Articles

Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union

*By Tamás Szabados**

Abstract

In several golden share cases, the Court of Justice of the European Union (the "Court") condemned Member States for reserving certain special rights in privatized companies for themselves. In spite of the Court's consistently strict approach in the golden share cases, the more recent golden share judgments demonstrate that the Court's practice is not free from uncertainties. In its case law, the Court seems to hesitate between the application of the freedom of establishment and the free movement of capital. Additionally, it is not entirely clear which measures are caught by provisions on the freedom of establishment and the free movement of capital.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

A. Introduction

After more than a decade of judiciary practice, it is well known that the Court of Justice of the European Union has consistently condemned Member States for reserving certain special rights in privatized companies for themselves. These special rights are commonly known as golden shares, although interestingly, these are not always special shares owned by the state, but at times simple public law rules favoring the state concerned in a company law context.[1]

The communication of the European Commission ("the Commission")—adopted in 1997 on certain legal aspects concerning intra-EU investment—stated that special rights granted to the national authorities in relation to specific domestic companies fall under the scope of the freedom of establishment and the free movement of capital.[2] A commission staff working document in 2005 confirmed this approach. The Commission wrote that special rights granted to the Member States are compatible with the fundamental freedoms only exceptionally and under strict circumstances. Similarly, the Court took a rigorous view on golden shares and, in a series of cases, the Court declared that Member States infringe the free movement of capital and/or the freedom of establishment by granting special rights to the Member State concerned.[3] In a recent golden share case, C-326/07, *Commission v. Italy*, Advocate General Ruiz-Jarabo Colomer cited Shakespeare's play *The Merchant of Venice*, pointing out that "[a]ll that glitters is not gold."[4] According to the Advocate General, in the sphere of golden shares, Member States often ignore this adage, as they are determined to transmute shareholdings in privatized undertakings operating in

* Lecturer, Faculty of Law, Eötvös Loránd University (ELTE), LL.M. (UCL), Ph.D (ELTE).

[1] *Commission Staff Working Document: Special Rights in Privatized Companies in the Enlarged Union—A Decade Full of Developments*, at 5 (July 22, 2005) [hereinafter Brussels], http://ec.europa.eu/internal_market/capital/docs/privcompanies_en.pdf; JONATHAN RICKFORD, COMPANY LAW AND ECONOMIC PROTECTIONISM 54, 56 (Ulf Bernitz & Wolf-Georg Ringe eds., 2010). *See, e.g.*, Case C-58/99, Comm'n v. Italy, 2000 E.C.R. I-3811; Case C-367/98, Comm'n v. Portugal, 2002 E.C.R. I-4731; Case C-207/07, Comm'n v. Spain, 2008 E.C.R. I-111.

[2] Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment, 1997 O.J. (C 220) 15 [hereinafter 1997 O.J. (C 220) 15].

[3] *Portugal*, Case C-367/98 at para. 41; *Italy*, Case C-58/99 at para. 20; Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781; Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809; Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581; Case C-98/01, Comm'n v. U.K., 2003 E.C.R. I-4641; Case C-463/04 and C-464/04, Federconsumatori and Associazione Azionariato Diffuso dell'AEM SpA v. Comune di Milano, 2007 E.C.R. I-10419; Case C-112/05, Comm'n v. Germany, 2007 E.C.R. I-8995; Case C-326/07, Comm'n v. Italy, 2009 E.C.R. I-2291; Case C-274/06, Comm'n v. Spain, 2008 E.C.R. I-26; *Spain*, Case C-207/07 at para. 1.

[4] Opinion of the Advocate General Colomer at para. 1, *Italy*, Case C-326/07, Comm'n v. Italy (Nov. 6, 2008), http://curia.europa.eu/juris/document/document.jsf?text=&docid=67893&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=193589 [hereinafter *Opinion of the Advocate General Colomer*].

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

strategic sectors or providing public services into a substitute for gold.[5] "However, in that unbridled alchemical activity governments frequently forget the correcting influence of Community law."[6]

The earlier cases are well-known and discussed in detail in literature.[7] Consequently, it might seem that the Court has settled all debates related to golden share cases. However, Member States continue to adhere to golden shares in order to more effectively safeguard and promote, for instance, their industry, energy, security policy, or labor market considerations.[8] Golden shares remain a means of economic protectionism and enforcement of state interests.[9] Thus, golden share cases still give work to the Court from time to time, and more recent golden share cases demonstrate that open questions remain. The debates have not been laid to rest in all respects.

This article examines whether state interest may be enforced in light of the most recent golden share case law, and if so, in what ways. The question arises whether Member States still have any real possibility for upholding special rights for themselves in relation to the operation of formerly public companies. If the answer is an affirmative one, the precise limits of the state's special powers have to be analyzed. Member States may not keep

[5] *Id.*

[6] *Id.* at para. 2.

[7] *See generally* Stanisław Sołtiński, *Golden Shares: Recent Developments in E.C.J. Jurisprudence and Member States Legislation*, *in* 2 FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70: GEBURTSTAG 2571 (Stefan Grundmann et al. eds., 2010); 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*, 82 TULANE L. REV. 1801 (2008); MICHAEL WEISS, GOLDENE AKTIEN IM LICHTE DER RECHTSPRECHUNG DES EUGH 174 (2007); Christine O'Grady Putek, *Limited but Not Lost: A Comment on the ECJ's Golden Share Decisions*, *72* FORDHAM L. REV. 2219 (2004); Johannes Adolff, *Turn of the Tide?: The "Golden Share" Judgements of the European Court of Justice and the Liberalization of the European Capital Markets,* 3 GERMAN L.J. (2002); Stefan Grundmann & Florian Möslein, *Die Goldene Aktie*, 32 ZEITSCHRIFT FÜR UNTERNEHMENS UND GESELLSCHAFTSRECHT (ZGR) 317 (2003), http://edoc.hu-berlin.de/oa/articles/reo24K3XTSYw/PDF/25eHWpmQPSSxk.pdf; Stefan Grundmann & Florian Möslein, *Golden Shares—State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects* (July 23, 2003), http://ssrn.com/abstract=410580 or http://dx.doi.org/10.2139/ssrn.410580; Ivan Kuznetsov, *The Legality of Golden Shares Under EC Law*, 1 HANSE L. REV. 22 (2005); Nadia Gaydarska & Stephan Rammeloo, *The Legality of the 'Golden Share' Under EC Law*, 5 MAASTRICHT FACULTY L. WORKING PAPER 1 (2009), *available at* http://ssrn.com/abstract=1426077; Andrea Gyulai-Schmidt, *Aranyrészvények Európában*, 13 EURÓPAI TÜKÖR 44 (2008); Gianluca Scarchillo, *Privatizations, Control Devices and Golden Share. The Harmonizing Intervention of the European Court of Justice*, 3 COMP. L. REV. 1 (2012).

[8] Boris P. Paal, *EuGH: Golden Shares bei Portugal Telecom*, 21 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 701 (2010); Lukasz Adamczyk & Tymoteusz Baranski, *The Compatibility of the Polish State's Golden Shares With EC Law*, 11 EBOR 95 (2010).

[9] Daniele Gallo, *The CJEU vis-à-vis EU and Non-EU Investors, Between National and European Solidarity: Golden Shares, Sovereign Investment and Socio-Economic Protectionism Under Free Movement Rules*, at 1, 7, (LUISS Guido Carli/Dep't of Law, Working Paper No. 03-2014), http://eprints.luiss.it/1297/1/WPG_03-14_Gallo.pdf.

special rights in force for themselves unless it is justified by a legitimate interest, and they observe the proportionality requirement; thus, Member States have little room to maneuver in this respect. Additionally, this article demonstrates that the judiciary practice of the Court is not free from uncertainties.

First, it is worth scrutinizing which freedom is to be applied in the golden share cases. Second, in relation to the recent *Volkswagen II* judgment, the question arose in legal literature of which state measures are caught at all by the freedom of establishment and the free movement of capital.[10] This article pays particular attention, therefore, to the measures touched upon in that judgment, namely the increased blocking minority rule and the voting cap. Third, this article will present typical state defenses and their evaluation by the Court.

This article's analysis takes into consideration the Court's judgments from the past five years.[11] Although this is undoubtedly an arbitrary selection of the period examined, much has already been said about previous case law; as such, it is worth turning instead to more recent judgments. Of course, this does not mean that the earlier judiciary practice is ignored. This article relies on it to the extent necessary to explain recent developments.

B. Which Freedom Should Be Applied?

The Commission's 1997 communication stated that the acquisition of controlling stakes in a company by an EU investor is a form of capital movement, to which the free movement of capital and the freedom of establishment apply.[12] Nevertheless, the Court does not always examine both freedoms together in golden share cases.

In C-58/99, *Commission v. Italy*, which was the first golden share judgment, the Court found that by the introduction of the special powers, "the Italian Republic has failed to fulfill its obligations under Articles 52, 59 and 73b of the Treaty."[13] The Court thus applied, in parallel, both the freedom of establishment and the free movement of capital. In the majority of the golden share judgments, the Court examined the restricting state measures under the provisions on the free movement of capital. In addition, it usually noted, as did it in *Commission v. Portugal*:

---

[10] Case C-95/12, Comm'n v. Germany (Oct. 22, 2013), http://curia.europa.eu/.

[11] *See generally* Case C-326/07, Comm'n v. Italy, 2009 E.C.R. I-2291; Case C-171/08, Comm'n v. Portugal, 2010 E.C.R. I-6817; Case C-543/08, Comm'n v. Portugal, 2010 E.C.R. I-11241; Case C-212/09, Comm'n v. Portugal, 2011 E.C.R. I-10889; Case C-244/11, Comm'n v. Greece (Nov. 8. 2012), http://curia.europa.eu/.

