and the need to prevent a potential abusive extraction of private benefits by executive directors and controlling shareholders (the so-called 'private benefits extraction' problem).[22] This relates to the general 'agency problem', the primary problem that corporate law is intended to address. The 'agency problem' arises whenever the welfare of one party ('the principal') depends upon actions taken by another party ('the agent').[23] The problem lies in motivating the agent to act in the principal's interest rather than simply in the agent's own interest.[24] According to corporate governance theory, three generic 'agency problems' may arise within a corporation: (1) the conflict between the firm's owners/shareholders (viewed as 'the principals')

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20 On the intriguing question of 'shareholders' democracy' see the following very interesting contributions: John Edward Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford University Press 1995), p. 160-199; Steef Bartman, 'Shareholder Democracy à la Dworkin' (2010) 7 *European Company Law* 5; Nicola De Luca, 'Unequal Treatment and Shareholders' Welfare Growth: Fairness v. Precise Equality' (2009) 34 *Delaware Journal of Corporate Law* 853; Mieke Olaerts and C. A. Schwarz, *Shareholder democracy: an analysis of shareholder involvement in corporate policies* (Eleven international publishing 2012). Nicola de Luca argues that the majority principle on the basis of which decisions are taken within a corporation is an expression of inequality, as minority shareholders – because of their minority shareholding – are essentially excluded from the management of the corporation. However, he underlines that the majority rule is a fundamental device to solve the deadlock which absolutely equal parties would unavoidably face (see p. 895). In the seminal *Audiolux SA*, the Court of Justice ruled that there is no general principle of EU law of equality of shareholders, under which minority shareholders are protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy their shares under the same conditions as those agreed when a shareholding conferring or strengthening the control of the dominant shareholder was acquired. Such a principle proposed by Audiolux is characterised by a degree of detail requiring legislation to be drafted and enacted at EU level by a measure of secondary EU law, whereas general principles of EU law have constitutional status. See Case C-101/08 *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, ECLI:EU:C:2009:626, paras 63-64.

21 Steef Bartman, 'Shareholder Democracy à la Dworkin' (2010) 7 European Company Law 5, p. 5.

22 European Commission, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies* (2007), p. 14.

23 Reinier Kraakman and others, *The Anatomy of Corporate Law – A Comparative and Functional Approach* (Oxford University Press 2009), p. 35.

24 Ibid, p. 35.

and the hired managers (viewed as 'the agents'); (2) the conflict between the controlling shareholders (viewed as 'the agents') and the non-controlling/minority shareholders (viewed as 'the principals'); and (3) the conflict between the firm itself (viewed as 'the agent') and other parties with whom the firm contracts, such as creditors, employees and consumers (viewed as 'the principals').[25] In the first conflict, the 'agency problem' lies in assuring that the managers are responsive to the shareholders' interests rather than pursuing their own personal interests.[26] In the second conflict, the 'agency problem' lies in assuring that the non-controlling/minority shareholders are not expropriated by the controlling shareholders.[27] Finally, in the third conflict, the 'agency problem' lies in assuring that the firm does not behave opportunistically towards these various other principals, such as by expropriating creditors, exploiting workers or misleading consumers.[28]

The 'agency problems', especially the conflict between shareholders and managers, were identified as early as in the 18th century by Adam Smith, who in his seminal work *The Wealth of Nations* wrote that

> 'the directors of such companies [joint stock companies] however being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. […] Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company'.[29]

The principle of proportionality between ownership and control relates primarily to the second conflict between controlling and non-controlling shareholders. In particular, shareholders who control a proportion of total voting rights much larger than their ownership (and dividend) rights have an incentive to extract value from the company at the expense of non-controlling shareholders.[30] It is argued that discrepancies between ownership and control can exacerbate the misalignment of the incentives of controlling and non-controlling shareholders and at the same time the separation of voting and cash-flow right may compromise the efficiency of markets for corporate control.[31] However, the empirical studies on this issue, included in the aforementioned Report by ISS

25 Ibid, p. 36.
26 Ibid, p. 36.
27 Ibid, p. 36.
28 Ibid, p. 36.
29 Adam Smith, *The Wealth of Nations* (W. Strahan and T. Cadell, London 1776). See also Christine Mallin, *Corporate Governance* (Oxford University Press 2004), p. 11.
30 European Commission, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies* (2007), p. 14.
31 OECD, *Lack of Proportionality Between Ownership and Control: Overview and Issues for Discussion* (2007), p. 4.

Europe, Shearman and Sterling and the European Corporate Governance Institute, do not provide sufficient evidence on the existence and extent of private benefit extraction resulting from lack of proportionality. Nevertheless, the Report notes that investors perceive negatively all Control Enhancing Mechanisms, and especially priority shares, golden shares, multiple voting shares and voting right ceilings.[32]

The European Commission took into account this Report and subsequently adopted an Impact Assessment on the Proportionality between Capital and Control in Listed Companies, which, after stressing the lack of conclusive evidence regarding the negative effects of Control Enhancing Mechanisms, concluded that it is inadvisable even to recommend prohibiting the ones separating ownership from control, as this could have undesirable effects in terms of, inter alia, hindering long-term policy of companies, hindering companies' access to the capital markets or increasing the monitoring cost for shareholders.[33] Instead, the most suitable solution would be to increase *transparency* regarding them. The Commission could adopt a Recommendation, which would leave Member States the freedom to evaluate which of the transparency options suit best the respective specificities of each legal and industrial system.[34] In the absence of empirical evidence on the existence and extent of shareholder expropriation, adopting further measures could entail a risk of imposing significant costs to issuers and controlling shareholders without a proportional benefit.[35] Thus, after weighing the arguments advanced, Commissioner McCreevy decided that there was no need for action at the EU level on this issue. Therefore, DG Internal Market and Services terminated their work in this area. This should be regarded as an indication that the political institutions of the Union decided to maintain their neutrality with respect to the principle of proportionality between ownership and control and to respect the Member States' right to organise their corporate governance systems as they deem appropriate for their national economies.

Despite the explicit political decision not to adopt any legislative measures prohibiting Control Enhancing Mechanisms and imposing the principle of proportionality between ownership and control as the dominant corporate governance model in Europe, the Court of Justice, through its golden shares case law, seems to suggest a different pathway. As will be shown in the following sections, by ruling that golden shares are incompatible with the free movement of capital, the Court has implicitly endorsed the principle of

32 European Commission, *Impact Assessment on the Proportionality between Capital and Control in Listed Companies* (2007), p. 6 and 84.
33 Ibid, p. 5.
34 Ibid, p. 6.
35 Ibid, p. 6.

proportionality between ownership and control as the overarching principle governing the European corporate governance regime (if one can speak of a such a 'European' regime) and has potentially opened the door to all sorts of claims from *intra* and *extra*-EU investors challenging not only golden shares, but also any kind of Control Enhancing Mechanism that might exist in the corporate governance systems of the Member States. Through the vehicle of *negative integration*, the Court advances a rigid jurisprudential reasoning regarding special holdings in privatised undertakings, which gradually leads to a convergence of the various national models of capitalism into one specific model of market economy, that of a *liberal market economy*.

2.4 Varieties of capitalism: liberal market economies v coordinated market economies

The theory of *Varieties of Capitalism* is an influential political economy theory, developed by Peter Hall and David Soskice, representing a useful framework for understanding the institutional convergences and divergences among the developed economies.[36] It forms part of the political theory of *Comparative Capitalism*, which was developed in the 1990s and sought to identify the differences between distinct forms of developed economies (especially between the two paradigm variants of *liberal market economies* and *coordinated market economies*).[37] Its main contribution is that it offers a theoretical counter-argu-

36 Peter Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001). Following this seminal work, the literature on *Varieties of Capitalism* has been flourishing, especially in relation to European Integration. See in particular Jukka Snell, 'Varieties of Capitalism and the Limits of European Economic Integration' (2012) 13 *Cambridge Yearbook of European Legal Studies* 415; Peer Zumbansen and Daniel Saam, 'The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism' (2007) 8 German Law Journal; Daniel Kinderman, *Challenging Varieties of Capitalism's Account of Business Interests – The New Social Market Initiative and German Employers' Quest for Liberalization, 2000-2014* (Max Planck Institute for the Studies of Societies, Cologne, MPIfG Discussion Paper 14/16, 2014); Matthew Allen, 'The Varieties of Capitalism Paradigm: Not Enough Variety?' (2004) 2 *Socio-economic Review* 87.

37 Chris Brewster, Marc Goergen and Geoffrey Wood, 'Corporate Governance Systems and Industrial Relations' in Adrian Wilkinson and Keith Townsend (eds), *The Future of Employment Relations: New Paradigms, New Developments* (Palgrave Macmillan 2011); Richard Deeg and Gregory Jackson, 'Comparing Capitalisms: The Implications of National Diversity for the Study of International Business' (2008) 39 *Journal of International Business Studies* 540; Ronald Dore, *British Factory, Japanese Factory: The Origins of National Diversity in Industrial Relations* (University of California Press 1973); Jeffrey Hart, *Rival Capitalists: International Competitiveness in the United States, Japan, and Western Europe* (Cornell University Press 1994); James R. Lincoln and Arne L. Kalleberg, *Culture, Control, and Commitment: A Study of Work Organization in the United States and Japan* (Cambridge University Press 1990); Michael E. Porter, *The Competitive Advantage of Nations* (Free Press, New York 1990).

ment to the *globalisation convergence* theory and the *neoliberal political paradigm*, according to which the forces of globalisation would inevitably lead to a convergence of the various economic models into the neoliberal model characterised by financial liberalisation, labour deregulation and privatisation of public assets.[38] Contrary to the predictions of the *globalisation convergence* theory, the *Varieties of Capitalism* theory is based on the hypothesis that the distinctive features shaping the various capitalist models will persist despite the converging forces of globalisation and that national governments and economic players will continue to support national institutional arrangements and economic structures.[39]

The *Varieties of Capitalism* doctrine draws from the theory of *Comparative Capitalism* and borrows the distinction between *liberal market economies* and *coordinated market economies*, as the two ideal models of advanced economies with distinct features and distinct comparative institutional advantages.[40] This distinction is based primarily on the different ways that *companies*, regarded as the most crucial actors in a capitalist economy, deal with the various coordination problems that they encounter in the organisation of their corporate life.[41]

On the one hand, *liberal market economies* (represented primarily by the UK and the US – the 'Anglo-Saxon model') have an institutional advantage in supporting *radical innovation*, which is primarily needed for fast-moving technology sectors based on pioneering scientific research, such as biotechnology, semiconductors, software development etc.[42] The reason is that the institutional arrangements of *liberal market economies* allow for (1) deregulated, flexible and highly mobile labour markets which enable companies to hire highly skilled

38 Christian Schweiger, *The EU and the Global Financial Crisis, New Varieties of Capitalism* (Edward Elgar Publishing 2014), p. 4; Hans-Werner Sinn, 'The Dilemma of Globalisation: A German Perspective' (2004) 4 *Economie Internationale* p. 111; Christel Lane, 'Institutional Transformation and System Change: Changes in Corporate Governance of German Corporations' in Glenn Morgan, Richard Whitley and Eli Moen (eds), *Changing Capitalisms? Internationalization, Institutional Change and Systems of Economic Organisation* (Oxford University Press 2006), pp. 78-109; Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984); Samir Amin and David Luckin, 'The Challenge of Globalization' (1996) 3 *Review of International Political Economy* p. 216.

39 Peter Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001), p. 57; Peter Hall and Daniel Gingerich, 'Varieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis' in Bob Hancké (ed), *Debating Varieties of Capitalism: A Reader* (Oxford University Press 2009), p. 169; Christian Schweiger, *The EU and the Global Financial Crisis, New Varieties of Capitalism* (Edward Elgar Publishing 2014), p. 17-18.

40 Peter Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001), p. 8 and 36.

41 Ibid, p. 6.

42 Ibid, p. 39.

and specialised workers, knowing that they can fire them if the project proves unprofitable; (2) extensive equity markets with dispersed shareholders and a regulatory framework that is favourable to mergers and acquisitions; and (3) the presence of venture capital (i.e. a form of financing to start-up companies) that allows scientists and engineers to bring their own ideas to the market.[43]

On the other hand, *coordinated market economies* (represented primarily by Germany – the 'German/Continental European model') have an institutional advantage in supporting *incremental innovation*, which is needed in order to attract consumer loyalty and secure continuous improvements in the production process of goods such as machine tools, factory equipment, consumer durables, engines and transport equipment.[44] The reason is that the institutional arrangements of *coordinated market economies* allow for a labour law regime that provides workers with secure employment and a corporate law regime that gives them the possibility to participate in the management and the decision-making process of the company.[45] This combination incentivises workers to have a genuine interest in the long-term profitability of the company and to develop high levels of industry-specific technical skills.[46] At the same time, inter-firm coordination and corporate governance rules that insulate firms against hostile takeovers and reduce their exposure to volatile capital flows encourage long-term employment and strategies based on product differentiation rather than intense product competition, thus fostering *incremental* rather than *radical innovation*.[47] Finally, in *coordinated market economies* capital is provided by banks and long-term investors aiming at ensuring the long-term economic sustainability of the company and the existence of various associations allows the development of cooperation schemes among companies (not always consistent with the anti-trust regulations of *liberal market economies*).[48]

2.5 Corporate governance and EU law

Corporate governance is defined as a set of relationships between a company's management, its board, its shareholders and other stakeholders.[49] It provides the structure through which the objectives of the company and the means of

43 Ibid, p. 40.
44 Ibid, p. 39.
45 Ibid, p. 39.
46 Ibid, p. 39.
47 Ibid, p. 40.
48 Jukka Snell, 'Varieties of Capitalism and the Limits of European Economic Integration' (2012) 13 Cambridge Yearbook of European Legal Studies 415, p. 1.
49 OECD, *G20/OECD Principles of Corporate Governance* (OECD Publishing 2015).

attaining them are determined.[50] An effective corporate governance framework is essential for economic efficiency and long-term financial stability, as it promotes competition and economic sustainability of corporations, which are regarded as the backbone of the modern globalised market economy system.[51] This holds true particularly for the EU's Internal Market, which must accommodate divergent national corporate systems and institutional arrangements in order to create the optimal market conditions that will ensure the most effective and competitive operation of undertakings and will promote consumer welfare.

Despite the fact that the functioning of an appropriate and efficient corporate governance system is first and foremost the responsibility of the company concerned, the role of the applicable national legal framework is of paramount importance for the establishment of a sustainable corporate governance system which will ensure that certain rules and codes of behaviour are respected in the course of corporate operations.[52] So far, this legal framework remains to a great extent national. Despite some efforts to establish common international rules on the conduct of corporate entities,[53] corporate law and corporate governance is still regulated primarily at national level. This is the case also in the EU. To borrow the famous *dictum* of the Court of Justice, '*companies are creatures of national law*'.[54] There have been efforts to harmonise the field of company law and corporate governance, but they have proved to be a very difficult endeavour in light of the significant national discrepancies in the institutional structures of national corporate governance regimes and the political controversies arising from the different approaches in national industrial policies. The efforts to establish a common regulatory framework in the EU have thus focused on certain specific issues of company law for which a political compromise was deemed feasible and have avoided the most sensitive legal issues dealing with the core of the different national institutional arrangements in the field of corporate governance and industrial relations. As a result, the harmonisation process in the field of company law has resulted

50 Ibid.

51 European Commission, *Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies* (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2012). See also Ronald J. Gilson, 'From Corporate Law to Corporate Governance' in Jeffrey N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press 2018), p. 4-27.

52 European Commission, *Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies* (2012).

53 See primarily the OECD Principles of Corporate Governance, which were adopted in 1999 and provide an indispensable and globally recognised benchmark for assessing and improving corporate governance.

54 Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, ECLI:EU:C:1988:456, para 20.

in a rather fragmented legal terrain, which consists of several instruments of secondary law (directives and regulations)[55] covering areas such as the formation of limited liability companies,[56] capital and disclosure requirements,[57] accounting and financial reporting rules,[58] domestic mergers and divisions,[59] cross-border mergers and setting up branches in another EU country,[60] business registers,[61] as well as rules on the European Company (SocietasEuro-

55 For an overview, see European Commission, 'Company Law and Corporate Governance' <https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en> accessed 31-01-2019.

56 'Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent' (2012) *OJ L 315, 14.11.2012, p. 74-97*.

57 'Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent' (2009) *OJ L 258, 1.10.2009, p. 11-19*

58 'Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC' (2013) *OJ L 182, 29.6.2013, p. 19-76*; 'Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC' (2006) *OJ L 157, 9.6.2006, p. 87-107*.

59 'Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies ' (2011) *OJ L 110, 29.4.2011, p. 1-11*; 'Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies' (1982) *OJ L 378, 31.12.1982, p. 47-54*.

60 'Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State' (1989) *OJ L 395, 30.12.1989, p. 36-39*; 'Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies' (2005) *OJ L 310, 25.11.2005, p. 1-9*.

61 'Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers' (2012) *OJ L 156, 16.6.2012, p. 1-9*.

pea),[62] the European Cooperative Society[63] and the European Economic Interests Groupings.[64]

In its 2012 Action Plan, the Commission acknowledged that the fragmented legal framework of European Company law makes it difficult for users to have a clear overview of the applicable law and carries the risk of unintended gaps and overlaps.[65] It therefore stressed the need for a codification of the rules applicable in this policy area. After conducting a public consultation, the Commission finally adopted a proposal to codify and merge a number of existing company law Directives,[66] which eventually led to the adoption of Directive 2017/1132 relating to certain aspects of company law.[67] This Directive constitutes an important, albeit partial, codification of six Company Law Directives, which are henceforth repealed.[68] Its objective is to make EU company law more reader-friendly and to reduce the risk of inconsistencies and

62 'Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)' (2001) *OJ L 294, 10.11.2001, p. 1-21*.

63 'Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)' (2003) *OJ L 207, 18.8.2003, p. 1-24*.

64 'Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG)' (1985) *OJ L 199, 31.7.1985, p. 1-9*.

65 European Commission, *Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies* (2012), p. 15.

66 European Commission, *Proposal for a Directive of the European Parliament and of the Council relating to certain aspects of company law (codification)* (COM(2015) 616 final, 2015/0283 (COD), 2015).

67 'Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law' (2017) *OJ L 169, 30.6.2017, p. 46-127*.

68 'Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies' (1982) *OJ L 378, 31.12.1982, p. 47-54*; 'Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State' (1989) *OJ L 395, 30.12.1989, p. 36-39*; 'Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies' (2005) *OJ L 310, 25.11.2005, p. 1-9*; 'Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent' (2009) *OJ L 258, 1.10.2009, p. 11-19*; 'Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies ' (2011) *OJ L 110, 29.4.2011, p. 1-11*; 'Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent' (2012) *OJ L 315, 14.11.2012, p. 74-97*.

ambiguities, without however amending the substantive content of the provisions it codifies.[69]

2.6 The Takeover Directive and the golden shares case law

The most controversial directive that has been adopted in the field of EU company law is undoubtedly the 2004 Takeover Directive.[70] The primary objective of the Takeover Directive is to achieve harmonization of national rules on takeover bids in order to create a level playing field at the European level in the market for corporate control.[71] A 'takeover bid' under Article 2 of the Directive is a public offer made to the holders of securities of a company to acquire all or some of those securitites, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law. Voluntary bids can be either *tender (friendly) offers* or *hostile takeovers*. A tender offer occurs when the incumbent majority shareholder or the management of the company agree on the takeover bid.[72] By contrast, a hostile takeover occurs when a bidder attempts to take over a target company whose management is unwilling to approve it.[73]

Due to the politically sensitive nature of hostile takeover regulation, the Directive largely reflects a political compromise[74] and gives Member States the possibility to 'opt-out' from its two most controversial rules, i.e. the *board neutrality rule* (Article 9 of the Directive) and the *break-through rule* (Article

69 European Commission, *Proposal for a Directive of the European Parliament and of the Council relating to certain aspects of company law (codification)* (2015), p. 3.

70 'Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids' (2004) *OJ L 142, 30.4.2004, p. 12-23*.

71 Nicola De Luca, *European Company Law: Text, Cases and Materials* (Cambridge University Press 2017), p. 398.

72 Ibid, p. 402.

73 Ibid, p. 402.

74 There is a rich literature on the Directive, its controversial provisions and the politically turbulent process of adoption. See in particular Vanessa Edwards, 'The Directive on Takeover Bids – Not Worth the Paper It's Written On?' (2004) 1 *European Company and Financial Law Review* 416; Frank Wooldridge, 'The Recent Directive on Takeover Bids' (2004) 15 *European Business Law Review* 147; Heribert Hirte, 'The Takeover Directive – A Mini-Directive on the Structure of the Corporation: Is it a Trojan Horse?' (2005) 2 *European Company and Financial Law Review* 1; Steef Bartman, 'The EC Directive on Takeover Bids: Opting in as a Token of Good Corporate Governance' in Steef Bartman (ed), *European Company Law In Accelerated Progress* (Kluwer Law International 2006); Thomas Papadopoulos, *EU Law and Harmonization of Takeovers in the Internal Market* (Kluwer Law International 2010); Joseph A. McCahery and Erik P.M. Vermeulen, 'The Case Against Reform of the Takeover Bids Directive' (2011) 22 *European Business Law Review* 541; Jonathan Mukwiri, 'Reforming EU Takeover Law Remains on Hold' (2015) 12 *European Company Law* 186; Jeremy Grant, *European Takeovers: The Art of Acquisition* (Euromoney Institutional Investor 2018).

11 of the Directive), which are intended to neutralise *ex-post* and *ex-ante* defensive mechanisms which can be adopted by the target company in order to counteract hostile takeovers.[75]

In particular, the *board neutrality/passivity rule* requires the target company's board of directors to abstain from taking any *ex-post* defensive measures that could frustrate the bid.[76] In other words, it requires the board of directors[77] to 'stay passive' or 'be neutral' once a takeover bid has been launched, whilst it confers the general meeting of shareholders the authority to decide upon the adoption of frustrating actions.[78] *Ex-post* defensive devices to counteract a hostile takeover include shares' repurchases restricting the number of the free floating shares available, mergers increasing the value and number of shares granting control over the company or capital increases, the sale of company's best assets ('crown jewels') etc.[79]

The *break-through rule* entails the suspension of *ex-ante* defensive measures, i.e. clauses embedded in the company's instruments of incorporation or statutes deterring potential interested investors from making their bids.[80] The *break-through rule* neutralises shares conferring multiple voting rights, targeting primarily the Nordic multiple voting rights model.[81] It should be noted that there is an exception to the breakthrough rule in relation to golden shares which are compatible with the Treaty. More precisely, Article 11 (7) of Directive 2204/25 provides that the *break-trhough rule* does not apply either where

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75 Alessandro Spano, 'Free Movement of Capital and Golden Shares: A New Perspective on Corporate Control? (Joined Cases C-463/04 and C-464/04 Federconsumatori and Others v Comune di Milano)' (2010) 13 *International Trade and Business Law Review* 291, p. 300.

76 For an extensive discussion about the significance or the triviality of the board neutrality rule see Carsten Gerner-Beuerle, David Kershaw and Matteo Solinas, 'Is the Board Neutrality Rule Trivial? Amnesia about Corporate Law in European Takeover Regulation' (2011) 22 *European Business Law Review* 559.

77 Interestingly, it has been suggested that the neutrality rule should bind not only the board of directors but also activist shareholders opposing the takeover bid, see Thomas Papadopoulos, 'Infringements of Fundamental Freedoms within the EU Market for Corporate Control' (2012) 9 *European Company and Financial Law Review* 221, p. 260.

78 Nicola De Luca, *European Company Law: Text, Cases and Materials* (Cambridge University Press 2017), p. 423.

79 Ibid, p. 423.

80 Ibid, p. 415.

81 Peter O. Mülbert, 'Make It or Break It: The Break-Through Rule as a Break-Through for the European Takeover Directive?' in Guido Ferrarini, Klaus J. Hopt, Jaap Winter and Eddy Wymeersch (eds), *Reforming Company and Takeover Law in Europe* (Oxford University Press 2004); Ulf Bernitz, 'The Attack on the Nordic Multiple Voting Rights Model: The Legal Limits under EU Law' (2004) 15 *European Business Law Review* 1423; Rolf Skog, 'The Takeover Directive, the "Breakthrough" Rule and the Swedish System of Dual CLass Common Stock' (2004) 15 *European Business Law Review* 1439; Paul Krüger Andersen, 'The Takeover Directive and Corporate Governance: The Danish Experience' (2004) 15 *European Business Law Review* 1461.

Member States hold securities in the offeree company which confer special rights on the Member States which are compatible with the Treaty, or to special rights provided for in national law which are compatible with the Treaty or to cooperatives. The first category of special rights refers to golden shares originated in the UK, where the *Articles of Association* of privatised companies used to provide for the issuance of special shareholding on behalf of the government.[82] Conversely, the second category of special rights refers to the privatisation schemes in countries like France and Italy, where it is usually the *national legislation* that attributes special rights to public authorities.[83]

It should be noted, however, that the official endorsement of the *board neutrality* and the *break-through rule* provoked fierce political reaction and, in the end, it was decided that these rules would be included in the Directive but only as optional arrangements, not as mandatory rules. Thus, under Article 12 (1) Directive 2004/25, Member States may 'opt-out' from both the *board neutrality* and the *break-through rule* if they consider that the market for corporate control must be restricted in order to achieve other objectives. However, if they 'opt-out', they should allow listed companies established within their territories to voluntarily 'opt-in' (Article 12 (2) Directive 2004/25).

The possibility to 'opt-out' from the *board neutrality* and the *break-through rule* admittedly leads to national discrepancies which might give rise to unequal treatment of some companies. In particular, this can occur when a listed company having its registered office in Member State A, where both the board neutrality and the breakthrough rules apply, is the target of a hostile takeover bid by a company having its registered office in Member State B, which has 'opted-out' from the board neutrality and the breakthrough rule.[84] In order to prevent this unequal treatment, Article 12 (3) Directive 2004/25 introduces the *principle of reciprocity*, which allows Member States to decide whether to apply less stringent measures than those arising from the two rules when the bidding company is not subject to the same restrictions.

It has been argued that through its capital case law, the Court of Justice is in effect trying to achieve what the EU legislator failed to achieve when adopting the Takeover Directive, i.e to abolish all restrictions in the market for corporate control. Some scholars claim that, in the absence of political consensus, the application of the golden shares standards to national company law will undoubtedly advance the harmonisation process in the field of take-

82 Guido Ferrarini, 'One Share – One Vote: A European Rule?' (2006) 3 European Company and Financial Law Review 147, p. 168.

