Keck in Capital? Redefining 'Restrictions' in the 'Golden Shares' Case Law

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Abstract

The evolution of the case law in the field of free movement of goods has been marked by consecutive changes in the legal tests applied by the Court of Justice of the European Union for the determination of the existence of a trade restriction. Starting with the broad Dassonville and Cassis de Dijon definition of MEEQR (measures having equivalent effect to a quantitative restriction), the Court subsequently introduced the *Keck*-concept of 'selling arrangements', which allowed for more regulatory autonomy of the Member States, but proved insufficient to capture disguised trade restrictions. Ultimately, a refined 'market access' test was adopted, qualified by the requirement of a 'substantial' hindrance on inter-State trade. Contrary to the free movement of goods, the free movement of capital has not undergone the same evolutionary process. Focusing on the 'golden shares' case law, this article questions the broad interpretation of 'capital restrictions' and seeks to investigate whether the underlying rationale of striking down any special right that could have a potential deterrent effect on inter-State investment is compatible with the constitutional foundations of negative integration. So far the Court seems to promote a company law regime that endorses shareholders' primacy, lacking, however, the constitutional and institutional legitimacy to decide on such a highly political question. It is thus suggested that a refined test should be adopted that would capture measures departing from ordinary company law and hindering market access of foreign investors, while at the same time allowing Member States to determine their corporate governance systems.

Keywords: Keck, selling arrangements, market access, golden shares, capital

1 Introduction

Twenty-two years have passed since the Court of Justice of the European Union delivered its seminal judgement in *Keck and Mithouard*.[1] Things have changed since then and Europe is no longer the same. The Internal Market has evolved to such an extent that it is argued that we have probably reached the last stage of the dynamic process of economic integration, which represents a fully integrated, efficient and competitive European market that can successfully respond to the challenges posed by the globalised economy of our times.[2] Yet, some patterns of the past sometimes come to the fore to remind us that some questions still remain to be answered. After a plethora of cases dealing with all sort of national regulations, we are still trying to figure out the appropriate test that can provide us with an economically sound and legally solid solution to the eternal conundrum of what qualifies as a 'trade restriction'. Also we are still trying to reach a conclusion as to whether the various tests that the Court has occasionally applied in one freedom can be equally applicable to the others. The present article does not purport to have the answer to this immensely complex and multivariate challenge. But it does attempt to reflect upon the critical notion of 'restriction' as developed through the case law of the Court in the field of goods and draw some parallels with the case law in the field of capital. In particular, it focuses on the golden shares case law and seeks to investigate whether the doctrine of 'selling arrangements' as formulated by the Court in *Keck*[3] together with the refined 'market access' test can be transposed in the free movement of capital in the form of 'investments arrangements'[4] that would be excluded from the scope of Article 63 TFEU. The analysis that follows is divided into three parts: the first part provides a brief overview of the case law in the free movement of goods, depicting the evolution of the scope of measures having equivalent effect to quantitative restrictions (MEEQRs); the second part turns to the free movement of capital and attempts to identify three criteria that are used in order to define the notion of capital restrictions in the golden shares case law; and finally, the third part seeks to formulate a *Keck*-inspired test that could delineate the contours of capital restrictions and to explore whether this test could be regarded as a new avenue that the Court could potentially follow in its legal reasoning

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1. Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-06097.
2. E. Spaventa, 'Leaving Keck Behind? The Free Movement of Goods After the Rulings in Commission v. Italy and Mickelsson and Roos', 34 *European Law Review* 914, at 929 (2009).
3. Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, at 16.
4. The term was coined by A. Biondi, 'When the State is the Owner – Some Further Comments on the Court of Justice "Golden Shares" Strategy', in U. Bernitz and W. Ringe (eds.), *Company Law and Economic Protectionism: New Challenges to European Integration* (2010) 95, at 96-97.

when dealing with special shareholdings in privatised companies.

2 Selling Arrangements and Market Access in the Free Movement of Goods

2.1 The Pre-*Keck* Case Law on MEEQRs

The establishment and development of the European Union's (EU) Internal Market has been to a large extent supported and promoted by the dynamics of negative integration. It was the Luxembourg Court that stepped in and took the lead in overcoming the political stagnation of the 1960s/1970s and facilitating the process of economic integration. With the two landmark decisions in *Dassonville*[5] and *Cassis de Dijon*,[6] the Court unleashed the powers of negative integration and inaugurated a new era, where any national rule capable of hindering, directly or indirectly, actually or potentially, intra-Community trade could be regarded as an MEEQR.[7] The principle of mutual recognition was proclaimed as the predominant criterion for determining whether a trade restriction existed or not.[8] This meant that the principles of non-discrimination and anti-protectionism were soon replaced by the strikingly broad and 'inherently nebulous'[9] concept of market access. The far-reaching consequences did not take too long to make themselves felt: in the aftermath of the two rulings, a wave of speculative national litigation mushroomed, calling for all sorts of national regulations to be disapplied as contrary to the free movement provisions.[10] Most of the contested measures were indistinctly applicable regulatory requirements that applied without distinction to domestic and foreign goods or traders and did not restrict or affect inter-State trade. This avalanche of legal actions against national rules regulating marketing and selling conditions was perceived as an intrusion into the domain of national regulatory autonomy, and it was increasingly suggested that the Court should clarify and delineate the boundaries of Article 34 TFEU.[11] In the same vein, Advocate General Tesauro in *Hünermund* courageously admitted that he had changed his mind in relation to his views in a previous case law,[12] and he opined that the *Dassonville* formula could not be construed as meaning that a potential reduction in imports caused solely and exclusively by a more general (and hypothetical) contraction of sales could constitute an MEEQR.[13] Accordingly, he asserted that rules that regulated the manner in which a trading activity was carried out were in principle to be regarded as falling outside the scope of Article 34 TFEU, insofar as they did not intend to regulate trade itself and they were not liable to render market access less profitable (and thus indirectly more difficult) for importers.[14] He believed that this approach was in line with the principle of mutual recognition established in *Cassis de Dijon* and did not in any way undermine its truly integrationist inspiration.[15] A different (i.e. more intrusive) interpretation of Article 34 TFEU 'would ultimately render nugatory the Treaty provisions … or in any event devalue them'.[16]

2.2 The *Keck* Ruling and the Introduction of the Concept of Selling Arrangements

The Court sooner or later realised that its broad definition of MEEQR and its blurry and ill-defined market-access approach had opened a Pandora's box. Thus, in 1993, when it was called upon to rule on the compatibility of a French prohibition on resale at a loss, it decided to put an end to the opportunistic and unsubstantiated litigation (though arguably in a clumsy manner). It explicitly expressed its intention to re-examine and clarify its case law in view of the increasing tendency of traders to invoke Article 34 TFEU as a means of challenging any rules whose effect was to limit their commercial freedom even where such rules were not aimed