[12] 1997 O.J. (C 220) 15, *supra* note 2, at para. 4; Brussels, *supra* note 1, annex 1, at 27.

[13] Case C-58/99, Comm'n v. Italy, 2000 E.C.R. I-3811, para. 20.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

> To the extent that the legislation in issue involves restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital considered above, to which they are inextricably linked. Consequently, since an infringement of Article 73b of the Treaty has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment.[14]

As an exception, in *Volkswagen I* the Court declared only the violation of the free movement of capital by Germany. Although the Commission formally requested that the Court state an infringement of the freedom of establishment, it did not put forward a supporting argument in this respect, so the Court dismissed the action regarding the breach of Article 43 of the Treaty on the European Community ("EC Treaty"; now Article 49 of the Treaty on the Functioning of the European Union ("the TFEU")).[15]

I. The C-326/07 Commission vs. Italy Judgment

The more recent C-326/07, *Commission v. Italy* judgment brought a twist in the judiciary practice, in that the Court made a more refined distinction between the two freedoms. The Italian rules provided a right of objection concerning certain companies for the Minister for Economic Affairs and Finance that could be exercised in consultation with the Minister for Productivity.[16] These special rights included a right to oppose the acquisition by investors of significant shareholdings representing at least 5% of voting rights—or a lower percentage fixed by the Minister for Economic Affairs and Finance—or the conclusion of agreements between shareholders representing at least 5% of voting rights—or a lower percentage fixed by the Minister for Economic Affairs and Finance. The special rights also included a veto right against resolutions on the dissolution of the company, transfer of the undertaking, merger, demerger, transfer abroad of the company headquarters, alteration of the company's objectives, and the amendment of the articles of association removing or modifying the special powers.[17] The articles of association of certain strategic companies

[14] Case C-367/98, Comm'n v. Portugal, 2002 E.C.R. I-4731, para. 56; *see also* Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781, paras. 55–56; Case C-503/99, Comm'n v. Belgium, 2002 E.C.R. I-4809, paras. 58–59; Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581, paras. 85–86; Case C-98/01, Comm'n v. U.K., 2003 E.C.R. I-4641, paras. 51–52.

[15] Case C-112/05, Comm'n v. Germany, 2007 E.C.R. I-8995, paras. 8, 13–16. Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47.

[16] Case C-326/07, Comm'n v. Italy, 2009 E.C.R. I-2291, para. 3.

[17] *Id.* at para. 4.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

had to enact the above special rights.[18] The Commission initiated proceedings against Italy for failing to make the conditions for the exercise of the above special powers sufficiently clear and for ensuring discretionary power to state authorities, thereby infringing the freedom of establishment and the free movement of capital.[19] According to the Commission, the measure might have deterred investors from settling in Italy.[20] In his opinion in C-326/07, *Commission v. Italy*, AG Ruiz-Jarabo Colomer referred to the earlier case law—according to which the purpose of the legislation must be taken into consideration in order to decide which freedom is applicable—and suggested applying the freedom of establishment instead of the free movement of capital, and at the most secondarily the free movement of capital:

> [T]he natural and most suitable context for evaluating restrictions which fall under the heading of 'golden shares' is that of freedom of establishment, since the defendant Member State usually seeks to control the formation of privatised companies' corporate will using powers of intervention as regards share structure (by influencing either the organisation of the shareholdings or specific management decisions), an aspect which has little in common with the free movement of capital.[21]

He pointed out that the restriction of the free movement of capital is only incidental to the freedom of establishment and is not inevitable. In his opinion, the freedom of establishment can apply to measures affecting the composition of the membership of a company, as well as measures restricting the adoption of company resolutions (for example, change of company object or disposal of assets). In such cases, the relation with the free movement of capital is only hypothetical or very tenuous.[22] AG Ruiz-Jarabo Colomer analyzed the right to oppose the acquisition of shares and shareholder agreements under the free movement of capital, while he assessed the veto right to strategic decisions in light of the freedom of establishment. He found that the restrictions are not necessary (for instance, the Italian state could have maintained a blocking minority to exercise control over the companies).

---

[18] *Id.* at para. 5.

[19] *Id.* at para. 11.

[20] *Id.* at para. 12.

[21] Opinion of Advocate General Colomer, supra note 4, at para. 44.

[22] Case C-326/07, Comm'n v. Italy, 2009 E.C.R. I-2291, para. 45.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

The Court also addressed the distinction between the freedom of establishment and the free movement of capital.[23] The freedom of establishment covers state measures that concern shareholdings of nationals of Member States, allowing them to exert a definite influence on the company's decisions and determine its activities. The free movement of capital embraces direct investment, which serves to establish or maintain lasting and direct links between those persons providing the capital and the undertakings that want it, in order to carry out an economic activity. The Court decided that the right of objection concerning the acquisition of more than 5% of the shares, and the agreements entered into by shareholders owning more than 5% of the shares, fall under the free movement of capital. The Court added, however, that in the case of a very dispersed ownership, even such a shareholding can enable the owner to decisively influence the management of a company, which also justifies the simultaneous application of the freedom of establishment. The freedom of establishment applies to the second category of special rights; for example, the strategic decisions of the company. The latter rights also affect the free movement of capital, but the Court considered this the unavoidable consequence of any restriction on freedom of establishment and did not require a separate examination.

Some remarks must be made regarding C-326/07, *Commission v. Italy*.[24] As described previously, the Court distinguished between measures applicable "to the possession by nationals of one Member State of holdings in the capital of a company established in another Member State allowing them to exert a definite influence on the company's decisions and to determine its activities"—falling under the scope of application of the freedom of establishment—and rules affecting "investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity"—measures falling under the scope of application of the free movement of capital.[25] According to the Court, the latter "presupposes that the shares held by the shareholder enable him to participate effectively in the management of that company or in its control."[26] This corresponds to the definition of direct investment laid down by Directive 88/361/EEC.[27] The distinction has not been a recent one, but rather stems from the *Volkswagen I* ruling.[28] The Court also added:

---

[23] *Id.* at paras. 32–39.

[24] *See* Michael Pießkalla, *Unzulässige Sonderrechte des Staates bei Ungenauigkeit der Kriterien*, 20 EUZW 463 (2009); RICKFORD, *supra* note 1, at 88–90.

[25] *Italy*, Case C326/07 at paras. 34–35.

[26] *Id*. at para. 35.

[27] *Id.* Council Directive 88/361, annex I, I.2 (explanatory notes), 1988 O.J. (L 178) 5 (EC).

[28] Case C-112/05, Comm'n v. Germany, 2007 E.C.R. I-8995, paras. 13, 18.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

> National legislation not intended to apply only to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Article 43 EC and Article 56 EC . . . [29]

However, certain authors rightly asserted that sometimes it is nearly impossible to distinguish state measures according to these criteria.[30] The Court did not define the exercise of a definite influence on the company's decisions and the determination of its activities. Similarly, it is unclear what is meant by effective participation in the management or control of the company. Literature proposes that, in the absence of any definition by the Court, the laws of the Member States determine the notion of "definite influence."[31] This seems, however, a less convincing view, because Member States could unilaterally decide the scope of the freedom of establishment's application by choosing their preferred threshold for "definite control." Thus, it is also difficult to see the difference between a shareholding allowing a shareholder "to exert a definite influence on the company's decisions and to determine its activities"[32] and a shareholding enabling the shareholder to "participate effectively in the management of that company or in its control."[33] The border between definite influence and participation in management and control is vague,[34] and so the borders between the two economic freedoms are blurred. It is unclear which freedom should apply if one follows the ambiguous lines of separation laid down by the Court. In the absence of a highly dispersed ownership structure, a small shareholding is usually insufficient to influence the decision making process of a company or to take part in the management or control of the company, while a larger holding may allow both.

---

[29] Case C-326/07, Comm'n v. Italy, 2009 E.C.R. I-2291, para. 36.

[30] Ramon Torrent, *Pourquoi un Revirement de la Jurisprudence "Golden Share" de la Cour de Justice de l'Union Européenne Est-Il Indispensable?*, *in* A MAN FOR ALL TREATIES—LIBER AMICORUM EN L'HONNEUR DE JEAN-CLAUDE PIRIS 539, 555 (M. Arpio Santacruz et al. eds., 2012); Bruno Mestre, *The ECJ's Decision on Portugal's "Golden Share": Broader Implications of a Restatement*, 9 EUR. L. REP. 283, 286 (2010).

[31] Claas Friedrich Germelmann, *Konkurrenz der Grundfreiheiten und Missbrauch von Gemeinschaftsrecht—Zum Verhältnis von Kapitalverkehrs—und Niederlassungsfreiheit in der neueren Rechtsprechung*, 19 EUZW 596, 597 (2008); Pießkalla, *supra* note 24, at 464.

[32] *Italy*, Case C-326/07 at para. 36.

[33] *Id.* at para. 35.

[34] 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*, 47 COMMON MKT. L. REV. 245, 255–56 (2010); STEFFEN HINDELANG, THE FREE MOVEMENT OF CAPITAL AND FOREIGN DIRECT INVESTMENT 85 (2009).

