Turn of the Tide?: The „Golden Share" Judgements of the European Court of Justice and the Liberalization of the European Capital Markets

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A. Introduction

[1] There is hardly a set of legal institutions that has more contributed to the creation of the common market than the fundamental freedoms enshrined in the Treaty of Rome. The expanding concepts of freedom of establishment (1) and of free movement of goods, (2) persons, (3) services (4) and capital (5) have, during the thirty years since the European Court of Justice\'s (ECJ) decision in \"*Dassonville*\" (6), by far become the Community\'s most effective deregulatory instruments. The driving force behind this development has been the case law of the Court. This case law has, on an initially slim basis in the Treaty, established the fundamental freedoms as the central element of a \"new legal order\" (7) which has direct effect, (8) results in the automatic inapplicability of incompatible national law and which can be invoked by every citizen in national administrative or judicial proceedings. Furthermore, it is enforced not only by Community institutions but also by EU-citizens acting as \"private public attorneys\" when bringing claims under European law against Member States for damages resulting from violations of the Treaty. (9)

[2] During the same period, the ECJ redefined its conceptual approach with regard to the fundamental freedoms\' scope of application. What the Treaty\'s drafters had devised as a set of prohibitions on discrimination, gradually assumed the quality of a general requirement for the justification, albeit under a specific proportionality test developed by the Court, of a broad range of legislative or administrative actions by a Member State capable of impeding trans-national commerce within the EU. The Court has by now firmly established that it will scrutinize not only the unequal treatment of EU-citizens turning, formally or in effect, on grounds of nationality, but also non-discriminatory arrangements in so far as they are capable of restricting free establishment (10) or free movement of goods,(11) persons,(12) services (13) or capital. (14) As a result, the Court has severely cut back the Member States\' powers to autonomously regulate market transactions.

[3] In the three judgements on \"golden share\" arrangements which the Court delivered on June 4, 2002,(15) it denied the Member States such powers with respect to a politically sensitive issue over which the Commission, the Council, the European Parliament and the Member States have been deeply entrenched as in a frustrating legislative battle. In these judgements, the Court relied on the concept of free movement of capital(16) to scrutinize national arrangements shielding privatised corporations against an exposure to integrated financial markets. The Court found those arrangements which contained an element of discrimination against foreign investors to be incompatible with the Treaty.(17) It then subjected non-discriminatory arrangements – i.e. restrictions on the free movement of capital that applied without distinction to domestic and foreign investors – to the proportionality test referred to above: (18) such non-discriminatory arrangements were found to be incompatible with the Treaty if (i) the objectives pursued by the Member States related only to general financial interests and could thus not be recognised as legitimate grounds for justification(19) or (ii) such objectives fell within the ambit of legitimate public concerns but the Member States went, in pursuing them, beyond what was necessary for that purpose.(20) As a result of applying a rather strict standard for determining what was, under European law, acceptable as \"necessary\", (21) the Court set the rules for Member States wishing to retain or introduce \"golden share\" arrangements in the future. It extended its scrutiny not only to the substance, but also to the details of the procedural arrangements provided for by the Member States. In doing so, it deviated, to a degree that few observers of the proceedings may have expected,(22) from the

recommendations of Advocate General COLOMER.(23) Against this background, there appears to be little doubt about the Court\'s determination to establish a level playing field in the European financial markets in general, and the European ‘market for corporate control\' in particular.(24)

[4] Thus, the question arises how these three judgements will contribute to the EU\'s current efforts to create truly integrated financial markets.(25) In our attempt to address this question, we proceed as follows: We commence our analysis by exploring how \"golden share\" arrangements work, how they have been spread throughout Europe during the privatisation wave of the 1990\'s (below B) and what objections to these arrangements have been raised under European law (below C). We then look at the failure of the European Takeover Directive.(26) We do so, in particular, because the existence of \"golden share\" arrangements was one of the main reasons why the European Parliament refused to adopt this Directive in July 2001 (below D). We then analyse a proposal to restricting the availability of \"golden shares\" on the basis of secondary EU-law (below E). On that basis, we evaluate the impact the three judgements are likely to have on the integration of European capital markets (below F).

B. Historical background: The neutrality of the Treaty regarding industrial ownership and the implementation of golden share arrangements in the 1990\'s

[5] The Treaty does not prejudice Member States in their decisions as to which portion of industrial and commercial property they allocate to the private or the public sector. Decisions on privatization or nationalization are, in principle, not an EU-affair.(27) In taking these decisions, the Member States are free to follow their own policies provided, however, that they acknowledge the limits imposed on their conduct by general, non-nationalization related community law.(28)

[6] In the 1990\'s a fair number of Member States implemented legal arrangements that fall outside the binary logic of fully nationalized or fully privatized industries: using stock corporations as a privatization vehicle, those Member States relied on special elements in the governance structures of individual (recently privatized) corporations to retain considerable influence despite having surrendered a majority of the shares. Examples for such structures include (i) limits on the maximum number of shares that may be held by foreigners (\"caps restricting foreign investments\"),(29) (ii) requirements for the approval of a public authority to the acquisition of shares by any person or entity, if such acquisition would result in the creation of a blockholding in excess of a certain threshold such as 10%, 25% or 33% (\"caps restricting substantial blockholdings\"),(30) (iii) exclusive rights attaching to a single share held by a public authority to appoint, outside the shareholders\' assembly, members of the corporation\'s board (\"exclusive rights of appointment\"), and (iv) exclusive rights attaching to such a single share to veto certain management decisions, such as the disposal of strategically important assets (hereafter \"exclusive veto rights\").(31)

[7] There is a clear distinction between these arrangements and traditional nationalization techniques: these new, hybrid structures seek influence where commitment has been withdrawn. Typically, they afford powers to a public authority that are, under the applicable corporate law, only available to a majority shareholder. They do so precisely when a Member State terminates the better part of its financial exposure by way of privatization. Thus, these arrangements lead to a separation of control and residual risk.

[8] Some of these arrangements are commonly referred to as \"golden shares\".(32) In most instances, this term is used in a narrow sense. It then only applies to special rights that have been attached to a share while excluding other means of influence. For the purpose of an analysis under European law, a broader definition appears to be more helpful: whether or not special types of shares are used as the legislative technique for establishing a Member State\'s special control rights over the affairs of a privatized corporation is not the key issue of that analysis. Instead, it turns on the effect that such control rights have with regard to the common market and on the public policy considerations which Member States may identify as a justification. Relying on that broader definition we use the term \"*golden share\" arrangements* in order to identify all legal structures applying to individual corporations for the purpose of preserving the influence of a public authority on the shareholder structure or the management of that corporation beyond the extent to which such influence would be afforded under general corporate and securities law.