5. Case 8-74, *Dassonville*, [1974] ECR 00837.
6. Case 120/78 *Cassis de Dijon*, [1979] ECR 00649.
7. Case 8-74, *Dassonville*, at 5.
8. C. Barnard, *The Substantive Law of the EU* (2014), at 656.
9. P. Oliver and S. Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law', 44 *Common Market Law Review* 649, at 674 (2007).
10. J. Snell, 'The Notion of Market Access: A Concept or a Slogan?', 47 *Common Market Law Review* 437, at 447 (2010). *See e.g.* Case 286/81, *Oosthoek's Uitgeversmaatschappij BV*, [1982] ECR-04575 concerning a Dutch rule prohibiting the offering of free gifts for sales promotion purposes; Case 155/80, *Sergius Oebel*, [1981] ECR 01993 regarding a German prohibition on night-work in bakeries; Case C-69/88 *H. Krantz GmbH*, [1990] ECR I-00583 on a Dutch rule granting tax authorities the power to seize goods sold on instalment terms with reservation of title in case the purchasers were not able to repay their tax debts; Case C-145/88 *Torfaen Borough Council* v. *B & Q plc.*, [1989] ECR 03851 on the British prohibition of Sunday trading; Case C-23/89, *Quietlynn Limited and Brian James Richards*, [1990] ECR I-03059 regarding the British legislation prohibiting the sale of lawful sex articles from unlicensed sex establishments; Case 382/87, *R. Buet*, [1989] ECR 01235 concerning a French prohibition on canvassing in connection with the sale of English-language teaching material; Case C-271/92, *Laboratoire de Prothèses Oculaires*, [1993] ECR I-02899 dealing with a provision in the French Code de la Santé Publique reserving solely to holders of an optician's certificate (Diplôme d' opticien-lunetier) the sale of optical appliances and corrective lenses; Case C-126/91, *Yves Rocher*, [1993] ECR I-02361 on a German rule prohibiting advertisements using price comparisons (displaying the new price and comparing it with the old one so as to catch the eye).
11. E.L. White, 'In Search of the Limits to Article 30 of the EEC Treaty', 26 *Common Market Law Review* 235 (1989); L.W. Gormley, 'Case 145/88, Torfaen Borough Council v. B&Q PLC (formerly B&Q Retail Ltd.), Preliminary reference under Art. 177 EEC by the Cwmbran Magistrates' Court on the interpretation of Arts. 30 & 36 EEC. Judgment of the Court of Justice of the European Communities of 23 November 1989', 27 *Common Market Law Review* 141 (1990); A. Arnull, 'What Shall We Do on Sunday?', 16 *European Law Review* 112 (1991); K. Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?', 28 *Common Market Law Review* 115 (1991); J. Steiner, 'Drawing the Line: Uses and Abuses of Article 30 EEC', 29 *Common Market Law Review* 749 (1992).
12. Opinion of Advocate General Tesauro in Case C-292/92, *Ruth Hünermund*, [1993] ECR I-06787, para. 26.
13. *Ibid.*, para. 25.
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*, para. 27.

at products from other Member States.[17] Thus, it introduced the famous (or rather infamous) concept of selling arrangements: rules that restricted or prohibited certain selling arrangements were not such as to hinder directly or indirectly, actually or potentially trade between Member States as long as two conditions were fulfilled: (i) they applied to all relevant traders operating within the national territory; and (ii) they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[18]

The exact content of the concept of selling arrangements was revealed in subsequent case law: rules on shop opening hours,[19] rules requiring processed milk for infants be sold only in pharmacies[20] and certain restrictive rules on advertising[21] are some examples of the type of national regulatory provisions that were captured by the concept of selling arrangements and were thus excluded from the scope of Article 34 TFEU. In general terms, rules relating to the place and time of sales as well as to the marketing of specific products were in principle considered to be caught by the *Keck*-formula.[22]

However, the somewhat artificial dichotomy between product rules and selling arrangements proved inadequate and sparked an academic debate.[23] Lawrence Gromley noted that the exclusion of selling arrangements from the scope of Article 34 TFEU would lead to a lack of judicial review of ostensibly innocent measures, which could, however, constitute disguised restrictions on inter-State trade.[24] Stephen Weatherill, while recognising that the ruling excluded from the scope of the Treaty certain regulatory choices that do not damage the realisation of economies of scale, he nevertheless considered that it had a 'disturbingly formalistic tone' and it was 'flawed by the absence of an adequate articulation of just why it was possible to conclude that no sufficient impact on trade between States was shown'.[25] He thus proposed a refined *Keck*-test that would allow Member States to apply national regulatory measures to imported goods as long as they would apply equally in law and in fact to domestic and foreign goods and they would not impose *direct* or *substantial* hindrance to market access.[26]

The origin of this refined test can be traced back to the Advocate General Jacobs' opinion in *Leclerc-Siplec*,[27] where he expressed his famous objection to the *Keck*-inspired presumption of lawfulness of selling arrangements and proposed the adoption of a test based on '*substantial* hindrance on market access' for determining whether non-discriminatory rules infringed Article 34 TFEU.[28] The *significance* of the impact on market access was also espoused by other Advocates General[29] and legal scholars as a criterion for establishing the existence of an MEEQR.[30] It was argued that the case law offered room for *de minimis* considerations in free movement law, in the sense that 'minimal restrictive effects' did not affect market access, while several trade restrictions hindered *significantly* market access and thus impinged on Article 34 TFEU.[31] However, the position of the Court was less clear. Although it had ostensibly rejected the adoption of a *de minimis* test in the free movement assessment,[32] it effectively accepted a similar test by acknowledging that if the effect on market

17. Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, at 14.
18. *Ibid*., at 16.
19. Joined Cases C-401/92 and C-402/92, *Boermans*, [1994] ECR I-02199; Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV*, [1994] ECR I-02355; Joined Cases C-418/93 *et al*., *Semeraro Casa Uno and Others*, [1996] ECR I-02975; Case C-483/12, *Pelckmans*, published in the electronic Reports of Cases.
20. Case C-391/92, *Commission* v. *Greece (processed milk for infants)*, [1995] ECR I-01621.
21. Case C-292/92, *Ruth Hünermund*, [1993] ECR I-06787; Case C-412/93, *Leclerc-Siplec* v. *TF1 Publicité*, [1995] ECR I-00179; Joined Cases C-34/95, C-35/95 and C-36/95, *De Agostini*, [1997] ECR I-3843; Case C-405/98, *Gourmet*, [2001] ECR I-1795.
22. Case C-71/02, *Herbert Karner*, [2004] ECR I-03025, at 38.
23. The *Keck* judgement and its implications for the functioning of the internal market have been extensively analysed by legal scholars. *See* indicatively L. Gormley, 'Reasoning Renounced? The Remarkable Judgment in Keck & Mithouard?', 5 *European Business Law Review* 63 (1994); M.P. Maduro, 'Keck: The End? The Beginning of the End? Or Just the End of the Beginning', 1 *Irish Journal of European Law* 30 (1994); N. Bernard, 'Discrimination and Free Movement in E.C. Law', 45 *International and Comparative Law Quarterly* 82 (1996); C. Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?', 26 *European Law Review* 35 (2001); A. Tryfonidou, 'Was Keck a Half-Baked Solution After All?', 34 *Legal Issues of Economic Integration* 167 (2007); I. Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic" Integration', 21 *European Business Law Review* 705 (2010); C. Barnard, 'What the Keck? Balancing the Needs of the Single Market with State Regulatory Autonomy', 2 *European Journal of Consumer Law* 201 (2012); S. Weatherill, 'The Road to Ruin: "Restrictions on Use" and the Circular Lifecycle of Article 34 TFEU', 2 *European Journal of Consumer Law* 359 (2012).
24. L.W. Gormley, 'Two Years After Keck', 19 *Fordhman International Law Journal* 866, at 885-886 (1996).
25. S. Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification', 33 *Common Market Law Review* 885, at 887 (1996).
26. *Ibid*., at 903.
27. Opinion of Mr. Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec*, [1995] ECR I-00179.
28. *Ibid*., para. 39.
29. Opinion of Advocate General Stix-Hackl in Case C-322/01, *DocMorris NV*, [2003] ECR I-14887, para. 78, where he underlined that 'The decisive factor should therefore be whether or not a national measure *significantly* impedes access to the market'. *See also* Opinion of Mr. Advocate General Van Gerven in Case C-145/88, *Torfaen*, [1989] ECR-03851, para. 24, where he argued that there was no room for a *de minimis* test, because Article 34 TFEU already presupposes a *serious*, and therefore a *more than appreciable*, obstruction to trade between Member States.
30. M.S. Jansson and H. Kalimo, 'De Minimis Meets "Market Access": Transformations in the Substance – and the Syntax – of EU Free Movement Law?', 51 *Common Market Law Review* 523 (2014). It is interesting to note that the authors of this article distinguish three substantive groups of *de minimis* thresholds: the magnitude (severity) of the restrictive effect, the probability of the restrictive effect and the causality between the measure and the restrictive effect. *See also* Steiner, above n. 11; Barnard (2014), above n. 8, at 147; H. Toner, 'Non-discriminatory Obstacles to the Exercise of Treaty Rights – Articles 39, 43, 49, and 18 EC', 23 *Yearbook of European Law* 275, at 285 (2004). Conversely, *c.f.* Weatherill (1996), above n. 25, who refrains from describing the 'direct or substantial hindrance to market access' test as a *de minimis* threshold.
31. Jansson and Kalimo, above n. 30, at 526.
32. Joined Cases 177 and 178/82, *Jan van de Haar*, [1984] ECR-01797, at 13; Case C-67/97, *Ditlev Bluhme*, [1998] ECR I-08033, at 20; Joined Cases C-1/90 and C-176/90, *Aragonesa de Publicidad and Publivía* v. *Departamento de Sanidad*, [1991] ECR I-4151, at 24; Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others*, [1993] ECR I-6621, at 37.

access was 'too uncertain or indirect'[33] or 'purely hypothetical',[34] then the contested measure did not infringe free movement provisions.

2.3 The Post-*Keck* Market Access Test

The Court started widening the scope of Article 34 TFEU by restricting the scope of selling arrangements and gradually adopted an over-inclusive 'market access' test.[35] In particular, in subsequent case law, the Court interpreted the two conditions contained in paragraph 16 of *Keck* as meaning that certain selling arrangements could not escape the scrutiny of the free movement provisions if they were discriminatory or they imposed additional burdens on imported goods (in the sense of the 'dual burdens' that the principle of mutual recognition was intended to eliminate under the *Cassis de Dijon* judgement). Cases such as *Familiarpress*,[36]*De Agostini*,[37]*Gourmet*[38] and *Alfa Vita*[39] signalled the transition from an approach based on a formalistic distinction between 'product rules' and 'selling arrangements' to a more straightforward test based on 'market access hindrance'.[40] Progressively, the Court departed from the *Keck*-test, without, however, overruling it explicitly. In *Commission* v. *Italy (trailers)*[41] and *Mickelsson and Roos*,[42] the Court reintroduced a refined market access test according to which rules restricting the use of products hinder the market access of foreign products and therefore constitute MEEQR prohibited under Article 34 TFEU.[43]

In the same vein, in *LIBRO*,[44] the Court ruled that book price-fixing[45] of German language books in Austria constituted an MEEQR contrary to Article 34 TFEU,[46] as it could potentially hinder market access for German book importers.[47] Furthermore, the predominance of the 'market access' test was very recently reiterated in the *Scotch Whisky* case,[48] where Court held that the Scottish imposition of a minimum price per unit of alcohol prevented the lower cost price of imported products being reflected in the selling price to the consumer and was thus capable of hindering the access to the UK market of alcoholic drinks that were lawfully marketed in other Member States.[49]

However, this 'market access' test is sometimes qualified by an additional step, which requires that the measure at issue have a *direct/substantial/significant* effect on inter-State trade. Thus, in *Ker-Optika*, the Hungarian prohibition on the selling of contact lenses via the Internet was deemed to be an MEEQR within the meaning of Article 34 TFEU, because it deprived traders from other Member States of a particularly effective means of selling those products and therefore *significantly* impeded market access.[50] Although admittedly the Court is not very consistent in the terminology or the precise tests that it uses, the fact nonetheless remains that its analysis implicitly includes a quantitative element: only measures that *directly/substantially/significantly* affect