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

As far as the veto right against the acquisition of shares above a certain level is concerned, the measure of shareholding is not in itself decisive. Interestingly, in the C-326/07, *Commission v. Italy* judgment, the Court applied both freedoms to a right of opposition of the acquisition of more than 5% of the shares. Here, the Court explained the application of the freedom of establishment, noting that where the ownership structure is fragmented, even a relatively small shareholding enables its owner to influence in a definite manner the management of the company and to determine its activities.[35]

In tax cases, the Court decides on the application of the freedom of establishment or the free movement of capital based on the center of gravity of the case.[36] The Court, however, does not apply this approach in golden share cases.[37] The Court takes as its departure the purpose of the legislation. It is not easy to determine, however, the original goal of the legislator. Undoubtedly, the objective of the legislation is keeping large, undesired foreign investors away. Large investors often may have long-term objectives with their investments that would claim the application of the freedom of establishment. The Court has neglected that application and, until recently, adhered to the application of the free movement of capital and referred to the incidental restrictions on the freedom of establishment.[38] However, it is also true that the deterrence of speculative investors may stand behind the maintenance of golden shares by the Member States, and the deterrent effect justifies the invocation of the free movement of capital. The exercise of the freedom of establishment usually involves capital movement; hence, in cases where the freedom of establishment is violated, Article 63 TFEU is also usually infringed. In order to decide on the applicable freedom, one has to take all the circumstances of the case into consideration, including the purpose of the legislation.

Some have described this judgment rendered by the Court in 2009 as the introduction of a new approach.[39] Since then, the Court rendered three judgments in cases against Portugal, where we do not see any sign of this new approach: The Court did not devote much attention to the distinction between the two freedoms and relied in all three cases exclusively on the free movement of capital. Only the usual reference to the ancillary nature of the freedom of establishment remained.

---

[35] Case C-326/07, Comm'n v. Italy, 2009 E.C.R. I-2291, para. 38.

[36] HINDELANG, *supra* note 34, at 96–108.

[37] MARCUS LUTTER, WALTER BAYER & JESSICA SCHMIDT, EUROPÄISCHES UNTERNEHMENS—UND KAPITALMARKTRECHT 178 (2012).

[38] JUSTIN KOTTHAUS, BINNENMARKTRECHT UND EXTERNE KAPITALVERKEHRSFREIHEIT 54 (2012).

[39] Jaron Van Bekkum, *Golden Shares: A New Approach*, at 1 (Nov. 15, 2009), http://ssrn.com/abstract=1684030.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

II. The Judgments in the Commission vs. Portugal *Cases*

In *Commission v. Portugal (Portugal Telecom)*, the Court analyzed a right of veto granted to the Portugal state in Portugal Telecom regarding the privatization of the Portuguese telecommunications sector in relation to certain significant company decisions—the appointment of some of the directors and the acquisition of more than ten percent of the shares by shareholders carrying out competing activities.[40] In the opinion he delivered on 2 December 2009, AG Paolo Mengozzi stated simply: "Such national rules have always been assessed by the Court in the light of the free movement of capital, the infringement of which gives rise, secondarily, to an infringement of the freedom of establishment."[41]

This statement may be called into question in light of the C-326/07, *Commission v. Italy* judgment rendered on 26 March 2009, which was not mentioned by the Advocate General in his opinion. Although the Court referred once to C-326/07, *Commission v. Italy* in its judgment,[42] it did not bother much with the distinction between the freedom of establishment and the free movement of capital. Instead, it applied Article 56 EC Treaty, adding the usual formula that "in so far as the national measures at issue entail restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital considered above, to which they are inextricably linked."[43]

In *Commission v. Portugal (EDP)*,[44] the Portuguese government, referring expressly to C-326/07, *Commission v. Italy*, argued that the measures concerned must be analyzed exclusively in the light of Article 43 and not under Article 56 EC Treaty.[45] Here, Portuguese laws provided for the creation of golden shares in the privatized energy undertaking, Energias de Portugal ("EDP"). The special rights granted a veto right to the state over the amendment of the articles of association of the company and other important company decisions. Additionally, no one could obtain more than five percent of the shares or

---

[40] *See* Paal, *supra* note 8, at 701; Michael Stöber, *Goldene Aktien und Kapitalverkehrsfreiheit in Europa*, 13 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 977 (2010); Kai Purnhagen, *Beschränkung des freien Kapitalverkehrs durch Halten von golden shares an Portugal Telecom—Anmerkung*, 21 EUZW 706 (2010); Olaf Müller-Michaels, *Keine Wende bei Golden Shares und Kapitalverkehrsfreiheit*, 65 BETRIEBS-BERATER 2395 (2010); Mestre, *supra* note 30, at 283; Nicolas Sonder, *AG, Vorzugsaktien, Goldene Aktien, freier Kapitalverkehr, Direktinvestition, Vertragsverletzung*, 26 ENTSCHEIDUNGEN ZUM WIRTSCHAFTSRECHT 739 (2010).

[41] Opinion of Advocate General Mengozzi at para. 51 (Dec. 2, 2009), Case C-171/08, Comm'n v. Portugal (Dec. 2, 2009), http://curia.europa.eu/.

[42] *Portugal*, Case C-171/08 at para. 77.

[43] *Id.* at para. 80.

[44] Andreas Klees, *Goldene Aktien, Sonderrechte, freier Kapitalverkehr, Energieversorgung, Verhältnismäßigkeit/ "Kommission/Portugal"*, 27 ENTSCHEIDUNGEN ZUM WIRTSCHAFTSRECHT 79 (2011).

[45] Case C-543/08, Comm'n v. Portugal, 2010 E.C.R. I-11241, para. 37.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

exercise voting rights beyond this threshold. The Court held that not only those shareholders that are capable of exerting a definite influence over the management and control of EDP are affected and therefore, it found that both Articles must be applied. The Court first carried out its analysis under the free movement of capital and then indicated the incidental restriction of the freedom of establishment.[46] The Court followed the same line of argument as in *Commission v. Portugal (GALP)*, where special rights—veto right and the appointment of the chairman of the board of directors through a state-owned bank—were granted to the state in relation to an energy company.[47]

III. The Commission vs. Greece *Judgment*

The change initiated in C-326/07, *Commission v. Italy* surfaced again in the *Commission v. Greece* judgment.[48] In *Commission v. Greece*, the Court broke again with the free movement of capital and applied the freedom of establishment only to a prior authorization scheme, although the Commission asked the Court to declare the violation of both freedoms.[49] Here, the acquisition of more than twenty percent of the shares in certain strategic, public limited undertakings was subject to prior authorization by the Inter-ministerial Privatization Committee. In addition, certain company decisions—dissolution, restructuring, and transfer of strategic elements of assets—required the *ex post* authorization of the Minister for Finance. The Court considered the acquisition of 20% of the shares as enabling shareholders to exert a definite influence over the management and control of the companies concerned.[50] Similarly, the Court assessed the *ex post* control of the above-mentioned company decisions under the freedom of establishment provisions because the restriction allowed those shareholders to exert definite influence over the company. The Court considered the restriction to the free movement of capital as only ancillary, stating that "even if the effects of such a scheme are restrictive of the free movement of capital, those effects would be the unavoidable consequence of any restriction on freedom of establishment and would not warrant independent examination in the light of Article 56 EC."[51] Interestingly, the Court also specified the difference as to the territorial scope of application of the freedom of establishment and the free

[46] *Id.* at para. 99.

[47] Jérémie Houet, *Golden Shares: No Shining Anymore?*, 18 COLUM. J. EUR. L. Section III. (2011), *available at* http://www.cjel.net/online/18_1-houet/.

[48] Caspar Behme, *Golden Shares, Strategische AG, Niederlassungsfreiheit, Kapitalverkehrsfreiheit/"Kommission/Griechenland*," 29 ENTSCHEIDUNGEN ZUM WIRTSCHAFTSRECHT 161 (2013).

[49] *See* Thomas Papadopoulos, *Greek Legislation on Strategic Investments; The Next "Golden Share" Case Before the European Court of Justice?*, 6 EUR. COMAPNY L. 264, 266–67 (2009).

[50] Case C-244/11, Comm'n v. Greece, para. 23 (Nov. 8. 2012), http://curia.europa.eu/.

[51] *Id.* at para. 30.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

movement of capital. It noted that the Greek rules apply to all potential investors, not only to those investors established outside the EU.[52] This element was missing from the Court's arguments in C-326/07, *Commission v. Italy*.

IV. Analysis

If we compare the five cases analyzed above, no unequivocal trend is visible in the judiciary practice of the Court. The state measures concerned were quite similar, but their assessment by the Court differed greatly. The best example is the veto rights against certain important company decisions, which went through a change in terms of its assessment. At the outset, the Court considered a veto right as falling under the free movement of capital. Subsequently, in C-326/07, *Commission v. Italy*, the Court applied the freedom of establishment. Then, the Court evaluated it under the free movement of capital three times once again in the judgments against Portugal. The story ends with the return of the freedom of establishment in *Commission v. Greece*. The other freedom was addressed at most secondarily.

The provisions of the TFEU further complicate the legal situation.[53] Article 65 (2) TFEU states that the provisions on the free movement of capital "shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties."[54] It could be inferred from this provision that the freedom of establishment rules should prevail over—or at least apply simultaneously with—the free movement of capital provisions. Some authors criticize the Court for ignoring Article 65 (2) TFEU in the golden share cases.[55] Ramon Torrent points out that the Court followed a reverse logic of Article 65 (2) TFEU, examining first the compatibility with the free movement of capital and then stating an incidental restriction to the freedom of establishment.[56] Article 65 (2) TFEU supports the approach followed in *Commission v. Greece*—and to a certain extent in C-326/07, *Commission v. Italy*. One must pay regard also to Article 49 (2) TFEU, pursuant to which

> [f]reedom of establishment shall include the right to take up and pursue activities as self-employed persons

[52] *Id.* at para. 27.

[53] Peter-Christian Müller-Graff, *Einflußregelungen in Gesellschaften Zwischen Binnenmarktrecht und Eigentumsordnung*, *in* FESTSCHRIFT FÜR PETER ULMER 929, 933–34 (Mathias Habersack et al. eds., 2003); KOTTHAUS, *supra* note 38, at 44–45; HINDELANG, *supra* note 34, at 88–89, 108–14.