[9] \"Golden share\" arrangements in this broad sense have, towards the end of the last century, been implemented in Portugal,(33) France,(34) Belgium,(35) Spain,(36) Italy(37) and the United Kingdom.(38) In Germany, the federal Act under which *Volkswagen Aktiengesellschaft*, Wolfsburg, was privatized in 1960(39) contains a number of arrangements for the purpose of affording the state of *Niedersachsen* the economic position of a majority shareholder despite the fact that *Niedersachsen* holds no more than 1/5 of the outstanding share capital.(40)

C. Initial conflicts: The legal analysis of \"golden share\" arrangements prior to the ECJ\'s judgements and the Commission\'s position

[10] The compatibility of \"golden share\" arrangements with the Treaty was almost immediately contested by the

Commission.(41) The Commission based its legal analysis that most of these arrangements violated the Treaty as unjustifiable restrictions on free movement of capital and freedom of establishment, on its distinction between discriminatory and non-discriminatory restrictions:

I. Discriminatory restrictions on the free movement of capital

[11] Accordingly, to the first category belongs national legislation which provides for caps restricting foreign investments. Such national legislation rarely prompts a complex analysis under European law. If its objective is discouraging foreign and promoting domestic investments, (42) such legislation is, in the absence of a justification that is available on narrow grounds only, incompatible with the Treaty. Member states rarely dispute this analysis.(43)

II. Non-discriminatory restrictions on the free movement of capital
1. \"Golden share\" arrangements as restrictions on the free movement of capital

[12] The conceptually more challenging category are non-discriminatory restrictions. Here, one has to wrestle – much more than in the case of discriminatory measures – with the problem of identifying the exact scope of application of a fundamental freedom.(44) In our context, caps restricting substantial blockholding, exclusive rights of appointment and exclusive veto rights fall into this category. It is by no means obvious whether these \"golden share\" arrangements constitute a \"restriction on the movement of capital\" within the meaning of Art. 56. One might argue that the restrictions imposed by \"golden share\" arrangements are of a rather indirect nature, since they do not impede the acquisition of shares as such. Passive portfolio investors – surely the predominant type of investor in the common financial markets - will normally not reach the relevant threshold of a cap restricting substantial blockholding and will not be interested in an active role regarding the composition and the decisions of the board which the Member States influence through their exclusive rights of appointment and exclusive veto rights. Thus, only *strategic investors* seeking an active role in the decision making process of the corporation are directly affected by the \"golden share\" arrangements. The markets on which transactions are being restricted are, in other words, not so much the transnational financial markets but rather the European *markets for corporate control*: the restriction relates, arguably, only to the freedom to acquire and make use of *controlling stakes* in (publicly listed) corporations and thus changes the way economic resources are put to use in businesses operated by such corporations.

[13] In order to arrive at an interpretation under which such restrictions on the market for corporate control must be understood as constituting a \"restriction on the movement of capital between Member States\" within the meaning of Art. 56 of the Treaty, one must either conclude that Art. 56 is applicable to non-discriminatory restrictions of both portfolio and strategic investments *or* one must show why a restriction on the market for corporate control also has a restrictive effect on the market for portfolio investments.

[14] The Commission has adopted the former approach. In doing so, it relied on Directive 88/361/EEC(45) providing for a prohibition on restrictions on the free movement of capital before this prohibition was elevated to the level of primary EU-law by way the insertion of Art. 73b (now Art. 56) into the Treaty with effect as of January 1, 1994.(46) Unlike Art. 56, Directive 88/361/EEC expressly specified the types of transactions to which it applies. Among these are cross-border \"direct investments\".(47) The Commission considers Directive 88/361/EEC a \"useful source\" for the interpretation of Art. 56.(48) It thus construes Art. 56 to apply to non-discriminatory restrictions of \"direct investments\", which are made for the purpose that a \"block of shares….enables the shareholder…. to participate effectively in the management of the company or in its control.\"(49)

[15] That approach, which had, in principle, already been endorsed by the European Court of Justice,(50) is somewhat problematic, since secondary EU law, such as Directive 88/361/EEC, cannot provide for binding guidelines regarding the construction of a provision in the Treaty.(51) On this basis, it has been argued that passive portfolio investments must be the principal purpose of a transaction to which Art. 56 is to be applied.(52) Even if one accepted that argument, one would, have to acknowledge the fact that \"golden share\" arrangements directly restricting strategic investors almost invariably have an impact on the market for portfolio investments. Where national laws deter a bidder form acquiring control over a corporation, the potential target\'s shareholders are deprived of an opportunity to dispose of their portfolio investments. Usually, a takeover bid is an exceptionally attractive opportunity to do so because bidders pay premiums above market prices. Where there is no potential market for corporate control, the market for non-controlling stock is therefore also affected. Even if there was a requirement that a national rule must have an impact on the market for portfolio investments in order to qualify as a \"restriction on the movement of capital\" within the meaning of Art. 56, such requirement would, for that reason, be fulfilled by non-discriminatory \"golden share\" arrangements.

2. Justification

[16] Being restrictions on the movement of capital, non-discriminatory \"golden share\" arrangements need to be

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justified. As a consequence of broadening the scope of application of the fundamental freedoms to include non-discriminatory restrictions, the Court added to the provisions on justification in the Treaty a general proportionality test. Under this test, \"requirements of the general interest\" may be invoked by a Member State to justify non-discriminatory restrictions if four conditions are satisfied: the restriction must be applied in a non-discriminatory manner; it must be justified by imperative requirements in the general interest; it must be suitable for securing the attainment of the objective that it pursues; and it must not go beyond what is necessary in order to attain that objective.\"(53)

[17] In applying this test to \"golden share\" arrangements, the Commission concluded in 1997 that a fair number of them did not meet these requirements.(54) According-ly, it challenged them in proceedings under Art. 226 (formerly Art. 169) of the Treaty.

III. Restrictions on the freedom of establishment
[18] In the Commission\'s analysis of the \"golden share\" arrangements, a possible infringement of the principle of free establishment does not prominently figure. It is clear that this principle can only be applied to what we have called the market for corporate control. Whilst the acquisition and use of a controlling stake in a (publicly listed) corporation clearly is a form of establishment falling within the scope of application of Art. 43, 48 of the Treaty, the trade by portfolio investors in passive equity investments is not.(55) Thus, *three* types of \"golden share\" arrangements are to be scrutinized under Art. 43, 48 of the Treaty:
- caps restricting substantial blockholding,
- exclusive rights of appointment, and
- exclusive veto rights.

As they are typically non-discriminatory, the proportionality test for their justification will derive from the case law of the European Court of Justice and will, in essence, turn on the criteria that we have just outlined under subheading C.II.