33. Case C-69/88, *H. Krantz GmbH*, [1990] ECR I-00583, at 11; Case C-190/98, *Volker Graf*, [2000] ECR I-00493, at 25 (in the field of free movement for workers). Conversely, in Case C-415/93, *Bosman*, [1995] ECR I-04921, at 103, the Court found that the transfer rules at issue *directly* affected players' access to the employment market in other Member States and were thus capable of impeding the freedom of movement for workers. Similarly, in Case C-384/93, *Alpine Investments*, [1995] ECR I-01141, the Court ruled that the prohibition of cold calling by telephone for financial services *directly* affected access to the market in services in the other Member States and was thus capable of hindering intra-Community trade in services.
34. Case C-299/95, *Friedrich Kremzow* v. *Republik Österreich*, [1997] ECR I-02629, at 16, where the Court interestingly ruled that whilst any deprivation of liberty may impede a person from exercising his or her right to free movement, a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of free movement provisions.
35. This over-inclusive market access test has been criticised by some scholars. *See e.g.* Catherine Barnard notes that the intrusion into national regulatory autonomy can have profound repercussions for national legislation adopted by democratic governments, as almost every national regulatory requirement can in one way or another affect the economic freedom of market operators, even if that was never the intention of the legislator and the effect on trade is inappreciable. *See* Barnard (2014), above n. 8, at 20.
36. Case C-368/95, *Familiapress*, [1997] ECR I-03689.
37. Joined Cases C-34/95, C-35/95 and C-36/95, *De Agostini*.
38. Case C-405/98, *Gourmet*.
39. Joined Cases C-158/04 and C-159/04, *Alfa Vita*, [2006] ECR I-08135, at 19.
40. For the notion of the market access, *see* Snell (2010), above n. 9; G. Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law', 11 *German Law Journal* 671 (2010); C. Barnard, 'Restricting Restrictions: Lessons for the EU from the US?', 68 *Cambridge Law Journal* 575 (2009); E. Spaventa, 'From Gebhard to Carpenter: Towards a (Non)-Economic European Constitution', 41 *Common Market Law Review* 743 (2004); Case C-531/07, *Fachverband der Buch- und Medienwirtschaft* v. *LIBRO Handelsgesellschaft mbH*, [2009] ECR I-03717.
41. Case C-110/05, *Commission* v. *Italy (trailers)*, [2009] ECR I-00519.
42. Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-04273.
43. For an academic discussion, *see* for instance L. Prete, 'Of Motorcycle Trailers and Personal Watercrafts: The Battle over Keck', 35 *Legal Issues of Economic Integration* 133 (2008); P. Pecho, 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v. Italy, C-110/05', 36 *Legal Issues of Economic Integration* 257 (2009); P. Wenneras and K.B. Moen, 'Selling Arrangements, Keeping Keck', 35 *European Law Review* 387 (2010); P. Oliver, 'Of Trailers and Jet Skis: Is the Case Law on Article 34 TFEU Hurtling in a New Direction?', 33 *Fordhman International Law Journal* 1423 (2011); G. Davies, 'The Court's Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles', 2 *European Journal of Consumer Law* 25 (2012).
44. Case C-531/07, *Fachverband der Buch- und Medienwirtschaft* v. *LIBRO Handelsgesellschaft mbH*, [2009] ECR I-03717.
45. Specifically, the case concerned an Austrian law prohibiting Austrian importers of German-language books from fixing a retail price below that fixed or recommended by the publisher for the State of publication.
46. Case C-531/07, *Fachverband der Buch- und Medienwirtschaft*, at 21-22.
47. *Ibid*.
48. Case C-333/14, *The Scotch Whisky Association and Others*, [2015] n.y.p.
49. *Ibid*., at 32.
50. Case C-108/09, *Ker-Optika*, [2010] ECR I-12213, at 54. By the same token but in a different context, recently the Court found that the Spanish legislation prohibiting tobacco retailers from importing tobacco products and forcing them to procure their supplies from authorised wholesalers hindered the access of these products to the market. This was despite the contentions of the Commission and the Spanish Government that the legislation at issue had to be assessed in the light of Art. 37 TFEU, because it concerned the operation of a monopoly of a commercial character and the restrictions on trade that are inherent in the existence of such a monopoly. *See* Case C-456/10 *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT)* v. *Administración del Estado* [2012], published in the electronic reports of cases, at 21, 43.

inter-State trade are captured by the MEEQR definition. By contrast, measures with *hypothetical*, *remote*, *uncertain* or *indirect* effect on market access escape from the internal market scrutiny.[51]

3 Defining Capital Restrictions in the Golden Shares Case Law

3.1 Golden Shares in Europe

In the early 2000s, after almost a decade from the *Keck* judgement, the Court was faced with the question whether the doctrine of selling arrangements could be applied in the field of the free movement of capital and, more precisely, in the golden shares case law. This case law raises important legal, political and economic questions, as it addresses issues, which lie at the heart of the fundamental interplay between the State and the Market.

The origins of golden shares can be traced back to the post-war economic history of Europe. In the aftermath of the Second World War, a widespread public ownership thrived in Europe in an effort to resuscitate the war-ravaged economies, boost growth and create national champions in strategic industries, which were deemed essential for national economy. The two privatisation waves that followed (the first in the late 1970s and 1980s as a result of the policy pursued by Margaret Thatcher in the UK and the second in the 1990s because of budgetary constraints imposed by the Maastricht Treaty and the subsequent efforts of Member States to reduce their public debts) did not thwart state intervention in the market.[52] One way of retaining control over the previously state-owned and subsequently privatised companies was through the creation of golden shares.

The notion of golden shares refers to the special rights that Member States usually maintain in strategically sensitive privatised companies (telecommunications, energy, postal services, car industries, etc.).[53] These special rights grant to the State the right to control changes in ownership and/or veto certain strategic decisions in order to prevent hostile takeovers, guarantee the provision of services of general interest, and safeguard public security and other public interest objectives.[54] The use of golden shares became a widespread phenomenon in Europe in the 1990s and 2000s. The Commission was not particularly content with these developments and regarded the establishment of special holdings in national champions as an expression of economic patriotism.[55] Fearing that this trend could severely obstruct the functioning of the Internal Market, it initiated a number of infringement proceedings against the Member States that had maintained special rights in privatised companies.

The conclusion that can be drawn after more than twenty years of litigation[56] is that golden shares constitute a restriction on the free movement of capital because of their *dissuasive* effect on investment. However, they may be justified by legitimate objectives in the public interest if the State provides sufficient evidence that the measures at issue comply with a strict proportionality test and requirements of legal certainty.[57] Therefore, just like in the other freedoms, the Court is confronted with the challenge of striking a fair balance between economic freedom (here in the form of foreign direct or portfolio investments in privatised companies) and the Member State's need to protect the overriding reasons in the public interest. Only here, the implications of its rulings

51. It could be argued that the 'substantial effect' test refers to a certain threshold that needs to be met in order for a measure to constitute an MEEQR, whereas the 'remote effect' test seeks to establish a link of causality between the contested measure and restriction on inter-State trade. Be that as it may, this distinction is not unproblematic, that is why some authors see a convergence of the two tests. *See* in particular Barnard (2014), above n. 8, at 147; Weatherill (1996), above n. 25, at 900; D. Doukas, 'Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services', 9 *Cambridge Yearbook of European Legal Studies* 177 (2007).
52. S. Grundmann and F. Möslein, 'The Golden Share – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects', *Euredia* 623, at 633 (2001-2002).
53. Oxera, 'Special Rights of Public Authorities in Privatised EU Companies: The Microeconomic Impact', Report Prepared for the European Commission (2005), at 3, available at: <http://ec.europa.eu/internal_market/capital/docs/2005_10_special_rights_full_report_en.pdf>.
54. Commission Staff Working Document, 'Special Rights in Privatized Companies in the Enlarged Union – A Decade Full of Developments' (2005), at 4, available at: <http://ec.europa.eu/internal_market/capital/docs/privcompanies_en.pdf>.
55. *See* in particular the highly cited Communication of the Commission on certain legal aspects concerning intra-EU investment, OJ C 220 of 19 July 1997, at 15-18. The concept of 'economic patriotism' or 'economic protectionism' implies the 'assertion of selfish interests in defiance of market forces, by those in a position to influence the outcome to that end by legal means', *see* J. Rickford, 'Protectionism, Capital Freedom and the Internal Market', in U. Bernitz and W. Ringe (eds.), *Company Law and Economic Protectionism: New Challenges to European Integration* (2010) 54, at 55; J. Rickford, 'Free Movement of Capital and Protectionism After Volkswagen and Viking Line', in M. Tison, H. De Wulf, C. Van der Elst & R. Steennot (eds.), *Perspectives in Company Law and Financial Regulation – Essays in Honour of Eddy Wymeersch* (2009) 61, at 62.
56. Case C-58/99, *Commission* v. *Italy*, [2000] ECR I-03811; Case C-367/98, *Commission* v. *Portugal*, [2002] ECR I-04731; Case C-483/99, *Commission* v. *France*, [2002] ECR I-04781; Case C-503/99, *Commission* v. *Belgium*, [2002] ECR I-04809; Case C-463/00, *Commission* v. *Spain*, [2003] ECR I-04581; Case C-98/01, *Commission* v. *United Kingdom*, [2003] ECR I-04641; C-174/04, *Commission* v. *Italy*, [2005] ECR I-04933; Joined Cases C-282/04 and C-283/04, *Commission* v. *The Netherlands*, [2006] ECR I-09141; Case C-112/05, *Commission* v. *Germany*, [2007] ECR I-08995; Joined Cases C-463/04 and C-464/04, *Federconsumatori and Others and Associazione Azionariato Diffuso dell'AEM SpA and Others v Comune di Milano*, [2007] ECR I-10419; C-274/06, *Commission* v. *Spain*, [2008] ECR I-00026; C-207/07, *Commission* v. *Spain*, [2008] ECR I-00111; Case C-326/07, *Commission* v. *Italy*, [2009] ECR I-02291; Case C-171/08, *Commission* v. *Portugal*, [2010] ECR I-06817; Case C-543/08, *Commission* v. *Portugal*, [2010] ECR I-11241; Case C-212/09, *Commission* v. *Portugal*, [2011] ECR I-10889; Case C-244/11, *Commission* v. *Greece*, [2012], published in the electronic reports of cases; Case C-95/12, *Commission* v. *Germany*, [2013], published in the electronic reports of cases.
57. So far only on one occasion did the Court find that the contested special rights were justified by public interest requirements and were also consistent with the principles of proportionality and legal certainty, and that was in Case C-503/99, *Commission* v. *Belgium*.