83 Ibid, p. 169.

84 Nicola De Luca, *European Company Law: Text, Cases and Materials* (Cambridge University Press 2017), p. 430.

over bids.[85] It has actually been suggested that the possibility of a Member State to 'opt-out' from the *board neutrality* and the *break-through rule* should be subject to judicial review for conformity with the free movement of capital.[86] This is because, as it is argued, the Takeover Directive is only a minimum harmonisation directive and the stricter rules that can be adopted by the Member States must be compatible with the fundamental freedoms.[87] The case law indeed confirms that the stricter rules adopted within the framework of a minimum harmonisation directive are subject to judicial review in order to ensure their conformity with the fundamental freedoms.[88] However, this approach is legally questionable as it disregards the decision of the EU legislator to leave discretion to the Member States in relation to some politically sensitive issues.

In the field of corporate governance, if the rationale of the golden shares case law is applied by the Court to all company law arrangements – and especially to the ones relating to takeover regulation – it will inevitably lead to a liberalisation of the market for corporate control through negative integration, despite the explicit decision of the EU legislator to grant discretion to the Member States as to whether they wish to keep in place defensive mechanisms against hostile takeovers. This judicially driven liberalisation of the market for corporate control is open to criticism not only in relation to its political legitimacy but also in relation to its economic justification. It is in fact disputed whether the *principle of proportionality between ownership and control/'one share one vote principle'* (which constitutes the underlying rationale of the break-through rule) is justified by economic efficiency.[89]

In view of the far-reaching implications of the application of the free movement of capital to national takeover regulation for the corporate governance systems of the Member States, it is necessary to develop a concrete and coherent legal test for the determination of what constitutes a capital restriction. As explained in the following sections, company law arrangements and in particular defensive mechanisms against hostile takeovers (even the ones contained in private

85 Alberto Artés, 'Advancing Harmonization: Should the ECJ Apply Golden Shares' Standards to National Company Law?' (2009) 20 *European Business Law Review* 457, p. 481.

86 Mads Andenas, Tilmann Gütt and Matthias Pannier, ''Free Movement of Capital and National Company Law' (2005) 16 European Business Law Review 757, p. 785.

87 Ibid.

88 Case C-201/15 *AGET Iraklis*, where the Court held that Directive 98/59 cannot, in principle, be interpreted as precluding a national regime which confers upon a public authority the power to prevent collective redundancies by a reasoned decision adopted after the documents in the file have been examined and predetermined substantive criteria have been taken into account (para 34), but nevertheless examined the compatibility of the national legislation in questions with the freedom of establishment under Article 49 TFEU.

89 Guido Ferrarini, 'One Share – One Vote: A European Rule?' (2006) 3 European Company and Financial Law Review 147, p. 173-177.

acts) can in principle be subject to Internal Market scrutiny, but they should not be regarded as capital restrictions if they do not derogate from ordinary company law and they do not grant an undue advantage to the State as opposed to private investors. The analysis that follows focuses on the most controversial legal issues arising from the golden shares case law and explores the legal ramifications of a possible extrapolation of the golden shares rationale to all company law mechanisms.

2.7 Provisional conclusion

The reason why golden shares are so controversial is because they constitute Control Enchancing Mechanisms deviating from the *principle of proportionality between ownership and control* (*one share-one vote principle*) and granting the State special rights over the management of the company without holding a proportionate stake of equity. While this principle is an important element of some national corporate governance systems, not all Member States adhere to it. Furthermore, in view of the fact that there is no conclusive economic evidence suggesting that Control Enhancing Mechanisms have negative effects on the economic efficiency of undertakings, the Commission decided not to propose any legislative measures harmonising corporate governance and introducing the principle of proportionality between ownership and control in the EU. At the same time, the Takeover Directive gives Member States the possibility to opt-out from the *board neutrality rule* and the *break-through rule*, thus allowing undertakings in those Member States to adopt defensive measures that could frustrate a hostile takeover. This means that the EU legislator has not abolished so far all restrictions in the market for corporate control. However, as will be shown below, both the principle of proportionality between ownership and control and the liberalisation of the market for corporate control has indirectly been promoted though the golden shares case law.

3 Legal issues arising from the golden shares case law

This section seeks to analyse the legal reasoning adopted by the Court in the golden shares case law and to identify possible changes in the interpretation of Article 63 TFEU that could allow room for State participation in the market for the purposes of pursuing public interest objectives. In order to do so, it attempts to answer the following sub-questions:

- Is it possible and/or desirable to grant horizontal effect to Article 63 TFEU?
- Does the golden shares case law allow enough room for Member States to justify the restrictions imposed by the special holding they retain in privatised undertakings?

- What is the proportionality assessment adopted by the Court in the golden shares case law? Is it appropriate?
- Is there a need to delineate the scope of 'capital restrictions' in a more consistent way through the introduction of a *Keck*-inspired approach?

In a nutshell, this section focuses on three main legal issues: the horizontal effect of Article 63 TFEU; the justifications/proportionality regime in the golden shares case law; and finally, the delineation of the 'scope' of capital restrictions. In particular, it is argued that in light of the private nature of many company law instruments which could have an effect on capital movements, it is possible that Article 63 TFEU will be granted horizontal effect. However, a horizontal application of Article 63 TFEU would broaden significantly the reach of the free movement of capital and could threaten the principle of private autonomy. Nevertless, the intrusive effect into private autonomy can be prevented through the introduction of a *Keck*-inspired test that could define in a more consistent way the scope of 'capital restrictions'. This is all the more necessary in light of the unsuccessful invocation of justification grounds by the Member States and the failure to comply with the requirements of the proportionality assessment as applied by the Court of Justice in the golden shares case law.

3.1 The horizontal application of Article 63 TFEU in the golden shares case law

While it is true that the focus of this thesis is on the pursuit of public interest objectives through State measures (golden shares granted to the State), the question of the horizontal applicability of Article 63 TFEU appears relevant in light of the private nature of some instruments granting golden shares to public authorities that have been scrutinised by the Court and its importance becomes even more evident when considering the width of private company law arrangements (Articles of Association, bylaws shareholders' agreements, codes of conduct etc.) that can be challenged through the use of the free movement of capital. So far, the Court has not given any precise answer. It has obliquely avoided the question whether the free movement of capital can be invoked in relations between private parties.

A possible recognition of the horizontal effect of Article 63 TFEU would allow individuals to challenge a wide spectrum of private instruments, thus expanding even more the already broad scope of measures affecting capital movements. For instance, the corporate governance model of the Scandinavian countries (Sweden, Finland and Denmark), which grants multiple voting rights through dual class share structures, might be challenged before the Court of

Justice as a restriction on capital movements.[90]This might have an intrusive effect into the sphere of private autonomy. However, as will be shown below, the intrusion into the sphre of private autonomy can be prevented either through a delineation of the scope of 'capital restrictions' or through a balancing exercise between economic freedoms and social values at the justifications/ proportionality level.

The present section focuses on the horizontal effect of Article 63 TFEU and aims to explore whether it is *feasible* and *desirable* in view of its broader implications for the principle of private autonomy and the choice of market economy model within the Member States. In order to achieve this, it proceeds in three main steps. The fist part explores the theoretical underpinnings of the concept of horizontality (or 'third-party effect') as a controversial topic in national constitutional law (Chapter 4, Section 3.1.1). This is necessary in order to understand the origins and the rationality of horizontality and to illustrate that the reasons justifying the horizontal application of fundamental rights in the context of constitutional and international law apply *mutatis mutandis* in the context of EU law. The second part briefly outlines the jurisprudential developments in EU law in relation to the horizontal direct effect of the free movement of goods, persons, services and certain provisions of the Charter of Fundamental Ruights and sketches the academic debate so far (Chapter 4, Section 3.1.2). Finally, the third part seeks to expound the possibility of a horizontal application of Article 63 TFEU under the existent golden shares case law and to propose a comprehensive solution that balances all conflicting interests and promotes the effective and uniform application of EU law (Chapter 4, Section 3.1.3).

3.1.1 The concept of 'horizontality' in constitutional law

The doctrine of horizontal direct effect of Treaty provisions in EU law originates from the controversial concept of 'horizontality' or 'third-party effect' (*Drittwirkung*) of the fundamental rights enshrined in national constitutions. In particular, in national constitutional law there is a long-standing debate regarding the scope of application of the fundamental rights protected under the constitution. Thus, over the years, two main approaches to human rights protection have been developped. On the one hand, the *vertical* theory holds that fundamental rights can be invoked by individuals only against the State.

90 Institutional Shareholder Services Inc., 'Analysis: Differentiated Voting Rights in Europe' <https://www.issgovernance.com/analysis-differentiated-voting-rights-in-europe/> accessed 31-01-2019; Niclas Hagelina, Martin Holménb and Bengt Pramborgc, 'Family ownership, dual-class shares, and risk management' (2006) 16 *Global Finance Journal* 283; Ben Amoako-Adu, Vishaal Baulkaran and Brian F. Smith, 'Executive compensation in firms with concentrated control: The impact of dual class structure and family management' (2011) 17 *Journal of Corporate Finance* 1580.

On the other hand, the *horizontal* theory expands the scope of application of fundamental rights so as to cover relations between private individuals as well.[91] It should be noted that the concept of horizontal effect can take three distinct manifestations: (1) '*direct* horizontal effect', i.e. imposition of direct fundamental rights obligations on private individuals and possibility of bringing direct claims against individuals for breaches of fundamental rights; (2) '*indirect* horizontal effect', i.e. judicial interpretation of the law applicable in a private dispute in the light of and in conformity with fundamental rights provisions; and (3) 'state-mediated effect'/'positive obligations', i.e. the obligation imposed on the State to take all necessary measures in order to ensure the effective protection of fundamental rights not only in the public sphere but also in the private sphere.[92]

The theoretical underpinnings of the two theories reflect different political philosophies and different views about the interconnection between the public and the private sphere. In particular, the vertical approach to human rights protection is inspired by the political and economic theory of *classical liberalism*[93] and is premised on a rigid distinction between public and private sphere.[94] Supporters of the vertical theory argue that most human rights instruments 'have been forged in the crucible of flagrant abuses of State power' and that, therefore, the purpose of human rights protection is 'to preserve the integrity of the private sphere against coercive intrusion by the State'.[95] It is not the purpose of human rights law to interfere with legal relations between

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91 For an overview of the rich constitutional debate regarding the dichotomy between vertical and horizontal approach to human rights protection see: Murray Hunt, 'The "horizontal effect" of the Human Rights Act' (1998) *Public Law* 423; Deryck Beyleveld and Shaun D. Pattinson, 'Horizontal applicability and horizontal effect' (2002) 118 *Law Quarterly Review* 623; H.W.R. Wade, 'Horizons of horizontality' (2000) 116 *Law Quarterly Review* 217; Jonathan Morgan, 'Questioning the True Effect of the Human Rights Act' (2002) 22 *Legal Studies* 259; Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 *Modern Law Review* 878; Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Journal* 387.

92 Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 *European Law Journal* 657, p. 662.

93 David Dyzenhaus, 'The New Positivists' (1989) 39 *University of Toronto Law Journal* 361.

94 Murray Hunt, 'The "horizontal effect" of the Human Rights Act' (1998) Public Law 423, p. 424; Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon Press, Oxford 1996); William P. Marshall, 'Diluting Constitutional Rights: Rethinking State Action' (1985) 80 *Northwestern University Law Review* 558; Cass R. Sustein, *The Partial Constitution* (Harvard University Press 1998); Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 *Northwestern University Law Review* 503; Brian Slattery, 'Charter of Rights and Freedoms – Does it Bind Private Persons' (1985) 63 *Canadian Bar Review* 148; Andrew S. Butler, 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1993) 22 *Anglo-American Law Review* 1; Stephen Gardbaum, 'The Place Of Constitutional Law in the Legal System' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

95 Murray Hunt, 'The "horizontal effect" of the Human Rights Act' (1998) Public Law 423.

private individuals. Relations between private individuals must remain outside the reach of human rights protection. The sanctity and maximisation of this shielded private sphere should be the ultimate goal of the society.[96] Liberal autonomy presupposes that private actors are able to operate in a private domain, where their reasons for acting in a certain way or another are free from public scrutiny.[97]

On the other end of the spectrum, advocates of the horizontal approach to human rights protection reject the view that there is a pre-political/natural private sphere that precedes the State as a fallacy of classical liberalism.[98] They show greater commitment to *social democratic norms*, which regard the State as having not only *negative* obligations, which essentially require the State not to interfere with the exercise of individual rights, but also *positive* obligations, which in practice require national authorities to take all necessary measures to safeguard human rights ('bestowing of entitlements from the State').[99] The doctrine of *positive obligations* is linked to the political theory of 'active State', which is the theoretical foundation of both *direct* and *indirect* horizontal effect.[100] An active State is a State which ensures that fundamental rights are fully protected within its jurisdiction not only in State-citizen relations but also in relations between private individuals, either by making sure that the legislature enacts laws protecting human rights and abolishing discrimination or by allowing the judiciary to apply human rights horizontally (directly or indirectly).[101] Adherents of the horizontal approach express their fear that concentration of private power can be as dangerous as coercive State power. In fact, they argue that the power to deprive someone of the opportunity to earn a living sometimes poses as great a threat to liberty as does the exercise of State power to imprison someone.[102] Therefore, in their view, all types of law (both legislation and common law governing relations between

96 Ibid.

97 Mark Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law' (2003) 1 *International Journal of Constitutional Law* 79, p. 89.

98 Murray Hunt, 'The "horizontal effect" of the Human Rights Act' (1998) Public Law 423.

99 Mark Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law' (2003) 1 International Journal of Constitutional Law 79, p. 90. For the distinction between negative and positive obligations in Human Rights Law see Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013); Jean-Franc¸ois Akandji-Kombe, *Positive obligations under the European Convention on Human Rights – A guide to the implementation of the European Convention on Human Rights* (Human rights handbooks, No 7, Council of Europe, 2007); Hugh Breakey, 'Positive Duties and Human Rights: Challenges, Opportunities and Conceptual Necessities' (2015) 63 *Political Studies* 1198.

100 Mark Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law' (2003) 1 International Journal of Constitutional Law 79, p. 90.

101 Ibid.

102 Ibid, p. 91.

private parties) should be subject to judicial review in order to ensure their compatibility with human rights.[103] This, they claim, does not spell the end of private autonomy, as the arrangements chosen by private parties might still pass the justification and proportionality test.[104]

Ultimately, the issue of horizontality boils down to a more fundamental question: what is the function of a constitution? Some might reasonably argue that it is merely a law for lawmakers, a Hobbesian social contract between rulers and ruled, whereas some others might convincingly assert that it should be regarded as a normative charter governing the relations between individuals in a society, as a Lockean social contract among equal citizens.[105] Adherents of the vertical approach proclaim values such as private autonomy, privacy and market efficiency.[106] They espouse the view that the most crucial function of a constitution is to provide the law for the lawmaker, not for the citizen.[107] Conversely, supporters of the horizontal approach regard the constitution as expressing a society's most fundamental values and therefore as applicable to all its members.[108] These fundamental values are threatened at least as much by powerful private actors as by governmental institutions, especially in light of the widespread recent privatisation of many governmental activities.[109] At the same time, they question the validity of the argument based on private autonomy, arguing that private actors are in any case regulated by other types of legislation, and therefore it is unclear why private autonomy is 'especially or distinctively threatened by constitutional regulation'.[110]

Although the vertical and the horizontal theory represent two polarized extremes, they mark the outer edges of a wide spectrum of possible scenarios where the application of human rights instruments might be triggered either by the State acting in its private capacity (for instance, as a landlord or an employer) or by private parties exercising collective regulatory powers or being in a dominant position of power (for instance, a sport association, a trade union or a corporation imposing certain terms on consumers or employees). Although not purely vertical, these scenarios contain a *quasi-public* element, which renders them without much hesitation susceptible to judicial review in order to ensure compliance with human rights. The judiciary in charge of adjudicating such

103 Murray Hunt, 'The "horizontal effect" of the Human Rights Act' (1998) Public Law 423.
104 Ibid.
105 Stephen Gardbaum, 'The Place Of Constitutional Law in the Legal System' in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), p. 178.
106 Ibid, p. 177.
107 Ibid, p. 177.
108 Ibid, p. 177.
109 Ibid, p. 177.
110 Ibid, p. 177.

a dispute might employ various legal remedies in order to give effect to the rights of individuals, without necessarily recognising the direct horizontal effect of human rights provisions.

This intermediate third position in between the two polarised extremes of vertical and direct horizontal effect is known as the concept of *indirect* horizontal effect. This concept originates from national constitutional judgments establishing the duty of the judiciary to uphold and protect fundamental rights and freedoms also in disputes between individuals. The two most prominent examples are the landmark *Lüth* ruling[111] of the German Federal Constitutional Court which established the German doctrine of '*mittelbare Drittwirkung*' (*in casu* in relation to the freedom of expression),[112] and the *Shelley v Kraemer* ruling[113] of the US Supreme Court, which expanded the scope of the 'state action' doctrine[114] so as to cover not only governmental conduct but also court orders and granted *indirect* horizontal effect to the 'equal protection clause' of the Fourteenth Amendment.[115]

3.1.2 *Horizontal effect in EU law*

The question of horizontality in EU law has been adressed in several landmark judgments of the Court of Justice and has sparked an animated debate among

111 *Lüth,* BVerfGE 7, 198 (1958) (Bundesverfassungsgericht).

112 Greg Taylor, 'The Horizontal Effect of Human Rights Provisions, the German Model and Its Applicability to Common-Law Jurisdictions' (2002) 13 *King's College Law Journal* 187; Basil S. Markesinis, 'Privacy, freedom of expression, and the horizontal effect of the Human Rights Bill: lessons from Germany' (1999) 115 *Law Quarterly Review* 47; Ulrich Preuß, 'The German Drittwirkung Doctrine and Its Socio-Political Background' in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005); Georg Sommeregger, 'The Horizontalization of Equality: The German Attempt to Promote Non-Discrimination in the Private Sphere via Legislation' in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005).

113 *Shelley v. Kraemer,* 334 US 1 (1948) (United States Supreme Court).

114 For the academic debate in the US regarding the state action issue see: Stephen Gardbaum, 'Where the (state) action is' (2006) 4 *International Journal of Constitutional Law* 760; András Sajó and Renáta Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005); Harold W. Horowitz, 'The Misleading Search for State Action under the Fourteenth Amendment' (1957) 30 *Southern California Law Review* 208; Larry Alexander, 'The Public/Private Distinction and Constitutional Limits on Private Power' (1993) 10 *Constitutional Commentary* 361; Richard S. Kay, 'The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law' (1993) 10 *Constitutional Commentary* 329; Erwin Chemerinsky, 'Rethinking State Action' (1985) 80 Northwestern University Law Review 503.

115 Mark Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law' (2003) 1 International Journal of Constitutional Law 79, p. 81.

scholars. In view of the rich literature on the topic,[116] this section restricts itself to a brief overview of the case law and the most prominent scholarly opinions expressed thereon in order to summarize the main controversies surrounding the horizontal application of the fundamental freedoms in the private sphere. This jurisprudential and scholarly background is in turn hoped to shed light on the salient question whether and to what extent the judicial reasoning regarding the horizontal effect of the other freedoms can be extrapolated to the free movement of capital.

116 Stefaan Van den Bogaert, 'Horizontality: The Court Attacks?' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing 2002); Christoph Krenn, 'A missing piece in the horizontal effect "jigsaw": Horizontal direct effect and the free movement of goods' (2012) 49 *Common Market Law Review* 177; Harm Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 *European Law Journal* 177; Miguel Poiares Maduro, 'The Chameleon State – EU Law and the blurring of the private/public distinction in the market' in Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond – Patterns of Supranational and Transnational Juridification* (Intersentia 2010); Kara Preedy, 'Fundamental Rights and Private Acts – Horizontal Direct or Indirect Effect? – A Comment' (2000) 8 *European Review of Private Law* 125; Erica Howard, 'ECJ Advances Equality in Europe by Giving Horizontal Direct Effect to Directives' (2011) 17 *European Public Law* 729; Pedro Cabral and Ricardo Neves, 'General Principles of EU Law and Horizontal Direct Effect' (2011) 17 *European Public Law* 437; Paul Verbruggen, 'The Impact of Primary EU Law on Private Law Relationships: Horizontal Direct Effect under the Free Movement of Goods and Services' (2014) 22 *European Review of Private Law* 201; Eva Julia Lohse, 'Fundamental Freedoms and Private Actors – towards an 'Indirect Horizontal Effect' (2007) 13 *European Public Law* 159; Justin Nogarede, 'Levelling the (Football) Field: Should Individuals Play by Free Movement Rules?' (2012) 39 *Legal Issues of Economic Integration* 381; Vassilios Skouris, 'Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives' (2006) 17 *European Business Law Review* 241; Michael Dougan, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy' (2007) 44 *Common Market Law Review* 931; Filippo Fontanelli, 'General Principles of the EU and a Glimpse of Solidarity in the Aftermath of Mangold and Kücükdeveci' (2011) 17 *European Public Law* 225; Harm Schepel, 'The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to 'Constitutionalize' Private Law' (2004) 12 *European Review of Private Law* 661; Rufat Babayev, 'Contractual Discretion and the Limits of Free Movement Law' (2015) 23 *European Review of Private Law* 875; Alan Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect' (2007) 10 *Cambridge Yearbook of European Legal Studies* 525; Peter Oliver and Wulf-Henning Roth, 'The internal market and the four freedoms' (2004) 41 Common Market Law Review 407; Lawrence W. Gormley, 'Private Parties and the Free Movement of Goods: Responsible, Irresponsible, or a Lack of Principles?' (2015) 38 *Fordham International Law Journal* 993; Sacha Prechal and Sybe De Vries, 'Seamless web of judicial protection in t he internal market?' (2009) 34 *European Law Review* 5;Sacha Prechal, 'Direct Effect Reconsidered, Redefined and Rejected' in Jolande M Prinssen and Annette Schrauwen (eds), *Direct Effect-Rethinking: A Classic of EC Legal Doctrine* (Europa Law Publishing 2002); Arthur Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law' (2010) 3 *European Review of Private Law* 529; Stefan Enchelmaier, 'Horizontality: the application of the four freedoms to restrictions imposed by private parties' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgal Publishing 2017).

3.1.2.1 Defrenne: horizontality of equal pay

Most legal analyses of the question of horizontality in EU law starts with *Defrenne*,[117] a landmark judgment concerning the horizontal direct effect of Article 119 EEC Treaty (today Article 157 TFEU) on equal pay between men and women. While *Defrenne* focused on Article 157 TFEU, it nevertheless set the tone for the case law that followed regarding the horizontal application of the fundamental freedoms. The question was whether the principle that men and women should receive equal pay for equal work could be relied on by an air hostesse against her employer, a private airline company, before the Cour du travail of Brussels. The Court answered in the affirmative. Rejecting the argument based on a strict textual approach that Article 157 TFEU refers expressly only to 'Member States'. It clarified that the fact that certain Treaty provisions are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.[118] Following a reasoning similar to the one adopted by the US supreme Court in *Shelley v Kraemer* (see above Chapter 4, Section 3.1.1.1), the Court in Luxembourg accepted that the reference to 'Member States' in Article 157 TFEU includes also the national courts, which have a duty to interpret national legislation, collective agreements but also private contracts in light of the fundamental principle of equal pay between men and women.[119] This cannot be regarded as an undue interference with the principle of private autonomy, since Article 157 TFEU is mandatory in nature and applies not only to the action of public authorities, but also extends to collective labour agreements and individual labour contracts.[120]

3.1.2.2 Walrave & Koch and Bosman: horizontal application of the free movement of workers to federation exercising regulatory powers

In the field of the fundamental freedoms, the first case raising the question of the horizontal effect of the free movement of workers was *Walrave and Koch*.[121] The case concerned the compatibility of a rule of the International Cycling Union relating medium-distance world cycling championships behind motorcycles, according to which the pacemaker had to be of the same nationality as the strayer, with Articles 7, 48 and 59 EEC Treaty (today Articles 18, 45

117 Case 43-75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56.
118 Ibid, para 31.
119 Ibid, para 37.
120 Ibid, paras 38-39.
121 Case 36-74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale*, ECLI:EU:C:1974:140.

and 56 TFEU). The Court, emphasizing the *regulatory powers* of the *association* in question, found that the prohibition of discrimination on the basis of nationality enshrined in the abovementioned provisions does not apply only to the action of public authorities but extends likewise to rules of any other nature regulating in a *collective manner* gainful employment and the provision of services.[122] This extension was justified by the *effet utile* argument,[123] according to which the abolition of obstacles to freedom of movement between Member States would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisation which do not come under public law.[124] Furthermore, the Court put forward the *uniform application* argument[125] according to which working conditions are regulated not only by means of legislation, but also by means of collective agreements or individual contracts and therefore limiting the prohibition of discrimination to acts of public authorities would risk creating inequality in their application.[126] Finally, the Court underlined the *general wording*[127] of the provisions in question, which made no distinction between the source of the restrictions to be abolished and were therefore deemed to be applicable to the dispute rule of the International Cycling Union.[128]

Two decades later, in the seminal *Bosman* judgment,[129] the Court reiterated that Article 45 TFEU applies horizontally to rules of *sporting associations regulating in a collective manner* the working conditions of athletes.[130] More importantly, it added that the horizontal effect of Article 45 TFEU does not concern only measures discriminating on the basis of nationality, but extends likewise to *non-discriminatory restrictions* on the free movement of workers. In other words, it expanded the 'material scope' of the horizontal effect of Article 45 TFEU. The case concerned the compatibility with EU law (in particular Article 45, 101 and 102 TFEU) of the FIFA and UEFA 'football transfer rules', according to which a professional football player was not free to move to a new club

122 Ibid, para 17.
123 Stefaan Van den Bogaert, 'Horizontality: The Court Attacks?' in Barnard and Scott (eds), *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing 2002), p. 125.
124 Case 36-74 *Walrave and Koch*, para 18.
125 Stefaan Van den Bogaert, 'Horizontality: The Court Attacks?' in Barnard and Scott (eds), *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing 2002), p. 125.
126 Case 36-74 *Walrave and Koch*, para 19.
127 Stefaan Van den Bogaert, 'Horizontality: The Court Attacks?' in Barnard and Scott (eds), *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing 2002), p. 125.
128 Case 36-74 *Walrave and Koch,* para 20-21.
129 Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman,* ECLI:EU:C:1995:463.
130 See Stefaan Van den Bogaert, 'Bosman: The Genesis of European Sports Law' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010), p. 493.

without the payment of a transfer fee, even if his contract with his previous club had expired. The Court repeated the *effet utile* and the *uniform application argument* it had previously advanced in *Walrave and Koch*.[131] Furthermore, it rejected the *justification argument* according to which only Member State are able to rely on limitations justified on grounds of public policy, public security or public health, holding that there is nothing to preclude individuals from relying on those justification grounds.[132] In this way, it firmly established that Article 45 TFEU was applicable to the FIFA and UEFA football transfer rules, which constituted a disproportionate restriction on the free movement of workers.[133]

3.1.2.3 Angonese: horizontal application of the free movement of workers to discriminatory private conduct

Then came the *Angonese* judgment,[134] which expanded the 'personal scope' of the horizontal effect of Article 45 TFEU so as to cover not only associations with regulatory powers but also private individuals, but only in relation to measures discriminating on the basis of nationality (not restrictions). In particular, the case concerned Mr Angonese, a bilingual (Italian-German) Italian national, who was denied admission to a competition for a post with a private bank in Bolzano because of the fact that he did not possess a certificate of bilingualism which was issued only by the local authorities in Bolzano. The Court reiterated the *effet utile*, *uniform application* and *general wording* arguments it had previously presented in *Walrave and Koch*.[135] Furthermore, it repeated the *Defrenne* argument that provisions which are *mandatory in nature*, such as Article 45 TFEU, which lays down a fundamental freedom and which constitutes a specific expression of the general prohibition of discrimination under Article 18 TFEU, apply not only in the public but also in the private sphere.[136] On the basis of this reasoning, it ruled that the prohibition of discrimination on grounds of nationality laid down in Article 45 TFEU is applicable not only to public authorities but also to private persons, and actually to *all* private persons, not only the ones holding collective regulatory powers.