D. Additional battlegrounds: \"Golden share\" arrangements and the failure of the European Takeover Directive

[19] As we have seen, golden share arrangements are capable of frustrating the effort to establish a level playing field on a European market for corporate control. The companies they protect are removed from the class of potential targets while they may still act as bidders. A frustration of that effort results, however, not only from \"golden share\" arrangements which specifically apply to individual (recently privatized) corporations. It also results from elements in the general corporate law of a Member State if it provides for a deviation from the principle according to which control rights should only be carried by share capital participating in the residual risk and that such share capital \"should carry control rights in proportion to the risk carried.\"(56) A High Level Group of Company Law Experts which has been empanelled by the Commission in September 2001 to render advice on issues related to takeover bids has drawn up a list of such corporate provisions currently in force in the Member States.(57) This list reveals the complexity of any attempt to establish proportionate allocation of control as a basis for a level playing fields on a European market for corporate control. The broad range of national laws providing for a deviation from proportionate allocation encompasses, for example, restrictions to the transferability of shares, dilution of the shares acquired by a bidder or potential bidder (poison pills; certain classes of poison debt), shares with double or multiple voting rights, shares with limited or non-existent voting rights, time lapse voting schemes, discriminatory quorum requirements, irrevocable proxies, binding voting agreements, voting trusts, co-determination (*Mitbestimmung*), other corporate structures that limit shareholders\' control of the board (*sociétés en commandite*), shares with special rights to appoint directors, staggered boards, fixed-term appointments for board members, golden parachutes and supermajority requirements.(58)

[20] \"Golden share\" arrangements thus constitute only a small fraction of the legal obstacles that stand in the way of the creation of a level playing field in this part of the common market. Their visibility after the Commission\'s intervention (see above C) brought them, however, to the center of an academic and political debate that culminated in the failure of the European Takeover Directive in July 2001. The way in which the issues initially raised by the Commission were absorbed into this larger context of the legislative procedures to establish a European framework for corporate takeovers appears to be a worthy subject for extended research by a political scientist. For the purpose of understanding the context in which the European Court of Justice has now delivered its \"golden share\" judgments,(59) it should suffice to account for the basic sequence of events:

[21] A 13th European Directive on Company Law Concerning Takeovers has been negotiated for decades. The negotiations resulted in formal Commission proposals in 1989,(60) 1990,(61) 1996,(62) and 1997.(63) These proposals pursued the objective of setting uniform minimum standards for corporate takeovers. The proposal of 1997, in particular, sought to establish, as a European minimum standard, two key elements modelled on the London City

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Code on Takeovers and Mergers(64) , namely a mandatory offer rule (similar to Rule 9 of the City Code) and a strict prohibition on any action of the target management frustrating a *bona fide* purchase offer (similar to General Principle 7 and Rule 21.1 of the City Code).(65)

[22] On the basis of the 1997-proposal a \"Common Position (EC) No 1/2001 with a view to adopting a Directive of the European Parliament and of the Council on company law concerning takeover bids\"(66) was drafted and adopted by the Council on June 19, 2000. The European Parliament demanded 15 amendments in December 2000,(67) most of which were rejected by the Commission.(68) Consequently the Conciliation Committee had to be empanelled under Art. 251 paras. 3 and 4 of the Treaty. The Conciliation Committee agreed on a revised joint text on June 6, 2001,(69) which was, however, rejected in a dramatic session of the European Parliament on July 4, 2001, when an equal number of members voted in favour and against the adoption of a Directive on the basis of the joint text. Under Art 251 para. 5, the procedure to adopt a 13th Directive has thus been terminated. It can only be revitalized by the initiation of entirely new proceedings under Art. 251.

[23] The central issue raised by those members of the European Parliament who opposed the Common Position related to the proposed prohibition on frustrating action of the target management. These members were not prepared to accept a provision under which \"the board of the offeree company shall obtain the prior authorisation of the general meeting of the shareholders, given for this purpose, before taking any action which may result in the frustration of the bid, other than seeking alternative bids….\".(70) In objecting to this language, the responsible parliamentary committee, under the guidance of its German *Rapporteur* KLAUS-HEINER LEHNE, had adduced two principal arguments. The first argument was that, since there was no such rule under neither the relevant US- federal nor state laws, the prohibition on frustrating action would work to the disadvantage of European corporations *vis-à-vis* their US-American counterparts.(71) The second argument was that \"golden share\" arrangements were resulting in a distortion of competition on the European market for corporate control,(72) which would become even more serious if those potential targets that were not shielded by such arrangements were restricted in their defences against a hostile bid.

[24] It is doubtful whether the first argument carries much weight, as, in particular, it fails to take into account that the proposal for a European Takeover Directive includes a mandatory offer rule while(73) neither US federal law nor, e.g., Delaware state law does. This has important consequences for a comparative analysis of the relative strength of bidders and targets under both systems: in the absence of a mandatory offer rule, the defence measures that US target managers are, within certain limits, permitted to implement primarily serve the purpose of preventing an exploitation of target shareholders. In that respect, defence measures of the board and the mandatory offer rule are functionally equivalent.(74) Both US-style defence measures and the EU-mandatory offer rule increase, for the purpose of protecting target shareholders, the cost of a takeover. After an adoption of the European Takeover Directive, a bidder for a European target would have to face the mandatory offer rule but only very limited defence measures of the target management. A bidder for an US-corporation would have to cope with such defence measures but not with the mandatory offer rule. If one accepts that both obstacles serve a functionally similar legislative objective and have equally adverse effects on bidders in their respective economic and legal environment, it becomes quite hard to conclude that a prohibition on frustrating action in Europe would create an unlevelled transatlantic playing field.

[25] The second objection to the prohibition on frustrating actions, i.e. the one turning on \"golden share\" arrangements and other deviations from a proportionate allocation of control among the risk-bearing shareholders, is not so easily rebutted: bidders will only pay a control premium when they have a plan on how to earn that premium back within a reasonable period of time. In some way they must expect the performance of the target corporation to be improved subsequent to their acquisition of control. Usually, that expectation is based on a plan involving the use of their prospective control position to cause an improvement in the target\'s earnings. Such a plan will, in most instances, only be feasible if the acquisition of a majority of the share capital does indeed give the bidder the power to change the way the target corporation is running its business. Where a bidder expects obstacles to the exercise of control, an acquisition becomes less attractive. If there are many such obstacles in some parts of the EU, but few in others, a prohibition on frustrating action in a European Takeover Directive might indeed intensify the already existing inequalities in the strategic positions of potential bidders and targets from different Member States. If, on the other hand, the impact of \"golden share\" arrangements and other deviations from the proportionate allocation of control could be eliminated *at least with regard to corporate takeovers*, the European Parliament would, if it stuck to its own line of argument, have every reason to surrender its opposition to a European Takeover Directive containing a strict prohibition on frustrating action.

E. New proposals: The suggestion to restrict \"golden share\" arrangements under secondary Community law

[26] Faced with failure in summer 2001, the Commission immediately commenced to prepare a new European

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Takeover Directive: Commissioner BOLKESTEIN announced at the ECOFIN meeting in July 2001 the Commission\'s intention to come forward with a new proposal. On September 11, the High Level Group of Company Law Experts already mentioned(75) commenced its work. This group has been explicitly commissioned to address the problems of a level playing field for a European market for corporate control created, *inter alia*, by \"golden share\" arrangements.