are far more profound, as they can affect the national corporate governance systems and the varieties of capitalism that exist in Europe.[58]

3.2 Selling Arrangements in Golden Shares Case Law

Not surprisingly, the Member States have consistently expressed their strong opposition to this line of case law, arguing that it essentially deprives them of their right to choose the corporate governance regime that suits best to the structure of their economy and corresponds to the needs of their industrial policy. Among their various defences, some Member States attempted to draw a parallel between golden shares and selling arrangements, arguing that a *Keck*-like approach should apply in relation to the special shareholding retained in privatised companies.[59] However, they did not manage to convince the Court to moderate its rigid legal reasoning in order to prevent a replication of the legal ramifications of the over-extensive application of the free movement rules, as the one occurred in the aftermath of *Dassonville* and *Cassis de Dijon*.

It emerges from the case law that the Court has not formulated a clear and consistent test as to what constitutes a capital restriction. Nevertheless, we can identify certain criteria which – if combined – could result in a structured legal test for capital restrictions. These criteria are the following: (1) discrimination on grounds of nationality, (2) derogation from ordinary company law and (3) positive effect on capital flows. The first criterion has appeared only once in the golden shares case law,[60] and because of its straightforward discriminatory nature, it is undisputed that it constitutes a restriction on the free movement of capital, which can only be justified by the objectives provided for under the Treaties.[61] Therefore, it will not be further analysed, as there is a wide consensus as to its restrictive nature. The second criterion, namely derogation from ordinary company law, has been developed in the context of golden shares, and it constitutes the foundation for the construction and development of a *Keck*-inspired approach in the free movement of capital. This approach raises interesting and contentious legal questions, which will be addressed in Section 3.2.1. Finally, the positive effect on capital flows criterion, inspired by the 'substantial hindrance' test originating from the free movement of goods, could perhaps contribute to the formulation of a more prudent test for capital restrictions in the golden shares case law. Its possible implications will be addressed in Section 3.2.2.

3.2.1 The 'Derogation from Ordinary Company Law' Criterion

The 'derogation from ordinary company law' criterion was introduced in the golden shares case law in order to determine, first, whether a special shareholding qualifies as a State measure and, second, whether it has a restrictive effect on capital movements. In reality, these two steps form part of one and the same test: if the State acts in its capacity as public authority and introduces special rights in a privatised company in derogation from ordinary company law in order to avail itself of a privileged position to the exclusion of private individuals, it restricts the free movement of capital; if, on the other hand, it acts in its capacity as a shareholder of a privatised company through a private act[62] in accordance with national company law, the special shareholding at issue constitutes an 'investment arrangement' that does not restrict the free movement of capital.

So far, most of the cases concerned golden shares introduced in derogation from the national company law in force at the time. Thus, the conclusion of the Court was, in most cases, justified by the need to prevent the State from exercising its regulatory powers in order to arbitrarily benefit from special prerogatives in the management of privatised companies. However, it is one thing to maintain a level-playing field between the State and private shareholders, and it is another to impose on all Member States a certain model of corporate governance that adheres to a strict principle of proportionality between ownership and control[63] and does not allow

58. Varieties of Capitalism (VoC) is a theory from the field of political economy, which essentially distinguishes between coordinated and liberal market economies on account of the corporate governance regime and the methods of production in these economies. It was introduced in 2001 by the influential work of P.A. Hall and D. Soskice, 'An Introduction to Varieties of Capitalism', in P.A. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (2001). Following this development, literature in this field has been gradually flourishing, revealing the importance of VoC in European Integration Theory. *See* indicatively J. Snell, 'Varieties of Capitalism and the Limits of European Economic Integration', 13 *Cambridge Yearbook of European Legal Studies* 415 (2012); P. Zumbansen and D. Saam, 'The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism', 8 *German Law Journal* 1027 (2007); D. Kinderman, 'Challenging Varieties of Capitalism's Account of Business Interests: The New Social Market Initiative and German Employers' Quest for Liberalization, 2000-2014', *Discussion Paper No. 14/16* (2014).
59. Case C-463/00, *Commission* v. *Spain*; C-98/01, *Commission* v. *UK*; C-171/08, *Commission* v. *Portugal*; C-543/08, *Commission* v. *Portugal*; C-219/09, *Commission* v. *Portugal*. Although the present article focuses primarily on the five aforementioned cases, it should be noted that the arguments are drawn from the entire golden shares case law, with the seminal VW case being one of the leading examples (Case C-112/05, *Commission* v. *Germany*, [2007] ECR I-08995).
60. Case C-367/98, *Commission* v. *Portugal*, [2002] ECR I-04731. The case concerned, amongst others, a prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings. This was of course a discriminatory restriction on the free movement of capital.
61. Although the Case C-367/98 *Commission* v. *Portugal* concerned a *directly* discriminatory measure, it should be noted that *indirectly* discriminatory measures are also covered by this criterion (one could for example envisage a situation where the national measure entails discrimination on the basis of the residence of the shareholders or the Members of the Board of Directors).
62. Usually through an amendment of the articles of association.
63. The principle of proportionality between ownership and control implies that any shareholder should own the same fraction of cash flow rights and voting rights. The OECD notes that proportionality as an economic welfare enhancing proposition is not self-evident. In fact, proportionality-limiting mechanisms are available in most countries, and they may actually be efficiency enhancing because they help overcome agency and incentive problems. *See* in particular OECD, 'Lack of Proportionality between Ownership and Control: Overview and Issues for Discussion' (2007), available at: <www.oecd.org/daf/ca/40038351.pdf>.

room for control-enhancing mechanisms (CEMs).[64] The analysis that follows attempts to shed light into this delicate distinction by examining some of the Court's golden shares rulings.