It has been argued that *Angonese* as well as *Defrenne* are characterised by a 'fundamental rights twist', in the sense that they both concern cases of the

131 Case C-415/93 *Bosman*, paras 82-84.
132 Ibid, paras 85-86.
133 Ibid, para 114.
134 Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, ECLI:EU:C:2000:296.
135 Ibid, paras 31-33.
136 Ibid, paras 30-36.

fundamental principle of non-discrimination in the employment sector.[137] This 'fundamental rights twist' is perhaps the reason why the Court was willing to accord an 'extended' horizontal effect to the non-discrimination principle so as to cover *all* private individuals, regardless of whether they exercise regulatory powers or not.[138] However, so far, this 'extended' horizontal effect concerns only discriminatory measures cases, not restrictions on the fundamental freedoms.

3.1.2.4 *Viking and Laval: horizontal application of the freedom of establishment and the free movement of services to trade unions*

In *Viking*[139] and *Laval*,[140] two landmark judgments in the field of social rights which sparked a contentious debate among scholars, [141] the Court

137 Sacha Prechal and Sybe De Vries, 'Seamless web of judicial protection in t he internal market?' (2009) 34 European Law Review 5, p. 17; Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, p. 665.

138 Sacha Prechal and Sybe De Vries, 'Seamless web of judicial protection in t he internal market?' (2009) 34 European Law Review 5, p. 17.

139 Case C-438/05 *Viking.*

140 Case C-341/05 *Laval.*

141 The academic literature on the far-reaching implications of Viking and Laval both in terms of the interplay between economic freedoms and social rights and in terms of the horizontal applicability of the freedoms is remarkably rich. See in particular: Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2014); Andreas Bücker and Wiebke Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms After Viking, Laval and Ruffert* (Nomos 2011); Niamh Nic Shuibhne, 'Settling Dust? Reflections on the Judgments in Viking and Laval' (2010) 21 *European Business Law Review* 681; Taco van Peijpe, 'Collective Labour Law after Viking, Laval, Rüffert, and Commission v. Luxembourg' (2009) 25 *International Journal of Comparative Labour Law and Industrial Relations* 81; Claire Kilpatrick, 'Has Polycentric Strike Law Arrived in the UK? After Laval, After Viking, After Demir?' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 293; Loïc Azoulai, 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization' (2008) 45 Common Market Law Review 1335; Jonas Malmberg and Tore Sigeman, 'Industrial actions and EU economic freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice' (2008) 45 *Common Market Law Review* 1115; Ulf Bernitz and Norbert Reich, 'Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No. 89/09 of 2 December 2009, Laval un Partneri Ltd. v. Svenska Bygggnadsarbetareförbundet et al.' (2011) 48 *Common Market Law Review* 603; Stephanie Reynolds, 'Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights' (2016) 53 *Common Market Law Review* 643; Tonia Novitz, 'The Internationally Recognized Right to Strike: A Past, Present and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 357; Gareth Davies, 'Freedom of Movement, Horizontal Effect, and Freedom of Contract' (2010) 20 *European Review of Private Law* 805; Kristina Lovén Seldén, 'Laval and Trade Union Cooperation: Views on the Mobilizing Potential of the Case' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 87; Claire Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted

recognised the horizontal effect of the freedom of establishment under Article 49 TFEU and the freedom to provide services under Article 56 TFEU in relation to trade unions exercising their right to take collective action. The Court in effect agreed with Advocates General Maduro and Mengozzi that under certain conditions private action may very well obstruct the proper functioning of the Internal Market.[142] Reasoning along the lines of the case law on the horizontal application of the free movement of workers, in *Viking* the Court referred to its well-established case law in the field of non-discrimination and free movement of workers[143] and emphasized that Article 49 TFEU may be relied on by a private undertaking against a trade union or an association of trade unions participating in the drawing up of agreements seeking to regulate paid work collectively.[144] Furthermore, it clarified that it does not follow from the case law that the horizontal application concerns only quasi-public organisations or associations exercising a regulatory task and having quasi-

workers' (2009) 34 *European Law Review* 844; Phil Syrpis and Tonia Novitz, 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33 *European Law Review* 411; Brian Bercusson, 'The Trade Union Movement and the European Union: Judgment Day' (2007) 13 *European Law Journal* 279; Damjan Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal* 406; Christian Joerges and Florian Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) 15 *European Law Journal* 1; Diamond Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 *European Law Journal* 303; Catherine Barnard, 'Viking and Laval: An Introduction' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 463; Mia Rönnmar, 'Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 493; Alan Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 525; Tonia Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 541; Silvana Sciarra, 'Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 563; Simon Deakin, 'Regulatory Competition after Laval' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 581; Anne Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126; Alicia Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms' (2008) 8 *Human Rights Law Review* 714; Catherine Barnard, 'Social dumping or dumping socialism?' (2008) 67 *The Cambridge Law Journal* 262; Phil Syrpis and Tonia Novitz, 'Economic and social rights in conflict: Political and judicial approaches to their reconciliation' (2008) 33 *European Law Review* 411.

142 *Opinion of Advocate General Poiares Maduro in Case C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:292, paras 35-38; *Opinion of Advocate General Mengozzi in Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, ECLI:EU:C:2007:291, paras 156-161.

143 Case 43-75 *Defrenne*, paras 31 and 39; Case 36-74 *Walrave and Koch*, para 18; Case C-415/93 *Bosman*, para 83; Joined cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL*, ECLI:EU:C:2000:199, para 47; Case C-281/98 *Angonese*, para 32; Case C-309/99 *Wouters and others*, para 120.

144 Case C-438/05 *Viking*, paras 60-61, 66.

legislative powers.[145] To the contrary, the Court emphasized that the prohibition on prejudicing a fundamental freedom applies to *all agreements intended to regulate paid labour collectively*.[146] In exercising their autonomous power to negotiate with employers the conditions of employment and pay of workers, the trade unions participated in the conclusion of agreements seeking to regulate paid work collectively.[147] The power of the trade unions to collectively regulate employment was deemed as a sufficient condition to bring their actions within the scope of the freedom of establishment and services.

In the same vein, in *Laval* the Court underlined that compliance with Article 56 TFEU is also required in the case of rules which are not public in nature but which are designed to *regulate collectively* the provision of services[148] and concluded that Article 56 TFEU could be relied on by a company against a trade union striking in order to protect the workers against possible social dumping.[149] Thus, Articles 49 and 56 TFEU can be invoked not only against the State (as broadly construed in *Marshall*[150] and *Foster*[151]), but also against private entities exercising *regulatory powers*.[152] Whether the application of the freedom of establishment and services to private bodies exercising collective regulatory powers amounts to a recognition of a horizontal applicability of the freedoms to purely private scenarios is a question that remains to be answered.

3.1.2.5 Dansk Supermarked, Van de Haar and Fra.bo: horizontal effect of the free movement of goods

In the field of free movement of goods, the situation is rather different. The judgment in *Dansk Supermarked*[153] is often cited as a one-off case where the Court implicitly recognised the *indirect* horizontal effect of Article 34 TFEU.[154] In particular, Imerco ordered a British manufacturer to manufucture certain dinning china with the intention to sell them exclusively to its shareholder.

145 Ibid, para 64.
146 Ibid, para 58.
147 Ibid, para 65.
148 Case C-341/05 *Laval*, para 98.
149 Ibid, para 99.
150 Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84, para 49.
151 Case C-188/89 *A. Foster and others v British Gas plc.*, ECLI:EU:C:1990:313, para 17.
152 Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2011), p. 799.
153 Case 58/80 *Dansk Supermarked A/S v A/S Imerco*, ECLI:EU:C:1981:17.
154 Arthur Hartkamp, Carla Sieburgh and Wouter Devroe, *Cases, Materials and Text on European Law and Private Law* (Hart Publishing 2017), p. 174; Stefaan Van den Bogaert, 'Horizontality: The Court Attacks?' in Barnard and Scott (eds), *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing 2002), p. 130 and the literature cited in footnote 35.

The agreement prohibited the exportation of any item in Denmark. Notwithstanding this prohibition, Dansk Supermarked imported some of the items into Denmark and Imerco argued that Dansk Supermarked had infringed the Danish law on unfair competition. Dansk Supermarked invoked the principle of mutual recognition enshrined in Article 34 TFEU as a defence and the Court indeed interpreted the pertinent Danish legislation in light of Article 34 TFEU, ruling that

> '[…] it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods. It follows that an agreement involving a prohibition on the importation into a Member State of goods lawfully marketed in another Member State may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice'.[155]

However, this judgment has not been cited in subsequent case law and therefore it is questioned whether it is still good law.[156]

To the contrary, in *Van de Haar*,[157] which concerned the sale of tobacco products to persons other than resellers at prices lower than those appearing on the excise label, the Court excluded the application of Article 34 TFEU to private agreements, advancing the well-known argument according to which the conduct of private undertakings is regulated by the competition law provisions whereas the conduct of public authorities is regulated by the free movement provisions. In particular, the Court held that Article 101 TFEU belongs to the rules on competition which are addressed to undertakings and association of undertakings and which are intended to maintain effective competition in the common market.[158] On the other hand, Article 34 TFEU belongs to the rules which seek to ensure the free movement of goods and, to that end, to eliminate measures taken by Member States which might in any way impede such free movement.[159] In the same vein, in *Vlaamse Reisbureaus*,[160] the Court held that Article 34 TFEU concerns only public measures and not the conduct of undertakings.[161]

155 Case 58/80 *Dansk Supermarked A/S v A/S Imerco*, para 17.
156 Stefaan Van den Bogaert, 'Horizontality: The Court Attacks?' in Barnard and Scott (eds), *The Law of the Single European Market – Unpacking the Premises* (Hart Publishing 2002), p. 131.
157 Joined cases 177 and 178/82 *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV,* ECLI:EU:C:1984:144.
158 Ibid, para 11.
159 Ibid, para 12.
160 Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten,* ECLI:EU:C:1987:418.
161 Ibid, para 30.

However, in 2012 came the *Fra.bo* judgment,[162] which is regarded as recognising the horizontal effect of the free movement of goods, albeit only in relation to private-law bodies entrusted with standardisation and certification activities. The Court ruled that a private-law body in charge of drawing up technical standards for products used in the drinking water supply sector and of cerifying products on the basis of these standards, is subject to the free movement of goods in the light of the legislative and regulatory context in which this body operates.[163] The underlying reason why the Court ruled in favour of the horizontal application of Article 34 TFEU *in casu* was that

> 'a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings'.[164]

3.1.2.6 *AMS and Egenberger: horizontal application of the Charter of Fundamental Rights*

The question of horizontality has been raised also in relation to the EU Charter of Fundamental Rights,[165] which with the entry into force of the Lisbon Treaty has been elevated into primary law with the same legally binding force as the Treaties. The starting point of every discussion about possible horizontality of the Charter is Article 51 (1) of the Charter which stipulates that

> 'The provisions of this Charter are addressed to *the institutions and bodies of the Union* with due regard for the principle of subsidiarity and to *the Member States* only when they are implementing Union law […]'.

The absence of any mention of private individuals has been interpreted as an argument against the horizontal applicability of the Charter.[166]

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162 Case C-171/11 *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein*, ECLI:EU:C:2012:453.

163 Ibid, para 26.

164 Ibid, para 31.

165 Some representative scholarly contributions regarding the horizontal application of the Charter include Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657; Dorota Leczykiewicz, Sas?a Sever Dorota Leczykiewicz, 'Horizontal application of the Charter of Fundamental Rights' (2013) 38 *European Law Review* 479; Sas?a Sever, 'Horizontal Effect and the Charter' (2014) 10 *Croatian Yearbook of European Law and Policy* 39; Schim Seifert, 'L'effet horizontal des droits fondamentaux' (2012) 48 *Revue Trimestrielle de Droit Européen* 801.

166 Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, p. 659 citing *Opinion of Advocate General Trstenjak in Case C-282/10 Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* ECLI:EU:C:2011:559, paras 80-88; Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights'

However, it has been counterargued that Article 51 (1) of the Charter does not explicitly exclude the horizontal effect of the Charter[167] and, furthermore, the Court, in *Defrenne,* expressly rejected a strict textual interpretation of the Treaties, ruling that

> 'the fact that certain provisions […] are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down'.[168]

By the same token, the Court could reject a similar strict textual interpretation of the Charter.

However, until very recently, the case law of the Court was pointing towards the opposite direction. In *AMS*,[169] the Court refused to accord horizontal effect to the Charter. In particular, the case concerned the wrongful implementation of Directive 2002/14 establishing a general framework for informing and consulting employees into the French legal order, and more specifically, the exclusion of certain categories of employees from the fundamental right to information and consultation. The Court reiterated its well-established case law that directives cannot be applied horizontally in a dispute between private individuals and found that, in the case at hand, *indirect effect* (duty of consistent/harmonious interpretation) was not possible, as it would entail a *contra legem* interpretation of the national legislation. Finally, the Court ruled that Article 27 of the Charter protecting the fundamental workers' right to information and consultation within the undertaking does not create a right specific enough to be directly invoked in a dispute between private individuals in order to assess the compliance with EU law of a national measure implementing the directive.[170]

Scholars seem unsatisfied with this judgment and have criticized the Court for not embarking on a much-needed interpretation of the content of Article 27 of the Charter and for not following an approach similar to the one adopted in *Mangold*[171] *and Kücükdeveci*,[172] in which the Court resorted to the use

(2012) 8 *European Constitutional Law Review* 375, footnote 11; Julianne Kokott and Christoph Sobotta, *The Charter of Fundamental Rights of the European Union after Lisbon* (EUI Working Papers, Academy of European Law (2010) No 2010/06, 2010), p. 14.

167 Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, p. 659.

168 Case 43-75 *Defrenne*, para 31.

169 Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others,* ECLI:EU:C:2014:2.

170 Ibid, paras 45-46, 51.

171 Case C-144/04 Werner Mangold v Rüdiger Helm, ECLI:EU:C:2005:709.

172 Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG.,* ECLI:EU:C:2010:21.

of the 'general principles' mechanism in order to grant direct horizontal effect to the principle of non-discrimination as enshrined in Article 21 of the Charter and given specific expression in Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[173]

In his recent Opinion regarding the horizontal application of Article 31 (2) of the Charter (in particular the right to an annual period of paid leave), Advocate General Bot expressed the view that in *AMS*, the Court implicitly recognised

> 'the *summa divisio* between the principles proclaimed by the Charter, the enforceability of which is limited and indirect, and the rights recognised by the Charter, which, fore their part, are fully and directly enforceable'.[174]

He furthermore considers that the recognition of horizontal effect of the Charter is not contrary to Article 51 of the Charter,

> 'since that recognition is intended to ensure that Member States, to which the provisions of the Charter apply, respect the fundamental rights recognised therein when implementing EU law'.[175]

In fact, he argues that Article 52 (5) of the Charter expressly permits the possibility of relying directly on a Charter provision recognising a 'principle' before a national court for the purpose of reviewing the legality of national measures implementing EU law.[176]

Very recently, in *Egenberger*,[177] the Court re-evaluated its position and recognised that not only Article 21 of the Charter but also Article 47 of the Charter are capable of being horizontally applicable in a dispute between private individuals. In particular, the case concerned a dispute between Ms

173 Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, p. 667 citing Eleni Frantziou, 'Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 *European Constitutional Law Review* 332; Nicole Lazzerini, 'Case C-176/12, Association de Médiation Sociale v. Union Locale des Syndicats CGT and Others, Judgment of the Court of Justice (Grand Chamber) of 15 January 2014' (2014) 51 *Common Market Law Review* 907; Cian C. Murphy, 'Using the EU Charter of Fundamental Rights Against Private Parties after Association De Médiation Sociale'' (2014) *European Human Rights Law Review* 170.

174 *Opinion of Advocate General Bot in Joined Cases C569/16 and C570/16 Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth* ECLI:EU:C:2018:337, para 70.

175 Ibid, para 77.

176 Ibid, para 68.

177 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI: EU:C:2018:257.

Vera Egenberger and Evangelisches Werk für Diakonie und Entwicklung eV concerning a claim by Ms Egenberger for compensation for discrimination on grounds of religion allegedly suffered by her in a recruitment procedure. The Court convincingly held that:

> 'a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law'.[178]

A careful analysis of this statement reveals that the Court advances first the *indirect* horizontal effect of Article 21 and 47 of the Charter, i.e. the duty of harmonious interpretation, and if this fails, national courts are obliged to resort to the *direct* horizontal effect of the provisions in question. Scholars have welcomed this jurisprudential development as affirming unequivocally that the rights to non-discrimination and to effective judicial protection enshired in Article 21 and 47 of the Charter respectively are capable of producing direct horizontal effect and as offering a methodologically comprehensive account of how such an interpretation can be reached.[179] Similarly, in the *IR v JQ* case, the Court emphasised that:

> 'a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law'.[180]

Rather, if it considers that it is impossible to interpret the national provision in a manner compatible with EU law, it is:

> 'under an obligation to provide […] the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to the principle prohibiting discrimination on grounds of religion or belief'.[181]

178 Ibid, para 82.

179 Eleni Frantziou, 'Mangold Recast? The ECJ's Flirtation with Drittwirkung in Egenberger' (*European Law Blog,* 24 April 2018) <http://europeanlawblog.eu/2018/04/24/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/> accessed 31-01-2019.

180 Case C-68/17 *IR v JQ,* ECLI:EU:C:2018:696, para 65.

181 Ibid, para 68.

Finally, in the recent *Bauer* case,[182] the Court went so far as to regcognise the horizontal effect of Article 31 (2) of the Chater. In particular, the Court held that:

> 'the right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature […]. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter'.[183]

Therefore, it concluded that:

> 'in the event that the referring court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 31(2) of the Charter, it will be required […] to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation'.[184]

3.1.3 Horizontal effect of Article 63 TFEU

So far, the Court has not dealt explicitly with the question of the horizontal application of Article 63 TFEU. It has been argued that the majority of the capital case law concerns the field of taxation, a quintessentially vertical issue, and this is why the thorny question of horizontality of the free movement of capital has not been answered until now (Chapter 2, Section 3.3.2).[185] Furthermore, in the field of golden shares, national governments acting in their capacity as shareholders have tried to escape from judicial scrutiny by arguing that the contested measure does not constitute a 'State measure' and therefore does not fall within the scope of the free movement of capital, an argument which implies that Member States oppose the idea of granting horizontal effect of Article 63 TFEU. However, until now, the Court has rejected this argument on the basis of a broad interpretation of the notion of 'State measure' covering all measures taken by public authorities even when acting in their private capacity. This has allowed the Court to treat these situations as vertical and to review the compatibility of those measures with the fundamental freedoms, without having to give an explicit answer to the question whether Article 63 TFEU is horizontally applicable. However, in light of the multilevel regulatory

182 Case C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871.

183 Ibid, Para 85.

184 Ibid, Para 91.

185 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 526.

regime governing corporate governance systems and financial operations (consisting of not only national legislation but also of *private* instruments, such as shareholders' agreements, articles of associations, codes of conduct etc.), it seems reasonable to predict that sooner or later the Court will be faced with the question whether Article 63 TFEU is horizontally applicable. Drawing from the evolution of the case law on the horizontal application of the other fundamental freedoms (especially workers, services and establishment), the Court might in fact be inclined to recognise the horizontal effect of the free movement of capital (at least in its indirect form). Although the fears regarding the possible intrusion into private autonomy resulting from such a recognition might be well-founded, it is argued here that granting horizontal effect to the free movement of capital can actually be regarded as a methodologically consistent approach aiming at advancing the *effectiveness* of EU law, especially in a field dominated by private corporations and financial institutions which can exercise quasi-regulatory powers over other market participants. Besides, it is suggested that the far-reaching effect of a possible recognition of horizontal effect of Article 63 TFEU can be thwarted by a contraction of the *material* scope of Article 63 TFEU (i.e through a more restrictive interpretation of the notion of 'capital restrictions').

3.1.3.1 The case law regarding the horizontal effect of Article 63 TFEU

In the *Eurobond* case,[186] the Commission initiated infringement proceedings against Belgium arguing that the prohibition contained in a Royal Decree on the acquisition by persons resident in Belgium of securities of a public loan issued in German marks constituted a restriction on the free movement of capital. The Royal Decree in question provided for a waiver of withholding tax on interest payable on the loan. This meant that if Belgian residents were able to subscribe to this loan, they could take advantage of the waiver in order to evade tax on the interest received. The prevention of tax evasion was according to the Belgian Government the underlying purpose of the contested measure. The Government started its defence by arguing that the contested measure had been taken by the Belgian State not in its capacity as a public authority, but *in its capacity as a private operator* and thus it did not fall within the scope of Article 63 TFEU. Essentially, the Belgian Government tried to escape from the scrutiny of the Court by arguing that it had acted as a *normal private market operator*. The Court dismissed the argument on the facts, as the waiver of withholding tax on interest payable on the loan *contained in the Royal Decree* constituted a *regulatory* measure, which only the State in its capacity as public authority was authorised to take.[187] This waiver together with the

186 Case C-478/98 *Commission v Belgium*.
187 Ibid, para 22.

prohibition imposed on Belgian residents was clearly adopted by the Belgian State acting as a public authority exercising its regulatory powers on matters of fiscal policy.[188] Consequently, the Court concluded that in the case at hand Article 63 TFEU was *vertically* applicable, as the contested measure had been adopted by the State in its capacity as a public authority. Thus, it did not deal explicitly with the question of horizontal applicability of the free movement of capital.

The question was brought up again some years later in the *Dutch Golden Shares* case.[189] The Court was called upon to appraise the compatibility with the free movement of capital of the golden shares that the Kingdom of the Netherlands had retained in the privatised companies Koninklijke KPN NV and TPG NV. The golden shares were maintained in the memorandum and the articles of association of the companies and had the form of special rights to approve certain decisions of the competent organs of companies in question. The Dutch Government argued that the shares at issue could not qualify as 'State measures', as it did not hold them in its capacity as a public authority, but instead *as a private shareholder without departing from normal national company law*.

Advocate General Maduro disagreed with the argument put forward by the Dutch Government. He expressed the view that the free movement rules imposed obligations on the Member States regardless of whether they acted in their capacity as public authorities or as entities under private law.[190] He further explained that the crucial factor rendering Member States subject to the free movement rules was not their *functional* capacity as a public authority, but their *organic* capacity as signatories of the Treaty. He therefore argued that the free movement of capital was applicable even when the public authorities were acting like any other shareholder under general company law. Legislation enabling some shareholders to obtain certain special rights in order to shield them from the market process could itself constitute a restriction on the free movement of capital.[191]

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188 Ibid, paras 24-25.

189 Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*.

190 *Opinion of Advocate General Maduro in Joined cases C-282/04 and C-283/04 Commission v The Netherlands (golden shares),* ECLI:EU:C:2006:234, para 22.

191 Ibid, para 24. See also *Opinion of Advocate General Maduro in Case C-446/03 Marks & Spencer,* ECLI:EU:C:2005:201, paras 37-40; *Opinion of Advocate General Maduro in Joined Cases C-94/04 and C-202/04 Federico Cipolla v Rosaria Fazari,* ECLI:EU:C:2006:76, paras 55-56;*Opinion of Advocate General Maduro in Joined Cases C-158/04 and C-159/04 Alfa Vita Vassilopoulos AE,* ECLI:EU:C:2006:212 , paras 54-55. For an interesting comment see Stefan Grundmann and Florian Möslein, 'Golden Shares – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects' (2001-2002) 4 EUREDIA 623.