[27 In January 2002, the group has come forward with the proposal to broaden the scope of the new European Takeover Directive so as to cover \"golden share\" arrangements and other deviations from the proportionate allocation of control.(76) According to this proposal, the European Takeover Directive should include a strict prohibition on frustrating action that does not even allow for a pre-bid authorization by the shareholders\' assembly of post-bid defence measures. Consequently, only defence measures that are approved by the shareholders\' assembly after a bid has been announced would be compatible with European law. All other defence measures would, with the exception of the search for a competing bidder, have to be outlawed by the Member State legislation implementing the Directive.(77)

[28] In addition, it was proposed that the Directive contained two further rules to ensure a level playing field. First, all deviations form the proportionate allocation of control rights among the risk bearing shareholders are to be suspended once a takeover bid is announced. This means that in the shareholders\' assembly which must, under the group\'s proposal, pass a resolution on the authorization of defences subsequent to the announcement of the bid, all shareholders will have voting powers in proportion to their share in the capital bearing the residual risk. Limited voting rights, multiple voting rights, caps on the exercise of voting rights, allocations of voting rights to non-risk bearing investors and similar arrangements would thus be suspended.(78)

[29] Secondly, a bidder who has acquired, in a successful bid for all shares in the target corporation, 75%(79) of the share capital (which is bearing the residual risk and entitled to receive the residual profit) is to be given the ability to exercise influence in proportion to that stake. Such a bidder \"should be able to control the affairs of the company and the operation of its business.\"(80) For that purpose he is to be permitted to \"break through\"(81) a number of obstacles to such an unrestricted exercise of influence: in the shareholders\' assembly subsequent to the acquisition of 75% all disproportionate allocation of voting rights shall, like in the case of the shareholders\' assembly authorizing defence measures before, be suspended. The successful bidder must, on that basis, have the ability to amend the articles of association and other constitutional documents of the corporation. He must be able to exercise the right to appoint and dismiss board members in so far as such board members are dismissed and appointed by the shareholders (and not, e.g., by employees). This means that exclusive rights of appointment shall be suspended. Likewise, fixed and staggered terms of office would not prevent the dismissal of board members. Employee co-determination under mandatory law would, on the other hand, not be affected.

[30] This \"break through\" rule is also to apply to golden share arrangements.(82) In so far as such arrangements are not altogether incompatible with the Treaty, they are, according to this proposal, *not* to be fully invalidated by secondary European law. However, they are to be suspended subsequent to the acquisition of 75% of the risk-bearing share capital in a successful bid addressed to all target shareholders.

F. Impact of the ECJ\'s judgements: How substantial is their contribution to the creation of a level playing field on the European market for corporate control?

[31] How much will the \"golden share\" judgements of June 4, 2002 contribute to the broader efforts to remove the major obstacles preventing the creation of a level playing field on the common market for corporate control? An important aspect of the answer lies in the observation that these judgements only relate to a fraction of these obstacles. The legal arrangements under the Court\'s scrutiny all applied to privatised enterprises. They included caps restricting foreign investments(83) in Portugal, caps restricting substantial shareholdings in Portugal(84) and France,(85) exclusive rights of appointment in France(86) and Belgium,(87) as well as exclusive veto rights in France(88) and Belgium.(89) Indeed, with respect to these \"golden share\" arrangements the Court did adopt a rather strict position. In doing so, it has, however, not passed a judgement on deviations in the *generally applicable* corporate law of the Member States from the principle of proportionate allocation of control to the risk bearing shareholders. In this regard, the secondary legislation referred to under (E) above is still indispensable in order to ensure a level playing field.

[32] Within these limits, the court subscribed to a very market-oriented legal analysis. While not holding that \"golden share\" arrangements are, by their very nature, incompatible with the Treaty, it established a tight set of standards for such arrangements. Quite a few Member States will have to re-draft their \"golden share\" arrangements to comply with these standards:

[33] The Court scrutinised the Portuguese, French and Belgian \"golden share\" arrangements under Art. 56 of the

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Treaty. In doing so, it fully endorsed the systematic analysis of the Commission that we have outlined above. In qualifying all these arrangements as restrictions on the movement of capital within the meaning of Art. 56, the Court did rely, just as the Commission had, on the definition of \"direct investments\" in Directive 88/361/EEC. Consequently, their justification under European law had to be considered. With respect to the Portuguese caps restricting foreign investments such justification was obviously lacking: these restrictions were of a clearly discriminatory nature and Portugal offered no explanation why they were to serve a legitimate public interest.(90) With respect to the Portuguese cap restricting substantial shareholdings the court concluded that Portugal pursued purely economic and financial objectives, which could not serve as a possible basis for justification.(91) This aspect was different with regard to the French and Belgian \"golden share\" arrangements: here, the objective pursued by the Member States – \"safeguarding of supplies of petroleum products in the event of a crisis\" in France(92) and \"safeguarding of energy supplies in the event of a crisis\" in Belgium(93) - fell undeniably within the ambit of a legitimate public interest. They served public security, which is one of the grounds of justification referred to in Article 58 para. 1b (formerly Article 73d para. 1b) of the Treaty. Having identified such possible grounds for justification, the court confirmed its case law under which, when Art. 56 of the Treaty is applied to non-discriminatory measures, such measures are subjected to the four-element proportionality test referred to above.(94) This meant that a \"golden share\" arrangement must, in addition to being non-discriminatory and aimed at a legitimate objective, be \"suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality\".(95)

[34] In consistency with its emphasis on ensuring the effectiveness of fundamental freedoms, the European Court of Justice used this proportionality requirement to expand the scope of its scrutiny to the level of the relevant national procedural law. It observed that the French arrangement provided for a ministerial decision (*ex ante* on the approval of a substantial shareholding and *ex post* on the veto to the disposal of certain core assets) without specifying, safe for a general reference to the national interest, any conditions capable of limiting the wide discretion the minister enjoyed. Because the investors concerned were, for that reason, \"given no indication whatever as to the specific, objective circumstances\" in which the ministerial decision will be granted or refused, the Court concluded that the French arrangement had gone beyond what was necessary to attain its objective.(96)

[35] Scrutinizing the Belgian arrangement, the Court found four elements in the procedural law limiting the wide discretion of the minister in charge of exercising the state\'s influence: (i) the Belgian arrangement (an exclusive right of appointment and an exclusive veto right) turned on a power of the state to intervene *ex post* fact only, (ii) the right of the state to intervene was limited to specific decisions of the management of the corporation (*in casu* the disposal or encumbrance of core assets, including, in particular, energy supply networks); (iii) the objectives by which the minister had to be guided in reaching a decision were clearly identified (*in casu* averting a threat to the Belgian energy policy) and (iv) any such intervention had to be supported by a formal statement of reasons and was the subject of an effective review by the national courts.(97) These arrangements the Court considered as capable of identifying sufficiently \"objective criteria\" to limit administrative discretion and to ensure transparency for the market participants. It thus concluded that Belgium did not, in implementing these arrangements, go beyond what was necessary to attain its legitimate objective. Accordingly, the Belgian arrangement was held to be compatible with the Treaty.