3.2.1.1 The British Airports Authority Case

One of the cases that can be used as a paradigm of a rigorous and over-inclusive interpretation of Article 63 TFEU is the *Commission* v. *UK* (BBA) case.[65] British Airports Authority (BAA), Britain's biggest airport operator, was privatised in 1986 as part of the privatisation policy pursued by Margaret Thatcher. The privatisation process was governed by the Airports Act 1986. The UK Government retained control over the newly formed company that took over the functions of the previously state-owned enterprise by retaining a special shareholding. In particular, the Articles of Association of the privatised BAA provided for a rule that prevented the acquisition of more than 15% of the voting shares in the company. Furthermore, they introduced a procedure that empowered the UK Government to give consent to certain major operations of the company, such as disposal of assets, control of subsidiaries and winding-up.

The UK Government argued first that national company law allowed the existence of different classes of shares as well as the existence of differences in the rights attached to them in relation to sharing the company's profits and to its management.[66] Secondly, BAA's Articles of Association could not be equated to national legislation (and thus regarded as a State measure), as their adoption was a mere application of private law mechanisms allowed under ordinary company law.

64. CEMs are various instruments that allow for the separation of ownership from control in listed companies, such as multiple voting rights shares, non-voting shares, pyramid structures, voting right ceilings, ownership ceilings and supermajority provisions. A study that was conducted by ISS Europe, Shearman and Sterling and the European Corporate Governance Institute in 2007 at the request of the European Commission showed that CEMs are relatively common across the EU. Of all the 464 European companies considered, 44% have one or more corporate CEMs (or other alternative mechanism). The countries with the highest proportion of companies featuring at least one of these mechanisms are France, Sweden, Spain, Hungary and Belgium. *See* Report on the Proportionality Principle in the European Union, External study commissioned by the European Commission (2007), available at: <http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf>; *See also* Commission of the European Communities, 'Impact Assessment on the Proportionality between Capital and Control in Listed Companies', Commission Staff Working Document, SEC(2007) 1705, at 4, available at: <http://ec.europa.eu/internal_market/company/docs/shareholders/impact_assessment_122007.pdf>. The latter document presents the pros and cons of possible policy actions, also including an evaluation of the consequences of not undertaking any regulatory action in this field. The impact assessment was validated by the Commission's impact assessment board. After weighing the arguments advanced, Commissioner McCreevy decided that there was no need for an action at EU level on this issue. Therefore, DG Internal Market and Services terminated their work in this area. This should be regarded as an indication that the political institutions of the Union have decided to maintain their neutrality with respect to the principle of proportionality and pay homage to the Member State's right to organise their corporate governance regimes.
65. Case C-98/01, *Commission* v. *UK*.
66. *Ibid*., at 26.

These arguments were not accepted by the Court. It held that the fact that BAA's Articles of Association were to be approved (and were actually) by the Secretary of State pursuant to the Airports Act 1986 meant that the UK had acted in its capacity as a public authority and not as a shareholder, and therefore the restrictions had not arisen from a normal operation of company law.[67] However, one might wonder whether the approval by the Secretary of State was a sufficient condition for a private law act – adopted in compliance with national company law – to be regarded as a State measure. Surely, it cannot be denied that there was an approval by the Secretary of State, but this cannot alter the nature of the Articles of Association as a private agreement among the shareholders. The State did not use its public authority powers in order to derogate from ordinary company law and benefit arbitrarily from a privileged status by distorting the market; rather it acted as a shareholder and made use of the possibilities offered by ordinary company law, just like any private investor could have done in a similar situation.

Secondly, the ordinary law criterion was used as a basis to advance the argument that the contested special rights should be interpreted in the light of the Keck ruling. The UK Government reminded the Court of its own efforts to keep a tight rein on the speculative litigation that emerged in the field of goods after Dassonville and Cassis de Dijon by adopting a more moderate approach in Keck. The application of a Keck-informed test would entail the exclusion of the contested special rights from the scope of capital restrictions under Article 63 TFEU.

In particular, it was argued that the measures at issue were applied equally to foreign and domestic investors and they did not restrict market access. Rules of private law such as the ones in the BAA's Articles of Association, which did not derogate from normal company law and merely determined the characteristics of the special shareholding, could not possibly amount to a restriction on market access.[68] It was further contended that the Member States were entitled to engage in economic activities on the same basis as private market operators, within the framework of contracts governed by private law. As there was no secondary legislation on this matter, EU law could not impose on a company the obligation to be placed under market control or to attach to its shares the rights that all actual or potential investors might wish to see attached to them.[69] If the special shareholding were open to challenge, this would mean that holders of ordinary shares could rely on the Treaty in order to renegotiate the rights attached to the shares they had bought.[70] In other words, ordinary shareholders would be allowed to convert their ordinary shares into special shares. This interpretation, however, could not be accepted, as EU law could not impose a specific

67. *Ibid*., at 48.
68. *Ibid*., at 29.
69. *Ibid*., at 31.
70. *Ibid*., at 35.

model of corporate governance. This was – and still remains – a domain reserved for the national legislator.

However, the Court found that while the contested measures were not discriminatory, they nonetheless affected the position of a person acquiring a shareholding as such and were thus liable to deter investors from other Member States from making such investments and consequently affected their access to the market. Although, in principle, it did not exclude the possibility of developing a concept similar to that of selling arrangements in the area of free movement of capital, it nevertheless rejected it on the facts, by stating that the measures at issue were not comparable to the rules concerning selling arrangements.[71]

It could be argued that the outcome of this case might have been different were it not for the approval of the Articles of Association by the Secretary of State. This approval was the decisive factor that led the Court to rule that the golden shares at issue were at variance with national company law and could not be regarded as 'investment arrangements'. Nevertheless, the Court did not explain how the approval by the Secretary of State altered the fact that the introduction of special shareholding was permitted under national company law. This criterion is decisive of determining whether a measure constitutes a restriction on capital movements. The UK Government argued emphatically that national company law did not preclude special shareholding. It was in fact so convinced of the merit of its arguments that it did not advance any justification arguments. This proved fatal for the outcome of the case, as the Court did not even examine whether the restriction could be justified by overriding reasons in the public interest.