[54] Treaty of the Functioning of the European Union, art. 65(2), Mar. 25, 1957, 2008 O.J. (L 115) 72, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E065 [hereinafter TFEU].

[55] Torrent, *supra* note 30, at 556–57.

[56] *Id.* at 556.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

> and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, *subject to the provisions of the Chapter relating to capital* [emphasis added].[57]

Consequently, both provisions provide for the respect of the other freedom, and the Court must solve the problem of the applicability of the two freedoms. This is undoubtedly a difficult task, but the Court seems to hesitate between the freedom of establishment and the free movement of capital instead of following a consistent approach.[58]

Nevertheless, the choice between these economic freedoms is not immaterial from the point of view of the Member States. There is no doubt that both freedoms serve to limit state intervention. The (territorial) scope of application of the free movement of capital, however, is wider. Article 63 TFEU declares that "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."[59] The free movement of capital also applies to third country relations, even in the absence of reciprocity. Thus, in C-326/07, *Commission v. Italy*, AG Ruiz-Jarabo Colomer remarked that even if a veto right in relation to strategic decisions were considered incompatible with the freedom of establishment, it would still be effective against shareholders of non-member countries.[60] Therefore, restrictions could still be applied against investors from outside the European Union.[61] Furthermore, the extended application of the free movement of capital, instead of the application of the freedom of establishment, reduces the leeway of Member States and the institutions of the EU in international negotiations and in shaping their economic policy towards third countries.[62] Therefore, from the perspective of Member States, which freedom is applied is material.

---

[57] TFEU art. 49(2).

[58] ANDREAS HARATSCH, CHRISTIAN KOENIG & MATTHIAS PECHSTEIN, EUROPARECHT 496–98 (2012).

[59] TFEU art. 63,

[60] Opinion of Advocate General Colomer, *supra* note 4, at para. 46.

[61] *See* Pießkalla, *supra* note 24, at 464; Heike Schweitzer, *Sovereign Wealth Funds—Market Investors or "Imperialists Capitalists": The European Response to Direct Investments by Non-EU State-Controlled Entities*, *in* COMPANY LAW AND ECONOMIC PROTECTIONISM 270–78 (Ulf Bernitz & Wolf-Georg Ringe eds., 2010); Vassilios Tountopoulos, *Niederlassungsfreiheit: Genehmigungserfordernis für Beteiligung an "strategischen Aktiengesellschaften"—Nachträgliche Kontrolle der Beschlussfassung, Anmerkung*, 24 EuZW 33 (2013); O'Brien, *supra* note 34, at 256–57; Nicola Ruccia, *The New and Shy Approach of the Court of Justice Concerning Golden Shares*, 24 EUR. BUS. L. REV. 275, 291 (2013); Gallo, *supra* note 9, at 14.

[62] Torrent, *supra* note 30, at 560.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

Although the problem of the applicable freedom is not unessential, it should not be overestimated. Any restriction against third country entities may be evaded by establishing a company within the territory of the EU, by which the entity will be entitled to rely on the freedom of establishment.[63] Moreover, in an intra-EU context the choice between the freedom of establishment and the free movement of capital does not influence, in practice, the application of the restriction test, the proportionality requirement, and the outcome of the procedure brought against the given Member State.[64]

The Court's selection of the applicable freedom may seem somewhat arbitrary. In its earlier judiciary practice and in the more recent cases against Portugal, the Court gave preference to the free movement of capital, while C-326/07, *Commission v. Italy* and *Commission v. Greece* represent a more nuanced approach. The vacillation in the approach of the Court may be explained by the composition of the adjudicating chambers. The Third Chamber decided C-326/07, *Commission v. Italy*, and the Fourth Chamber decided *Commission v. Greece*. The First Chamber decided all three recent cases against Portugal, composed mainly of the same judges. This may explain why the Court deviated from the C-326/07, *Commission v. Italy* judgment in the cases against Portugal.

C. Measures Falling Under the Scope of the Free Movement of Capital—*Volkswagen II*

In terms of exercising powers granted to the Member States, it is crucial to examine what kinds of measures the free movement of capital provisions cover—and, additionally, the freedom of establishment. In its communication of 1997, the Commission made it clear that both discriminatory and indistinctly applicable restrictive rules are considered in violation of the free movement of capital or the freedom of establishment. The Commission listed several measures in its communication that infringe the free movement of capital and the freedom of establishment. Thus, the exclusion of investors from another Member State from acquiring more than a limited proportion of voting shares in domestic companies, a general authorization procedure in relation to the acquisition of shares, veto rights given to national authorities regarding certain company decisions, and the right of national authorities to appoint directors were deemed by the Commission as infringing the above-mentioned freedoms.[65]

In the vast majority of the cases, the Court confirmed the Commission's approach. The sole exception was the *Commission v. Belgium* decision. The strict attitude towards special

[63] Gallo, *supra* note 9, at 16; Van Bekkum, *supra* note 39, at 8.

[64] Pedro Caro De Sousa, *Case Comment: Case C-244/11 Commission v. Greece*, *in* EUTOPIA LAW, point A, *available at* http://eutopialaw.com/2012/11/20/case-comment-case-c-24411-commission-v-greece/.

[65] 1997 O.J. (C 220) 15, *supra* note 2, at paras. 7–8.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

powers held by Member States was also maintained in the past years. The Court condemned Italy, Greece, and, three times, Portugal.

In *Commission v. Portugal (GALP)*, the Portuguese government asserted that GALP had several foreign shareholders, and thus the state measures in practice did not deter investors. The Court rejected this argument and, in essence, declared that the potential effect of deterring investors suffices to establish a restriction to the free movement of capital.[66] In *Commission v. Greece*, the Greek government contested a violation of the fundamental freedoms on the grounds that the prior authorization scheme only affected the exercise of voting rights, but not the acquisition of shares. The Court found the exercise of voting rights attached to shares to be linked to the active participation in the management of a company, or in its control, and considered any restriction to this an obstacle to the free movement of capital.[67]

The enforcement of state interests through golden shares has remained undoubtedly limited. Nevertheless, one recent judgment deserves special attention because in this case the Court rejected the Commission's action. After the judgment, the question emerged of whether certain state measures, namely a voting cap and a rule on a decreased blocking minority, are compatible with the fundamental freedoms. Therefore, it is worth turning to the *Volkswagen II* decision.[68]

In *Volkswagen II*, the Commission brought a new action against Germany for failing to comply with the *Volkswagen I* judgment.[69] As is well-known, in *Volkswagen I*, the Court

---

[66] Case C-212/09, Comm'n v. Portugal, 2011 E.C.R. I-10889, paras. 66–68; 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* 8 (NORDIC & EUR. CO. L., Working Paper No. 14-01, 2014), http://ssrn.com/abstract=2386145 or http://dx.doi.org/10.2139/ssrn.2386145.

[67] Case C-244/11, Comm'n v. Greece, paras. 28–29 (Nov. 8. 2012), http://curia.europa.eu/; Sørensen, *supra* note 66, at 8.

[68] Claus Dieter Classen, *VW-Gesetz hat Bestand*, 128 DEUTSCHES VERWALTUNGSBLATT 1607 (2013); Hans Anton Hilgers, *Das erneute Vertragsverletzungsverfahren um das VW-Gesetz—Ein Kostspieliger Streit um des Kaisers Bart?*, 32 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1535 (2012).

[69] Case C-112/05, Comm'n v. Germany, 2007 E.C.R. I-8995; *see generally* Wolfgang Kilian, *Vereinbarkeit des VW-Gesetzes mit Europarecht*, 48 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3469 (2007); Wolf-Georg Ringe, *Case C-112/05, Commission v. Germany ("VW Law"), Judgment of the Grand Chamber of 23 October 2007, NYR.*, 45 COMMON MKT. L. REV. 537 (2008); Florian Sander, *Höchststimmrechte und Kapitalverkehrsfreiheit nach der VW-Gesetz-Entscheidung—Psychologisiert der EuGH den Schutzbereich des Art. 56 EG*, 19 EUZW 33 (2008); Yves de Cordt & Patricia Colard, *CJCE, 23 Octobre 2007, Commission/Allemagne Aff. C-112/05, Rec. p. I-8995*, 16 REVUE DES AFFAIRES EUROPÉENNES 473 (2007); Peer Zumbansen & Daniel Saam, *The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism*, 8 GERMAN L.J. 1027 (2007); Magnus Schmauch, *Economic Patriotism Made in Germany—The Court of Justice Overturns Parts of the "VW-Gesetz"*, 6 EUR. L. REP. 438 (2007); Florian Sanders, *Case 112/05, European Commission v. Federal Republic of Germany: The Volkswagen Case and Art. 56 EC—A Proper Result, Yet Also a Missed Opportunity?*, 14 COLUM. J. EUR. L. 359 (2008); Dirk A. Verse, *Das VW-Urteil und Seine Folgen. Zugleich Besprechung von EuGH, Urteil vom 23.10.2007, Rs. C-112/05 -*