[36] In essence, these judgments appear to have a twofold effect on the future of \"golden share\" arrangements in Europe: In non-vital industries, to which no key role in a hypothetical crisis can be assigned, Member States will, as a rule, find it difficult to implement any form of \"golden share\" arrangements that meet the standards now established by the Court. In vital industries, by contrast, Member States will have to take great care to identify exactly which aspects of the activities of an enterprise they need to control. They will then have to devise a transparent legal mechanism clearly restricted to these aspects. Defence, energy and public health appear to be the main sectors where that is feasible. Where it is not, it will, for the purpose of an analysis under Art. 56 of the Treaty, not make a difference whether the mechanism by which the state secures its influence on a privatized corporation is technically attached to a share or not. The reason why a right of intervention attributed to a Member States is a restriction on the free movement of capital is that such intervention impedes transactions on the market for corporate control (which the Court classifies as \"direct investment\"). Any right of intervention that is capable of frustrating the acquisition of a controlling stake by a private investor or the exercise of control subsequent to such an acquisition will therefore have to be measured against the standards that have now been established by the European Court of Justice. This is an extremely strong signal to those Member States who seek to shelter some of their industrial undertakings from the forces of an integrated financial market. (98) It might be this signal – rather than the immediate impact on specific \"golden share\" arrangements – that indeed marks the turn of the tide in the conflict between the protectionist and the liberal school of thought currently debating the proper legal framework of the European market for corporate control.

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(1) PART THREE, TITLE III, Chapter 2, Art. 43 to 48. The current, consolidated text of the Treaty can be downloaded under http://europa.eu.int/eur-lex/de/search/search_treaties.html.

(2) PART THREE, TITLE I, Art. 23 (duties on import and export and charges having equivalent effect), Art. 28 to 30 (quantitative restrictions and measures having equivalent effect).

(3) PART THREE, TITLE III, Chapter 1, Art. 39.

(4) PART THREE, TITLE III, Chapter 2 Art. 49 to 55.

(5) PART THREE, TITLE III, Chapter 4, Art. 56 to 58.

(6) ECJ Case 8/74: *Dassonville* [1974] ECR 873.

(7) ECJ Case 26/62: *van Gend en Loos* [1963] ECR 1.

(8) Since ECJ Case 26/62: *van Gend en Loos* [1963] ECR 1 (duties on import and export and charges having equivalent effect) gradually established for all fundamental freedoms. See: ECJ Case 13/68: *Salgoil* [1968] ECR 453 (free movement of goods, quantitative restrictions and measures having equivalent effect), ECJ Case 41/74: *van Duyn* [1974] ECR 1337 (free movement of persons), ECJ Case 2/74: *Reyners* [1974] ECR 631 (freedom of establishment), ECJ Case 33/74: *van Binsbergen* [1974] ECR 1299 (free movement of services) and ECJ Cases C-163/94, C-165/94 and C-250/94: *Sanz de Lera* [1995] ECR I-4830 (free movement of capital).

(9) ECJ Cases C-46/93 and 48/93 *Brasserie du Pêcheur/Factortame* [1996] ECR I-1029 (liability for national legislation that was incompatible with free movement of goods and of services, respectively). In this judgment, the European Court of Justice applied to a violation of the Treaty the principles it had developed with respect to the failure to implement a Directive into national law in ECJ Cases C-6 & C-9/90: *Francovich* [1991] ECR I-5357. For an account of the struggle between the European Court of Justice and national constitutional courts over this issue see HARTLEY, *The Foundations of European Community Law*, 4th ed. (Oxford, 1998), pp. 187 *et seq*.

(10) ECJ Case C-55/94: *Gebhard* [1995] ECR I-4165. For a critical discussion of this decision and the transformation of prohibitions on unjustified discrimination into prohibitions on unjustified non-discriminatory restrictions see EVERLING, *Liber Amicorum (Gedächtnisschrift) Knobbe-Keuk* (Cologne, 1997), pp. 607 *et seq*.

(11) ECJ Case 8/74: *Dassonville* [1974] ECR 873 and ECJ Case 120/78: *Cassis de Dijon* [1979] ECR 649, as qualified by ECJ Cases C-267/268/91: *Keck and Mithouard* [1993] ECR I-6097. With respect to the distinction between regulations on products and regulations on selling arrangements see ECJ Case C-315/92: *Clinique* [1994] ECR I-317.

(12) ECJ Case C-415/93: *Bosman* [1995] ECR I-4921.

(13) ECJ Case 33/74: *van Binsbergen* [1974] ECR 1299; ECJ Case 279/80: *Webb* [1981] ECR 3305.

(14) ECJ Case C-148/91: *Veronica* [1993] ECR I-513 and now the three \"golden share\" judgements ECJ Case C-367/98: *Commission vs. Portugal*, case C-483/99: *Commission vs. France*; C-503/99: *Commission vs. Belgium*; these judgments can be downloaded under http://curia.eu.int/en/jurisp/index.htm. See also GRUNDMANN, *Zeitschrift für Schweizerisches Recht* 1996, pp. 103, 105 *et seq*., MÜLBERT, *Wertpapiermitteilungen* (WM) 2001, pp. 2085, 2088 *et seq*.

(15) Case C-367/98: *Commission vs. Portugal*, case C-483/88: *Commission vs. France*; case C-503/99: *Commission vs. Belgium*; these judgments can be downloaded under the URL in footnote 14.

(16) Art. 56 para. 1 of the Treaty.

(17) Case C-367/98: *Commission vs. Portugal*, para. 40

(18) Case C-367/98: *Commission vs. Portugal*, para. 49; case C-483/88: *Commission vs. France*; C-503/99, para. 45; case C-503/99: *Commission vs. Belgium*, para. 45.

(19) Case C-367/98: *Commission vs. Portugal*, para. 52

(20) Case C-483/99: *Commission vs. France*, para. 49 *et seq*.

(21) Case C-483/99: *Commission vs. France*, para. 49 *et seq*.

(22) Cf., for example, the comments on the Opinion of Advocate General COLOMER (footnote 23) by JENNEN, KLAU and THIELE under www.legal500.com/devs/germany/eu/deeu_005.htm.

(23) Opinion of Advocate General COLOMER on cases C-367/98, C-483/99 and C-503/99 (\"Golden Shares\") delivered on July 3, 2001; this document can be downloaded under http://curia.eu.int/en/jurisp/index.htm.

(24) With respect to the concept of a market for corporate control, which derives, in its modern form, from MANNE, *Mergers and the Market for Corporate Control*, 73 J.Pol.Econ. 110 (1965), see EASTERBROOK/FISCHEL, *Corporate Control Transactions*, 91 Yale L.J. 689 (1982); EASTERBROOK/FISCHEL, The Economic Structure of Corporate Law (1991), S. 109ff.; POSNER, *Economic Analysis of Law*, (4th ed., 1992), S. 412ff; ROMANO in: HOPT/WYMEERSCH (eds.), *European Takeovers, Law and Practice* (1992), pp. 3 *et seq*. and ROMANO, *Foundations of Corporate Law*, (New York, 1993), pp. 1993 *et seq*. For the application of this theory to the law pertaining to corporate control transactions in Germany see REUL, *Die Pflicht zur Gleichbehandlung der Aktionäre bei privaten Kontrolltransaktionen* (Tübingen, 1990), pp. 102 *et seq*.; BAUMS, *Zeitschrift für Wirtschaftsrecht* (ZIP) 1989, 1376f; HOPT, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR) 1993, 534, 544f; HOPT, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (ZHR) 161 (1997), pp. 368, 370 *et seq*.