3.2.1.2 The Portugal Telecom and GALP Energia Cases

Contrary to the BAA case, in *Commission* v. *Portugal (Portugal Telecom SGPS SA)*,[72] the Court rightfully found that the contested special shareholding amounted to a State measure liable to restrict the free movement of capital. The special rights at issue included, among others, a right to elect at least one-third of the total number of directors, including the chairman of the board of directors, a right to elect one or two of the members of the executive committee and an approval procedure for important decisions, such as the appropriation of net income of the year, alterations to the articles of association and increases in share capital, and relocation of its registered office. Although the preferred shares were introduced in the Articles of Association, the Court noted that these Articles were adopted not only immediately after the adoption of the decree-law authorising the creation of golden shares within Portugal Telecom, but in particular at a time when the Portuguese Republic had a majority holding in the company's share capital and thus exercised control over that company.[73] Furthermore, as underlined by Advocate General Mengozzi, the creation of those golden shares was not the result of a normal application of company law: in derogation from the Portuguese Commercial Companies Code, the golden shares retained in Portugal Telecom were not transferable.[74] Therefore, in those circumstances, the Court rightfully regarded the introduction of golden shares in Portugal Telecom as a State measure liable to restrict the free movement of capital. It was clear that the Portuguese Government had departed from the ordinary provisions of company law in order to avail itself of a privileged position in the privatised telecommunications company.

Similarly, in *Commission* v. *Portugal (GALP Energia SGPS SA)*,[75] the Court held that the right of the State to appoint the chairman of the Board of Directors in GALP Energia SGPS SA was not stemming from a normal application of company law, since the Portuguese Commercial Companies Code expressly precluded the right to appoint certain directors being attached to certain categories of shares.[76] The national law at issue and GALP's Articles of Association derogated from general company law with the sole intention of benefitting the public authorities.[77] Consequently, the right of the State to appoint the chairman of GALP's Board of Directors was attributable to the Portuguese State and was thus falling within the scope of Article 63 TFEU.[78]

3.2.2 *The 'Positive Effect on Capital Movements' Criterion*

The test that has been developed so far is essentially based on the derogation from ordinary company law criterion, which could allow us to distinguish between investment arrangements and restrictions on capital movements. Although this test could be regarded as sufficient for determining whether the contested golden shares constitute a restriction on the free movement of capital, it is suggested that a quantitative dimension could be added in order to enable the Court to take into account some factual evidence in borderline and exceptional cases in which there is a strong likelihood that the special shareholding has actually promoted and encouraged cross-border capital flows.

71. Case C-98/01, *Commission* v. *UK*, at 45-48.
72. Case C-171/08, *Commission* v. *Portugal*.
73. *Ibid*., at 53. Nevertheless, it should be noted that it is disputed whether the fact that a State makes use of its majority shareholding in order to introduce special rights in the Articles of Association – when this is allowed by national company law – is sufficient to qualify this act as a 'State measure'. Special rights are usually introduced by those in control, either in the initial phase of incorporation or after an amendment of the Articles in view of a planned divestiture. *See* C. Gerner-Beuerle, 'Shareholders between the Market and the State. The VW law and Other Interventions in the Market Economy', 49 *Common Market Law Review* 97 (2012), at 118.
74. Opinion of Advocate General Mengozzi in Case C-171/08 *Commission* v. *Portugal*, para. 62.
75. Case C-212/09, *Commission* v. *Portugal*.
76. *Ibid*., at 5.
77. *Ibid*., at 53.
78. *Ibid*., at 54.

So far the Court has found that special shareholding in privatised companies amounts to a restriction on capital movements, even when there is factual evidence that this shareholding has no negative impact on the acquisition of shares in the undertaking concerned by foreign investors. Member States have tried to invoke the 'substantial hindrance' criterion, as developed in the free movement of goods, in the area of free movement of capital, but the Court has resisted the pressure.

In particular, in *Commission* v. *Portugal (Energias de Portugal)*,[79] the Portuguese Republic contended that the provisions of national law at issue did not establish any *direct* or *substantial* obstacle to the access of direct investors or portfolio investors to the share capital of EDP. To the contrary, EDP's shares were among the most sought-after on the Lisbon Stock Exchange and a large number of those shares were in the hands of foreign investors.[80] This could probably be explained by the fact that the existence of public ownership in a national industry can be regarded as guaranteeing the financial stability and solvency of a company, and can thus act as an incentive for foreign public and private investors to buy shares in that company. However, the Court refused to engage in a factual examination of the actual impact of the special rights in question on cross-border investment and ruled that foreign investors, whether actual or potential, might have been deterred from acquiring stake in the capital of EDP.[81]

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

In other words, when the contested special rights derogate from ordinary company law, there is a presumption of a restrictive effect on capital movements. However, this presumption is rebuttable: the Member State should be able to provide evidence to prove that the special rights at issue not only have not discouraged foreign investors but have actually had a positive effect on capital flows. Admittedly, one could argue that this criterion is loosely framed and it is difficult to be reconciled with the principle of legal certainty. Nevertheless, if used carefully and on a case-by-case basis, it could help redress some shortcomings arising from the erroneous premise that all golden shares inherently restrict capital movements.

4 In Search of a Refined Test for Capital Restrictions

The role of EU law in the formation of the national regimes of corporate governance lies at the heart of the underlying rationale of the Court's approach in the golden shares case law. The Court embraces the principle of proportionality between corporate ownership and control, implying that any shareholder should in principle own the same fraction of cash flow rights and voting rights. Its legal reasoning starts from the premise that the principle of proportionality between ownership and control should be respected, and thus any structure or mechanism that derogates from this principle should be disapplied as it discourages investors from acquiring shares in the undertaking concerned. According to this reasoning, the State's interference in the management of the company through the vehicle of golden shares is capable of depressing the value of the shares, thus reducing the attractiveness of an investment in that company.[82] The reason is that the State might exercise its special rights in order to protect the public interest, 'which might be contrary to the economic interests of the company'.[83]

The Court seems to embrace the shareholders' primacy value as a normative foundation of free capital flows in the Internal Market. State participation in preferred holding is regarded as a deterrent for foreign investors, thus restricting the free movement of capital. This view reflects an inherently political choice favouring unfet-

79. Case C-543/08, *Commission* v. *Portugal*. The national legislation at issue granted to the Portuguese State and to other public shareholders 'golden shares' in the company EDP – Energias de Portugal, the principal licensed distributor of electricity in Portugal and the undertaking acting as the last resort supplier. The special rights at stake included (a) the right of veto in respect of certain resolutions of the general meeting of the company's shareholders; (b) the right to appoint a director, where the State has voted against the nominees successfully elected as directors; and (c) the exemption of the State from the voting ceiling of 5% laid down in relation to the casting of votes.
80. *Ibid*., at 69.
81. *Ibid*., at 71.
82. Case C-171/08, *Commission* v. *Portugal (I)*, at 54.
83. Joined Cases C-282/04 and C-283/04, *Commission* v. *The Netherlands*, at 30. A similar view was expressed by Advocate General Maduro in Federconsumatori, where he opined that public ownership of shareholding does not reduce the attractiveness of investing in the company concerned, only insofar as the State respects the normal rules of operation of the market with a view to maximising its return on investment. *See* Opinion of Advocate General Maduro in Joined Cases C-463/04 and C-464/04, *Federconsumatori and Others*, paras. 25-26. In this case, for the first time, a shareholders' association successfully challenged the golden shares maintained by the Italian Government in the company Azienda Elettrica Milanese SpA active in the gas and electricity sector.