The Court followed the Advocate's General suggestion to qualify the golden shares in question as 'State measures' despite the fact that they were adopted by the State in its private capacity as a shareholder. This way, it avoided again dealing with the question of horizontal application of Article 63 TFEU. It concluded that the contested golden shares could be classified as 'State measures', as the introduction of the special shares into the memorandum and the articles of association of KPN and TPG was the result of decisions taken by the Netherlands State in the course of the privatisation of the companies with a view to reserving a certain number of special rights under the companies' statutes.[192]

Equally, in the seminal *Volkswagen* case,[193] the Court refrained from explicitly ruling on the crucial question of horizontal direct effect of Article 63 TFEU. The provisions of the German Volkswagen Law concerning the capping of voting rights at 20% and the fixing of the blocking minority at 20%, and the right of the Federal State and the Land of Lower Saxony to appoint each two representatives to the supervisory board, were found to be contrary to Article 63 TFEU. In its defence Germany argued that the Volkswagen Law merely reproduced an agreement concluded in 1959 between the workers and the trade unions in the form of a private contract.[194] This agreement had deep historical roots and it served social and political considerations: the privatisation of Volkswagen relinquished any claims to ownership rights of the workers over the company and thus, the underlying purpose of the agreement was to secure the assurance of workers' protection against any large shareholder, which might gain control of the company.[195]

The Court rejected this argument on the grounds that the incorporation of an agreement into national legislation sufficed for it to be considered as a 'State measure' for the purposes of the free movement of capital.[196] It emphatically underlined that 'the exercise of legislative power by the national authorities duly authorised to that end is a manifestation *par excellence* of State power'.[197] Furthermore, the provisions of the contested law could no longer be amended solely at the will of the parties to the initial agreement. To the contrary, any modification required the adoption of new legislation in accordance with the procedure prescribed by the German Constitution.[198] Thus, the Court con-

192 Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*, para 22.
193 Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*.
194 Ibid, para 22.
195 Ibid.
196 Ibid, para 26.
197 Ibid, para 27.
198 Ibid, para 28.

cluded that the Volkswagen Law was a 'State measure' for the purposes of the free movement of capital.[199]

Nevertheless, in one of the first *Portuguese Golden Shares* case,[200] the Court seemed to rule out the view that even when the State acts as a normal *shareholder* Article 63 TFEU is still applicable. The case concerned national legislation granting to the Portuguese State and to other public shareholders golden shares in the company EDP – Energias de Portugal, the principal licensed distributor of electricity in Portugal and the undertaking acting as last resort supplier. The special rights at stake included (a) the right of veto in respect of certain resolutions of the general meeting of the company's shareholders; (b) the right to appoint a director, where the State has voted against the nominees successfully elected as directors, and (c) the exemption of the State from the voting ceiling of 5% laid down in relation to the casting of votes.

Despite the fact that the Portuguese State admittedly conceded that the contested golden shares qualified as 'State measures' and thus focused primarily on the absence of any hindrance to the market access of foreign investors, the Court in an *obiter dictum* in paragraph 62, implied that there might be no restriction on capital movements when the State acts as any other *shareholder* and introduces special rights which are available to *all* shareholders. In particular, it found that the right to appoint a director constituted a restriction on the free movement of capital since it departed from general company law and was laid down by a national legislative measure for the sole benefit of the public authorities.[201] However, it made a very interesting general statement recognising that such a right to appoint a director can be conferred by legislation as a right of a qualified minority on the condition that it is accessible to *all* shareholders and not reserved exclusively to the State.[202] It has been argued that this excerpt should be interpreted in the sense that if the Member State just makes use of the rights available for all shareholders, it may not impinge upon Article 63 TFEU.[203]

The aforementioned case law reveals that the qualification of a measure as 'State measure' is sometimes confused with the finding of a 'restriction'. In principle, these should be treated as two distinct steps in the legal reasoning,

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199 Ibid, para 29.
200 Case C-543/08 *Commission v Portugal (golden shares – EDP).*
201 Ibid, para 60.
202 Ibid, para 62.
203 Karsten Engsig Sørensen, 'Company Law as a Restriction to Free Movement – Examination of the Notion of 'Restriction' Using Company Law as the Frame of Reference' (2014) 11 *European Company Law* 178 at p. 186. See also the cited books Stefan Grundmann, *European Company Law – Organization, Finance and Capital Markets* (Intersentia 2012); Alan Dashwood and others, *Wyatt and Dashwood's European Union Law* (Hart Publishing 2011).

as the first one concerns primarily the *procedural* question whether the case concerns a vertical situation in which an individual can bring a claim against the State, whereas the latter concerns the *substantive* question whether the contested measure obstructs the free movement of capital. However, more often than not, in the capital case law these two distinct questions are treated as one. While this is perhaps understandable from a judicial economy perspective, it nevertheless reveals the strikingly broad interpretation of 'capital restrictions' adopted by the Court, which covers virtually all measures that qualify as 'State measures'.

3.1.3.2 Scholarly opinions on the horizontal effect of Article 63 TFEU

Scholars have expressed different views regarding the horizontal effect of Article 63 TFEU, both in relation to the question whether Article 63 TFEU applies when the State acts as a shareholder/market participant under private law ('extended vertical effect') and in relation to the *stricto sensu* horizontal effect of Article 63 TFEU covering acts of private parties.

Commenting on the *Volkswagen* case, Barnard argues that if the Court considered that Article 63 TFEU was horizontally applicable, it would have rejected Germany's argument that Volkswagen Law merely reproduced a private agreement on that ground.[204] In other words, it would have said that despite its private nature, this agreement is still caught by Article 63 TFEU. The fact that it chose to classify the measure at issue as a *State measure* is an indication of its unwillingness to grant horizontal direct effect to Article 63 TFEU.

Conversely, Rickford, who interprets the Court's rulings in *Viking* and *Laval* as endorsing the concept of horizontal effect of Articles 49 and 56 TFEU, contends that the same applies to capital as well.[205] Firstly, he espouses the 'extended vertical effect' of Article 63 TFEU, arguing that there is no doubt that the obligation not to obstruct capital movements binds Member States not only when they exercise their sovereign powers under public law, but also when they act *in their private capacity under private law*.[206] This view is reinforced by the principle of sincere cooperation enshrined in Article 4 (3) TFEU, according to which Member States are obliged to abstain from any measure that could

204 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 526.

205 Jonathan Rickford, 'Protectionism, Capital Freedom and the Internal Market' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism – New Challenges to European Integration* (Oxford University Press 2010), p. 77.

206 Jonathan Rickford, 'Free movement of capital and protectionism after Volkswagen and Viking Line' in Tison and Wymeersch (eds), *Perspectives in Company Law and Financial Regulation – Essays in Honour of Eddy Wymeersch* (Cambridge University Press 2009), p. 83-84.

jeopardise the attainment of the objectives of the Treaty.[207] He agrees with Advocate General Maduro in KPN where he famously stated that

> 'Member States are subject to the rules on free movement, of which they are clearly addressees, not on account of their *functional* capacity as public authority, but on account of their *organic* capacity as signatory of the Treaty'.[208]

Secondly, he ponders over the extent to which private persons are bound by the free movement of capital and, drawing from *Angonese*, he thinks that there is reason to believe that a discriminatory practice by a private individuals might be caught by Article 63 TFEU. At the same time, he draws a parallel with the *Viking* and *Laval* rulings on the basis of which he contends that, by the same token, the free movement of capital applies to private persons exercising regulatory powers.[209] In other words, he considers that where a private party is *entrusted with public functions* under private law, the free movement of capital applies because that private party acts *as a surrogate for the State*.[210] As an illustration of this configuration he refers to three examples of *private acts with a public purpose* which might be subject to the scrutiny of the free movement of capital: (1) the private law golden share in the UK Reuters Trust aiming at ensuring that control changes in the company will not jeopardise the editorial independence; (2) certain company law arrangements in Nordic countries offering voting shares with enhanced powers exercisable for the benefit not of the shareholders but of the company in the widest sense, including its continuity, the protection of its workers and the interests of the society as a whole; and (3) the powers of company boards in certain Member States to frustrate the success of takeover bids from companies with a less open structure than their own (a possibility which is stems from the fact that the 'board neutrality rule' under Article 9 of Directive 2004/25/EC on Takeovers[211] is *optional* under Article 12 thereof). He regards these private acts as subject to the Internal Market scrutiny because of the fact that they have a *public purpose* and the private parties exercising them act as *surrogate for the State*. However, he expresses doubts as to whether private parties engaging for purely private

207 Jonathan Rickford, 'Protectionism, Capital Freedom and the Internal Market' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism – New Challenges to European Integration* (Oxford University Press 2010), p. 78.

208 *Opinion of Advocate General Maduro in Joined cases C-282/04 and C-283/04 Commission v The Netherlands (golden shares)*, para 22.

209 Jonathan Rickford, 'Free movement of capital and protectionism after Volkswagen and Viking Line' in Tison and Wymeersch (eds), *Perspectives in Company Law and Financial Regulation – Essays in Honour of Eddy Wymeersch* (Cambridge University Press 2009), p. 86.

210 Ibid, p. 87.

211 'Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids' (2004) *OJ L 142, 30.4.2004, p. 12-23.*

purposes in conduct which falls short of discrimination are bound by the free movement of capital.[212]

Similarly, Ringe strongly advocates the 'extended vertical effect' of Article 63 TFEU, arguing that there is 'no escape into private law' for the Member States.[213] All State action, regardless of whether it is based on public authority or not, should be classified as 'State measure' and should therefore be subject to the free movement of capital.[214] He effectively agrees with Advocate General Maduro that 'Member States, when operating as a market participant, may be subject to constraints that do not apply to other market participants'[215] and he compares golden shares with the area of public procurement where the State, even when acting under private law, is subject to additional and more restrictive requirements of transparency and accountability which do not bind private parties.[216] Similarly, he considers that, despite the 'private market actor' test, the very existence of State aid rules reveals that the State is treated with more suspicion than private parties.

In relation to the *stricto sensu* horizontal effect of Article 63 TFEU, he draws from the settled case law in the other fields (*Bosman*, *Viking*, *Laval*, *Defrenne*, *Angonese*) and concludes that when powerful federations act in a quasi-regulatory manner, they are subject to the free movement rules because the effect of their action can be equalised with the effect of State legislation (the 'private governance' argument).[217] At the same time, because of its eminent status as a fundamental value, the principle of non-discrimination is applied horizontally even when there is no private governance.[218] In the context of the interaction between company law and free movement of capital, Ringe ponders the question whether a commercial company, which collectively decides for all investors, fulfils the 'private governance' test (which has traditionally be

212 Jonathan Rickford, 'Free movement of capital and protectionism after Volkswagen and Viking Line' in Tison and Wymeersch (eds), *Perspectives in Company Law and Financial Regulation – Essays in Honour of Eddy Wymeersch* (Cambridge University Press 2009), p. 87.

213 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 Cambridge Law Journal 378, p. 396. See also Wolf-Georg Ringe, 'Case C-112/05, Commission v. Germany ("VW law"), Judgment of the Grand Chamber of 23 October 2007, nyr.' (2008) 45 Common Market Law Review 37; Wolf-Georg Ringe, 'Is Volkswagen the New Centros? Free movement of Capital's Impact on Company Law' in Prentice and Reisberg (eds), *Corporate Finance Law in the UK and EU* (Oxford University Press 2011).

214 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 Cambridge Law Journal 378, p. 397-398

215 *Opinion of Advocate General Maduro in Joined cases C-282/04 and C-283/04 Commission v The Netherlands (golden shares)*, para 22.

216 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 Cambridge Law Journal 378, p. 397.

217 Ibid, p. 392.

218 Ibid, p. 392-393.

linked to the 'intermediary powers' of federations and trade unions issuing collective rules) and thus can be subject to the Treaty provisions on the free movement of capital.[219] In this respect, he estimates that decisions of a single company will not necessarily cross this threshold in the absence of any particular circumstances.[220]

By contrast, Andrea Biondi follows a more nuanced approach in relation to the 'extended vertical effect' of Article 63 TFEU.[221] He considers that the golden shares case law carries an element of risk in the sense that every action attributable to the State might be caught by capital scrutiny, leaving thus very limited leeway for Member States to organise their economic and industrial policies and to pursue public policy objectives.[222] Inspired by state aid law, he suggests that this risk might be prevented through the adoption of a 'private market investor' principle, whereby State conduct is immune from scrutiny if proven to be subject to the normal rules of the operation of the market.[223]

Carsten Gerner-Beuerle agrees with the other scholars that the vertical effect of Article 63 TFEU covers not only regulatory acts of the State (*ius imperii*), but also acts taken by the State in the course of its operation as a normal shareholder without *ius imperii*.[224] However, in the latter scenario, only measures discriminating between domestic and foreign investment should fall within the scope of the free movement of capital.[225] In relation to the horizontal application of Article 63 TFEU, he expresses his fear that if the Court accords horizontal effect to Article 63 TFEU, this could potentially open the door to an avalanche of claims challenging any type of Control Enhancing Mechanisms (Chapter 4, Section 2.2) contained in a company's Articles of Association as capital restrictions.[226] However, from a conceptual point of view, it is not self-evident why the free movement of capital should restrict the private autonomy of companies opting to include Control Enhancing Mechanisms in their Articles of Association.[227] Furthermore, while it is true that some Control Enhancing Mechanisms might have a deterrent effect on foreign investment, it cannot be excluded that a possible prohibition on them might

219 Ibid.
220 Ibid.
221 Andrea Biondi, 'When the State is the Owner – Some Further Comments on the Court of Justice 'Golden Shares' Strategy' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press 2010).
222 Ibid, p. 97.
223 Ibid, p. 101.
224 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97, p. 131.
225 Ibid, p. 131.
226 Ibid, p. 133.
227 Ibid, p. 134.

actually have the same deterrent effect on foreign investment.[228] Indeed, some investors might be discouraged by the existence of Control Enhancing Mechanisms in the undertaking concerned, while some others might be discouraged by their very absence. Moreover, convincing statistical evidence might be required in order to assess the deterrent effect private actions might have on cross-border investment and it is questionable whether the Court is well-equipped to devise and employ such evidence.[229] He therefore concludes that, apart from cases of flagrant discrimination like the one in *Angonese* and *Defrenne*, which however are of limited practical use in the capital case law, special rights included in the Articles of Association of a company without any involvement of public authorities should not fall within the scope of Article 63 TFEU.[230]

Finally, Harm Schepel believes that the Court will sooner or later recognise the horizontal direct effect of Article 63 TFEU, since the *Walrave* rationale of *effet utile and uniform application* apply *a fortiori* in the field of free movement of capital due to the nature of the rules defining the corporate governance systems of the Member States in the EU.[231] These rules include a transnational patchwork of private agreements, a number of codes, a plethora of different rules included in the Articles of Association of companies as well as diverging mandatory and optional rules of national company law.[232] However, it is argued that the recognition of horizontal effect of Article 63 TFEU together with the strikingly broad interpretation of capital restrictions will most likely place all company law structures deviating from the one share/one vote principle and from the principle of shareholders' primacy under judicial review for conformity with the free movement of capital.[233]

228 Ibid, p. 134.
229 Ibid, p. 135.
230 Ibid, p. 136.
231 Harm Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 European Law Journal 177.
232 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97, p. 193.
233 Harm Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 European Law Journal 177, p. 193.

3.1.3.3 *Suggested solution: Granting horizontal effect to Article 63 TFEU for reasons of legal consistency and equality between the State and private parties as market participants*

The aforementioned scholarly contributions provide a thorough analysis of all the legal, political and social dimensions of ascribing horizontal effect to Article 63 TFEU and reveal the intricate legal issues arising from a possible horizontality of the free movement of capital in view of the multifaceted nature of the various corporate governance arrangements that exist in the Member States. It is submitted here that, for reasons of legal consistency, if one accepts that when the State acts in its private capacity as a normal shareholder its actions are not caught by the free movement of capital by virtue of the private market operator test, then *a fortiori* it should be acknowledged that private parties are not at all bound by Article 63 TFEU. If, however, one accepts that the free movement of capital binds the State even when it acts as a shareholder, the same should apply to all private parties, especially when given their dominant position they exercise quasi-regulatory powers over other market participants. It is argued here that when acting in their private capacity as market participants, both the State and private parties should operate under equal conditions. The more restrictive requirements imposed on the State in the field of public procurement through the adoption of specific secondary legislation, cannot justifiably be extrapolated to the free movement of capital.

Given that the Court has established that State action (both as regulator and as shareholder) is always subject to the free movement of capital,[234] reasons of legal consistency and equality require that the same should apply to private operators, especially when they hold a dominant position in the market which gives them the power to impose conditions on other market participants (such as consumers, creditors, suppliers, other competitors etc.). Private parties are important market operators (in many instances much more important than the State) and their actions can have far-reaching economic and social implications. This is all the more true if one accepts the theory of horizontality of fundamental rights which regards private individuals as not existing in a legal vacuum, but as part of a solidaristic society in which individuals are responsible for their actions towards other individuals. To reject horizontality on the basis of the argument of self-regulation of the market and respect of private autonomy, although admittedly appealing, disregards firstly the shortcomings of self-regulation and secondly the fact that private autonomy is in any case regulated by national legislation.

234 See cases mentioned above in Chapter 4, Section 3.1.3.1, with the exception of the *obiter dictum* in the Portuguese case.

It should be noted, however, that the fears expressed by some scholars above are well-founded. Indeed, it seems that the golden shares case law amounts to a 'quality control' review of all company law arrangements and this could perhaps be exacerbated if the Court accords horizontal effect to Article 63 TFEU, as this would bring under judicial scrutiny *all* (both public and private) corporate governance instuments derogating from the *principle of proportionality between ownership and control* and the *principle of shareholders' primacy*. However, despite the undisputed merits of this argument, it is claimed here that this intrusive function of the free movement of capital can be thwarted by a more restrictive interpretation of the notion of 'capital restrictions', not by refusing to grant horizontal effect.

Indeed, horizontal effect relates more to the question whether private parties can judicially invoke their free movement rights against other private parties. This is different from the question whether the substantive content of the specific private act constitutes indeed a restriction on capital movements. Concerns over the potentially invasive effect of the free movement of capital for the corporate governance systems of Member States are more adequately adressed in the following steps of the legal reasoning, i.e. the one concerning whether the measure in question constitutes a capital restriction and the next one concerning possible justification of that restriction.

The same holds true for concerns relating to the potential interference with private autonomy and with the freedom to conduct a business under Article 16 of the Charter as a result of the horizontal application of the free movement provisions. In particular, in his interesting analysis, Rufat Babayev argues that if all free movement provisions were attributed full horizontal effect this would negate the freedom to conduct a business under Article 16 of the Charter.[235] To resolve the conflict between free movement rights and freedom to conduct a business, he puts forward a 'double proportionality' test under which the realisation of both must be presumed to constitute a legitimate objective.[236] On the basis of this test, he argues that, when there is no 'dominance' (i.e. when the private actors in question do not exert power the outcome of which other private actors are not able to avoid), the 'minor' interference with free movement rigths cannot justify the 'major' interference with the freedom to conduct a business.[237] Conversely, when there is 'dominance' (i.e when the private actors impose obligations which other private actors cannot avoid), the 'major' interference with the free movement rights can justify the 'minor'

235 Rufat Babayev, 'Private Autonomy at Union Level: On Article 16 CFREU and Free Movement Rights' (2016) 53 *Common Market Law Review* 979.
236 Ibid, p. 1000.
237 Ibid, p. 1004.

interference with the freedom to conduct a business.[238] It is submitted here that, in reality, this intellectually challenging analysis does not concern the limits imposed on horizontality by Article 16 of the Charter, but rather the balancing exercise at the justification/proportionality level between the fundamental freedoms of the Treaty and the freedom to conduct a business under Article 16 of the Charter. Thus, it proves the point being made here that concerns relating to possible interference with private autonomy are better addressed at a later stage, i.e. when examining the justification grounds and when conducting the proportionality assessment.

3.2 Public interest objectives as justification grounds in the golden shares case law

The Court has recognised that, in principle, the free movement of capital may be restricted by national measures justified on the grounds set out in Article 65 TFEU or by overriding reasons in the general interest to the extent that there is no harmonization at the EU level providing for measures necessary to ensure the protection of those interests.[239] Member States have also attempted to justify capital restrictions on the basis of other Treaty provisions, such as Article 106 (2) TFEU and Article 345 TFEU. In the absence of harmonisation, the Court, in principle, accepts that it is generally for the Member States to decide on the degree of protection they wish to afford to such legitimate interests and on the way in which such protection is to be achieved, while ensuring that they respect the principle of proportionality.[240] However, in all but one golden shares case (the *Belgian* case), the above-mentioned justification grounds have been rejected either due to a lack of evidence proving that the special shareholding in question is actually suitable and necessary in order to pursue the legitimate objective invoked or due to a failure to comply with the principle of legal certainty. This stems partly from the fundamental adjudicative principle of Internal Market case law that the four freedoms must be interpreted widely, whereas exceptions must be construed narrowly. But it also stems from the ideological premise that golden shares are protectionist measures and as such they are inherently incompatible with the Internal Market. The following section provides a typology of the justification grounds unsuccessfully that have been invoked by the Member States.

238 Ibid.
239 Joined cases C-463/04 and C-464/04 *Federconsumatori (AEM/Edison)*, para 39.
240 Ibid, para 40.

3.2.1 *The objective of safeguarding energy supplies in the event of a crisis as covered by public security under Article 65 (1) (b)* TFEU

One of the most frequently used legitimate objectives in the golden shares case law is the *safeguarding of energy supplies in the event of a crisis*.[241] This is because most of the privatised undertakings in which the Member States maintain special rights are active in the *energy sector*. For instance, in one of the early golden shares cases, the French Government argued that the prior administrative authorisation scheme for the acquisition of shares in privatised undertakings was essential in order to safeguard supplies of petroleum products in the event of a crisis, which, in *Campus Oil*,[242] had been recognised as an objective covered by the concept of *public security*.[243] In this regard, the Court recognised that the objective of safeguarding supplies of petroleum products fell undeniably within the ambit of a legitimate public interest which could justify an obstacle to the free movement of goods and the same could apply to obstacles to the free movement of capital, inasmuch as public security was also one of the justification grounds referred to in Article 65 (1) (b) TFEU.[244] Similarly, in the *Belgian golden shares* case, the Court accepted that the national opposition scheme in question could be justified on grounds of safeguarding energy supplies in the event of a crisis, which fell within the ambit of public security as a derogation ground under Article 65 (1) (b) TFEU.[245]

At the same time, however, the Court has clarified that public security as a derogation from the fundamental freedoms must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.[246] It can be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[247] Merely making a general statement

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241 The golden shares cases in which this justification ground was used include: Case C-367/98 *Commission v Portugal (golden shares)*, ECLI:EU:C:2002:326; Case C-483/99 *Commission v France (golden shares – Sociéte Nationale Elf-Aquitaine)*; Case C-503/99 *Commission v Belgium (golden shares)*; Case C-463/00 *Commission v Spain (golden shares)*; Case C-174/04 *Commission v Italy (golden shares)*; Case C-274/06 *Commission v Spain (golden shares)*; Case C-207/07 *Commission v Spain (golden shares in the energy sector)*; Case C-326/07 *Commission v Italy (golden shares)*; Case C-543/08 *Commission v Portugal (golden shares – EDP)*; Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*; Case C-244/11 *Commission v Greece (golden shares)*.

242 Case 72/83 *Campus Oil*, paras 34-35.

243 Case C-483/99 *Commission v France (golden shares – Sociéte Nationale Elf-Aquitaine)*, para 28.

244 Ibid, para 47.

245 Case C-503/99 *Commission v Belgium (golden shares)*, para 46.

246 Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*, para 83.

247 Case C-207/07 *Commission v Spain (golden shares in the energy sector)*, para 47; Case C-244/11 *Commission v Greece (golden shares)*, para 67.

asserting the relevance of the safequarding of enegy supplies as a legitimate objective is not sufficient to meet the required standard of proof.[248] Thus, in *Commission v Portugal (EDP – Energias de Portugal)* the Court rejected Portugal's argument that a State could legitimately equip itself with the means required to guarantee the fundamental interest of security of energy supplies even if there was no imminent threat.[249] In particular, the Portuguese government had argued that since the risk of serious threats to the security of energy supply could not be excluded and since such threats were by definition sudden and, in the majority of cases, unforeseeable, it was the duty of the Member State concerned to ensure that adequate mechanisms were put in place to enable it to react rapidly and effectively to guarantee that the security of that supply was not interrupted.[250] While acknowledging the merit of this argument, the Court nevertheless rejected the justification on the ground that the Portuguese government had done no more than raise the ground relating to the security of the energy supply, without stating clearly the exact reasons why it considered that the special rights at issue would make it possible to prevent such an interference with a fundamental interest of society.[251]

3.2.2 *The objective of ensuring availability of the telecommunications network in the event of a crisis as covered by public security under Article 65 (1) (b) TFEU*

By analogy, in the field of telecommunications, it has been accepted that the objective of ensuring availability of the telecommunications network in case of crisis, war or terrorism may constitute a ground of public security under Article 65 (1) (b) TFEU.[252]

3.2.3 *The objective of guaranteeing a service of general interest as an overriding reason in the public interest*

In the *Dutch golden shares* case, the Court acknowledged that the guarantee of a service of general interest, such as universal postal service, may constitute an overriding reason in the general interest capable of justifying an obstacle to the free movement of capital.[253] In *Federconsumatori*, the Court used a more generous formulation and held that

248 Niamh Nic Shuibhne and Marsela Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2015) 50 *Common Market Law Review* 965, p. 980.

249 Case C-543/08 *Commission v Portugal (golden shares – EDP)*, para 86.

250 Ibid, para 86.

251 Ibid, para 87.

252 Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*, para 72.

253 Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*, para 38 citing Joined cases C388/00 and C429/00 *Radiosistemi Srl v Prefetto di Genova*, ECLI:EU:C:2002:390, para 44.