(25) See the Commission\'s Action Plan of May 11, 1999: \"Implementing the Framework for the Financial Markets\", COM(1999)232; this document and the Progress Reports pertaining to it are available under http://europa.eu.int/comm/internal_market/en/finances/actionplan/index.htm. The Action Plan has been explicitly endorsed by a number of European Councils, including the recent Seville Council, see Presidency Conclusions Seville European Council 21 and 22 June 2002, para. 49: \"The European Council …..reaffirms its commitment to the timely and full implementation of the Financial Services Action Plan.\" This document is available under http://europa.eu.int/comm/seville_council/index_en.html. The dynamics of the integration process can be expected to be accelerated considerably as a consequence of the endorsement of the suggestions made by the LAMFALUSSY group of wise men of February 2001 (Final Report available under http://europa.eu.int/comm/internal_market/en/finances/general/lamfalussyen.pdf) by the Stockholm European Council in March 2001 and by the European Parliament in February 2002 (see for an account of these events: http://europa.eu.int/comm/internal_market/de/finances/general/02-195.htm); for a discussion of the compatibility of this group\'s suggestions with the system of institutional checks and balances under the Treaty see: LANGENBUCHER, *Zeitschrift für Europäisches Privatrecht* [ZEuP] 2002, pp. 265 *et seq.*). Arguably, the effort to integrate the European financial markets is, after harmonization of company law has suffered a number of serious setbacks (see HOPT, *Zeitschrift für Wirtschaftsrecht* [ZIP] 1998, pp. 96 *et seq*.), in the process of becoming the major force in the pursuit of common European governance structures determining the way economic resources are put to use by (publicly listed) corporations in the Member States of the EU, cf. HOPT, *Europäisches Kapitalmarktrecht - Rückblick und Ausblick*, in GRUNDMANN (ed.): *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, pp. 307 *et seq*.; WYMEERSCH, Report for the 1st European Jurist Forum (Baden-Baden, 2001), pp. 110 *et seq*.; HELLWIG, EWS 2001 pp., 580 *et seq*.; MÜLBERT, *Wertpapiermitteilungen* (WM) 2001, pp. 2085 *et seq*.

(26) This article does not address the new Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) which Germany has adopted subsequent to the failure of the European Takeover Directive and which it will have to revise if a second attempt to adopt a European Takeover Directive should succeed. For a review of the new regulatory framework in Germany see ADOLFF/MEISTER/RANDELL/STEPHAN, *Public Company Takeovers in Germany* (Munich/London, 2002).

(27) This principle, which had already been a part of the Schuman Declaration of 1950, was spelled out by the Drafting Committee on December 5, 1956 to read: \"*Le présent Traité ne préjuge en rien le régime de propriété des moyens de production existant dans la Communauté*\" (\"This Treaty shall in no way prejudice the system of ownership of means of production which exists within the Community\"). In a slightly modified version, it has been incorporated into the Treaty as currently in force: \"This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership\" (Art. 295). The relevance of this principle in the context of scrutinizing \"golden shares\" under European law has been stressed, in particular, by Advocate General COLOMER in his opinion on cases C-367/98, C-483/99 and C-503/99 delivered on July 3, 2001 (see footnote 23).

(28) To give a (fairly undisputed) example: the mere fact that it occurs in the context of a privatization or nationalization procedure does not, as such, legalize the grant of state aid beyond the scope of the general framework provided for in Art. 87 *et seq*. of the Treaty.

(29) An arrangement of this type, which obviously provides for a formal discrimination on the grounds of nationality, has been a part of Portuguese Law No 11/90 that has been found to be incompatible with Art. 56 para. 1 of the Treaty in the ECJ-judgment of June 4, 2002 (C-367/98).

(30) An arrangement of this type, which does not contain a formal discrimination on grounds of nationality but may nonetheless be capable of impeding cross-border movements of capital, has been a part of Portuguese Law No 11/90 that has been found incompatible with Art. 56 para. 1 of the Treaty in the ECJ-judgment of June 4, 2002 (C-367/98). A provision of this type has also been included in the French Decree No 93-1298 of 13 December 1993 concerning *Société Nationale Elf-Aquitaine* that has been found incompatible with Art. 56 para. 1 of the Treaty in the ECJ-judgment of June 4, 2002 (C-483/99).

(31) An arrangement of this type has been a part of the French Decree No 93-1298 of 13 December 1993 concerning *Société Nationale Elf-Aquitaine* that has been found incompatible with Art. 56 para. 1 of the Treaty in the ECJ-judgment of June 4, 2002 (C-483/99). A provision of this type has also been included in the Belgian Royal Decree of 16 June 1994 concerning *Société de distribution du gaz SA* which has, because of its different structure, been found to be *compatible* with the requirements of the Treaty by the European Court of Justice in its judgment of June 4, 2002 (503/99). See section (E) for a discussion of the differences between the French and the Belgian arrangement.

(32) This is also the terminology that the European Court of Justice uses in cases C-483/99 (*French \"golden shares\"*) and C-503/99 (*Belgian \"golden shares\"*) but not in case C-367/98 (*protective arrangements in Portugal*).

(33) See above footnotes 29 and 30.

(34) See above footnotes 30 and 31.

(35) See above footnotes 30 and 31.

(36) The Commission has challenged \"golden share\" arrangements in the UK in case C-463/00 pending before the European Court of Justice. It concerns the provisions of Law No 5/1995 establishing the rules applying to public transfers in certain undertakings, and the corresponding implementing decrees creating special powers in respect of *Repsol SA, Telefónica de España SA, Tabacalera SA* and *Endesa*.

(37) See ECJ Case C-58/99: Commission vs. Italy [2000] ECR I-3811 concerning special powers retained by the Italian Government regarding *ENI SpA* and *Telecom Italia SpA*. In the proceedings before the European Court of Justice, Italy did not contest the incompatibility with European law of the arrangements challenged by the Commission; also see Opinion of Advocate General COLOMER on cases C-367/98, C-483/99 and C-503/99 delivered on July 3, 2001, paras. 73 *et seq*.

(38) The Commission has challenged \"golden share\" arrangements in Spain in case C-98/01 pending before the European Court of Justice. It concerns the rights and powers of the British authorities within *BAA plc*, formerly the public authority which managed British airports.

(39) *Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerke Gesellschaft mit beschränkter Haftung in private Hand* of 21 July 1960 (*Bundesgesetzblatt* 1960 I 585).