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

condemned Germany for infringing the free movement of capital by granting special rights to the German State and the State of Lower Saxony in the Volkswagen Law. These special rights included the right for each to appoint two directors. The Volkswagen Law also introduced a voting cap of twenty percent and required certain company decisions to be passed by a four-fifths majority—giving rise to a blocking minority of twenty percent—deviating from the three-quarters majority set out in general company law.[70] These latter provisions favored Lower Saxony, owning just twenty percent of the shares.[71] In the *Volkswagen I* judgment, the Court declared that, by maintaining Paragraph 4 (1) [the right to appoint directors], as well as Paragraph 2 (1) [the voting ceiling of twenty percent] in conjunction with Paragraph 4 (3) [the four-fifths majority required for certain decisions] of the Volkswagen Law in force, Germany failed to fulfill its obligations under Article 56 (1) EC Treaty.[72] As a corollary of the judgment, Germany repealed the provisions on the voting cap and the right to appoint directors, but kept the blocking minority of twenty percent in force. Additionally, it incorporated the appointment right[73] and the decreased blocking minority[74] into the articles of association of Volkswagen.[75] The Commission was not satisfied with this and brought a new action against Germany, asserting that all three provisions should have been repealed. The Court was then forced to answer whether the requirement of a four-fifths majority in relation to certain decisions that should be adopted by a three-fourths majority under general company law constituted an independent violation of the free movement of capital.[76] The Commission also claimed that Volkswagen's articles of association should have been amended because it also contained a provision on the reduced blocking minority.[77] The Court rejected this latter claim, stating

---

Kommission./.Deutschland, 5 ZEITSCHRIFT FÜR GEMEINSCHAFTSPRIVATRECHT 31 (2008); Michael Weiss, *Staatlicher Schutz vor Investitionen nach dem Urteil zum VW-Gesetz*, 20 EUROPÄISCHES WIRTSCHAFTS- & STEUERRECHT (EWS) 13 (2008); Christoph Teichmann & Elisabeth Heise, *Das VW-Urteil des EuGH und seine Folgen*, 62 BETRIEBS-BERATER 2577 (2007), http://www.jura.uni-wuerzburg.de/fileadmin/02130100/WS2009_10/Krakauer_Forum/Teichmann_Heise_BB_2007_2577.pdf; Victoria Cherevach & Bas Megens, *Commission of the European Communities v. Federal Republic of Germany. Case C-112/05. The VW Law Case; Some Critical Comments*, 16 MAASTRICHT J. EUR. & COMP. L. 370 (2009).

[70] *Germany*, Case C-112/05 at paras. 38–56.

[71] *Id.* at paras. 48–49.

[72] *Id.* at para. 82.

[73] Volkswagen Aktiengesellschaft, *Satzung* § 11(1) (2015), http://www.volkswagenag.com/content/vwcorp/content/de/investor_relations/corporate_governance/satzung.bin.html/downloadfilelist/downloadfile/downloadfile/file/Satzung_Mai_2015_de.pdf.

[74] *Id.* at § 25(2).

[75] Klaus J. Hopt, *European Company and Financial Law: Observations on European Politics, Protectionism, and the Financial Crisis*, *in* COMPANY LAW AND ECONOMIC PROTECTIONISM 13, 17 (Ulf Bernitz & Wolf-Georg Ringe eds., 2010).

[76] Case C-95/12, Comm'n v. Germany, para. 27 (Oct. 22, 2013), http://curia.europa.eu/.

[77] *Id.* at para. 19.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

that the Court examined the compatibility of the Volkswagen Law in *Volkswagen I* and not that of the articles of association with the EC Treaty.[78] Taking into account the dispositive part and justification of the *Volkswagen I* judgment, the Court concluded that the grammatical and contextual analysis of the *Volkswagen I* decision suggests that a violation could be established based on the restrictive effect caused by the voting cap in conjunction with the provision on the reduced blocking minority. No independent infringement could, therefore, be established regarding the rule on blocking minorities. This led the Court to reject the Commission's action. The Court's reasoning was rather formal and relied exclusively on the text of the *Volkswagen I* judgment. It does not provide for a substantial explanation of why the voting cap and the blocking minority are restrictive only in conjunction.[79] This, however, was not the task of the Court in *Volkswagen II*.

In theory, Germany would have had a choice of what to repeal: The voting ceiling, the provision on the blocking minority, or both.[80] Two potential findings could be deduced from the judgment. First, it could follow from the decision that a majority requirement exceeded the requirement laid down in general company law, and thus a reduced blocking minority does not infringe the free movement of capital by itself. As AG Nils Wahl put it, however:

> [T]he purpose of the present proceedings is not to determine whether Paragraph 4(3) of the VW Law, considered on its own, constitutes an infringement of EU law, there is no need to enquire any further into whether the minority blocking right provided for in Paragraph 4(3) of the VW Law constitutes an infringement of EU law.[81]

The Court itself declared:

> [I]n observing . . . that Paragraph 4(3) of the VW Law 'creates an instrument enabling the Federal and State authorities to procure for themselves a blocking minority allowing them to oppose important resolutions, on the basis of a lower level of investment

[78] *Id.* at paras. 24–25.

[79] Susanne Kalss, *Gesellschaftsrecht: Sperrminorität im VW-Gesetz - Anmerkung*, 23 EUZW 949, 949 (2013).

[80] *Id.* at 949.

[81] Opinion of Advocate General Wahl at para. 54, Case C-95/12, Germany (May 29, 2013), http://curia.europa.eu/juris/document/document.jsf?text=&docid=137785&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=19216.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

> than would be required under general company law', the Court – contrary to what the Commission appears to suggest – did not in any way rule on the question as to whether or not that provision, on its own, infringes Article 63(1) TFEU.[82]

The literature suggests that, in the question of the reduced blocking minority, the Commission should bring a new action or the Court could be asked in the framework of a preliminary reference procedure.[83] It could be argued, however, that the reduced blocking minority rule does not violate in itself the free movement of capital. After repealing the voting cap, all shareholders may exercise their voting rights without any higher limit, and the public shareholders are not privileged due to the interplay of their shareholding, the voting maximum, and the reduced blocking minority. In addition, it was pointed out[84] that a reduced blocking minority is in conformity with the text of the already repealed Directive 77/91/EEC and now that of Directive 2012/30/EU, which provide minimum thresholds for the required voting majorities, though Member States are entitled to deviate from these.[85] Some also argue that a provision on a reduced blocking minority is a non-discriminatory

---

[82] Case C-95/12, Comm'n v. Germany, para. 47 (Oct. 22, 2013), http://curia.europa.eu/, *cited by* Philipp Kubicki, *EuGH, Rs. C-95/12 (Kommission/Deutschland)—Sperrminorität im VW-Gesetz mit Unionsrecht vereinbar?* at 1, 2, https://www.bundestag.de/blob/194848/e7b51aff33227ab7303f74140f928fec/sperrminorit__t_im_vw-gesetz_mit_unionsrecht_vereinbar-data.pdf.

[83] Kubicki, *supra* note 82, at 2; Thomas M. J. Möllers, *Die Juristische Aufarbeitung der Übernahmeschlacht VW-Porsche—ein Überblick*, 17 NZG 363 (2014).

[84] Barbara Rapp-Jung & Andreas Bartosch, *Das neue VW-Gesetz im Spiegel der Kapitalverkehrsfreiheit—Droht wirklich ein Neues Vertragsverletzungsverfahren?*, 64 BETRIEBS-BERATER 2210, 2211–12 (2009).

[85] Second Council Directive 77/91, 1976 O.J. (L 26) 1, art. 40 (EC)

> Second Council Directive of 13 December 1976, 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 58 of the Treaty, 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[;]

Directive 2012/30, 2012 O.J. (L 315) 74, art. 44 (EU)

> 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[.]

trading rule not affecting market access in the sense of the *Keck* judgment, and so it does not infringe the free movement of capital.[86] As will be described below, in the absence of an express statement of the Court, it is strongly questionable whether the *Keck* judgment may be extended to Article 63 TFEU.

Secondly, one could also infer from the judgment that the application of a voting cap in itself is not necessarily contrary to the fundamental freedoms.[87] Already in the *Volkswagen I* judgment, the Court noted that "the capping of voting rights is a recognised instrument of company law."[88] This would also imply that a strict proportionality between the shareholding and voting rights is not required under EU law. AG Nils Wahl noted that "[a]lthough I am not convinced that the same result could have been achieved by repealing Paragraph 4(3) of the VW Law instead of Paragraph 2(1) thereof, the grounds of the 2007 Judgment as well as its operative part would seem equally to permit such a solution."[89] The acceptability of a voting cap raises the question of the permissibility of a deviation from the one share-one vote principle. In the golden share cases, the Court rejected the exercise of disproportionate powers by Member States in comparison to their shareholdings. The golden share case law demonstrates that deviations from the one share-one vote rule in favor of States are prohibited. Therefore, it may be questioned whether the maintenance of the voting cap instead of the reduced blocking minority rules would have resulted in the same decision in *Volkswagen II*. Whether a deviation from the one share-one vote rule in purely private arrangements complies with Articles 49 and 63 presents another question. Although the Takeover Directive has introduced such a rule for certain situations,[90] EU law has not so far provided for the recognition of the one share-one vote principle generally, and some national laws permit deviations.[91]

It is clear that the Court had to decide only on the compliance with the *Volkswagen I* judgment in a procedure under 260 (2) TFEU.[92] No definite conclusion may, therefore, be drawn from *Volkswagen II* as to the issue of a blocking minority and voting cap.[93]

---

[86] Rapp-Jung & Bartosch, *supra* note 84, at 2214–15.

[87] Sanders, *supra* note 69, at 363–64.

[88] Case C-95/12, Comm'n v. Germany, para. 38 (Oct. 22, 2013), http://curia.europa.eu/.

[89] Opinion of Advocate General Wahl, *supra* note 81, at para. 46.

[90] Directive 2004/25/EC of the European Parliament and of the Council of Apr. 21, 2004, On Takeover Bids, 2004 O.J. (L 142) 12, arts. 10(1)(f) & 11(3)–(4) [hereinafter Takeover Directive].