'it is undeniable that certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services'.[254]

3.2.4 *Article 106 (2) TFEU*

In *Commission v Portugal (GALP Energia SGPS SA)*, the Portuguese governement argued that the right to veto certain important decisions of the company and the right to appoint the chairman of the Board of Directors were required under Article 106 (2) TFEU in order to enable GALP to carry out appropriately its tasks of managing services of general economic interest entrusted to it by the State.[255] The Court rejected this argument on the basis of the fact that the national provisions in question did not involve the granting of special or exclusive rights to GALP or the classification of GALP's activities as services of general economic interest, but were concerned with the lawfulness of attributing to the Portuguese State, as a shareholder of that company, special rights in connection with golden shares which it holds in the share capital of GALP.[256] Moreover, the Court emphasized that the Portuguese government had not provided any reasons why the performance of services of general economic interest would be jeopardised if the special rights in question were abolished.[257] Therefore, Article 106 (2) TFEU was not applicable *in casu*.[258] The same conclusion was reached in *Commission v Portugal (EDP)*.[259]

3.2.5 *Protection of workers and of minority shareholders*

In *Commission v Germany (Volkswagen I)*, which epitomizes the conflict between internal market and social objectives,[260] the Court accepted that the protection

254 Joined cases C-463/04 and C-464/04 *Federconsumatori (AEM/Edison)*, para 41.
255 Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*, para 80.
256 Ibid, para 93.
257 Ibid, para 94.
258 Ibid, para 95.
259 Case C-543/08 *Commission v Portugal (golden shares – EDP)*, paras 93-96. Similarly, in the recent *Commission v Hungary*, the Court found that a national monopoly of mobile payment services constitutes a restriction of the freedom to provide services that could not be justified on Article 106 (2) TFEU, as Hungary failed to prove why the performance of the particular task with which the service concerned was entrusted required the creation of a monopoly by granting exclusive rights to the undertaking in question. See Case C-171/17 *Commission v Hungary,* ECLI:EU:C:2018:881, para 93.
260 Jonathan Rickford, 'Protectionism, Capital Freedom and the Internal Market' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism – New Challenges to European Integration* (Oxford University Press 2010), p. 67.

of workers[261] and the protection of minority shareholders[262] could be regarded as overriding reasons in the public interests capable of justifying a restriction on capital movements.[263] However, it found that Germany had failed to explain how the special rights in question could protect the workers and the minority shareholders.[264]

3.2.6 Economic rule

The Court has confirmed the validity of the 'economic rule' in the golden shares case law and has ruled that economic considerations cannot justify a restriction on capital movements (see also the analysis in Chapter 3, section 3.2.4.2). In particular, in the first *Portuguese golden shares* case, the Portuguese Government claimed that its legislation, imposing a cap on foreign investment and an authorisation procedure for the acquisition of shares, was justified by overriding requirements of the general interest, since it was intended to safeguard its financial interests and the economic policy objectives pursued by the pre-privatisation process, such as choosing a strategic partner where the activities of the undertaking were to assume an international dimension, or strengthening the competitive structure of the market concerned, or moderniz-

261 Case 279/80 *Criminal proceedings against Alfred John Webb,* ECLI:EU:C:1981:314, para 19; Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media,* ECLI:EU:C:1991:323, paras 13–14; Case C-106/16 *Polbud – Wykonawstwo sp. z o.o.,* ECLI:EU:C:2017:804, para 54; Joined cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL,* ECLI:EU:C:1999:575, para 36; Case C-411/03 *SEVIC Systems AG,* ECLI:EU:C:2005:762, para 28; Case C-438/05 *Viking*, para 77; Case C-201/15 *AGET Iraklis*, para 73. Similarly, it has also been accepted that the encouragement of employment and recruitment which, being designed in particular to reduce unemployment, constitutes a legitimate aim of social policy. See, Case C-208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit,* ECLI:EU:C:2007:16, para 38; Case C-385/05 *Confédération générale du travail and Others,* ECLI:EU:C:2007:37, para 28; Case C-379/11 *Caves Krier Frères Sàrl v Directeur de l'Administration de l'emploi,* ECLI:EU:C:2012:798, para 51. Moreover, the protection of workers has been recognised as a justification ground alongside consumer protection in the Services Directive, see 'Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market' (2006) *OJ L 376, 27.12.2006, p. 36-68*, Recital 40. For a comprehensive analysis of the relevant case law, see Catherine Barnard, 'The Worker Protection Justification: Lessons from Consumer Law' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016), p. 106-130, in which the author distinguishes between 'worker welfare' and 'worker protection' (p. 110); see also Sophie Robin-Olivier, 'Bargaining in the shadow of free movement of capital' (2012) 8 *European Review of Contract Law* 167.

262 Case C-106/16 *Polbud*, para 54; Case C-411/03 *SEVIC Systems*, para 28; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC),* ECLI:EU:C:2002:632, para 92.

263 Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*, paras 72-80.

264 Ibid, paras 74-77.

ing and increasing the efficiency of means of production.[265] Not surprisingly, the Court replied that neither the *general financial interests* of a Member State nor the *economic policy objectives* could constitute adequate justification, as according to settled case law economic grounds can never serve as justification for obstacles prohibited by the Treaty.[266] In the same vein, in *Commission v Italy*, the Court held that an interest in generally strengthening the competitve structure of the market could not constitute valid justification for restrictions on the free movement of capital.[267] Finally, in *Commission v Portugal (Portugal Telecom SGPS SA)*, the Court found that an interest in ensuring the conditions of competition on a particular market and the need to prevent a possible disruption of the capital market could not constitute valid justifications for restrictions on the free movement of capital.[268]

3.3 Proportionality in the golden shares case law

The proportionality test applied by the Court in its case law on the fundamental freedoms consists of two separate steps: 1) whether the national measure in question is sutable/appropriate to achieve the legitimate objective pursued (*suitability test*); and 2) whether it is necessary to achieve this objective, i.e. whether there are other less restrictive means capable of attaining the objective in question (*necessity test*).[269] In order to prove that the contested national measure is compatible with the principle of proportionality, Member States are required to provide sufficient evidence capable of *substantiating* this conclusion.[270] In view of the general rule that exceptions from the fundamental freedoms are to be construed narrowly, the burden of proof of the Member States – although admittedly not strictly defined[271] – is in practice very high and often difficult to be met. The Court is usually strict in the review of the justifications invoked by the Member States and quite tough when assessing the proportionality of the contested measure.[272]

265 Case C-367/98 *Commission v Portugal (golden shares)*, para 31.
266 Ibid, para 52.
267 Case C-174/04 *Commission v Italy (golden shares)*, para 37.
268 Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*, paras 70-71.
269 In the majority of the cases, proportionality *stricto sensu*, as the third step in the traditional proportionality assessment stemming from German Constitutional Law, is not applied by the Court. See Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2011), p. 551.
270 Case C-542/09 *Commission v Netherlands (access to education)*, ECLI:EU:C:2012:346, para 82.
271 Niamh Nic Shuibhne and Marsela Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2015) 50 Common Market Law Review 965, p. 975.
272 Catherine Barnard, 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009), p. 299.

The golden shares case law provides a typical example of rigorousness in the application of the standard of proof in the proportionality assessment. The Court requires a high degree of evidence in order to establish the legal claim that the contested special rights are justified and proportionate to the objective pursued. The intensity of the judicial review comes as no surprise as it reflects the underlying rationale that golden shares are inherently incompatible with free movement of capital and it confirms the generally stringent jurisprudential approach to proportionality in Internal Market litigation. What is more interesting, however, is the additional step that emerges from the proportionality assessment of golden shares and characterises the capital case law in general. This additional step examines the compatibility with the principle of *legal certainty* and it is governed by a *procedural* rather than substantive rationality.

Procedural elements of proportionality such as *policy coherence*, *consistency* and *transparency* are discerned in other fields of Internal Market case law, primarily the ones touching upon morally contientious issues. Floris de Witte argues that in these fields the 'procedural proportionality' test is used to rationalize the process of national legislation and is more respectful of the normative policy aims of the Member States.[273] The 'procedural proportionality' test is juxtaposed with the 'substantive proportionality' test which seeks to rationalise the content of national legislation, leaving little normative leeway for Member States.[274] It is argued that for morally and ethically contentious questions, the 'procedural proportionality' test is better suited, as it respects the substance of national moral and ethical choices and focuses only on teasing out discriminatory or protectionist biases by assessing the normative coherence of national policies, the consistent application of sanctions and the legislative transparency.[275]

The main field in which the 'procedural proportionality' test has been widely applied is gambling, a field in which the process of market liberalisation has not been very successful and Member States continue to enjoy a wide margin of discretion in defining their regulatory framework. Stefaan Van den Bogaert and Armin Cuyvers argue that the relaxation of the internal market requirements in the gambling cases comes down to virtual dismantling.[276] In par-

273 Floris De Witte, 'Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law' (2013) 50 *Common Market Law Review* 1545, p. 1566.

274 Ibid.

275 Ibid, p. 1573.

276 Stefaan Van den Bogaert and Armin Cuyvers, '"Money for nothing": The case law of the EU Court of Justice on the regulation of gambling' (2011) 48 *Common Market Law Review* 1175, p. 1208; Alan Littler, 'Regulatory perspectives on the future of interactive gambling in the internal market' (2008) 33 *European Law Review* 211; Allan Littler, *Member States versus the European Union – The Regulation of Gambling* (Brill Academic Publishers 2011). See also the annotations: Marek Szydło, 'Continuing the judicial gambling saga in Berlington' (2016)

ticular, in its gambling case law,[277] the Court has granted a general margin of appreciation to the Member States in choosing how to regulate gambling services and has accepted a whole array of public interest objectives capable of justifying restrictions on the fundamental freedoms (such as the fight against gaming addiction, the reduction of gambling opportunities, the fight against crime, the general need to preserve public order, protection of consumers of games of chance against fraud on the part of operators etc). At the same time it has refined the *suitability* test so as to include the requirement of *consistency*: restrictions on gaming activities are suitable to achieve their public interest objectives only insofar as these objectives are being pursued 'in a consistent and systematic manner'.[278] The consistency test *prima facie* imposes an additional procedural requirement in the proportionality assessment: Member States must not take, facilitate or tolerate measures that would run counter to the achievement of the legitimate objectives pursued.[279] In practice, however,

53 *Common Market Law Review* 1089; Thomas Beukers, 'Case C-409/06, Winner Wetten GmbH v. Bu¨rgermeisterin der Stadt Bergheim, Judgment of the Court (Grand Chamber) of 8 September 2010, not yet reported' (2011) 48 *Common Market Law Review* 1985; Armin Cuyvers, 'Joined Cases C-338/04, C-359/04 and C-360/04, Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio (Placanica)' (2008) 45 *Common Market Law Review* 515; Vassilis Hatzopoulos, 'Case C-275/92, Her Majesty's Customs and Excise v. Gerhart and Jorg Schindler, [1994] ECR 1-1039' (1995) 32 *Common Market Law Review* 841.

277 Case C-275/92 *Schindler*; Case C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State),* ECLI:EU:C:1999:435; Case C-67/98 *Questore di Verona v Diego Zenatti,* ECLI:EU:C:1999:514; Case C-6/01 *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português,* ECLI:EU:C:2003:446; Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others,* ECLI:EU:C:2003:597; Case C-338/04 *Criminal proceedings against Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio,* ECLI:EU:C:2007:133; Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim,* ECLI:EU:C:2010:503; Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International,* ECLI:EU:C:2009:519; Case C-316/07 *Markus Stoß, Avalon Service-Online-Dienste GmbH and Olaf Amadeus Wilhelm Happel,* ECLI:EU:C:2010:504; Case C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein,* ECLI:EU:C:2010:505; Case C-64/08 *Criminal proceedings against Ernst Engelmann,* ECLI:EU:C:2010:506; Case C-203/08 *Sporting Exchange Ltd v Minister van Justitie,* ECLI:EU:C:2010:307; Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International,* ECLI:EU:C:2010:308; Case C-447/08 *Criminal proceedings against Otto Sjöberg and Anders Gerdin* ECLI:EU:C:2010:415; Case C-347/09 *Criminal proceedings against Jochen Dickinger and Franz Ömer,* ECLI:EU:C:2011:582; Case C-186/11 *Stanleybet International Ltd, William Hill Organization Ltd, William Hill plc, Sportingbet plc v Ipourgos Oikonomias kai Oikonomikon Ipourgos Politismou,* ECLI:EU:C:2013:33; Case C-463/13 *Stanley International Betting and Stanleybet Malta,* ECLI:EU:C:2015:25; Case C-98/14 *Berlington Hungary Tanácsadó és Szolgáltató kft and Others v Magyar Állam,* ECLI:EU:C:2015:386; Case C-336/14 *Criminal proceedings against Sebat Ince,* ECLI:EU:C:2016:72; Case C-375/14 *Criminal proceedings against Rosanna Laezza,* ECLI:EU:C:2016:60; Case C-3/17 *Sporting Odds Limited v Nemzeti Adó- és Vámhivatal Központi Irányítása,* ECLI:EU:C:2018:130 (Court of Justice).

278 Case C-169/07 *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung and Oberösterreichische Landesregierung,* ECLI:EU:C:2009:141, para 55; Case C-42/07 *Liga Portuguesa*, para 61.

279 European Commission, *Commission Staff Working Document: Online gambling in the Internal Market* (SWD(2012) 345 final, 2012), p. 35.

the *consistency* test means that if the legitimate objectives are pursued in a 'consistent and systematic manner', the national regulatory framework on gambling will generally pass the proportionality assssement, without really examining the substantive content of the legislation in question and without really applying the suitability and necessity test as applied in other fields of Internal Market litigation. This is all the more true when considering that the *necessity* requirement plays virtually no role in assessing the regulation of gambling services.[280] Member States have a sufficient degree of latitude to set the level of protection desired according to the national scale of values and it is up to them 'to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited'.[281] Overall, it has been argued that *consistency* makes restrictions more easily acceptable: a measure as restrictive as a public monopoly, which however forms part of a *consistent* policy, is easier to justify than a far less restrictive licensing requirement fraught with inconsistencies.[282]

Floris de Witte argues that this 'light-touch proportionality review' in the gambling case law offers a perfect example of how free movement should operate in areas which fall within the competence of the Member States.[283] At the same time, however, he notes that, below the surface, Member States are primarily concerned with the economic imperative of maximising tax revenues,[284] but – because of the rule that economic objectives cannot jutify restriction on the fundamental freedoms – they invoke social, moral and cultural values as justification grounds for their restrictive regulatory choices.[285] The Court, in applying the requirement of *coherence* and *consistency* of the national gambling policy in the proportionality assessment, holds Member States *accountable for their own regulatory framework* on gambling services.[286] In this way, the Court not only respects the regulatory choices of the Member States (ranging from national monopolies to complete liberalisation), but it also enforces the domestic normative aspirations *against*

280 Stefaan Van den Bogaert and Armin Cuyvers, '"Money for nothing": The case law of the EU Court of Justice on the regulation of gambling' (2011) 48 Common Market Law Review 1175, p. 1207.

281 Case C-275/92 *Schindler*, para 61; Case C-124/97 *Läärä*, para 39; Case C-67/98 *Zenatti*, para 33; Case C-6/01 *Anomar*, para 87; Case C-243/01 *Gambelli*, para 63.

282 Gjermund Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 *Common Market Law Review* 1021, p. 1047.

283 Floris De Witte, 'The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU' (2017) 42 *European Law Review* 313, p. 332.

284 Des Laffey, Vincent Della Sala and Kathryn Laffey, 'Patriot games: the regulation of online gambling in the European Union' (2016) 23 *Journal of European Public Policy* 1425.

285 Floris De Witte, 'The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU' (2017) 42 European Law Review 313, p. 332.

286 Ibid, p. 336.

the Member States themselves, forcing them to take seriously the social, moral and cultural objectives they claim to pursue.[287] He concludes that from a constitutional perspective, this approach offers an interesting and convincing example of an adjudicative method that respects both the division of competences between the EU and its Member States and the specific regulatory and normative choices made on the national level.[288]

The 'procedural proportionality test' has also been described as 'good governance' model by Jotte Mulder who seeks to develop an adjudicative model capable of ensuring the 'social responsiveness' and 'social legitimacy' of EU free movement law.[289] Drawing from the case law of the Court in various fields, he distinguishes between three models of adjudication: 1) The *substantive efficiency model*, which examines the substantive content of a measure and its necessity (a representative example can be found the *Beer Purity* case[290]); 2) The *margin of appreciation model*, which grants a margin of discretion to the Member States when the restriction is considered to be 'sensitive', i.e. primarily when fundamental rights or fundamental values are being invoked in order to justify a restriction on the fundamental freedoms (such as the *Schmidberger* case[291]); 3) The *good governance model*, which reviews the procedural aspects of the contested measure, focusing on principles of transparency, coherence and consistency (for instance, the aforementioned gambling case law).[292]

Applying this theoretical framework in the *Volkswagen* case,[293] he argues that the judicial scrutiny of the Volkswagen law should have been based on principles of good governance (i.e. coherence and transparency of the decision making process, availability of judicial remedies, and broader coherence of the Germany policy) and not on substantive efficiency.[294] The application of the *good governance model* would not necessarily have led to a different outcome of the case, but it would have allowed diverging corporate governance models to co-exist in accordance with good governance standards, i.e. it would have respected *national regulatory diversity* while stimulating *EU procedural unity*.[295]

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287 Ibid, p. 336.
288 Ibid, p. 339.
289 Jotte Mulder, 'Responsive Adjudication and the 'Social Legitimacy' of the Internal Market' (2016) 22 *European Law Journal* 597, p. 599.
290 Case 178/84 *Commission v Germany (Beer Purity)*, ECLI:EU:C:1987:126.
291 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.
292 Jotte Mulder, 'Responsive Adjudication and the 'Social Legitimacy' of the Internal Market' (2016) 22 European Law Journal 597, p. 606-613.
293 Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*.
294 Jotte Mulder, 'Responsive Adjudication and the 'Social Legitimacy' of the Internal Market' (2016) 22 European Law Journal 597, p. 616.
295 Ibid, p. 616, 617.

The application of the good governance model in the golden shares case law is very interesting and indeed worthy of further consideration. A proportionality assessment based on the procedural standards of the legal instruments granting golden shares in privatised undertakings can guarantee an objective judicial review that respects national regulatory diversity in a sensitive field that is not harmonised at the EU level, whilst at the same time ensuring compliance with procedural requirements that create a *transparent* legal framework protecting the *legitimate expectations* of foreign investors and providing *effective judicial remedies* against arbitrary decisions of public authorities. The adoption of a *good governance adjudicative model* shifts the discussion away from politically and ideologically fraught questions (such as the conflict between liberal market economy and coordinated market economy, or the conflict between a corporate governance model that advances shareholders' primacy or one that promotes other stakeholders' interests) to procedural questions which can be objectively reviewed by the Court.

The judicial scrutiny of procedural requirements such as compliance with the principle of legal certainty, transparency, consistency of national policies and availability of effective judicial remedies falls undoubtedly within the competence of the Court and can effectively promote *procedural uniformity* in the EU, which can in turn significantly facilitate cross-border investment. In fact, it can be argued that the existence of procedural discrepancies and the lack of transparency often pose more obstacles to cross-border capital flows than the mere participation of the State in the shareholding of privatised undertakings. This is why the application of the *good governance model* in the proportionality assessment of the golden shares case law offers a better adjudicative approach, one that provides all the procedural guarantees necessary for the promotion of foreign investment, whilst at the same time respecting the discretion of the Member States in the field of corporate governance and promoting a 'pluralism of values' in the EU.[296]

The Court has indeed been responsive to concerns relating to compliance with procedural standards in order to incentivise and facilitate foreign investment and has developed an additional step in the proportionality assessment that examines the compatibility of the measure in question with the fundamental *principle of legal certainty*. This additional step reflects the broader discussion about the protection of *legitimate expectations* of foreign investors as part of the *Fair and Equitable Treatment* standard in international investment law.[297]

296 Niamh Nic Shuibhne, 'Margins of appreciation: national values, fundamental rights and EC free movement law' (2009) 34 *European Law Review* 230, p. 255.

297 Nicolas Angelet, *Fair and Equitable Treatment*, (Max Planck Encyclopedia of Public International Law, 2011); Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 *British Yearbook of International Law*

In EU law, the protection of legitimate expectations is usually framed as compliance with the *principle of legal certainty*. The Court has examined legal certainty as an additional step in the proportionality assessment in the *Beglian* golden shares case,[298] which is actually the only case where the Court found that the special rights that the Belgian government had retained in the undertakings concerned were justified by public interest objectives in accordance with the principle of proportionality. In particular, the contested Belgian legislation gave the Belgian government the right to oppose (a) any transfer of strategic assets of SNTC and Distrigaz and (b) certain management decisions regarded as contrary to the guidelines for the country's energy policy. The Court found that this 'opposition procedure' was justified by the objective of safeguarding supplies of petroleum products in the event of a crisis, and more importantly, it was in conformity with the principle of proportionality. In particular, the Court noted that the opposition procedure was predicated on the principle of respect for the *decision-making autonomy of the undertaking* concerned.[299] Moreover, the public authorities were obliged to adhere to *strict time limits* and the opposition regime was limited only to certain decisions concerning the *strategic assets* of the companies in question.[300] Finally, the responsible Minister could oppose only when there was a *threat* to the objectives of the energy policy and only on the condition that any such opposition was supported by a *formal statement of reasons* and could be the subject of an *effective review* by the courts.[301] Accordingly, the Court concluded that the opposition scheme was consistent with the principle of proportionality, since it was based on *objective criteria* which were *subject to judicial review*,[302] enabling thus Belgium to intervene with a view to ensuring compliance with the public service obligations incumbent on SNTC and Distrigaz, whilst at the same time observing the requirements of *legal certainty*.[303]

99; Barnali Choudhury, 'Evolution or Devolution? – Defining Fair and Equitable Treatment in International Investment Law' (2005) 6 *Journal of World Investment and Trade* 297; Rudolf Dolzer, 'Fair and Equitable Treatment – A Key Standard in Investment Treaties' (2005) 39 *The International Lawyer* 87; Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle' (2006) 21 *ICSID Review – Foreign Investment Law Journal* 1; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008).

298 Case C-503/99 *Commission v Belgium (golden shares)*.

299 Ibid, para 49.

300 Ibid, para 50.

301 Ibid, para 51.

302 See the analysis of Johannes Adolff, 'Turn of the Tide?: The "Golden Share" Judgments of the European Court of Justice and the Liberalization of the European Capital Markets' (2002) 3 *German Law Journal* 20, who concludes that if Member States take good care to identify exactly which aspects of the activities of an enterprise active in a vital sector such as defence or energy they need to control and if they devise a transparent legal framework, they can retain golden shares without disproportionately obstructing the free movement of capital.

303 Case C-503/99 *Commission v Belgium (golden shares)*, para 52.

The *Belgian* case offers a prime example of how the *principle of legal certainty* can operate in the golden shares case law so as to respect the regulatory autonomy of the Member States in the field of corporate governance and property ownership whilst at the same time applying procedural standards that can guarantee the protection of foreign investment. Ever since the *Belgian* case, the Court has attempted to apply the same standard of judicial review to most of the golden shares cases, but on no occasion was the restriction found to be justified. It is true that in some instances the Court might have been strict in the application of the standard of proof, requiring further (and often vaguely defined) evidence in order to prove that the special rights in question actually pursue the objective invoked by the government.[304] However, the fact still remains that in the majority of the golden shares cases the Court rejected the justification because of the rather general and imprecise manner in which the conditions were formulated, which, in turn, confered on the national authorities 'a latitude so discretionary in nature that it [could not] be regarded as proportionate to the objectives pursued'.[305] It is surprising that the Member States did not try to comply with the procedural requirements of legal certainty set out in the *Belgian* case or failed to prove compliance with these requirements.

Given the general application of the procedural proportionality test (based on the *Belgian* case) in the golden shares case law, it is surprising why the Court did not use the same standard of judicial review in the *Volkswagen* case. Indeed, the question as to why the Court decided to abandon the legal certain-

304 See, for instance Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*, paras 39-40, in which the Court, in a rather vague statement, held that the Dutch golden shares went beyond what was necessary in order to safeguard the solvency and continuity of the provider of the universal postal service, because of the fact that they were not limited to the company's activities as provider of a universal postal service. However, it should be noted that this was not the only reason why the Court rejected the invoked justification. It also found that the special rights in question were not based on any precise criterion and did not have to be backed by any statement of reasons, which made any effective judicial review impossible. See also Case C-174/04 *Commission v Italy (golden shares)*, para 40, in which the Court rejected the justification on the ground that the Italian Government had not explained why it was necessary for the shares of undertakings operating in the energy sector in Italy to be held by private shareholders or by public shareholders quoted on regulated financial markets for the undertakings concerned to be able to guarantee sufficient and uninterrupted supplies of electricity and gas in the Italian market.

305 Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*, paras 88-90; Case C-543/08 *Commission v Portugal (golden shares – EDP)*, paras 90-92; Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*, paras 75-77; Case C-244/11 *Commission v Greece (golden shares)*, paras 82-86; Case C-274/06 *Commission v Spain (golden shares)*, paras 50-52; Case C-207/07 *Commission v Spain (golden shares in the energy sector)*, paras 55-57; Case C-326/07 *Commission v Italy (golden shares)*, paras 66-72; Case C-463/00 *Commission v Spain (golden shares)*, paras 77-80; Case C-483/99 *Commission v France (golden shares – Sociéte Nationale Elf-Aquitaine)*, paras 50-52.

ty requirement in the *Volswagen* case has not been answered to date. The judicial reasoning is worthy of closer examination. The two justification grounds invoked by the German government (i.e. the protection of workers and the protection of minority shareholders) were rejected by the Court due to lack of evidence. In particular, the Court found that

> 'the Federal Republic of Germany [had] not shown why, in order to protect the general interests of minority shareholders, it [was] appropriate or necessary to maintain such a position for the benefit of the Federal and State authorities'[306]

and

> 'failed to explain, beyond setting out general considerations as to the risk that shareholders [might] put their personal interests before those of the workers, why the provisions of the VW Law criticised by the Commission [were] appropriate and necessary to preserve the jobs generated by Volkswagen's activity'.[307]

However, the crux of the matter is hidden in a general statement the Court made regarding the interests which a company is expected to serve. More precisely, the Court held that

> 'it cannot be ruled out that, in certain special circumstances, the Federal and State authorities in question may use their position in order to defend general interests which might be contrary to the economic interests of the company concerned, and therefore, contrary to the interests of its other shareholders'.[308]

This statement takes an ideological stance on perhaps the most controversial politico-economic question that a corporate governance system is supposed to resolve: whose interests should a corporation serve?

By ruling that the public interest objectives can be contrary to the economic objectives of the company and by equating the latter with the interests of its shareholders, the Court, driven by ideological considerations, implicitly promotes a corporate governance system governed by *shareholders' primacy* and the *principle of proportionality between ownership and control* with a view to liberalising the market for corporate control. However, as explained in Chapter 4, Section 3.2.4, the choice of corporate governance model is a fundamental political question, which depends on various socio-economic factors that differ significantly among Member States. The salience of the issue becomes apparent if one considers that the regulation of corporate control affects the most important aspects of a capitalist economy, influencing a nation's employment

306 Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*, para 78.
307 Ibid, para 80.
308 Ibid, para 79.

level, the conditions of work and production, as well as the distribution of wealth.[309] Whether corporate governance should be dominated by the *shareholders' primacy norm* or by the *stakeholders' primacy norm* is a sensitive national choice, which should be clearly distinguished from the objective of market integration pursued by the Treaties. Consequently, a judicially-driven convergence into a European corporate governance model governed by shareholders' primacy is legally and politically questionable. This relates to the general *problématique* of the legal structure of the free movement provisions, which sometimes fails to respect the vertical balance of competence between the EU and the Member States and does not ensure that the normative values underpinning the socio-economic European space are articulated through a political process that can legitimise them in a democratic way.[310]

Drawing from the *contextual* reading of the case law in relation to the other fundamental freedoms,[311] it is submitted here that, in light of the politically and economically contentious context of golden shares, the most appropriate adjudicative approach is the 'procedural proportionality' or 'good governance model'. Through this approach the Court can be more deferential towards national policy objectives in a field of law that falls outwith the legislative competences of the EU, whilst at the same time disapplying discriminatory measures or special shareholding that derogate from ordinary company law and grant an undue advantage to the Member States to the detriment of private investors. This 'procedural proportionality' or 'good governance model' is based upon the *principle of legal certainty* and includes the review of elements such as respect for the decision-making autonomy of the undertaking concerned, strict time limits, objective criteria, obligation to provide a formal statement of reasons when adopting certain decisions and availability of effective judicial remedies. The judicial review of these elements as conducted in the *Belgian* case has an important pedagogical value as it can be used as a guiding principle upon which Member States can structure their special shareholding in privatised undertakings in order to be compatible with the free movement of capital.