(40) The *Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerke Gesellschaft mit beschränkter Haftung in private Hand* provides for a combination of limited voting rights, restrictions on the use of proxy voting in the shareholders\' assembly, exclusive rights of the state of *Niedersachsen* and the Federal Republic of Germany to appoint, outside the shareholders\' assembly, shareholder representatives to the co-determined supervisory board and supermajorities under which, in particular, the construction and transfer of production facilities requires the consent of a majority of 80% of the share capital represented at the passing of the resolution.

(41) See Communication of the Commission on certain legal aspects concerning intra EU-investments, OJ C 220, 19.07.1997, p. 15. This document is available under http://europa.eu.int/eur-lex/de/search/search_oj.html.

(42) This motive is especially apparent with regard to the Portuguese cap restricting foreign shareholdings (see above footnote 29). As is evident from the Opinion of Advocate General COLOMER on cases C-367/98, C-483/99 and C-503/99 (above footnote 23), para 26, the Portuguese government had to take into consideration national sentiments when re-privatising, in 1990, enterprises that had been nationalized at the time of the revolution of 1974: \"In 1990 the legislature considered that it was only fair that assets which had been nationalised to the detriment of Portuguese citizens should be returned to the Portuguese people, and that this ought to facilitate the reorganisation

of national economic groups.\"

(43) Instead, they sometimes asked for leeway to implement a smooth transition to non-discriminatory regulations. Cf. for example, the arguments brought forward Case C-367/98: Commission vs. Portugal, para. 16 *et seq*.

(44) If an element of discrimination is not a requirement, the class of national regulations potentially qualifying as a \"restriction\" is very large. Consequently, additional criteria need to be identified to distinguish them from regulations falling outside the scope of a fundamental freedom. The necessity to find a method for this delineation has induced the ECJ to establish, with respect to free movement of goods, the distinction between national rules relating to products and national rules relating to selling arrangements (ECJ Cases C-267 and 268/91: *Keck and Mithouard* [1993] ECR I-6097, para. 16). It has not yet made an equivalent distinction with respect to Art. 56, thus retaining the capability to construe \"free movement of capital\" in the broadest possible terms and to apply Art. 56 to an extremely wide range of non-discriminatory laws, regulations and administrative practices in the Member States. Nonetheless a functional equivalent of the Keck-qualification appears to be necessary with respect to all fundamental freedoms, if their application to non-discriminatory restrictions is not to entail the Court\'s involvement in the scrutiny of national regulations that lies beyond the reach of the Treaty even if most dynamically construed. See for a discussion of this problem with regard to the freedom of establishment, ROTH, *Liber Amicorum (Gedächtnisschrift) Knobbe-Keuk* (Cologne, 1997), pp. 729 *et seq*.

(45) OJ L 178, 8.7.1988, p. 5. Although it has been functionally replaced by Art. 56 *et seq*., the Directive is still part of the *acquis communautaire*, see GLAESER in: SCHWARZ (ed.), *EU-Kommentar* (2000), Annotation 2 to Art 56.

(46) Art. 73b was inserted as a part of the Maastricht revisions of the Treaty; the ensuing Amsterdam revisions were of a formal, rather than a substantive nature. Art. 73b became Art. 56.

(47) The term \"direct investments\" also appears in Art. 57 para. 2 of the Treaty.

(48) See Communication of the Commission on certain legal aspects concerning intra EU-investments, OJ C 220 , 19/07/1997, p. 15 (see footnote 41 for the URL).

(49) This is part of the definition of \"direct investments\" in Annex I to Directive 88/361/EEC. With respect to the Commissions understanding see: Communication of the Commission on certain legal aspects concerning intra EU-Investments, OJ C 220 , 19/07/1997, pp. 15 et seq.

(50) ECJ Cases C-163/94, C-165/94 and C-250/94: *Sanz de Lera* [1995] ECR I-4830, para. 34. The *nomenclatura* of Directive 88/361/EEC is, however, not exhaustive; a transaction that is not covered by the *nomenclatura* may still fall within the ambit of \"movement of capital\" within the meaning of Art. 56, see ECJ Case C-222/07: *Trummer and Mayer* [1999] ECR I-1661, para. 20 and 21.

(51) BRÖHMER in: CALLIESS/RUFFERT (ed.), *Kommentar des Vertrages über die Europäische Union* (1999), Annotation 12 to Art. 56.

(52) BRÖHMER in: CALLIESS/RUFFERT (ed.), *Kommentar des Vertrages über die Europäische Union*, Annotation 12 to Art. 56. Also cf. SCHÖN, RabelsZ Vol. 64 (2000), pp. 11 *et seq*.

(53) ECJ Case C-55/94: *Gebhard* [1995] ECR I-4165. para. 37; this formula has subsequently been applied to other freedoms, see: ECJ Case C-148/91: *Veronica* [1993] ECR 1993, I-487, para. 9; *Bosman* [1995] ECR I-4921, para. 104.

(54) See Communication of the Commission on certain legal aspects concerning intra EU-investments, OJ C 220 , 19/07/1997, pp. 17 *et seq*. (see footnote 41 for the URL).

(55) For a thorough analysis of the overlapping scopes of application of the freedom of establishment and the prohibition on restrictions on free movement of capital (when applied to direct investments) see SCHÖN, RabelsZ Vol. 64 (2000), 1, 11 *et seq*., SCHÖN, *Liber Amicorum (Gedächtnisschrift)Knobbe-Keuk* (Cologne, 1997), pp. 743, 748 *et seq*., and MÜLBERT, *Wertpapiermitteilungen* (WM) 2001, pp. 2085, 2089 *et seq*.

(56) See Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids of January 10, 2002, p. 21. This report is available under http://europa.eu.int/comm/internal_market/de/company/company/news/02-24.htm.

(57) See Annex 4 to the group\'s report of January 10, 2002 (p. 74). This report is available under

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http://europa.eu.int/comm/internal_market/de/company/company/news/02-24.htm.

(58) For a recent account of the legal restrictions that the acquirer of a majority in the shareholders\' assembly of a German stock corporation (*Aktiengesellschaft*) must deal with if he seeks to exercise control in an effective manner, see ADOLFF/MEISTER/RANDELL/STEPHAN, *Public Companies Takeover in Germany* (Munich/London, 2002), p. 249 to p. 319.

(59) See above footnote 15.

(60) OJ C 64, 14.3.1989, 8.

(61) OJ C 240, 26.9.1990, 7.

(62) OJ C 162, 6.6.1996, 5.

(63) OJ C 378, 13.12.1997, 10.

