# 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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# Overall conclusion

Capital liberalisation has undoubtedly brought significant benefits to the global economy, by improving economic efficiency, allocating efficiently global resources, promoting foreign investment and supporting the transfer of technology and innovation around the globe. However, it is often associated with increased financial instability and rising levels of unemployment and income inequality. This is why international economic organisations such as the IMF and the OECD have concluded that capital liberalisation improves economic efficiency only if it is complemented by measures of prudential supervision and regulation, sound macroeconomic policies and transparency.

The negative social consequences of unfettered capital flows have caused a rising backlash against globalisation, which is often accompanied by measures of economic protectionism. In the field of trade, protectionist barriers on imports and exports of goods are counter-productive and they have a negative impact on growth and employment.[1] In the field of financial integration, however, defining what constitutes a protectionist measure and assessing its impact on economic growth and employment is a more difficult exercise.

In the EU, golden shares and forms of public ownership have been are regarded as protectionist measures aiming at protecting national industries against hostile takeovers, from foreign or even domestic competitors. However, although it is true that in some cases golden shares in strategic privatised undertakings might be considered to be forms of economic protectionism, they should not always be regarded as restrictions on the fundamental freedoms. While it is straightforward that measures which prohibit the acquisition of shares by foreign investors constitute discriminatory restrictions on the free movement of capital, other measures affecting the voting rights of shareholders, the composition of the Board of Directors or the decision making process within an undertaking without discriminating between foreign and domestic investors might actually not restrict the free movement of capital.

1 Christine Lagarde, 'Fix the Roof While the Window of Opportunity is Open: Three Priorities for the Global Economy, Speech at University of Hong Kong' (*IMF*, 2018) <https://www.imf.org/en/News/Articles/2018/04/09/spring-meetings-curtain-raiser-speech> accessed 31-01-2019.

In this context, this thesis has attempted to answer the following research question:

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

In order to do so, it has firstly discussed the international theoretical debate regarding the question whether capital liberalisation actually contributes to economic growth or rather exacerbates income inequality. Secondly, it has analysed the case law of the Court of Justice on privatisations and golden shares and has concluded that the judicial endorsement of a very broad interpretation of capital restrictions limits significantly the competence of the Member States to determine their corporate governance and property ownership systems and to protect vital societal values.

In particular, this broad interpretation deprives Member States of their right to prohibit the privatisation of public undertakings or to maintain golden shares in privatised companies, which are of strategic importance for the national industrial policy and often serve public interest objectives. The golden shares case law of the European Court of Justice seems to be based on the ideological premise that golden shares are inherently incompatible with the fundamental freedoms. The rigorous interpretation of the free movement of capital under Article 63 TFEU 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.

The principle of proportionality between ownership and control implies that any shareholder should own the same fraction of cash flow rights and voting rights and the principle of shareholders' primacy refers to the protection of shareholders' interests as the ultimate objective of a corporation. According to the Court's reasoning, golden shares deviate from the principle of proportionality between ownership and control, as they grant to public authorities voting rights which do not correspond to their percentage of ownership. Furthermore, they do not adhere to shareholders' primacy, as the State's interference with the management of an undertaking for the purposes of protecting public interest objectives is allegedly capable of depressing the value of shares, thus reducing the attractiveness of investing in the undertaking concerned and thus undermining shareholders' interests. As such, they constitute restrictions on capital movements.

However, the prohibition on restrictions on capital movements under Article 63 TFEU should not be regarded as a blank cheque to abolish all national company law requirements which derogate from the principle of proportionality between ownership and control or do not adhere completely to shareholders' primacy on the assumption that they render investment less attractive. While it is true that Member States should refrain from adopting measures that obstruct the functioning of the Internal Market, the choice of the market economy model remains a national competence. Member States should in principle be able to define their market economy model, to participate in the market and to protect societal values. A judicially driven convergence into the model of liberal market economies can be barely squared with the wording and the spirit of the Treaties, let alone with the international debate about the possible contributory effect of capital liberalisation to the rising levels of income inequality. Such a convergence raises significant concerns regarding the division of competences between the EU and the Member States in the fields of corporate governance and property ownership systems and the protection of public interest objectives. In this respect, the thesis has proposed two main modifications in the judicial interpretation of the free movement provisions which could help address the aforementioned concerns regarding the division of competences and the protection of societal values: firstly, the rediscovery of the principle of neutrality under Article 345 TFEU as a legal provision which shields national decisions to maintain public ownership in undertakings from Internal Market scrutiny; and, secondly, the recalibration of the 'capital restrictions' test in the golden shares case law by reference to a Keck-inspired notion of 'investment arrangements'.

In relation to the first proposal regarding the rediscovery of Article 345 TFEU, it is suggested that the sovereign right to opt for a private or public property ownership system of undertakings should be covered by the principle of neutrality enshrined in Article 345 TFEU. EU law is neutral with respect to privatisations and nationalisations. If a prohibition of privatisation is regarded as a restriction on the free movement of capital, this is liable to render Article 345 TFEU devoid of any legal content and meaning whatsoever. Therefore, the thesis takes issue with the 'sword interpretation' adopted in Essent and embraces the 'reductionist shield' interpretation according to which measures intrinsically linked with the national property ownership system, such as a prohibition on privatisation, should be excluded from the scope of the free movement provisions by virtue of Article 345 TFEU. However, it is acknowledged that the ruling in Essent, where the Court held that the reasons underlying the choice of a public ownership system under Article 345 TFEU could be used as a justification for the capital restriction imposed by the prohibition of privatisation, should be regarded as an important compromise aiming at reconciling capital liberalisation with public interest objectives.