309 Benjamin Werner, 'National responses to the European Court of Justice case law on Golden Shares: the role of protective equivalents' (2016) 24 *Journal of European Public Policy* 989, at p. 993.

310 Floris De Witte, 'The constitutional quality of the free movement provisions: looking for context in the case law on Article 56 TFEU' (2017) 42 European Law Review 313, p. 337-339.

311 Ibid, where the author explores the constitutional implications of the freedom to provide services by examining the case law in the field of labour law, healthcare and gambling and he suggests that a *contextual* reading of the fundamental freedoms is necessary in order to ensure that that the Court remains sensitive to the distinct and diverse policy context that the free movement provisions touch upon.

3.4 The definition of 'capital restrictions' in the golden shares case law

The analysis above showed that in the golden shares case law the Court has left very limited room for the Member States to justify their special rights in privatised undertakings. In light of the unsuccessful invocation of the aforementioned derogation grounds and the high standard of proof required in the proportionality assessment, it is essential to go a step back in the judicial reasoning and to explore the precise contours of the scope of 'capital restrictions'.[312] This is because a more appropriate delineation of the notion of 'capital restrictions' can allow a better drawing of the dividing line between the competence of the EU and the Member States in the field of corporate governance and can accordingly give Member States sufficient room to exercise their regulatory autonomy to protect public interest objectives, within the contours of the Internal Market.

In particular, the golden shares case law, the Court has adopted the 'deterrent effect test', which leads to a strikingly broad interpretation of the notion of 'capital restrictions' encompassing *all* measures liable to deter/discourage foreign investors. This over-inclusive definition is reminiscent of the broad *Dassonville* formula[313] in the area of free movement of goods. Although the Court is notoriously known for not easily retreating from its previous case law, the *Keck* ruling[314] in the area of free movement of goods constitutes the prime example where the Court explicitly reconsidered the broad interpretation of 'measures having equivalent effect to a quantitative restriction' and introduced the concept of 'selling arrangements' in an attempt to restrict the scope of Article 34 TFEU.

The present section draws from the jurisprudential developments in the area of free movement of goods and investigates whether a concept similar to the *Keck* notion of 'selling arrangements' could or should be introduced in the free movement of capital in order to delimit the boundaries of Article 63 TFEU.[315] Such a concept could take the form of an 'investment arrangements'

312 It should be noted that this part constitutes a modified and extended version of the published journal article: Ilektra Antonaki, 'Keck in Capital? Redefining "Restrictions" in the "Golden Shares" Case Law' (2016) *Erasmus Law Review* 177.

313 Case 8-74 *Dassonville*, para 5: 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'.

314 Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard*, ECLI:EU:C:1993:905.

315 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 Cambridge Law Journal 378, p. 402; Anne Looijestijn-Clearie, 'All that glitters is not gold: European Court of Justice strikes down golden shares in two Dutch companies' (2007) 8 *European Business Organization Law Review* 429, p. 452; Florian Sanders, 'Case C-112/05, European Commission v. Federal Rebublic of Germany: The Volkswagen Case and Art. 56 EC – A

test,[316] whereby measures that do not derogate from ordinary company law and that respect equality between the State and private parties as market participants escape from the material scope of the free movement of capital and therefore cannot be regarded as 'capital restrictions'. The section is divided into four parts. The first part seeks to explore the evolution of the concept of restrictions in the free movement of goods through a brief overview of the relevant case law (section 3.4.1). The second part examines the transposition of the *Keck* ruling in the area of workers, services and establishment (section 3.4.2). The third part analyses the Court's negative reaction to the attempts of the Member States to invoke the *Keck* test in the golden shares case law (section 3.4.3). Finally, the fourth part attempts to put forward a novel legal test for the delimitation of the scope of 'capital restrictions' on the basis of which certain measures can escape from judicial scrutiny if they satisfy two conditions: first, they do not derogate from ordinary company law; and second, they respect the principle of equality between the State and private parties as market participants (section 3.4.4).

3.4.1 The concept of 'restrictions' in the free movement of goods

3.4.1.1 The pre-Keck case law on MEEQRs

The establishment and development of the EU's Internal Market has been to a large extent supported and promoted by the dynamics of negative integration. It was the Luxembourg Court that stepped in and took the lead in overcoming the political stagnation of the 1960s/1970s and facilitating the process of economic integration. With the two landmark decisions in *Dassonville*[317] and *Cassis de Dijon*,[318] the Court unleashed the powers of negative integration and inaugurated a new era, where any national rule capable of hindering, directly or indirectly, actually or potentially, intra-Community trade could be regarded as a 'measure having equivalent effect to a quantitative restriction'.[319]

The far-reaching consequences did not take too long to make themselves felt: in the aftermath of the two rulings, a wave of speculative national litigation mushroomed, calling for all sorts of indistinctly applicable national regulatory

Proper Result, Yet Also a Missed Opportunity?' (2007-2008) 14 Columbia Journal of European Law 359, p. 368.

316 Andrea Biondi, 'When the State is the Owner – Some Further Comments on the Court of Justice 'Golden Shares' Strategy' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press 2010), p. 96.

317 Case 8-74 *Dassonville*.

318 Case 120/78 *Cassis de Dijon*.

319 Case 8-74 *Dassonville*, p. 5.

requirements to be disapplied as contrary to the free movement provisions.[320] These legal actions against national rules regulating marketing and selling conditions were perceived as an intrusion into the domain of national regulatory autonomy and it was increasingly suggested that the Court should clarify and delineate the boundaries of Article 34 TFEU.[321] In the same vein, Advocate General Tesauro in *Hünermund* admitted that he had changed his mind in relation to his views in previous case law[322] and he opined that the all-inclusive *Dassonville* formula could not be construed as meaning that a potential reduction in imports caused solely and exclusively by a more general (and hypothetical) contraction of sales, could constitute an MEEQR.[323] Accordingly, he asserted that rules which regulated the manner in which a trading activity was carried out were in principle to be regarded as falling outside the scope of Article [34 TFEU], insofar as they did not intend to regulate trade itself and they were not liable to render market access less profitable (and thus indirectly

320 Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437. See for example Case 286/81 *Oosthoek's Uitgeversmaatschappij BV*, ECLI:EU:C:1982:438 concerning a Dutch rule prohibiting the offering of free gifts for sales promotion purposes; Case 155/80 *Summary proceedings agains Sergius Oebel*, ECLI:EU:C:1981:177 regarding a German prohibition on night-work in bakeries; *Opinion of Mr Advocate General Darmon in Case C-69/88 H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State*, ECLI:EU:C:1989:627 on a Dutch rule granting tax authorities the power to seize goods sold on instalment terms with reservation of title in case the purchasers were not able to repay their tax debts; Case C-145/88 *Torfaen Borough Council v B & Q plc.*, ECLI:EU:C:1989:593 on the British prohibition of Sunday trading; Case C-23/89 *Quietlynn Limited and Brian James Richards v Southend Borough Council*, ECLI:EU:C:1990:300 regarding the British legislation prohibiting the sale of lawful sex articles from unlicensed sex establishments; Case 382/87, *R. Buet*, [1989] ECR -01235 concerning a French prohibition on canvassing in connection with the sale of English-language teaching material; Case C-271/92 *Laboratoire de Prothèses Oculaires v Union Nationale des Syndicats d'Opticiens de France and Groupement d'Opticiens Lunetiers Détaillants and Syndicat des Opticiens Français Indépendants and Syndicat National des Adapteurs d'Optique de Contact*, ECLI:EU:C:1993:214 dealing with a provision in the French Code de la Santé Publique reserving solely to holders of an optician's certificate (Diplôme d' opticien-lunetier) the sale of optical appliances and corrective lenses; Case C-126/91 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH*, ECLI:EU:C:1993:191 on a German rule prohibiting advertisements using price comparisons (displaying the new price and comparing it with the old one so as to catch the eye).

321 Eric L. White, 'In Search Of The Limits To Article 30 Of The EEC Treaty' (1989) 26 *Common Market Law Review* 235; L.W. Gormley, 'Case 145/88, Torfaen Borough Council v. B&Q PLC (formerly B&Q Retail Ltd.), Preliminary reference under Art. 177 EEC by the Cwmbran Magistrates' Court on the interpretation of Arts. 30 & 36 EEC. Judgment of the Court of Justice of the European Communities of 23 November 1989' (1990) 27 *Common Market Law Review* 141; Anthony Arnull, 'What shall we do on Sunday?' (1991) 16 *European Law Review* 112; Kamiel Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) 28 *Common Market Law Review* 115; J. Steiner, 'Drawing the line: Uses and abuses of Article 30 EEC' (1992) 29 *Common Market Law Review* 749.

322 *Opinion of Advocate General Tesauro in Case C-292/92 Ruth Hünermund*, ECLI:EU:C:1993:863, para 26.

323 Ibid, para 25.

more difficult) for importers.[324] He believed that this approach was in line with the principle of mutual recognition established in *Cassis de Dijon* and did not in any way undermine its truly integrationist inspiration.[325] A different (i.e. more intrusive) interpretation of Article [34 TFEU] 'would ultimately render nugatory the Treaty provisions … or in any event devalue them'.[326]

3.4.1.2 The Keck ruling and the introduction of the concept of 'selling arrangements'

In 1993, with the *Keck* ruling, the Court introduced the 'selling arrangements' test in an effort to clarify the boundaries of the broad definition of MEEQR. The facts of the case are widely known. Mr Keck and Mr Mithouard, owners of a French supermarket, were prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss') contrary to the pertinent French legislation. In their defence, they argued that a prohibition on resale at a loss was contrary to the free movement of goods under Article [34 TFEU]. The Court was faced with a dilemma: to continue the line of case law advocating a broad interpretation of Article 34 TFEU or to reconsider its position in view of the fact that the contested measure had arguably no effect on inter-State trade. It chose to do the latter.

In particular, it explicitly expressed its intention to re-examine and clarify its case law in view of the increasing tendency of traders to invoke Article 34 TFEU as a means of challenging any rules whose effect was to limit their commercial freedom even where such rules were not aimed at products from other Member States.[327] Thus, it introduced the famous (or rather infamous) concept of 'selling arrangements'. According to the Court's reasoning, rules that restricted or prohibited certain selling arrangements were not such as to hinder directly or indirectly, actually or potentially trade between Member States as long as two conditions were fulfilled: (i) they applied to all relevant traders operating within the national territory; and (ii) they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[328] These 'selling arrangements' were excluded from the scope of Article 34 TFEU, which meant that the national measure at issue was permissible without there being a need to examine possible justification grounds.

324 Ibid.
325 Ibid.
326 Ibid, par 27.
327 Joined cases C-267/91 and C-268/91 *Keck and Mithouard*, para 14.
328 Ibid, para 16.

The exact content of the concept of 'selling arrangements' was revealed in subsequent case law: rules on shop opening hours,[329] rules requiring processed milk for infants be sold only in pharmacies[330] and certain restrictive rules on advertising[331] are some examples of the type of national regulatory provisions that were captured by the concept of 'selling arrangements' and were thus excluded from the scope of Article 34 TFEU. In general terms, rules relating to the place and time of sales as well as to the marketing of specific products were in principle considered to be caught by the *Keck*-formula.[332]

However, the somewhat artificial dichotomy between 'product requirement' and 'selling arrangements' rules proved rigid and artificial[333] and sparked an academic debate.[334] Lawrence Gormley noted that the exclusion of 'selling arrangements' from the scope of Article 34 TFEU would lead to a lack of judicial review of ostensibly innocent measures, which could however constitute

329 Joined cases C-401/92 and C-402/92 *Criminal proceedings against Tankstation 't Heukske vof and J. B. E. Boermans,* ECLI:EU:C:1994:220; Joined cases C-69/93 and C-258/93 *Punto Casa SpA v Sindaco del Comune di Capena and Comune di Capena and Promozioni Polivalenti Venete Soc. coop. arl (PPV) v Sindaco del Comune di Torri di Quartesolo and Comune di Torri di Quartesolo,* ECLI:EU:C:1994:226; Joined cases C 418/93 et al. *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco,* ECLI:EU:C:1996:242; Case C-483/12 *Pelckmans Turnhout NV v Walter Van Gastel Balen NV and Others,* ECLI:EU:C:2014:304.

330 Case C-391/92 *Commission v Greece (infant milk),* ECLI:EU:C:1995:199.

331 Case C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg,* ECLI:EU:C:1993:932; Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA,* ECLI:EU:C:1995:26; Joined cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB,* ECLI:EU:C:1997:344; Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP),* ECLI:EU:C:2001:135.

332 Case C-71/02 *Karner*, para 38.

333 Stefaan Van den Bogaert and Pieter Van Cleynenbreugel, 'Free Movement of Goods' in Pieter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin, Bruno De Witte, Alison McDonnell and Stefaan Van den Bogaert (eds), *The Law of the European Union, Fifth Edition* (Wolters Kluwer 2018), pp. 485-537, at p. 519.

334 The *Keck* judgment and its implications for the functioning of the internal market have been extensively analysed by legal scholars. See indicatively: Lawrence W. Gormley, 'Reasoning Renounced? The Remarkable Judgment in Keck & Mithouard?' (1994) 5 *European Business Law Review* 63; Miguel Poiares Maduro, 'Keck: The end? The beginning of the end? Or just the end of the beginning' (1994) 3 *Irish Journal of European Law* 30; Nicolas Bernard, 'Discrimination and Free Movement in E.C. Law' (1996) 45 *International and Comparative Law Quarterly* 82; Catherine Barnard, 'Fitting the remaining pieces into the goods and persons jigsaw?' (2001) 26 *European Law Review* 35; Alina Tryfonidou, 'Was Keck a Half-baked Solution After All?' (2007) 34 *Legal Issues of Economic Integration* 167; Ioannis Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration' (2010) 21 *European Business Law Review* 705; Catherine Barnard, 'What the Keck? Balancing the needs of the single market with state regulatory autonomy' (2012) 2 *European Journal of Consumer Law* 201; Stephen Weatherill, 'The Road to Ruin: 'Restrictions on Use' and the Circular Lifecycle of Article 34 TFEU' (2012) 2 *European Journal of Consumer Law* 359.

disguised restrictions on inter-State trade.[335] Stephen Weatherill, while recognising that the ruling excluded from the scope of the Treaty certain regulatory choices that do not damage the realisation of economies of scale, nevertheless considered that it had a 'disturbingly formalistic tone' and it was 'flawed by the absence of an adequate articulation of just why it was possible to conclude that no sufficient impact on trade between States was shown'.[336] He thus proposed a refined *Keck*-test that would allow Member States to apply national regulatory measures to imported goods as long as they would apply equally in law and in fact to domestic and foreign goods and they would not impose *direct* or *substantial* hindrance to market access.[337] The origin of this refined test can be traced back to the Advocate General Jacobs' opinion in *Leclerc-Siplec*,[338] where he expressed his famous objection to the *Keck*-inspired presumption of lawfulness of 'selling arrangements' and he proposed the adoption of a test based on '*substantial* restriction of market access' for determining whether non-discriminatory rules infringed Article 34 TFEU. In his highly cited and illustrative excerpt, he emphasised that

> 'If an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade. … If a Member State imposes a *substantial barrier* on access to the market for certain products … and a manufacturer of those products in another Member State suffers economic loss as a result, he will derive little consolation from the knowledge that a similar loss is sustained by his competitors in the Member State which imposes the restriction'.[339]

The *substantial barrier* test was also espoused by other Advocates General[340] and legal scholars as a criterion for establishing the existence of a 'measure having equivalent effect to a quantitative restriction'.[341] It was argued that

335 Lawrence W. Gormley, 'Two Years After Keck' (1996) 19 *Fordham International Law Journal* 866.

336 Stephen Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 *Common Market Law Review* 885.

337 Ibid, p. 903.

338 *Opinion of Advocate General Jacobs in Case C-412/93 Leclerc-Siplec*, ECLI:EU:C:1994:393.

339 Ibid, para 39.

340 *Opinion of Advocate General Stix- Hackl in Case C-322/01 DocMorris NV*, ECLI:EU:C:2003:147, para 78, where he underlined that 'The decisive factor should therefore be whether or not a national measure *significantly* impedes access to the market'. See also *Opinion of Advocate General Van Gerven in Case C-145/88 Torfaen*, ECLI:EU:C:1989:279, para 24, where he argued that there was no room for a *de minimis* test, because Article 34 TFEU already presupposes a *serious*, and therefore a *more than appreciable*, obstruction to trade between Member States.

341 Max S. Jansson and Harri Kalimo, 'De Minimis Meets "Market Access": Transformations in the Substance – and the Syntax- of EU Free Movement Law?' (2014) 51 *Common Market Law Review* 523. It is interesting to note that the authors of this article distinguish three substantive groups of *de minimis* thresholds: the magnitude (severity) of the restrictive effect, the probability of the restrictive effect and the causality between the measure and the restrictive effect. See also J. Steiner, 'Drawing the line: Uses and abuses of Article 30 EEC'

the case law offered room for *de minimis* considerations in free movement law, in the sense that 'minimal restrictive effects' did not affect market access, while several trade restrictions hindered *significantly* market access and thus impinged on Article 34 TFEU.[342] However, the position of the Court was less clear. Although it had ostensibly rejected the adoption of a *de minimis* test in the free movement assessment,[343] it effectively accepted a similar test by acknowledging that if the effect on market access was 'too uncertain or indirect'[344] or 'purely hypothetical'[345] then the contested measure did not infringe free movement provisions.[346] By contrast, measures which *significantly* impeded market access constitute 'measure having equivalent effect to a quantitative restriction' within the meaning of Article 34 TFEU.[347]

(1992) 29 Common Market Law Review 749; Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2017), p. 352; Helen Toner, 'Non-discriminatory obstacles to the exercise of Treaty Rights – Articles 39, 43, 49, and 18 EC' (2004) 23 *Yearbook of European Law* 275, p. 285. Conversely c.f. Stephen Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 Common Market Law Review 885, who refrains from describing the 'direct or substantial hindrance to market access' test as a *de minimis* threshold.

342 Max S. Jansson and Harri Kalimo, 'De Minimis Meets "Market Access": Transformations in the Substance – and the Syntax- of EU Free Movement Law?' (2014) 51 Common Market Law Review 523, p. 526.

343 Joined cases 177 and 178/82 *Van de Haar*, at 13; Case C-67/97, *Ditlev Bluhme*, [1998] ECR I-08033, para 20; Joined cases C-1/90 and C-176/90 *Aragonesa de Publicidad and Publivi´a v Departamento de Sanidad,* ECLI:EU:C:1991:327, para 24; Joined cases C-277/91, C-318/91 and C-319/91 *Ligur Carni Srl and Genova Carni Srl v Unità Sanitaria Locale n. XV di Genova and Ponente SpA v Unità Sanitaria Locale n. XIX di La Spezia and CO.GE.SE.MA Coop a r l,* ECLI:EU:C:1993:927, para 37.

344 Case C-69/88 *H. Krantz GmbH & Co. tegen Ontvanger der Directe Belastingen en Staat der Nederlanden,* ECLI:EU:C:1990:97, para 11; Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH,* ECLI:EU:C:2000:49, para 25 (in the field of free movement for workers). Conversely, in Case C-415/93 *Bosman,* ECLI:EU:C:1995:463, para 103 the Court found that the transfer rules at issue *directly* affected players access to the employment market in other Member States and were thus capable of impeding the freedom of movement for workers. Similarly, in Case C-384/93 *Alpine Investments BV v Minister van Financiën,* ECLI:EU:C:1995:126, the Court ruled that the prohibition of cold calling by telephone for financial services *directly* affected access to the market in services in the other Member States and was thus capable of hindering intra-Community trade in services.

345 Case C-299/95 *Friedrich Kremzow v Republik Österreich,* ECLI:EU:C:1997:254, para 16, where the Court interestingly ruled that whilst any deprivation of liberty may impede a person from exercising his right to free movement, a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of free movement provisions.

346 Stephen Weatherill, 'After *Keck*: Some Thoughts on How to Clarify the Clarification' (1996) 33 Common Market Law Review 885, p. 900; Dimitrios Doukas, 'Untying the market access knot: Advertising restrictions and the free movement of goods and services' (2007) 9 *Cambridge Yearbook of European Legal Studies* 177.

347 Case C-108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete,* ECLI:EU:C:2010:725, para 54. By the same token but in a different context, recently the Court found that the Spanish legislation prohibiting tobacco retailers from importing tobacco products and forcing

3.4.1.3 The post-Keck 'market access' test

Although the Court never overruled explicitly the *Keck*-test, progressively it clarified its content and its precise requirements. In particular, in subsequent case law the Court interpreted the two conditions contained in paragraph 16 of *Keck* as meaning that certain 'selling arrangements' could not escape the scrutiny of the free movement provisions if they were discriminatory or they imposed additional burdens on imported goods (in the sense of the 'dual burdens' that the principle of mutual recognition was intended to eliminate under the *Cassis de Dijon* judgment). Cases such as *Familiapress*,[348] *De Agostini*,[349] *Gourmet*[350] and *Alfa Vita*[351] signalled the transition from an approach based on a formalistic distinction between 'product rules' and 'selling arrangements' to a more straightforward test based on 'market access hindrance'.[352] In *Commission v Italy (trailers)*[353] and *Mickelsson and Roos*,[354] without departing from *Keck*, the Court seemed to focus more on a 'market access' test according to which rules restricting the *use* of products hinder the market access of foreign products and therefore constitute 'measures having equivalent effect to a quantitative restriction' prohibited under Article 34 TFEU.[355] Thus,

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them to procure their supplies from authorised wholesalers hindered the access of these products to the market. This was despite the contentions of the Commission and the Spanish Government that the legislation at issue had to be assessed in the light of Article 37 TFEU, since it concerned the operation of a monopoly of a commercial character and the restrictions on trade which are inherent in the existence of such a monopoly. See Case C-456/10 *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado,* ECLI:EU:C:2012:241, paras 21, 43.

348 Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag,* ECLI:EU:C:1997:325.

349 *Joined cases C-34/95, C-35/95 and C-36/95 De Agostini.*

350 Case C-405/98 *Gourmet*.

351 Joined cases C-158 & 159/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon,* ECLI:EU:C:2006:562, para 19.

352 For the notion of the market access, see Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 Common Market Law Review 437; Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) 11 *German Law Journal* 671; Catherine Barnard, 'Restricting Restrictions: Lessons for the EU from the US?' (2009) 68 *Cambridge Law Journal* 575; Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (non-)economic European constitution' (2004) 41 Common Market Law Review 743; Peter Oliver and Stefan Enchelmaier, 'Free movement of goods: Recent developments in the case law' (2007) 44 *Common Market Law Review* 674.

353 Case C-110/05 *Commission v Italy (trailers),* ECLI:EU:C:2009:66.

354 Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos,* ECLI:EU:C:2009:336.

355 For an academic discussion, see for instance Luca Prete, 'Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck' (2008) 35 *Legal Issues of Economic Integration* 133; Peter Pecho, 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05' (2009) 36 *Legal Issues of Economic Integration* 257; Pal Wenneras and Ketil Boe Moen, 'Selling Arrangements, Keeping Keck' (2010) 35 *European Law Review* 387; Peter Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?'

the Italian prohibition on motorcycles towing trailers and the Swedish prohibition on the use of personal watercraft on waters other than general navigable waterways were regarded as trade restrictions, which could however be justified on road safety[356] and environmental protection grounds.[357]

3.4.2 The application of Keck in the other freedoms (workers, services and establishment)

Despite the change of terminology and the adoption of the broader 'market access' test, in the area of free movement of goods the Court has never officially abandoned the *Keck*-test. In the field of workers and services, although the Court has not ruled out the possibility of using a *Keck*-inspired approach, in practice it has refrained from doing so given the fact that most of the contested measures have been not found to be comparable to selling arrangements. In particular, in relation to the free movement of workers (Article 45 TFEU), in *Bosman*,[358] the Court ruled that:

> 'although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in Keck and Mithouard were held to fall outside the ambit of Article 30 of the Treaty'.[359]

Similarly, in relation to the freedom to provide services (Article 56 TFEU), in *Alpine Investments*,[360] the Court found that the *Keck*-test could not be applied by analogy *in casu*, because:

> 'a prohibition such as that at issue is imposed by the Member State in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services but also offers made to potential recipients in another Member State. It

(2011) 33 *Fordhman International Law Journal* 1423; Gareth Davies, 'The Court's jurisprudence on free movement of goods: pragmatic presumptions, not philosophical principles' (2012) 2 *European Journal of Consumer Law* 25.

356 Case C-110/05 *Commission v Italy (trailers)*, para 69.

357 Case C-142/05 *Mickelsson and Roos*, para 36, provided that the competent national authorities designated within reasonable period waters other than general navigable waterways on which personal watercraft could be used.