[91] Mestre, *supra* note 30, at 287; Viviane de Beaufort, *One Share—One Vote, le Nouveau Saint Graal?* ESSEC WORKING PAPERS 1, 2 (2006), http://www.essec.edu/faculty/showDeclFileRes.do?declId=6743&key=Publication-Content.

[92] Kalss, *supra* note 79, at 948; Kubicki, *supra* note 82, at 1; Möllers, *supra* note 83, at 363.

[93] Kubicki, *supra* note 82, at 2; Möllers, *supra* note 83, at 363.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

D. Typical State Defenses

I. Property System

Governments already relied on Article 345 TFEU (Article 295 EC Treaty) in the early golden share cases. According to Article 345 TFEU, the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. The Court did not consider the national property system as a potential basis for the derogation from the fundamental freedoms. This practice continued in the more recent cases, as illustrated by *Commission v. Portugal (Portugal Telecom)*[94] and *Commission v. Greece*.[95]

The Court specified the contents of Article 345 TFEU in *Essent*.[96] Dutch law contained three prohibitions that had to be examined by the Court. First, Dutch rules required the consent of the Minister for Economic Affairs for the sale of shares held in electricity and gas distribution system operators active in the Netherlands and consent had to be denied if the shares had been acquired by entities other than national authorities or legal persons owned directly or indirectly by national authorities. The sale of shares in electricity and gas distribution system operators to private investors was thus ruled out, amounting to prohibition of privatization. Second, any ownership or control links between companies which were members of the same group as an operator of such distribution systems and companies which were members of the same group as an undertaking which generates/produces, supplies, or trades in electricity or gas in the Netherlands were prohibited, amounting to group prohibition. Lastly, any engagement by an operator and by the group of which it was a member in transactions or activities which may have adversely affected the operation of the system concerned—the prohibition of activities that may adversely affect the system operation—was also prohibited.[97] The Court had to decide whether these prohibitions may be justified by Article 345 TFEU in the course of their assessment, carried out under the free movement of capital provisions. The Dutch state argued that the prohibition of privatization qualified as a system of property ownership within the meaning of Article 345 TFEU to which the free movement of capital and the freedom of establishment is not applicable.[98] The Court started by stating that the Treaties do not preclude either the nationalization of undertakings or their privatization, but Article

[94] Case C-171/08, Comm'n v. Portugal, 2010 E.C.R. I-6817, para. 64.

[95] Case C-244/11, Comm'n v. Greece, paras. 15–18 (Nov. 8. 2012), http://curia.europa.eu/.

[96] Joined Cases C-105/12, Staat der Nederlanden v. Essent NV, C-106/12, Eneco Holding NV, C-107/12, Delta NV (Oct. 22, 2013), http://curia.europa.eu/.

[97] *Id.* at para. 2.

[98] *Id.* at para. 24.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

345 TFEU does not exempt national laws from the observance of the fundamental rules, such as the free movement of capital; therefore, the maintenance of public ownership had to be examined under Article 63 TFEU. The Court held that not only the prohibition of privatization, but also the group prohibition and prohibition of adverse activities restrict the free movement of capital because they preclude investments in certain undertakings.

Regarding the relation between Article 63 TFEU and Article 345 TFEU, the Court referred to the *Commission v. Portugal (Portugal Telecom)* and *Commission v. Poland* cases, where it established that Article 345 cannot justify a restriction to the free movement of capital.[99] Although *Essent* is sometimes mentioned together with the golden share cases,[100] here the Court distinguished it from them. In *Essent*, the Court adjudged an absolute prohibition of privatization, while the Court in the golden share cases addressed privileges of the Member States attached to their position as a shareholder in already privatized undertakings.[101] Member States create golden shares to protect certain undertakings from competition, whereas the Dutch legislation aimed to ensure competition in the energy market.[102] The Court concluded that "the reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU constitute factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital."[103] Additionally, it may be noted that the group prohibition and the prohibition of activities that may adversely affect system operation could be justified by the aims of consumer protection and the security of energy supply. Although Dutch law imposed stricter requirements on energy undertakings than secondary EU law, the goals pursued by national law were deemed to be in accordance with the objectives of secondary EU law, and therefore acceptable.

In fact, the Court's judgment is in accordance with the communication of the Commission that laid out that

> the movement of a firm from the public to the private sector is an economic policy choice which, in itself, falls within the exclusive competence of Member States, stemming from the principle of neutrality in the Treaty

[99] Case C-271/09, Comm'n v. Poland, 2011 E.C.R. I-13613, para. 55.

[100] Clemens Kaupa, *A More Prudent Approach in the "Golden Share" Cases*, EUR. L. BLOG (Oct. 31, 2013), http://europeanlawblog.eu/?p=2015.

[101] Joined Cases C-105/12, Staat der Nederlanden v. Essent NV, C-106/12, Eneco Holding NV, C-107/12, Delta NV, ¶ 54 (Oct. 22, 2013), http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-105/12&td=ALL.

[102] Pieter Van Cleynenbreugel, *No Privatisation in the Service of Fair Competition? Article 345 TFEU and the EU Market-State Balance After Essent*, 39 EUR. L. REV. 271 (2014).

[103] *Essent*, Case C-105/12, at para. 55.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

> vis-à-vis the system of property ownership, established in Article 222 [the present Article 345 TFEU].[104]

Based on the above-described judiciary practice, it can be concluded that the Court accepts Article 345 TFEU as a reason for restricting fundamental freedoms before the privatization of a public undertaking, but subsequent to the privatization of a former state-owned company, the Court rejected the reliance on a particular property ownership system. *Essent* is applicable in a pre-privatization scenario, while the golden share cases limit state intervention subsequent to the privatization of a company.

More generally, it can be concluded that protectionism is allowed up to the point of privatization, but after that state intervention is excluded. The stricter approach subsequent to privatization may cause Member States to not be motivated to privatize publicly owned companies. Member States must be cautious when allowing a company to enter into the market because this amounts to surrendering the special powers possessed by the given Member State.

II. Private or Public?

In some previous golden share cases, governments argued that the measure concerned was not a state measure but a private act, usually because the special rights were enacted in the articles of association of the given company. The basis of this reasoning is that the provisions governing the free movement of capital do not have horizontal direct effect. For example, they do not bind private persons.[105] In light of the more recent C-326/07, *Commission v. Italy* and *Commission v. Greece* judgments, however, one must pay attention to the horizontal binding force of the freedom of establishment provisions in relation to golden share cases.

In its judiciary practice, the Court rejected such arguments and did not change its stance in the more recent cases. The Portuguese government in *Commission v. Portugal (Portugal Telecom)*, *Commission v. Portugal (EDP)*, and *Commission v. Portugal (GALP)* put forward such argumentation: It alleged that the shares granting special rights to the state authorities were of a private nature. In both cases, the Court called attention to the fact that although national legislation only gave the possibility to introduce golden shares in the articles of associations, the Portuguese state could, however, use its majority shareholding at the time of the introduction of golden shares to reserve for itself the special rights concerned.[106] In essence, the "legislator state" and the "shareholder state" were not

[104] 1997 O.J. (C 220) 15, *supra* note 2, at n.1.

[105] Stöber, *supra* note 40, at 979.

[106] Case C-543/08, Comm'n v. Portugal, 2010 E.C.R. I-11241, paras. 48–53.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

separable.[107] In addition, the rules constituted a deviation from general company law because the shares were the property of the state and could not be transferred. In *Commission v. Portugal (GALP)*, the right to appoint the chairman of the board of directors was based on a shareholder agreement entered into between a bank fully owned by the state and other private shareholders. This right was enacted in the laws and the articles of association of GALP, deviating from the general company law provisions prohibiting preferential shares to appoint directors. Therefore, this special right was also attributed to the Member State. In this way, the Court could evade answering the question of whether the free movement of capital has horizontal direct effect or not.[108] Therefore, the question still stands of whether Article 63 TFEU binds private entities.

This poses two questions. First, what happens when the state acts as a private shareholder and that comes into question? A state can increase its shareholding in a company and amend the company's articles of association in order to ensure itself certain privileges. AG Miguel Poiares Maduro argued in his opinion delivered in *Commission v. Netherlands* that Member States are bound by the Treaties as signatories and not only in their quality of state authority; they are, therefore, bound both in a private and public capacity. Member States, acting as market participants, may be subject to constraints that do not apply to other market participants.[109] This approach was also followed by AG Paolo Mengozzi in *Commission v. Portugal (Portugal Telecom)* and by other authors.[110] Thus, Jonathan Rickford asserts that, as states must act always in the public interest, any restriction stemming from the state, either in its private or in public capacity, must be prohibited as a state act to be assessed under the free movement rules.[111] Carsten Gerner-Beurle points out that the state's differentiation from private persons is proven by the fact that it is subject to specific rules in certain areas—for instance, public procurement and state aid rules. The possibility of a later intervention remains in the hands of the state due to its legislative and financial powers, even if the state acted previously as a private entity.[112] Although Wolf-Georg Ringe acknowledges that the question is still open, he opines that any state measure—adopted either in a private or public capacity—that deters potential

[107] Opinion of Advocate General Mengozzi, *supra* note 41, at para. 61.

[108] *See also* Case C-98/01, Comm'n v. U.K., 2003 E.C.R. I-4641, para. 48; Case C-112/05, Comm'n v. Germany, 2007 E.C.R. I-8995, paras. 26–29.

[109] Opinion of Advocate General Maduro at paras. 22–25, Joined cases C-282/04 and C-283/04, Comm'n v. Netherlands, 2006 E.C.R. I-9141.

[110] Opinion of Advocate General Mengozzi, *supra* note 41, at para. 65.

[111] RICKFORD, *supra* note 1, at 77.