In relation to the second proposal regarding the recalibration of the 'capital restrictions' test, the analysis draws inspiration from the Keck concept of 'selling arrangements' as developed in the field of free movement of goods and and proposes the transposition of a similar concept in the field of free movement of capital. 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 restriction 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', falling 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 grant privileges to the State are prohibited.

Overall, the thesis argues that through this 'velvet revolution' in the context of negative integration the interpretation of the free movement of capital in the EU can respect the delicate balance of competences between the EU and the Member States and can facilitate the reconciliation of the capital freedom with public interest objectives. This way, the EU will not only follow the contemporary economic school of thought advocating a more restrictive approach regarding international capital flows in order to prevent the risks of financial instability and social inequality, but it will also reinforce the social dimension of the European integration project.

Seen from a broader perspective, the two main proposals of this thesis attempt to bridge the gap between the State and the Market and to create sufficient room for the State to engage in economic activities as a market participant. More precisely, it is argued that the State should in principle be able to participate in the market under equal conditions with other private market operators and that forms of public ownership of undertakings or special shareholding in privatised undertakings should not be regarded as inherently problematic from the perspective of EU Internal Market law. The participation of the State in the market might even be desirable in some cases in order to

pursue vital public interest objectives, such as the protection of workers, the provision of services of general interest or the protection of workers.

At the same time, beyond these social considerations, there are also economic arguments supporting certain forms of public ownership, as recent evidence shows that the State's contribution to the achievement of an innovation-led economic growth is much greater than usually thought.[2] For instance, in her recent book, Mariana Mazzucato explained how all the technological advancements that made the creation of iPhones possible were funded by the government and achieved in public universities and other public research institutes.[3] Her findings debunk the myth of a lumbering, bureaucratic State versus a dynamic, innovative private sector and emphasise the important role of the State in innovation, technology and economic growth. In view of the aforementioned social and economic considerations, it is not surprising that, despite ambitious privatisation programmes undertaken in recent decades, many governments still maintain public ownership in commercial enterprises in strategically sensitive sectors such as electricity and gas, transportation and finance in order to protect public interest objectives.[4]

In the legal terrain, almost twenty years after the first generation of golden shares cases, the saga of golden shares litigation has not come to an end yet. Notwithstanding the resistance of the Member States to give up any control over their privatised national champions, the Commission is still scrutinising national legislation granting special rights in privatised undertakings to public authorities. In fact, in July 2017, the Commission decided to refer Croatia to the Court of Justice for failing to amend the law on the privatisation of the energy company INA, which granted the State special powers to veto certain decisions of the company.[5] However, a year later, the Commission decided to suspend the referral of Croatia to the Court, since the Croatian authorities

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

3 Mariana Mazzucato, *The Entrepreneurial State: debunking public vs. private sector myths* (Anthem 2013).

4 OECD, *The Size and Sectoral Distribution of SOEs in OECD and Partner Countries* (OECD Publishing 2014), p. 7. See also Hans Christiansen, *The Size and Composition of the SOE Sector in OECD Countries* (2011). According to the OECD report, the largest State-owned enterprises sectors in the OECD are found in four European countries: Norway, France, Slovenia and Finland.

5 European Commission, *Press Release – Commission refers Croatia to the Court for failing to amend the law on the privatisation of the energy company INA-Industrija Nafte, d.d. (INA), Brussels, 13 July 2017* (IP/17/1949, 2017).

submitted a draft amending the INA law, which would address the Commission's main concerns subject to some further adjustments.[6]

The suspension of this referral could be regarded as an indication that the Commission might be willing to reconsider the rigorous scrutiny of golden shares and allow more discretion for Member States to regulate their corporate governance systems. Yet, the suspension of one case cannot reasonably be interpreted as a shift in the institutional view of the Commission that golden shares are inherently incompatible with the free movement of capital. Contrary to the gambling sector, where the Commission decided to close all the infringement proceedings in the area of online gambling, acknowledging explicitly the 'broader political legitimacy of the public interest objectives' and highlighting that 'it is not one of its priorities to use its infringement powers to promote an EU Single Market in the area of online gambling services',[7] no such general statement has been made in relation to golden shares. In the absence of any formal closure of pending golden shares cases, it can be inferred that legal action against Member States holding special rights in privatised undertakings still remains on the table as one of the Commission's political priorities. It is yet to be seen whether the Court of Justice will be called upon to rule on a new generation of golden shares cases and, if so, whether it will remain faithful to its well-established case law on the incompatibility of golden shares with the free movement provisions or it will be willing to reconsider some aspects of its judicial reasoning and perhaps try adopt a more restrictive approach regarding capital restrictions.

6 European Commission, *Press release – Commission suspends referral of CROATIA to the Court for failing to amend the law on the privatisation of the energy company INA-Industrija Nafte, d.d. (INA), Brussels, 19 July 2018* (IP/18/4489, 2018).

7 European Commission, *Press release – Commission closes infringement procedures and complaints in the gambling sector, Brussels, 7 December 2017* (IP/17/5109, 2017).