358 Case C-415/93 *Bosman*.

359 Ibid, para 103.

360 Case C-384/93 *Alpine Investments*.

> therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services'.[361]

However, it seems that the Court has indirectly and tacitly accepted the transposition of a *Keck*-like approach to the freedom of establishment. More precisely, in the *Kornhaas* case,[362] the Court implicitly distinguished between (innocent) '*business-related rules*' and '*establishment-related rules*' (requiring justification).[363] The case concerned a company incorporated under English law, which carried out most of its business (thus had its 'centre of main interests') in Germany through a branch. The dispute arose between the liquidator of the company and its director regarding an action for reimbursement of payments, which the latter had made as a managing director of the debtor company after it had become insolvent. The Court, after ruling that the law applicable to the insolvency proceedings was the German law pursuant to Article 4(1) of Regulation No 1346/2000, found that the pertinent German provision on the personal liability of the managing directors did not infringe the freedom of establishment under Article 49 TFEU, since such a provision:

> 'in no way concerns the formation of a company in a given Member State or its subsequent establishment in another Member State, to the extent that that provision of national law is applicable only after that company has been formed, in connection with its business […]'.[364]

This ruling has been interpreted as departing from the liberal approach adopted in *Centros*[365] and introducing a distinction between company law and insolvency law for the purposes of assessing their compatibility with EU free movement law.[366] In particular, in *Centros*, the Court had opened up the market for incorporations by ruling that provisions of national company law which prohibit the incorporation of a company in a Member State in which the company does not conduct business were contrary to the freedom of establishment.[367] In the light of this ruling, German (and other) companies registered their offices in England in order to benefit from the liberal English company law regime, while maintaining their economic activities exclusively in Germany or in the other Member States of origin. The *Kornhaas* case con-

361 Ibid, para 38.
362 Case C-594/14 *Simona Kornhaas v Thomas Dithmar als Insolvenzverwalter über das Vermögen der Kornhaas Montage und Dienstleistung Ltd,* ECLI:EU:C:2015:806.
363 Wolf-Georg Ringe, 'Case Comment: Kornhaas and the challenge of applying Keck in establishment' (2017) 42 *European Law Review* 270.
364 Case C-594/14 *Kornhaas*, para 28.
365 Case C-212/97 *Centros Ltd. v Erhvervs-og Selskabbsstyrelsen,* ECLI:EU:C:1999:126.
366 Wolf-Georg Ringe, Kornhaas and the Limits of Corporate Establishment, https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/kornhaas-and-limits-corporate-establishment
367 Case C-212/97 *Centros*, para 39.

cerned the question whether such a company incorporated in England but operating exclusively in Germany was subject to German insolvency law and whether the latter constituted a restriction on the freedom of establishment. The Court ruled that the company was indeed subject to German insolvency law and that the national provision on the personal liability of the managing directors was not contrary to the freedom of establishment. The distinction between, on the one hand, rules of company concerning incorporation and establishment which can impose restrictions on the freedom of establishment and, on the other hand, rules of insolvency law concerning the business behaviour of the company which do not affect the freedom of establishment has been interpreted as reminiscent of the *Keck* doctrine.[368] Although the Court did not mention explicitly *Keck* in its judgment, it seems that the rationale behind this distinction was to create a category of 'business-related arrangements', which would fall outside the scope of the freedom of establishment.

The *Kornhaas* ruling received criticism from scholars arguing that:

> 'the scope of art. 49 TFEU (unlike art. 34 TFEU) does not differentiate but rather applies broadly to "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings" without there being room for a differentiated interpretation'.[369]

Although this criticism is certainly worthy of consideration, the Court, aware of the legal controversies of the case, tried to pre-empt the critiques by clarifying that the legal capacity of the debtor company is in no way called into question[370] and that the German provision is in fact applicable only from the time when the company must be considered to be insolvent or when its over-indebtedness is recognised in accordance with the applicable national law.[371] As the referring court rightly pointed out, the German provision in question does not govern the conditions in which a company established in accordance with the law of another EU State may install its administrative office in Germany, but only the legal consequences of such a decision and of wrong-

368 Wolf-Georg Ringe, 'Kornhaas and the Limits of Corporate Establishment' (*Oxfrod Business Law Blog*, 25 May 2016) <https://www.law.ox.ac.uk/business-law-blog/blog/2016/05/kornhaas-and-limits-corporate-establishment> accessed 31-01-2019.

369 Wolf-Georg Ringe, 'Case Comment: Kornhaas and the challenge of applying Keck in establishment' (2017) 42 European Law Review 270, p. 276.

370 Case C-594/14 *Kornhaas*, para 26.

371 Ibid, para 28.

ful conduct of its managing directors.[372] Therefore, the freedom of establishment is not affected.[373]

The refusal of the Court to qualify the German provision on the personal liability of the managing directors regarding payments that were made after the company became insolvent as a restriction on the freedom of establishment sends a strong signal that the Court is not willing to undertake a quality control of all company, insolvency, labour or tax law requirements of the Member States as this would be against not only the letter but also the spirit of the fundamental freedoms protected under the Treaties and the rationale of the whole project of market integration in the EU. The implicit transposition of the *Keck*-ruling in the area of establishment provides support and reinforces the argument that a similar approach should be adopted in the area of free movement of capital. As will be analysed below, the crucial factor that makes the transposition of *Keck* to the free movement of capital (and establishment) so imperative is that more often than not the national measures that are challenged as capital restrictions constitute regulatory requirements which *structure the market itself*, rather than imposing obstacles to the *market access* of foreign investors.

3.4.3 'Selling arrangements' in the golden shares case law

In the golden shares case law, the Member States have consistently expressed their strong opposition to the strikingly broad interpretation of 'capital restrictions', arguing that it essentially deprives them of their right to choose and determine the corporate governance regime that suits best to the structure of their economy and corresponds to the needs of their industrial policy. Among their various defences, some Member States attempted to draw a parallel between 'golden shares' and 'selling arrangements', arguing that a *Keck*-like approach should apply in relation to the special shareholding retained in privatised companies. They asked the Court to relativise its rigid legal reasoning in order to prevent a replication of the legal ramifications that we

372 Ibid, para 10.

373 Ibid, para 10. One could argue that the same approach could have been adopted in *AGET Iraklis* which concerned the Greek legislation imposing a ministerial authorisation requirement for a company wishing to effectuate a collective redundancies scheme. The Court could have said that the ministerial authorisation requirement does not affect the establishment, legal capacity or even the pursuing of business activities of the undertaking concerned and therefore cannot qualify as a restriction on the freedom of establishment. However, the Court held that the freedom of establishment entails the freedom to scale down or even give up an economic activity and therefore the legislation in question constitutes a significant interference with the freedom of an undertaking to take such a fundamental decision as the decision to effectuate collective redundancies. See Case C-201/15 *AGET Iraklis*, paras 53-55.

witnessed as a result of the over-extensive application of the free movement of goods in the aftermath of *Dassonville* and *Cassis de Dijon*. This argument has so far been invoked unsuccessfully five times: once by Spain,[374] once by the UK[375] and three times by Portugal.[376]

The first case where the argument that a *Keck*-like approach could be applied in the field of the free movement of capital concerned Britain's biggest airport operator, the British Airports Authority (BAA).[377] BAA was privatised in 1986 as part of the privatisation policy pursued by Margaret Thatcher. The privatisation process was governed by the Airports Act 1986. The UK Government retained control over the newly formed company that took over the functions of the previously state-owned enterprise by retaining a special shareholding. In particular, the Articles of Association of the privatised BAA provided for a rule that prevented the acquisition of more than 15 % of the voting shares in the company. Furthermore, they introduced a procedure, which empowered the UK Government to give consent to certain major operations of the company, such as disposal of assets, control of subsidiaries and winding-up. It is noteworthy that under the Airports Act 1986, the Articles of Association were approved by the Secretary of State and as such the rules at issue amounted to 'State measures', despite the fact that they were permitted by national company law.[378]

The Commission was of the opinion that although the provisions at issue applied without distinction, they could nevertheless *hinder* or *render less attractive* the exercise of the free movement rights of foreign investors.[379] In its response, the UK Government, after explaining that the existence of different classes of shares was consistent with national company law, put forward an inventive and eloquent argument: it invited the Court to interpret the contested special rights in the light of the ruling in *Keck and Mithouard*. The application of the *Keck*-formula would entail the exclusion of the contested special rights from the scope of capital restrictions under Article 63 TFEU. It reminded the Court of its own efforts to keep a tight rein on the speculative litigation that emerged in the field of goods after *Dassonville* and *Cassis de Dijon* by adopting a more moderate approach in *Keck and Mithouard*. It thus warned the Court that if the Commission's view prevailed, the negative implications of the broad definition of 'measures having equivalent effect to a quantitative restriction'

374 Case C-463/00 *Commission v Spain (golden shares)*.
375 Case C-98/01 *Commission v UK (golden shares)*.
376 Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*; Case C-543/08 *Commission v Portugal (golden shares – EDP)*; Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*.
377 Case C-98/01 *Commission v UK (golden shares)*.
378 Ibid, para 24.
379 Ibid, para 20.

would be replicated in the context of the free movement of capital.[380] It also added the criterion of *directness*, similar to the one that was used by the Court in the other freedoms, emphasising that the system of prior approval related to eventualities that were too *uncertain* or *indirect* to amount to a capital restriction.[381]

Furthermore, the UK Government contended that the measures at issue applied equally to foreign and domestic investors and did not restrict market access. Rules of private law such as the ones in the BAA's Articles of Association that *did not derogate from normal company law* and merely determined the characteristics of the special shareholding could not possibly amount to a restriction on market access.[382] It was persuasively argued that the Member States were entitled to engage in economic activities on the same basis as private market operators, within the framework of contracts governed by private law. As there was no secondary legislation on this particular matter, Community law could not impose on a company the obligation to be placed under market control or to attach to its shares the rights which all actual or potential investors might wish to see attached to them.[383] It was argued that if the UK special shareholding were open to challenge, this would mean that holders of ordinary shares could rely on the Treaty in order to renegotiate the rights attached to the shares they had bought.[384] In other words, ordinary shareholders would be allowed to convert their ordinary shares into special shares. However, this interpretation could not be accepted. Community law could not impose a specific model of corporate governance. This was – and still remains – a domain reserved for the national legislator.

In its reply, the Commission contended – rather obscurely – that the issue at hand was not the *manner* in which shares might be acquired or dealt with, but the *actual acquisition* of shares and thus the negation of a fundamental aspect of the free movement of capital.[385] It underlined that in *Alpine Investments*[386] and *Bosman*[387] the Court had refused to transpose the doctrine of 'selling arrangements' to the free movement of services and workers.[388] However, a careful reading of the judgments in *Alpine Investments* and *Bosman* would reveal that the Court did not reject the argument that the doctrine of 'selling arrangements' could *in principle* apply by analogy to the other

380 Ibid, para 28.
381 Ibid, para 36.
382 Ibid, para 29.
383 Ibid, para 31.
384 Ibid, para 35.
385 Ibid, para 34.
386 Case C-384/93 *Alpine Investments*, para 36-38.
387 Case C-415/93 *Bosman*, para 103.
388 Case C-98/01 *Commission v UK (golden shares)*, para 34.

freedoms; rather it ruled that the national measures *at issue* (i.e. prohibition of cold calling by telephone for financial services and the sporting rules on the transfer of players) were not comparable to the rules on 'selling arrangements' of goods, as they directly affected access to the market (for service providers and players respectively) in other Member States and thus were capable of hindering intra-Community trade and impeding freedom of movement for workers. But the fact remained that *in principle* the *Keck*-test could be transposed to the other freedoms.

The Court was faced with a unique opportunity to reconsider anew the application of the *Keck*-test in the free movement of capital. However, it did not do so. By contrast, it sided with the Commission and followed the well-beaten path of 'direct hindrance of market access'. Although *in principle* it did not exclude the possibility of developing a concept of 'selling arrangements' in the free movement of capital, it nevertheless rejected it on the facts, by stating that the measures at issue were not comparable to the rules concerning 'selling arrangements'. It reiterated the famous paragraph 16 in *Keck*, and without further substantiating its conclusion, the Court found that while the contested measures were not discriminatory, they nonetheless affected the position of a person acquiring a shareholding as such and were thus liable to deter investors from other Member States from making such investments and consequently affected their access to the market.[389]

In the same vein and without any addition to its legal reasoning, the Court dismissed the *Keck*-argument in *Commission v Spain*.[390] The case concerned a Spanish privatisation law which granted special government control in five strategic undertakings: Respol (petroleum and energy), Telefónica (telecommunications), Argentaria (banking), Tabacalera (tobacco) and Endesa (electricity). More specifically, the Spanish legislation provided for a system of prior administrative approval with respect to major corporate decisions relating to voluntary winding-up, demerger or merger of the undertaking, disposal of assets or shareholdings necessary for the attainment of the undertaking's object, a change in the undertaking's object etc. As was expected, the Commission invoked the ruling in *Eglise de Scientologie*[391] where it was held that a provision of national law which makes a direct foreign investment subject to prior authorisation constitutes a restriction on the free movement of capital,[392] as it causes the exercise of the free movement of capital to be

389 Ibid, para 47.
390 Case C-463/00 *Commission v Spain (golden shares)*.
391 Case C-54/99 *Association Eglise de scientologie de Paris*, para 14.
392 Case C-463/00 *Commission v Spain (golden shares)*, para 33.

subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory.[393]

The Spanish government counter-argued that the privatisation process was perfectly legal under national law,[394] that the system of prior approval applied without restriction on grounds of nationality[395] and that it should be regarded as compatible with EU law as a result of the application of the principle of neutrality with regard to the property ownership systems of the Member States under Article 345 TFEU.[396] In support of the Spanish Government, the UK – which had a particular interest in the outcome of the case as the ruling on its special shareholding in BAA was delivered on the same day – relied again on *Keck and Mithouard* and argued that the measure at issue did not restrict market access and thus did not infringe Article 63 TFEU.[397]

Using exactly the same wording, the Court repeated its ruling in *Commission v UK*[398] and found that the measures at issue did not have comparable effects to those of the rules that according to the *Keck*-formula qualified as 'selling arrangements'. Although non-discriminatory, the system of prior approval had a deterrent effect on foreign capital inflows and was thus regarded as affecting the access of foreign investors to the relevant Spanish market.[399] Similarly, in *Commission v Portugal I*,[400] the Portuguese Republic invited the Court to apply the logic underlying the judgment in *Keck*, as the case concerned non-discriminatory rules regarding the *management* of shareholdings in the company and not rules regarding the *acquisition* of those shareholdings. However, the Court rejected once again the application of the concept of 'selling arrangements' in the golden shares case law.

3.4.4 In search of a refined test for 'capital restrictions'

In order to develop an appropriate legal test for determining the scope of capital restrictions, it is first necessary to understand the logic behind the Court's rigorous interpretation of the free movement of capital in the golden

393 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, para 25.
394 Case C-463/00 *Commission v Spain (golden shares)*, para 39.
395 Ibid, para 55. Such an argument was of course rejected by the Court, since the free movement of capital goes beyond the mere elimination of unequal treatment on grounds of nationality as between operators on the financial markets and prohibits 'all restrictions on the movement of capital between Member States and between Member States and third countries'.
396 Ibid, para 41.
397 Ibid, para 58.
398 Case C-98/01 *Commission v UK (golden shares)*.
399 Ibid, para 61.
400 Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*.

shares case law. The underlying rationale of this interpretation is that golden shares, by their very nature, are inherently incompatible with EU law. This is a rather political argument which stems from the general ideological premise that State participation in the market should be limited and reflects a political choice favouring the model of *liberal market economy* as opposed to the model of *coordinated market economy* that allows the existence of corporate governance regimes with Control Enhancing Mechanisms (Chapter 4, Section 2.4). In the field of corporate governance, this view finds more concrete expression in the embracement of two principles, namely the *principle of proportionality between ownership and control* and the *principle of shareholders' primacy.*

Indeed, in the golden shares case law, the Court seems to endorse the *principle of proportionality between corporate ownership and control* (Chpater 4, Section 2.3), implying that any shareholder should in principle own the same fraction of cash flow rights and voting rights. Its legal reasoning starts from the premise that the *principle of proportionality between ownership and control* should be respected, and thus any structure or mechanism that derogates from this principle should be disapplied as it discourages investors from acquiring shares in the undertaking concerned. According to this reasoning, the State's interference in the management of the company through the vehicle of golden shares is capable of *depressing the value of the shares*, thus *reducing the attractiveness* of an investment in that company.[401] The reason is that the State might exercise its special rights in order to pursue public interest objectives, 'which might be contrary to the economic interests of the company'.[402]

The concerns relating to the 'depression of the share value' and the protection of 'the economic interests of the company' reveal that the Court implicitly adheres to *shareholders' primacy value* as the principal normative foundation upon which the free movement of capital should operate and on the basis of which national corporate governance regimes should be structured. In this way, it promotes a policy choice advancing the maximisation of shareholders' profit as the ultimate objective of a corporation. To the contrary, State participation in preferred holding is regarded as having a deterrent effect on foreign investment because it serves interests other than the interests of the share-

401 Ibid, para 54.

402 Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*, para 30. A similar view was expressed by Advocate General Maduro in *Federconsumatori*, where he opined that public ownership of shareholding does not reduce the attractiveness of investing in the company concerned, only insofar as the State respects the normal rules of operation of the market with a view to maximising its return on investment. *See* Opinion of *Advocate General Maduro in Joined cases C-463/04 and C-464/04 Federconsumatori and Others,* ECLI:EU:C:2006:524, paras 25-26. In this case, for the first time, a shareholders' association successfully challenged the golden shares maintained by the Italian Government in the company Azienda Elettrica Milanese SpA active in the gas and electricity sector.

holders. The Court seems to endorse the corporate governance school of thought that advocates *shareholders' primacy* as the ultimate objective of company law and seems to disregard the interests of other stakeholders such as employees, suppliers, creditors and ultimately the society as a whole.[403]

However, the maximisation of shareholders' profit is not the only consideration to be taken into account in the governance of a corporation.[404] In fact, it has rightly been pointed out that it is not a universal principle of company law that shareholders' powers must be exercised in the economic interest of the company (whatever that means) and even when such principle operates it is not the competence of the EU to ensure that it is upheld.[405] It has been argued that this legal reasoning of the Court is based on three assumptions, whose acceptance though is far from evident: it implies that, first, the interests of the company are those of the shareholders, secondly, the shareholders' interests are embodied in the share value[406] and, thirdly, the existence of golden shares diminishes the value of the share.[407] All three assumptions raise highly

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403 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97. See also Martha O'Brien, 'Case C-326/07, Commission of the European Communities v. Italian Republic, Judgment of the Court of Justice (Third Chamber) of 26 March 2009' (2010) 47 *Common Market Law Review* 245, p. 260, who criticises the Court for being 'very strict in its refusal to allow Member States to exercise control over ownership of shares, voting rights and management decision-making in private companies through golden share mechanisms'.

404 Andrea Biondi, 'When the State is the Owner – Some Further Comments on the Court of Justice 'Golden Shares' Strategy' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford University Press 2010), p. 102.

405 Jonathan Rickford, 'Protectionism, Capital Freedom and the Internal Market' in Bernitz and Ringe (eds), *Company Law and Economic Protectionism – New Challenges to European Integration* (Oxford University Press 2010), p. 66.

406 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97, p. 124.

407 However, this assumption is not empirically proven. In 2005, Oxera, authorised by the European Commission, provided an overview of the special rights retained by public authorities in privatised companies in the EU and an evaluation of their economic impact on the performance of affected companies. The Report examined six companies (Cimpor, Volkswagen, Repsol YPF, KPN, Portugal Telecom and BAA) and concluded that special rights held by public authorities tend to have a negative impact on the longer-term economic performance of EU privatised companies because four of the six companies examined tended to underperform relative to comparable companies not subject to special rights. However, the remaining two companies outperformed their comparators and, thus, this contradictory evidence was not consistent with the hypothesis that the impact of special rights is negative. Accordingly, Oxera concluded that: '… although there is some indication of a negative impact of special rights, the evidence obtained from the benchmarking analysis is disparate and does not allow any strong conclusions to be drawn. However, the results do not imply that special rights have no negative impact on companies' long-term performance'. *See*

controversial questions in the field of corporate governance and political economy regarding the role of a corporation in a society and the interests it should serve. In his insightful contribution, Harm Schepel argues that the golden shares case law so far has advanced the rule that corporations should be governed with a view to maximise shareholders' profit to such an extent that it has turned Article 63 TFEU into a 'Charter of Shareholder Rights'.[408] It has managed to elevate the *shareholders' primacy* principle to a constitutional norm underpinning capital liberalisation.[409]

The underlying narrative of the Court's reasoning is based on a utopian nostalgia for the traditional forms of capitalism. However, the transformations of modern economy have led to a high degree of 'financialisation', which is currently associated with economic stagnation, rising social inequalities and high levels of unemployment.[410] Furthermore, such a reading of the Treaty is open to question. Surely, the wording of Article 63 TFEU provides for the prohibition of 'all restrictions' on capital movements without any allusion to discrimination. However, this cannot be regarded as a *carte blanche* to abolish *all* national company law requirements that derogate from the *principle of proportionality between ownership and control* or that do not adhere completely to *shareholders' primacy* on the assumption that they render investment less attractive. The choice of corporate governance model is a fundamental political question, which depends on various socio-economic factors that differ significantly among Member States. Carsten Gerner-Beuerle is right in doubting whether the Court of Justice is the appropriate institution to decide upon sensitive political questions concerning the choice of national economic policy.[411] This essentially boils down to the observance of the fundamental principle of separation of powers in the EU polity. The Court has been on several occasions accused of engaging in judicial activism,[412] which causes

Oxera, *Special rights of public authorities in privatised EU companies: the microeconomic impact* (2005), p. 68.

408 Harm Schepel, 'Of Capitalist Nostalgia and Financialisation: Shareholder Primacy in the Court of Justice' in Joerges and Glinski (eds), *The European Crisis and the Transformation of Transnational Governance* (Hart Publishing 2014).

409 Ibid, para 144.

410 Ibid, para 152. On the highly topical issue of the interplay between capital liberalisation and social inequalities, see the recent bestseller of Thomas Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014).

411 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97, p. 125, especially in the light of the political controversies during the negotiations for the adoption of the European Takeover Directive.

412 The problem of securing respect for the rule of law by the Union itself and the debate about 'competence creep' by the Union institutions (including the Court of Justice in the exercise of its judicial functions) has been aptly addressed by the recent Editorial of the Common Market Law Review, wondering whether this is a Union that sacrifices its own rule of law on the altar of political expediency. *See* Editorial Comments, 'The Rule of Law in the Union,

confusion as to its role as the judicial institution of the EU. Although sometimes this might be an overstatement, the fact still remains that, under Article 19 TEU, the role of the Court is to ensure that in the interpretation and application of the Treaties, the 'law' is observed. Whether corporate governance should be dominated by the *shareholders' primacy norm* or by the *stakeholders' primacy norm* is a political question and should be clearly distinguished from the objective of market integration pursued by the Treaties.[413] It is doubtful whether the Court is the appropriate institution to design the corporate governance policy of the Member States. It is therefore argued that the rigorous interpretation of the free movement of capital, according to which all company law requirements derogating from the *principle of proportionality between ownership and control* and the *principle of shareholders' primacy* are incompatible with EU law, cannot be reconciled with the wording and the spirit of Article 63 TFEU and the discretion of the Member States in the field of corporate governance.

This by no means should be interpreted as leaving room for suspicious State interferences that could lead to serious market abuses and distortions of competition. The Court should not refrain from disapplying distinctly or indistinctly national measures that obstruct capital flows and undermine the process of financial integration. However, it should respect the division of competences between the EU and the Member States and the discretion of the Member States to determine the corporate governance regime of their national economy, and it should intervene only when the national choices seriously undermine the objectives of market integration either by *discriminating* against foreign investors or by *hindering the market access* of foreign investors *in derogation from ordinary company law*. Its prime objective should not be the maximisation of shareholders' profit, but the establishment of a well-functioning and integrated market economy, which respects the national policy choices as expressed through various mechanisms of national company law. This is why the question of whether the contested measure *derogates from domestic company law* has been a recurring theme in the golden shares case law and rightly so. It has been argued that it is the only criterion that can contribute to the development of a reasonable and coherent test to assess whether special shareholdings in privatised undertakings amounts to restrictions on capital movements.[414]

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the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems' (2016) 53 *Common Market Law Review* 597.

413 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97, p. 126.

414 Ibid, p. 108. However, the author admits that company law is a highly complex field of law with many different variations, exceptions and special provisions, making the determination of what complies with or derogates from ordinary company law a rather intricate and challenging exercise, at 138.

Indeed, the *derogation from ordinary company law* has been elevated into a predominant criterion determining the existence of a capital restriction. The Court has used this criterion in the golden shares case law in order to delineate the scope of the free movement of capital. For instance, in *Commission* v. *Portugal (I) (Portugal Telecom SGPS SA)*,[415] the Court found that the contested special shareholding amounted to a State measure liable to restrict the free movement of capital. The special rights at issue included, among others, a right to elect at least one-third of the total number of directors, including the chairman of the board of directors, a right to elect one or two of the members of the executive committee and an approval procedure for important decisions, such as the appropriation of net income of the year, alterations to the articles of association and increases in share capital, and relocation of its registered office. Although the preferred shares were introduced in the Articles of Association, the Court noted that these Articles were adopted not only immediately after the adoption of the decree-law authorising the creation of golden shares within Portugal Telecom, but in particular at a time when the Portuguese Republic had a majority holding in the company's share capital and thus exercised control over that company.[416] More importantly, as underlined by Advocate General Mengozzi, the creation of the golden shares in question *was not the result of a normal application of company law*, as they were not transferable, in derogation from the Portuguese Commercial Companies Code.[417] Therefore, in those circumstances, the Court regarded the introduction of golden shares in Portugal Telecom as a 'State measure' liable to restrict the free movement of capital. The Portuguese Government had departed from the ordinary provisions of company law in order to avail itself of a privileged position in the privatised telecommunications company.

Similarly, in *Commission v Portugal (GALP Energia SGPS SA)*,[418] the Court held that the right of the State to appoint the chairman of the Board of Directors in GALP Energia SGPS SA was not stemming from a normal application of company law, since the Portuguese Commercial Companies Code expressly precluded the right to appoint certain directors being attached to certain

415 Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA).*

416 Ibid, p. 53. Nevertheless, it should be noted that it is disputed whether the fact that a State makes use of its majority shareholding in order to introduce special rights in the Articles of Association – when this is allowed by national company law – is sufficient to qualify this act as a 'State measure'. Special rights are usually introduced by those in control, either in the initial phase of incorporation or after an amendment of the Articles in view of a planned divestiture. See Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97, p. 118.

417 *Opinion of Advocate General Mengozzi in Case C-171/08 Commission v. Portugal (I) (golden shares),* ECLI:EU:C:2010:412, para. 62.