[112] Carsten Gerner-Beurle, *Shareholders Between the Market and the State. The VW Law and Other Interventions in the Market Economy*, 49 COMMON MKT. L. REV. 97, 130–31 (2012).

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

investors is caught by Article 63 (1) TFEU.[113] On the contrary, some authors argue that the Court objects to state measures only if they grant to the state a power disproportionate to its shareholding.[114] From the Court's *obiter dicta* statement in the *Commission v. Portugal (EDP)* judgment, it may also be inferred that the acts of a Member State in its shareholder capacity are not caught by the fundamental freedoms. Here, the Court recognized that while "the right to appoint a director constitutes a restriction on the free movement of capital since such a specific right constitutes a derogation from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities," the same right "can be conferred by legislation as a right of a qualified minority[;] it is clear that it must, in such a case, be accessible to all shareholders and must not be reserved exclusively to the State."[115]

A second question posed is whether private parties are generally bound by the freedom of establishment and the free movement of capital.[116] The horizontal direct effect of the fundamental freedoms is to be examined separately with regard to each freedom. The Court acknowledged only in the case of the free movement of workers that the principle of non-discrimination set out in Article 48 of the EC Treaty is "not specifically addressed to the Member States," and discriminatory measures by private actors are forbidden.[117] Although the Court recognized that the prohibition of discrimination applies "equally . . . to contracts between individuals," the Court has not applied this outside the free movement of workers.[118]

In the *Viking* judgment the Court held that the freedom of establishment may be relied on by a private undertaking against a trade union, or an association of trade unions regulating paid work collectively, even though they are not public law entities but exercise the legal autonomy conferred on them.[119] However, the Court stopped at this point, and its decisions do not go beyond the acts of trade unions exercising collective regulatory power.

The Court has not yet made an express statement on the horizontal direct effect of Article 63 TFEU, not even regarding those cases of regulatory power exercised or discrimination

---

[113] Wolf-Georg Ringe, *Company Law and Free Movement of Capital*, 69 CAMBRIDGE L.J. 378, 398–99 (2010).

[114] Mestre, *supra* note 30, at 287; Jan Lieder, *Staatliche Sonderrechte in Aktiengesellschaften*, 172 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 306, 313–14 (2008).

[115] Case C-543/08, Comm'n v. Portugal, 2010 E.C.R. I-11241, para. 62; Sørensen, *supra* note 66, at 13–14.

[116] *See* TAMÁS SZABADOS, THE TRANSFER OF THE COMPANY SEAT WITHIN THE EUROPEAN UNION 189–206 (2012).

[117] Case C-281/98, Roman Angonese v. Cassa di Risparmio di Bolzano SpA, 2000 E.C.R. I-4139, paras. 30–36.

[118] *Id.* at para. 34.

[119] Case C-438/05, Int'l Transport Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779, paras. 56–66.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

imposed by private parties. Some authors affirm the horizontal direct effect of the free movement of capital provisions.[120] Others tend to attribute a restricted horizontal direct effect to Article 63 TFEU, usually limited to the acts of private entities enjoying certain regulatory power due to their autonomy.[121] Some authors deny this.[122] The aim of the Internal Market is undoubtedly to grant wider freedom to market players. It is questionable whether the full horizontal direct effect of Article 63 TFEU would facilitate achieving this goal of restricting the autonomy of private parties.[123] Certain privileges—for instance, multiplied voting rights—in companies may even render the acquisition of a shareholding more attractive for certain investors.[124] Catherine Barnard denies the horizontal direct effect of Article 63 TFEU and points out that, in *Volkswagen I*, the Court could have rejected the argument of the German government that the capping of the voting rights of the shareholders at twenty percent and the majority requirement of eighty percent for substantial company decisions were part of a private agreement and not a state measure based on the horizontal direct effect of Article 63 (1) TFEU, insofar as the Court would have in fact intended to accord such a nature to that Article.[125] A potential problem with the extension of the personal scope of application of Article 63 TFEU is that private actors can neither rely on the exceptions of the TFEU nor the overriding reasons of public interest set out by the Court. Private acts are typically founded on private interests not envisaged by the TFEU or the Court's present practice. In addition, private measures are linked to the economic interests of the private entity concerned, which cannot justify a restriction to the free movement of capital pursuant to the Court's case law. In practice, however, the Court has not yet challenged private measures.[126] Nevertheless, it can still be argued that the horizontal indirect effect binds Member States to prevent the restricting measures of private actors.[127] However, this again raises the question of which private acts are caught by the free movement of capital provisions.

---

[120] MADS ANDENAS & FRANK WOOLDRIGE, EUROPEAN COMPARATIVE COMPANY LAW 20 (2009).

[121] HARATSCH, KOENIG & PECHSTEIN, *supra* note 58, at 523; MATHIAS HABERSACK & DIRK A. VERSE, EUROPÄISCHES GESELLSCHAFTSRECHT 41 (2011); THOMAS OPPERMANN, CLAUS DIETER CLASSEN & MARTIN NETTESHEIM, EUROPARECHT 510 (2011).

[122] KOTTHAUS, *supra* note 38, at 75; Rolf Otto Seeling & Martin Zwickel, *Das Entsenderecht in den Aufsichtsrat Einer Aktiengesellschaft als "Ewigkeitsrecht,"* 63 BETRIEBS-BERATER 622, 623 (2008); HANS-WOLFGANG ARNDT & KRISTIAN FISCHER, EUROPARECHT 132 (2008); Verse, *supra* note 69, at 35.

[123] HABERSACK & VERSE, *supra* note 121, at 15; CHRISTOPH OHLER, EUROPÄISCHE KAPITAL—UND ZAHLUNGSVERKEHRSFREIHEIT 148–49 (2002).

[124] Gerner-Beurle, *supra* at note 112, at 134.

[125] CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU—THE FOUR FREEDOMS 586–87 (2013).

[126] Mestre, *supra* note 30, at 286.

[127] KOTTHAUS, *supra* note 38, at 75–76; Verse, *supra* note 69, at 35; HARATSCH, KOENIG & PECHSTEIN, *supra* note 58, at 523.

III. Keck

The reliance on the *Keck* judgment also appeared in the previous golden share cases, and there too the Court rejected it.[128] The Portuguese government argued that the national measures should be exempted based on *Keck*, which is known from the free movement of goods case law because the indistinctly applicable national rules did not restrict the acquisition of shareholdings but only the management of the company, which does not hinder market access. In both *Commission v. Portugal (Portugal Telecom)* and *Commission v. Portugal (EDP)*, the Court held that the possibility of acquisition of a shareholding was affected and, consequently, market access was also restricted.[129] The Court neither expressly excluded the application of the *Keck* decision in these judgments nor allowed the unequivocal conclusion that the rule in *Keck* would be transferable to the free movement of capital.

IV. Exceptions and Justifications

Restrictions imposed by the Member States are not acceptable unless they are based on an express exception provided by the TFEU or overriding reasons in the public interest recognized in the Court's case law. Irrespective of the question of whether the freedom of establishment or the free movement of capital is applicable to golden share cases, the potential exceptions and justifications are narrowly interpreted, which further restricts any state intervention.

In its judgments, the Court acknowledged that certain reasons may justify the maintenance of golden shares. Thus, it accepted that the security of the availability of the telecommunications network in the event of crisis, war, or terrorism,[130] and securing the energy supply[131] linked to the public security, may constitute legitimate objectives for restricting the free movement of capital. At the same time, the Court rejected that the interest in ensuring the conditions of competition in a particular market,[132] or the

[128] Case C-98/01, Comm'n v. U.K., 2003 E.C.R. I-4641, paras. 45-47; Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I-4581, paras. 58–61. *See* KOTTHAUS, *supra* note 38, at 91–95; Andrea Biondi, *When the State is the Owner—Some Further Comments on the Court of Justice 'Golden Shares' Strategy*, *in* COMPANY LAW AND ECONOMIC PROTECTIONISM 96 (Ulf Bernitz & Wolf-Georg Ringe eds., 2010); Sørensen, *supra* note 66, at 9; Sanders, *supra* note 69, at 367–68; KIRSA STEINKE, DIE ÜBERTRAGBARKEIT DER KECK-RECHTSPRECHUNG DES EUGH AUF DIE NIEDERLASSUNGSFREIHEIT 200–06 (2009).

[129] Case C-543/08, Comm'n v. Portugal, 2010 E.C.R. I-11241, paras. 65–68; Case C-212/09, Comm'n v. Portugal, 2011 E.C.R. I-10889, paras. 62–65; Walter Frenz, *Goldene Aktien Nach der 3. Portugal Entscheidung*, 23 EWS 125, 129–30 (2011); Müller-Michaels, *supra* note 40, at 2396.

[130] Case C-171/08, Comm'n v. Portugal, 2010 E.C.R. I-6817, para. 72.

[131] *Portugal*, Case C-171/08 at 84; *Portugal*, Case C-212/09 at para. 82.

[132] *Portugal*, Case C-171/08 at para. 70.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

prevention of a possible disruption of the capital market,[133] could constitute a justification for restricting the free movement of capital.