(64) See, the description at: http://www.xrefer.com/entry/447241; see the code at: http://www.thetakeoverpanel.org.uk/ (last visited 5 July 2002)

(65) For an analysis from the German perspective reflecting the range of prevailing views on this issue prior to the failure of the European Takeover Directive see HOPT, *Liber Amicorum (Festschrift) Lutter* (Cologne, 2000), pp. 1361 *et seq.* When the European Takeover Directive failed in 2001, the German legislature seized the opportunity to adopt a Takeover Act which allows for considerably more maneuvering room for the management of a German target corporation wishing to frustrate an unsolicited bid; for a discussion of the new German arrangement see DRYGALA, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2001, p. 1861, WINTER/HARBARTH, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2002, p. 1, H. KRAUSE, *Die Aktiengesellschaft* (AG) 2002, p. 133 and ADOLFF/MEISTER/RANDELL/STEPHAN, *Public Companies Takeover in Germany* (Munich/London, 2002), pp. 200 *et seq*.

(66) OJ C 23, 24.1.2001, 1.

(67) See with respect to these amendments: Recommendations for the Second Reading of 29 November 2000 (Rapporteur: LEHNE) PE 294.900, which can be downloaded from the Internet under http://www.europarl.eu.int.

(68) COM(2001) 77.

(69) PE-CONS 3629/01.

(70) Art. 9 para. 1 (a) sentence 1 of the proposed 13th Directive.

(71) Recommendations for the Second Reading of 29 November 2000 (Rapporteur: LEHNE) PE 294.900, p. 23.

(72) Recommendations for the Second Reading of 29 November 2000 (Rapporteur: LEHNE) PE 294.900, p. 24.

(73) Under Art. 5 para. 1 of the proposed 13th Directive the acquirer of a certain percentages of the voting rights (to be determined individually by the Member States under Art. 5 para 5) conferring on him the control of the target must make an offer for the acquisition of the shares of his fellow shareholders for an adequate consideration.

(74) See also Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids of January 10, 2002, p. 40.

(75) See the text accompanying footnote 57.

(76) See the Report of January 10, 2002, available at: http://europa.eu.int/comm/internal_market/en/company/company/news/02-24.htm (last visited 5 July 2002).

(77) Report of January 10, 2002, p. 27.

(78) Report of January 10, 2002, p. 28.

(79) The Member States are to be allowed to determine a lower, but not a higher threshold. Report of January 10,

2002. p. 31.

(80) Report of January 10, 2002, p. 32.

(81) Report of January 10, 2002, p. 29.

(82) Report of January 10, 2002, p. 34.

(83) Under the Portuguese Law No 11/90 the legislation providing for privatization of nationalized industries may limit the overall amount of shares which may be acquired or subscribed for by foreign entities; see ECJ Case C-367/98: *Commission vs. Portugal*, para. 10.

(84) Under the Portuguese Law No 11/90 the legislation providing for privatization of nationalized industries may lay down rules fixing the maximum value of the respective participations in the capital of any company. Accordingly, Decree-Law No 380/93 provides that \"the acquisition… by a single natural or legal person, of shares representing more than 10% of the voting capital….in companies which are to be re-privatized, shall require the prior authorisation of the Minister for Financial Affairs\"; see ECJ Case C-367/98: *Commission vs. Portugal*, para. 10 and para. 14.

(85) Under the French Decree No 93-1298 an ordinary share held by the State in *Société Nationale Elf-Aquitaine* was converted into a \"golden share\" to which, as a special right, the Decree attached a requirement for the prior approval by the Minister for Economic Affairs to \"any direct or indirect shareholding, whatever its nature or legal form, by a natural or legal person, acting alone or in conjunction with others, which exceeds the ceiling of one tenth, one fifth or one third of the capital of, or voting rights, in the company\"; see ECJ Case C-483/99: *Commission vs. France*, para. 9

(86) The \"golden share\" arrangement under the French Decree No 93-1298 (see footnote 85) also provided that two representatives of the State, appointed by decree, shall sit on the board of directors of the company, without entitlement to vote; see ECJ Case C-483/99: *Commission vs. France*, para. 9

(87) The Belgian Royal Decree of 10 June 1994 provided that a share in *Société nationale de transport par canalisations (SNTC)* which had, upon privatization, to be assigned to the state shall confer on a minister the right to appoint two representatives of the Federal Government to the board of directors who sit on the board in a non-voting advisory capacity and who may apply to the Minister, within four working days, for the annulment of any decision of the board of directors which they regard as contrary to the guidelines for the country\'s energy policy, including the Government\'s objectives concerning the country\'s energy supply; see case C-503/99: *Commission vs. Belgium*, para. 9. The Belgian Royal Decree of 16 June 1994 provided the same with respect to *Société de distribution du gaz SA (Distrigaz)*.

(88) The \"golden share\" arrangement under the French Decree No 93-1298 (see footnote 85) also provided that the state had a right to oppose a decision to transfer or use as security certain assets, namely the majority of the capital of Elf-Aquitaine Production, Elf-Antar France, Elf-Gabon SA and Elf-Congo SA; see ECJ Case C-483/99: *Commission vs. France*, para. 9 and para. 10.

(89) The Belgian Royal Decree of 10 June 1994 provided that a share in *Société nationale de transport par canalisations (SNTC)* which had, upon privatization, to be assigned to the state shall confer on a minister the right to oppose any transfer, use as security or change in the intended destination of SNTC\'s system of lines and conduits which are used or are capable of being used as major infrastructures for the domestic conveyance of energy products, if the Minister considers that the operation in question adversely affects the national interest in the energy sector; see ECJ Case C-503/99: *Commission vs. Belgium*, para. 9. The Belgian Royal Decree of 16 June 1994 provided the same with respect to *Société de distribution du gaz SA (Distrigaz)*.

(90) ECJ Case C-367/98: *Commission vs. Portugal*, para. 40

(91) ECJ Case C-367/98: Commission vs. Portugal, para. 52.

(92) ECJ Case C-483/99: *Commission vs. France*, para. 47

(93) ECJ Case C-503/99: *Commission vs. Belgium*, para. 46

(94) See the text accompanying footnote 53.

(95) See ECJ Case C-483/99: *Commission vs. France*, para. 45, ECJ Case C-503/99: *Commission vs. Belgium*,

para. 45; also see the almost identical wording of: Communication of the Commission on certain legal aspects concerning intra EU-investments, OJ C 220 , 19/07/1997, p. 17 that had been drawing on the language of ECJ Case C-55/94: *Gebhard* [1995] ECR I-4165 and the equivalent formulas in Case C-148/91: *Veronica* [1993] ECR 1993, I-487, para. 9; ECJ Case C-12/92: *Kraus* [1993] ECR I-1663, para. 32; also cf. ECJ Case C-415/93: *Bosman* [1995] ECR I-4921, para. 104.

(96) ECJ Case C-483/99: *Commission vs. France*, para. 50 et seq. (with respect to the caps restricting substantial blockholdings) and para. 52 (with respect to the exclusive veto rights).

(97) ECJ Case C-503/99: *Commission vs. Belgium*, para. 49 – 50.

(98) For Germany it means, arguably, that the structures protecting *Volkswagen Aktiengesellschaft* will also have to be measured against these standards. HELLWIG, EWS 2001, 580, 582, for example, qualifies the arrangements pertaining the *Volkswagen* as \"golden shares\".