418 Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA).*

categories of shares.[419] The national law at issue and GALP's Articles of Association *derogated from general company law* with the sole intention of benefitting the public authorities.[420] Consequently, the right of the State to appoint the chairman of GALP's Board of Directors was attributable to the Portuguese State and was thus falling within the scope of Article 63 TFEU.[421]

By contrast, in the *Commission v UK (BAA)* case, regrettably, the Court did not take into account the UK Government's claim that the contested provisions in the BAA's Articles of Association *did not derogate from normal company law* but merely determined the characteristics of the special shareholding and therefore they could not possibly amount to a restriction on market access of foreign investors.[422]

The application of the *derogation from ordinary company law criterion* was more complicated in *Commission v Germany (Volkswagen I)* case.[423] In particular, at stake were three provisions of the controversial Volkswagen Law: (1) the capping of the voting rights of every shareholder to 20% of Volkswagen's share capital; (2) the fixing of the blocking minority at 20% for the most important decisions of the general meeting of shareholders; and (3) the right of the Federal State and the Land of Lower Saxony each to appoint two representatives to the company's supervisory board.

Regarding the third provision, the finding that it derogated from ordinary company law was a rather straightforward exercise. The entitlement of the Federal State and the Land of Lower Saxony to appoint a total of four persons in the supervisory board of Volkswagen constituted a derogation from general company law, as under the latter they would have been entitled to appoint a maximum of three representatives.[424]

The other two provisions were examined together and it was found that *the combination of the two* constituted a restriction on the free movement of capital. More precisely, the capping of the voting rights of every shareholder to 20 % of the company's share capital *derogated from general company law*, since Volkswagen was a listed company and for that reason a ceiling on the voting rights could not normally be inserted into its Articles of Association.[425] The fixing of the blocking minority at 20% (and thus the required majority at 80%)

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419 Ibid, para 5.
420 Ibid, para 53.
421 Ibid, para 54.
422 Case C-98/01 *Commission v UK (golden shares)*, para 29.
423 Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*.
424 Ibid, para 60.
425 Ibid, para 41.

derogated form ordinary company law as the latter established a blocking minority of 25% (and thus required majority of 75%).[426] While it was true that general company law allowed the increase of the 75% percentage of required majority by the Articles of Association of a company,[427] the Court nevertheless emphasized that what was crucial was the *fact* that the Land of Lower Saxony held 20% of Volkswagen share capital.[428] In other words, the restriction came from a *combination* of *legislative provisions* granting certain privileges and the *factual situation* in which the Land of Lower Saxony was holding the required percentage of shareholding allowing it to benefit from those privileges.[429] Thus, the two provisions in question, *examined together* and *in combination with the factual situation*, enabled the Federal and State authorities to procure for themselves a blocking minority allowing them to oppose important resolutions on the basis of a reduced investment[430] and to limit the possibility for other shareholders to participate effectively in the management of the company.[431]

It is interesting to note that following the 2007 judgment, Germany repealed the provisions regarding the appointment of the representatives and the capping of voting rights, but maintained the provision on the lower blocking minority. The Commission brought again infringement proceedings against Germany for failure to comply with the 2007 judgment.[432] However, the Court dismissed the action, holding that the restriction on the free movement of capital did not result from the lower blocking minority examined in isolation, but from the *combination* of the latter with the capping of voting rights. Therefore, by repealing the provision of the Volkswagen Law relating to the appointment of representatives to the supervisory board and the provision relating to the cap on voting rights, Germany did fulfil the obligations that followed from the 2007 judgment. This way, it could be argued that the Court confirmed the validity of the *derogation from ordinary law criterion*, as from the three contested provisions, the lower blocking minority was the only one that was allowed, albeit as an exception, under general company law.

On the basis of the aforementioned considerations and taking into account the evolution of the interpretation of restrictions in the field of free movement

426 Ibid, para 44.
427 Ibid, para 45.
428 Ibid, para 48.
429 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 Cambridge Law Journal 378, p. 401.
430 Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*, para 51.
431 Ibid, para 52.
432 Case C-95/12 *Commission v Germany (golden shares – Volkswagen II)*. See also the annotation Florian Mo¨slein, 'Compliance with ECJ judgments vs. compatibility with EU law – Free movement of capital issues unresolved after the second ruling on the Volkswagen law: Commission v. Germany' (2015) 52 *Common Market Law Review* 801.

of goods, it is suggested here that a twofold test could be adopted in order to delineate in a more consistent manner the scope of capital restrictions:

Discrimination on grounds of nationality: Measures that discriminate between domestic and foreign investors (distinctly applicable measures) undeniably constitute restrictions on the free movement of capital, which can be justified only by the objectives provided for in the Treaty.

Derogation from ordinary company law: Measures that do not discriminate on grounds of nationality (indistinctly applicable measures) may be divided into two sub-categories:

(a) indistinctly applicable measures that (i) *do not derogate from ordinary company law* and (ii) *respect the principle of equality between the State and private parties as market participants without granting any privilege to the State* should be regarded as 'investment arrangements', which – just like the *Keck* 'selling arrangements' in the field of free movement of goods – fall outside the scope of Article 63 TFEU. These rules merely *structure* the market and the corporate governance regime of a Member State, without hindering foreign investment.

(b) indistinctly applicable measures that (i) *derogate from ordinary company law* and (ii) *are available only to the State (to the exclusion of private investors)* constitute restrictions on the free movement of capital prohibited under Article 63 TFEU. It can then be examined whether they can be justified by the Treaty-based derogation grounds or overriding reasons in the public interest in accordance with the principle of proportionality.

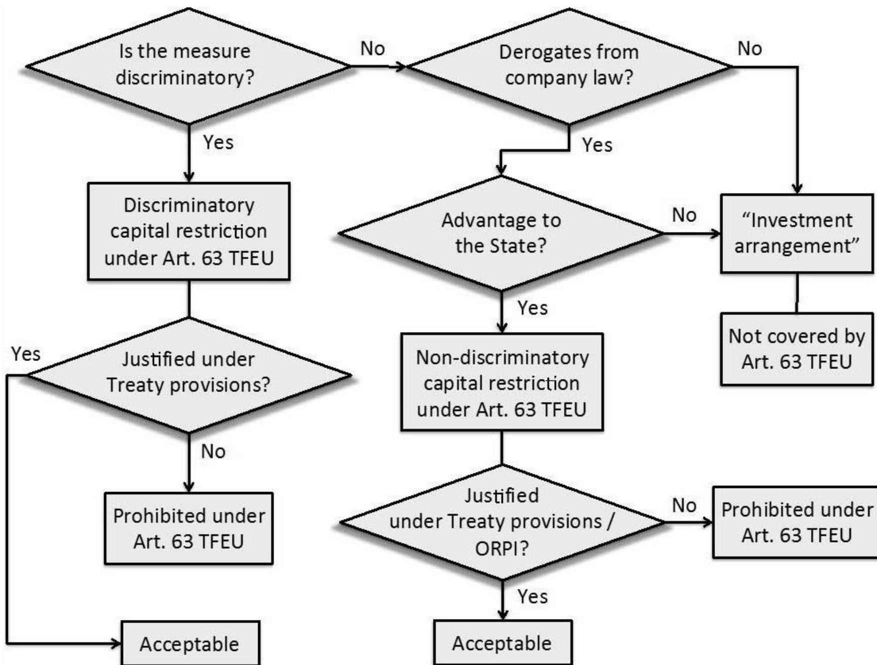

Figure 1: Schematic representation of the proposed test for 'capital restrictions'.

As stated above, the first criterion, i.e. *derogation from ordinary company law*, stems from the golden shares case law and ensures that neither the State nor private parties (if one accepts the horizontality of Article 63 TFEU) depart from the normal application of national company law in order to avail themselves of undue advantages that infringe the national legislative framework and distort the market for corporate control. This way, both the principle of legal certainty and the discretion of Member States in organising their corporate governance systems are respected. Private market operators are expected to abide by the binding rules of national company law whilst at the same time they can exercise their private autonomy under certain optional choices allowed under the national legislative framework. In the same vein, the State, in its capacity as a shareholder, is expected to act in accordance with the binding rules of national company law, while at the same time it can make use of the options available under the national corporate governance regime.

However, it should be noted that although the *non-derogation from ordinary company law* might be a necessary condition for the exclusion of a certain measure from the scope of capital restrictions, it is nevertheless not a sufficient

one. What is also needed is a guarantee that the rules of national company law from which the measure in question does not derogate, create a *level playing field* for all market participants, both public and private. In other words, it is necessary to ensure that the measure at stake respects *the principle of equality between the State and private parties as market participants* and does not grant an undue advantage to the State to the detriment of private operators.

This second criterion does not stem from the golden shares case law. To the contrary, it can be argued that the golden shares case law seems to start from the ideological premise that State participation in the market is not allowed and, therefore, golden shares are *inherently* incompatible with EU law regardless of whether they grant an undue advantage to the State. However, the view that golden shares are inherently incompatible with EU law reflects a political view which cannot be supported by the letter or the spirit of the Treaties, which merely demand the establishment and the proper functionning of a competitve internal market, without however prohibiting State participation in economic activity.

It has been argued that the political view that the State should be subject to more stringent conditions when acting as a market participant than those imposed on private operators view is supported by the legislative framework that governs EU public procurement law, whereby the State is treated with more suspicion than private market actors and is subject to more restrictive requirements when organising tenders for the purchase of goods, works or services.[433] However, the rationale underlying the strict requirements of transparency, equal treatment, open competition, and sound procedural management which bind the State in the field of public procurement is to ensure the *non-discrimination between private actors*. In other words, the purpose of EU public procurement law is to ensure that when contracting for the provision of goods or services, the State does not grant an unfair advantage to a private contractor as opposed to another private contractor. This rationale cannot be applied by analogy in the golden shares case law, as at stake is not the discrimination between private shareholders, but the participation of the *State itself as a shareholder*.

Ultimately, the analysis of the golden shares case law boils down to one fundamental question: should the State when acting as a shareholder or more broadly as a market participant be subject to more stringent conditions as the ones applicable to private market operators? This thesis answers in the negative and argues that the State should operate under equal conditions as other

433 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 Cambridge Law Journal 378, p. 397.

private market operators. Support for this position can be found in a comparative analysis of the US legal framework, which allows states to participate in economic activities under normal market conditions. In particular, in the US, when states are deemed to be engaging in economic activity rather than regulation of the market, the limitations of the American Constitution's dormant commerce clause do not apply ('market participation exception').[434] The private activities of states are governed by private law and they are not subject to special limitations.[435] Thus, states can acquire shareholding in corporations and pursue their interests to the extent that these interests can be pursued under private law.[436]

Overall, it can be argued the conceptual foundation of the suggested test is the theory of *economic supranationalism* as opposed to *economic constitutionalism*.[437] Indistinctly applicable measures should be regarded as restricting the free movement of capital only if the Member State is making use of its public regulatory powers to structure the market in its favour in derogation from ordinary company law. The mere assumption that State participation in a corporate structure hinders the market access of foreign investors – even if it is in accordance with national company law – is an overly broad interpretation of Article 63 TFEU, which oversteps the boundaries of the constitutional foundations of market integration. The European imperatives of economic and political integration do not openly demand such a dramatic retreat of the State from direct intervention in economic activity.[438] They merely demand a *level playing field*, whereby both the State and private operators abide by the rules of a competitive market.[439] The refined test on capital restrictions would allow the Court to exercise thorough and scrupulous oversight over national rules that unjustifiably grant privileges to the State, while at the same time ensuring that it does not overstep the boundaries of its judicial powers by implicitly imposing a specific corporate governance regime on the Member States. It would allow a better drawing of the dividing line between the EU and the Member States and would respect the preserved competence of the Member States to determine their corporate governance systems and protect public interest objectives, whilst at the same time remaining within the con-

434 Larry Catá Backer, 'The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law' (2008) 82 *Tulane Law Review* 1, p. 66-67.

435 Ibid.

436 Ibid.

437 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and other Interventions in the Market Economy' (2012) 49 Common Market Law Review 97, p. 141.

438 Erika Szyszczak, 'Golden Shares and Market Governance' (2002) 29 Legal Issues of Economic Integration 255, p. 258.

439 Ibid.

tours of the Internal Market and preventing protectionist measures which derogate from ordinary company law and hinder the market access of foreign investors.

3.4.5 The 'positive effect' criterion

In an earlier version of this section published as a journal article,[440] it has been argued that a quantitative dimension could be added in order to enable the Court to take into account some factual evidence in borderline cases in which there is a strong likelihood that the special shareholding in question has actually promoted and encouraged cross-border capital flows rather than discouraged it. It has been suggested that, as a third step of the refined test, the Court could examine the 'positive effect on capital movements', i.e. it could allow Member States to rebut the presumption that golden shares derogating from ordinary company law hinder foreign investors by providing convincing evidence proving that the existence of the golden shares in the undertaking concerned has actually encouraged capital movements instead of restricting them.

So far, the Court has found that special shareholding in privatised companies amounts to a restriction on capital movements, even when there is factual evidence that this shareholding has no negative impact on the acquisition of shares by foreign investors. Member States have tried to invoke the 'substantial hindrance' criterion, as developed in the free movement of goods, in the area of free movement of capital, but the Court has not accepted it.

In particular, in *Commission v Portugal (Energias de Portugal)*,[441] the Portuguese Republic contended that the provisions of national law at issue did not establish any *direct* or *substantial* obstacle to the access of direct investors or portfolio investors to the share capital of EDP. To the contrary, EDP's shares were among the most sought-after on the Lisbon Stock Exchange and a large number of those shares were in the hands of foreign investors.[442] This could probably be explained by the fact that the existence of public ownership in a national

440 Ilektra Antonaki, 'Keck in Capital? Redefining "Restrictions" in the "Golden Shares" Case Law' (2016) Erasmus Law Review 177.

441 Case C-543/08 *Commission v Portugal (golden shares – EDP)*. The national legislation at issue granted to the Portuguese State and to other public shareholders 'golden shares' in the company EDP – Energias de Portugal, the principal licensed distributor of electricity in Portugal and the undertaking acting as the last resort supplier. The special rights at stake included (a) the right of veto in respect of certain resolutions of the general meeting of the company's shareholders; (b) the right to appoint a director, where the State has voted against the nominees successfully elected as directors; and (c) the exemption of the State from the voting ceiling of 5% laid down in relation to the casting of votes.

442 Ibid, para 69.

industry can sometimes be regarded as guaranteeing the financial stability and solvency of a company (as the State can always raise money from taxation), and can thus act as an incentive for foreign public and private investors to buy shares in that company. However, the Court refused to engage in a factual examination of the actual impact of the special rights in question on cross-border investment and ruled that foreign investors, whether actual or potential, might have been deterred from acquiring stake in the capital of EDP.[443] This echoes the *Consten and Grundig* ruling in competition law, where the Court held that there was no need to take account of the concrete effects of an agreement once it appeared that it had as its object the prevention, restriction or distrortion of competition.[444] Similarly, in *Commission v Germany (I) (Volkswagen)*, the Court did not take into account Germany's argument that Volkswagen's shares were among the most highly-traded in Europe and that a large number of them were in the hands of investors from other Member States.[445]

The rationale underlying the 'substantial hindrance' criterion, as developed in the free movement of goods, could be transposed into the area of free movement of capital in order to give Member States the possibility to refute the premise of the Court's reasoning that golden shares are *by definition* a restriction on capital movements. This could take the form of a criterion based on a possible 'positive impact' of golden shares on capital movements, which would allow the Member States to prove that the contested golden shares have actually incentivised cross-border investment and have increased the number of foreign shareholders, rather than restricting it.

However, despite its appeal, the criterion of 'positive impact' is loosely framed and it is difficult to be reconciled with the principle of legal certainty. Furthermore, it is questionable whether the Court has the necessary expertise and the competence to evaluate highly technical evidence relating to the financial situation of the companies concerned.[446] Therefore, upon careful consideration, it was decided that the 'positive effect' criterion should not form part of the suggested legal test for the delineation of the scope of capital restrictions. Nevertheless, if used carefully and on a case-by-case basis, it could help redress some shortcomings arising from the erroneous premise that all golden shares *inherently* and *by their very nature* restrict capital movements.

443 Ibid, para 71.
444 Joined cases 56 and 58-64 *Consten and Grundig*, p. 342.
445 Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*, para 53.
446 The Court has never conducted an economic analysis in its golden shares case law (and understandably so) and yet it has accepted as axiomatic that golden shares prevent the acquisition of shares and deter foreign investors from investing in the undertakings concerned. See Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 169.

3.5 National responses

Zooming out from the doctrinal context of this study, one might actually wonder whether the legal issues analysed here pose real concerns to the Member States and whether they have a practical impact on their economic policies. In particular, in order to assess the actual consequences of the European case law within the domestic jurisdiction of the Member States, it is necessary to examine how this case law has been in practice enforced at the national level. In the field of golden shares, Benjamin Werner conducted an interesting survey of the reactions of national governments to the golden shares case law.[447] The main finding of his study was that most governments did abolish their golden shares after the respective rulings of the Court. However, they did so only because they had already adopted institutionalised fall-back solutions ('protective equivalents') to safeguard the interests originally protected by the golden shares.[448] This means that although in the majority of the cases the golden shares were abolished, their practical effect remained intact through the adoption of other measures with an equivalent effect. In cases where the practical effect of the golden shares could not have been maintained if the golden shares were abolished completely, the Member States opted to revise them in a way that would ensure compliance with the judgments of the Court whilst at the same time protecting the crucial prerogatives of the public authorities.

Examples of Member States which abolished their golden shares while adopting other 'protective equivalents' include the UK and the Netherlands. In particular, in the aftermath of the *BAA* ruling, although the British government abolished the golden shares, the Department of Transport commented that despite the repealing of the special rights, all crucial issues regarding the operation of BAA could still be regulated by the adoption of subsequent legislation.[449] In the same vein, although the Dutch government complied with the *KPN/TPG* judgment by abolishing the golden shares in the privatised post company TPG, it did so only because the universal service obligation was guaranteed by law. In this respect, a spokesman of the Dutch Finance Ministry declared that

447 Benjamin Werner, 'National responses to the European Court of Justice case law on Golden Shares: the role of protective equivalents' (2016) 24 Journal of European Public Policy 989.

448 Ibid, at p. 990. Notable exceptions are Greece and Portugal, which from 2010 until 2012 abolished their golden shares without reported 'protective equivalents' as a result of the implementation of the Troika's rescue package, see p. 996.

449 Ibid, pp. 997-998.

> 'We should not overestimate the importance of the golden share. The original intention was to protect the universal nature of postal services in the Netherlands. This is already protected by law'.[450]

The most prominent example of a Member State that revised the contested legislation in order to protect its special powers is Germany. More precisely, in the aftermath of *Volkswagen I*, the German government decided to revise the Volkswagen law instead of abolishing it completely, as this was the only way to reach a compromise between the obligation to comply with the ruling of the Court and the pressure from domestic political actors and trade unions to retain the veto power for certain decisions of the company.[451] Thus, the German government repealed the provisions regarding the appointment of the representatives and the capping of voting rights, but maintained the provision on the lower blocking minority. This way, the most important legal effect of the legislation, i.e. the veto power of the State and the workers, was kept in place.[452] Interestingly, in *Volkswagen II*, the Court held that by revising the legislation, Germany did fulfil the obligations that followed from the *Volkswagen I* judgment.

The aforementioned national reactions to the golden shares case law show that although the Member States ostensibly complied with the rulings of the Court, they nevertheless maintained in practice a certain degree of influence over the privatised undertakings concerned, either by adopting 'protective equivalents' or by revising the contested legislation and keeping the most crucial powers. Therefore, the liberalisation of the market for corporate control was somehow frustrated by the way in which the rulings were actually enforced at the national level.

4 Conclusion of Chapter 4

This chapter has attempted to investigate whether the interpretation of Article 63 TFEU in the golden shares case law allows room for State participation in the Market for the purposes of protecting public interest objectives and respects the division of competences between the EU and the Member States in the field of corporate governance, whilst at the same time ensuring that Member States do not impose protectionist measures liable to hinder the market access of foreign investors.

450 Ibid, p. 998.
451 Ibid, p. 999.
452 Ibid, p. 1000.

The use of golden shares in strategically sensitive privatised undertakings (in the energy sector, telecommunications, postal services, airports, car industries etc.) is a widespread phenomenon in Europe, which has given rise to a long-running litigation between the Commission and the Member States before the Court of Justice. The privatisation of State-owned companies has stimulated the growth and development of capital markets in Europe by creating an equity culture.[453] However, the State's involvement in the competitive market through golden shares is perceived as a threat or a hindrance to the emergence of a fully competitive market for corporate control.[454] The establishment of special shareholding in national privatised champions is regarded by the Commission as an expression of economic protectionism and therefore incompatible with the free movement of capital.

In most of the cases, the Member States contend that this special shareholding does not derogate from ordinary company law and is in any case necessary in order to pursue public interest objectives, such as safeguarding security of energy supplies or guaranteeing a service of general interest. The Court has so far adopted a rigorous application of the free movement of capital, ruling in all but one case that the special shareholding that Member States retain in privatised undertakings constitutes a restriction on the free movement of capital because of its *deterrent* effect on foreign investment. It has thus created a normative framework for regulating the relationship between the State and the competitive market.[455]

The adjudicative model of the Court is based on the ideological premise that golden shares are inherently incompatible with the fundamental freedoms and is characterised by a strikingly broad interpretation of the notion of 'capital restrictions'. This broad interpretation carries the risk that it might turn into a 'quality control' of domestic company law, whereby the Court will be called upon to review not only questions of cross-border discrimination or market access, but also *any type* of company law arrangements.[456] This may lead to a situation where *all* company law rules (ranging from various anti-takeover mechanisms to the German co-determination rule)[457] will be liable to deter foreing investors and therefore hinder capital movements.[458] The rigorous

453 Erika Szyszczak, 'Golden Shares and Market Governance' (2002) 29 Legal Issues of Economic Integration 255, p. 260.
454 Ibid, p. 261.
455 Ibid, p. 256.
456 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010) 69 Cambridge Law Journal 378, p. 400.
457 Ibid, p. 400.
458 Ibid, p. 400. See also Mads Andenas, Tilmann Gütt and Matthias Pannier, ''Free Movement of Capital and National Company Law' (2005) 16 European Business Law Review 757; Stefan Grundmann and Florian Mo¨slein, 'The Golden Share – State Control in Privatised Com-

application of the free movement of capital in the golden shares case law implicitly favours the constitutional foundations of *liberal market economies* (as opposed to *coordinated market economies*) and promotes through negative integration a corporate governance system, which endorses the *principle of proportionality between ownership and control* and the *principle of shareholders' primacy*. This in turn might lead to an erosion of the *varieties of capitalism* that exist in Europe and to a judicially driven convergence into a specific model of market economy, which might give rise to concerns regarding the respect of the division of competences between the EU and the Member States.

The present chapter has identified and analysed the three most controversial legal issues arising from the golden shares case law: firstly, the question of the horizontal effect of Article 63 TFEU; secondly, justification grounds invoked by the Member States and the proportionality assessment applied by the Court of Justice in the golden shares case law; and finally, and most importantly, the strikingly broad interpretation of the notion of 'capital restrictions'.

With respect to the horizontal effect of Article 63 TFEU, the chapter draws from the theory of horizontality/third-party effect (*Drittwirkung*) in national constitutional law and in international human rights law and concludes that if one accepts that the free movement of capital binds the State even when it acts as a *shareholder* ('extended vertical effect'), reasons of legal consistency and equality require that the same should apply to private action. Private parties are important market operators (in many instances much more important than the State) and their actions can have far-reaching economic and social implications. Therefore, they should be bound by the fundamental freedoms, especially when they are in a dominant position and can exercise quasi-regulatory powers over other market participants. Despite the undisputed merits of the argument that a possible horizontal effect of Article 63 TFEU will interfere with private autonomy and will turn into a 'quality control' of *all* (both public and private) company law arrangements, it is argued that this 'intrusive' function of the free movement of capital can be prevented by a more restrictive interpretation of the notion of 'capital restrictions' and by a better balancing exercise at the justifications and proportionality level.

With respect to the balancing exercise, this Chapter firstly explores the derogation grounds which have been invoked by the Member States. Secondly, it turns to the proportionality assessement and argues that in the golden shares case law the Court uses the 'procedural proportionality' test or 'good govenance' model. The 'procedural proportionality' test has also been used in the

panies: Comparative Law, European Law and Policy Aspects' (2001-2002) 4 *European Banking and Financial Law Journal – Euredia* 623.

gambling case law, wherer the Court has introduced the so-called *consistency* requirement. In the field of golden shares, the Court has introduced the requirement of compliance with the *principle of legal certainty*. The *Belgian* golden shares case offers a prime example of this test and is to date the only golden shares case where the national legislation was deemed to be compatible with the free movement of capital. A proportionality assessment based on the 'good governance' model and the procedural standards of *legal certainty* can guarantee an objective judicial review that respects national regulatory diversity in a sensitive field that is not harmonized at the EU level, whilst at the same time ensuring compliance with procedural requirements that create a *transparent* legal framework protecting the *legitimate expectations* of foreign investors and providing *effective judicial remedies* against arbitrary decisions of public authorities. However, despite the fact that the Court uses the appropriate proportionality test, the fact still remains that it requires a high standard of proof and in the vast majority of the cases the Member States have failed to justify their golden shares.

For this reason, the final part of the Chapter goes a step back in the legal reasoning of the Court and argues that the Court should reconsider tthe strikingly broad interpretation of the notion of 'capital restrictions'. The analysis draws inspiration from the *Keck* concept of 'selling arrangements' as developed in the field of free movement of goods and puts forward a refined test in order to delineate in a more consistent manner the scope of 'capital restrictions'. According to this test, if the contested measure is distinctly applicable (i.e. it discriminates between domestic and foreign investors), it constitutes a discriminatory restriction on the free movement of capital, which can be justified only by the objectives provided for in the Treaty. If the contested measure is indistinctly applicable (i.e. it does not discriminate on the basis of nationality), it constitutes a capital restrictions only if it (i) *derogates from ordinary company law* and (ii) *is available only to the State (to the exclusion of private investors)*. If, however, the indistinctly applicable measure (i) *does not derogate from ordinary company law* and (ii) *respects the principle of equality between the State and private parties as market participants without granting any privilege to the State*, it should then be regarded as 'investment arrangement', which falls outside the scope of Article 63 TFEU, since it merely *structures* the market and the national corporate governance regime, without hindering foreing investment. Such a test can offer room for State participation in the market for the purposes of pursuing public interest objectives, whist at the same time ensuring that the State participates in the market under equal conditions with private market operators and that protectionist measures which derogate from ordinary company law and/or grant the State an unfair advantage are prohibited. This is particularly important since a more restrictive interpretation of the notion of 'capital restrictions' under Article 63 TFEU can ensure that the division of competences between the EU and the Member States

is respected and that the Member States are allowed sufficient room to determine their corporate governance systems and to protect public interest objectives within the contours of the Internal Market.