In practice, however, the Court rejected the Member States' arguments based on such reasons. Even if the Court recognizes that the restriction is based on a legitimate objective, state measures rarely pass the proportionality test set out by the Court. This is partly because the Court also requires that one may rely on public security only in the event of a genuine and sufficiently serious threat to a fundamental interest of society.[134] The Member States could not prove such a threat in the cases examined. In the *Commission v. Portugal (EDP)* decision, the Court seemed to accept that threats to the energy supply are sudden and unforeseeable, and therefore acknowledged that a genuine and sufficiently serious threat does not necessarily have to be immediate. It refuted, however, that the special rights given to the Portuguese state would contribute to the prevention of such threats.[135] In addition, purely economic reasons cannot justify a restriction of the free movement of capital. Hence, ensuring the conditions of competition[136] or the prevention of a possible disruption of the capital market could not constitute a valid justification.[137]

It is usually found that the exercise of the special rights granted to the state was not subject to any specific and objective condition that reduces uncertainty and gives wide discretion to national authorities.[138] Many times, the national laws required that the special rights can be exercised only on the grounds of public interest, but neither national laws nor the articles of associations of the companies concerned determined what public interest exactly meant.[139]

Commission v. Belgium stood as the singly instance of the Court accepting a justification for quite a while. Therefore, it is not surprising that Member States considered *Commission v. Belgium* as a compass in shaping their defense. In comparison to previous cases, there is a significant difference in the legislation and the related arguments of the Member States. In the more recent laws, the Member States attempted to lay down several criteria to

[133] *Id.* at para. 71.

[134] *Id.* at paras. 73–74; *Portugal*, Case C-171/08 at paras. 85–86; *Portugal*, Case C-212/09 at para. 83.

[135] Case C-543/08, Comm'n v. Portugal, 2010 E.C.R. I-11241, para. 87; Case C-212/09, Comm'n v. Portugal, 2011 E.C.R. I-10889, para. 85.

[136] Case C-171/08, Comm'n v. Portugal, 2010 E.C.R. I-6817, para. 70.

[137] *Id.* at para. 71.

[138] *Id.* at para. 75; *Portugal*, Case C-543/08 at paras. 90–92; *Portugal*, Case C-212/09 at paras. 88, 90.

[139] *Portugal*, Case C-171/08 at para. 76; *Portugal*, Case C-212/09 at para. 89.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

circumscribe the public interest factors concerned and to determine the framework of exercising the right of authorization or the right of veto exerted by state authorities.

Although the Court accepted in C-326/07, *Commission v. Italy* that the minimum supply of energy resources and goods essential to the public, the continuity of public service, national defense, the protection of public policy and public security, and health emergencies may justify a restriction on the free movement of capital, it held that the Italian rules did not meet the proportionality test. The case was distinguished from *Commission v. Belgium* on the grounds that the exercise of the veto right concerning strategic decisions was not based on objective and verifiable conditions, even though it was subject to judicial control, and so the Court found that the relevant national provisions were contrary to the freedom of establishment.[140]

In *Commission v. Portugal (Portugal Telecom)*, although the Portuguese government referred in its defense to the *Commission v. Belgium* judgment, the Court did not address this argument.[141] In *Commission v. Greece*, the Greek rules determined that the prior authorization to the acquisition of more than twenty percent of the shares is to be granted provided that "the general interest criteria for ensuring the continuity of the services provided and the operation of the networks are met."[142] Furthermore, the Greek law set out ten indicative evaluation criteria—for instance, experience, solvency, transparency, system of ownership, structure of the share capital—that had to be taken into account in deciding whether to grant authorization. The Court recognized that the objective of guaranteeing the security of supply in the petroleum, telecommunications, and energy sectors in the event of a crisis may constitute a public security reason and justify an obstacle to the freedom of establishment. Yet, it found that the government may rely on this objective in the event of a genuine and sufficiently serious threat to a fundamental interest of society, which was absent here. The prior authorization scheme was effective even before any real risk arose; therefore, the Court considered it neither suitable nor proportional. The Court established that there were less restrictive means—for example, imposing positive obligations on undertakings—to attain the objective pursued and pointed out that the evaluation criteria constituted a non-exhaustive, indicative list that increases the discretion of the national authority. The Court distinguished this case from *Commission v. Belgium* in that the Greek rules did not specify the company decisions and strategic assets affected by the *ex post* authorization. Also, the Greek rules lacked the formal statement of reasons and effective court review. The Court inferred that investors could not be aware of the circumstances under which authorization could be denied.

---

[140] Case C-326/07, Comm'n v. Italy, 2009 E.C.R. I-2291, paras. 71–74.

[141] *Portugal*, Case C-171/08 at para. 47.

[142] Case C-244/11, Comm'n v. Greece, para. 2 (Nov. 8. 2012), http://curia.europa.eu/.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

Although it seems that the more recent cases are not very different from the *Commission v. Belgium* case, the Court rejected the Member States' defense relying on that judgment, even when the same public interest factor—the safeguarding of energy supplies in the event of a crisis—was relied on. The distinctive characteristic of *Commission v. Belgium* was that the Member States' special powers were limited to certain assets, such as the energy supply network. In addition, the Belgian scheme was based on an *ex post* authorization system that was subject to strict time limits, a formal statement of reasons for the decision, and effective judicial review.

In *Commission v. Portugal* (EDP) and *Commission v. Portugal (GALP)*, Portugal also relied on Article 86 EC Treaty (the present Article 106 TFEU), which the Court rejected. The grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights may be justified, even if it is contrary to the provisions of the Treaties, to the extent that performance of the particular task assigned to that undertaking can be assured only through the grant of such rights, and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the EU. As the case dealt with the legality of special rights granted to the Portuguese state, and not with granting special or exclusive rights to an undertaking or the nature of the services, the Court concluded that Article 86 EC Treaty was not applicable.[143]

As previously discussed, the scope of application of the freedom of establishment is limited to the relations between Member States, while Article 63 extends to third countries. The question may be posed whether the same restriction test and justifications are applied against third countries as against the Member States. Martha O'Brien points out that Member States may have greater leeway to impose restrictions on the free movement of capital in relation to third states. She invokes the justification of effective fiscal supervision and the "lack of information about a third country investor seeking to acquire shares in a strategic sector" as potential reasons for justification.[144] In *Commission v. Greece*, Greece argued that the objective of controlling speculative hostile acquisitions by sovereign wealth funds established in non-member countries precludes the application of the freedom of establishment.[145] The Court did not express a view on whether this is a legitimate objective, but simply rejected Greece's argument because the prior authorization requirement concerning the acquisition of more than 20% of the voting rights in strategic public limited undertakings was applicable not only in the relation to third country investors, but also to investors established in the EU.[146] It may be noted that,

[143] Case C-543/08, Comm'n v. Portugal, 2010 E.C.R. I-11241, paras. 93–96; Case C-212/09, Comm'n v. Portugal, 2011 E.C.R. I-10889, paras. 91–96.

[144] O'Brien, *supra* note 34, at 259.

[145] *Greece*, C-244/11 at para. 26.

[146] *Id.* at para. 27.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

with regard to the application of the freedom of establishment, Member States may impose restrictions in third country relations. The question of whether such an objective is legitimate would arise regarding Article 63 TFEU instead.

E. Conclusion

The Court continues to follow a strict approach, even after the economic crisis, and in the majority of cases condemns Member States for possessing special powers in privatized companies.[147] Although it might seem that the Court developed a coherent judiciary practice regarding golden share cases, the more recent judgments demonstrate that several uncertainties still remain.

The Court does not always appear consistent in determining the applicable freedom. In the earlier cases, the Court applied the free movement of capital and only secondarily the freedom of establishment. In C-326/07, *Commission v. Italy* and *Commission v. Greece*, however, the Court relied on the freedom of establishment instead. Hence, the C-326/07, *Commission v. Italy* judgment was described as "an unexpected turn."[148] The Court left the application of the freedom of establishment (finding only the incidental restriction thereof) in its three recent judgments against Portugal and returned to its preference for the free movement of capital. In most of the cases, the applicable restriction test, the potential justifications, and the proportionality test are the same; the choice between the two freedoms may still be relevant in third country relations.

As the Commission asserted, "the Court has not ruled out golden shares, but it has set very strict criteria for their use . . . ."[149] Under very limited circumstances, the Court acknowledged that certain state interests could justify their application. State interests behind golden shares remained the same but, in the proceedings before the Court, the formulation of the arguments of the Member States changed. The governments as defendants increasingly take the *Commission v. Belgium* decision as a departure. Despite the similarities of the facts, the Court has not accepted the reliance on *Commission v. Belgium* in any of the more recent golden share judgments.

To a certain extent, the *Volkswagen II* judgment constitutes an exception, in that the Court did not condemn Germany. It cannot be ignored, however, that the subject of the procedure was the examination of the proper "implementation" of the *Volkswagen I* judgment, and not the compliance with the fundamental freedoms. In relation to

[147] Müller-Michaels, *supra* note 40, at 2396.

[148] Van Bekkum, *supra* note 39, at 1.

[149] Brussels, *supra* note 1, at 12.

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

Volkswagen II, the question emerges of whether a voting cap and a reduced blocking minority are in accordance with the fundamental freedoms.

We started with a citation from Shakespeare, and so it is appropriate to finish by citing a dramatist again, the German Christian Friedrich Hebbel, in his Diaries writing "all that glitters is not gold. But not even all that is gold glitters, it should be added."[150] Of course, the author's intention was not to explain the golden share case law of the Court, but this statement remains true for golden shares held by the Member States of the EU, even in light of the more recent developments. The Court's approach is not free from uncertainties, as the most recent golden share cases demonstrate, but has not changed much in the last couple of years in comparison to the earlier practice. Golden shares do not glitter. The most we can say is that they exist, but only under a very narrow framework.

[150] CHRISTIAN FRIEDRICH HEBBEL, TAGEBÜCHER, ERSTER BAND, 1835–1839, 64 (1905), *available at* https://archive.org/stream/smtlichewerke11werngoog#page/n0/mode/2up (author's translation of "Es ist nicht Alles Gold, was glänzt. Aber, es glänzt auch nicht Alles, was Gold ist, sollte man billig hinzu setzen.").

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press

https://doi.org/10.1017/S2071832200021052 Published online by Cambridge University Press