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tered liberal market economy,[84] as opposed to a market economy that allows the existence of corporate governance regimes with CEMs. It also reflects a policy approach advancing the maximisation of the shareholders' profits as the ultimate objective of a corporation. However, this approach is based on three premises, whose acceptance is far from evident: it implies that, first, the interests of the company are those of the shareholders, secondly, the shareholders' interests are embodied in the share value[85] and, thirdly, the existence of golden shares diminishes the share value.[86] The Court endorses the corporate governance school of thought that advocates shareholders' primacy as the ultimate objective of company law and seems to disregard the interests of other stakeholders such as employees, suppliers, creditors and ultimately the society as a whole.[87]

To accept that the mere existence of golden shares restricts the free movement of capital would imply that any type of special shareholding would amount to a restriction on capital movements. This would in turn mean that the free movement of capital is horizontally applicable and captures also acts of private shareholders, an interpretation that would have serious implications for the fundamental principle of private autonomy.[88]

Such a reading of the Treaty is open to question, as the constitutional foundations of the Internal Market do not seem to allow such a broad interpretation. Surely, the wording of Article 63 TFEU provides for the prohibition of 'all restrictions' on capital movements without any allusion to discrimination. However, this cannot be regarded as a *carte blanche* to abolish all national company law requirements that could potentially dissuade foreign investors from investing their capital in undertakings with mechanisms that do not adhere completely to shareholders' primacy. In his insightful contribution, Harm Schepel argues that the golden shares case law so far has advanced the rule that corporations should be governed with a view to maximise shareholders' profit to such an extent that it has turned Article 63 TFEU into a 'Charter of Shareholder Rights'.[89] It has managed to elevate the shareholders' primacy principle to a constitutional norm underpinning capital liberalisation.[90] However, the Court's underlying narrative is based on a utopian nostalgia for the traditional forms of capitalism. The transformations of modern economy have led to a high degree of 'financialisation', which is currently asso-

84. The structural bias of negative integration in favour of liberal market economies as opposed to social market economies has been thoroughly addressed by eminent scholars of the Max Planck Institute for the Study of Societies; *see* F.W. Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy', 8 *Socio-Economic Review* 211 (2010); M. Höpner and A. Schäfer, 'Integration among Unequals: How the Heterogeneity of European Varieties of Capitalism Shapes the Social and Democratic Potential of the EU', *MPIfG Discussion Paper No. 12/5* (2012); M. Höpner and A. Schäfer, 'A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe', 33 West European Politics 344 (2010); M. Höpner and A. Schäfer, 'Embeddedness and Regional Integration. Waiting for Polanyi in a Hayekian Setting', 66 International Organization 429 (2012). The latest contribution to the debate about the model of market economy in Europe came very recently by Advocate General Wahl. In his recent opinion in *AGET Iraklis*, he stated – in the very first paragraph – that the 'European Union is based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit'. This rather sweeping statement seems to disregard the reference to 'social market economy' in Art. 3 TEU. *See* Opinion of Advocate General Wahl delivered on 9 June 2016 in the Case C-201/15 *AGET Iraklis*.
85. Gerner-Beuerle, above n. 73, at 124.
86. However, this assumption is not empirically proven. In 2005, Oxera, authorised by the European Commission, provided an overview of the special rights retained by public authorities in privatised companies in the EU and an evaluation of their economic impact on the performance of affected companies. The Report examined six companies (Cimpor, Volkswagen, Repsol YPF, KPN, Portugal Telecom and BAA) and concluded that special rights held by public authorities tend to have a negative impact on the longer-term economic performance of EU privatised companies because four of the six companies examined tended to underperform relative to comparable companies not subject to special rights. However, the remaining two companies outperformed their comparators and, thus, this contradictory evidence was not consistent with the hypothesis that the impact of special rights is negative. Accordingly, Oxera concluded that: '… although there is some indication of a negative impact of special rights, the evidence obtained from the benchmarking analysis is disparate and does not allow any strong conclusions to be drawn. However, the results do not imply that special rights have no negative impact on companies' long-term performance'. *See* Oxera, above n. 53, at 68.
87. Gerner-Beuerle, above n. 73. *See also* M. 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 Market Law Review* 245, at 260 (2010), who criticises the Court for being 'very strict in its refusal to allow Member States to exercise control over ownership of shares, voting rights and management decision-making in private companies through golden share mechanisms'.
88. So far the Court has qualified the contested 'golden shares' as 'State measures' and has thus refrained from ruling explicitly on the question as to whether Article 63 TFEU is horizontally applicable (*see* Joined Cases C-282/04 and C-283/04 *Commission* v. *The Netherlands*, at 22; Case C-112/05 *Commission* v. *Germany*, at 27-29). However, Advocate General Maduro has advocated a horizontal applicability of the free movement of capital, noting that even when the State acts like any other shareholder under general company law, Article 63 TFEU should be applicable (*see* Advocate General Maduro in Joined Cases C-282/04 and C-283/04, *Commission* v. *The Netherlands*, para. 24). For an academic discussion, *see* Gerner-Beuerle, above n. 73; W. Ringe, 'Is Volkswagen the New Centros? Free movement of Capital's Impact on Company Law', in Dan Prentice and Arad Reisberg (eds.), *Corporate Finance Law in the UK and EU* (2011) 461; Saam and Zumbansen, above n. 61; H. Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law', 18 *European Law Journal* 177 (2012); E. Szyszczak, 'Golden Shares and Market Governance', 29 *Legal Issues of Economic Integration* 255 (2002).
89. H. Schepel, 'Of Capitalist Nostalgia and Financialisation: Shareholder Primacy in the Court of Justice', in C. Joerges and C. Glinski (eds.), *The European Crisis and the Transformation of Transnational Governan* (2014) 143.
90. *Ibid*., at 144.

ciated with rising stagnation in the real economy, social inequalities and high levels of unemployment.[91]

The choice of corporate governance model is a highly political question, which depends on various socioeconomic factors that differ across the globe. Carsten Gerner-Beuerle is right in doubting whether the Court of Justice, the judicial institution of the EU, could or should decide on such sensitive and highly political questions of national economic policy.[92] This question essentially boils down to the observance of the fundamental principle of separation of powers in the EU polity. The Court has been on several occasions accused of engaging in judicial activism,[93] which causes confusion as to its role as the judicial institution of the EU. Although this might sometimes be an overstatement, the fact remains that the role of the Court should be limited to what Article 19 TEU prescribes: to ensure that in the interpretation and application of the Treaties, the 'law' is observed.

Whether corporate governance should be dominated by the shareholders' primacy norm is a political question and should be clearly distinguished from the objective of market integration pursued by the Treaties.[94] It is doubtful whether the Court is the appropriate institution to design the corporate governance policy of the Member States. It is therefore argued that the premise of an over-inclusive interpretation of Article 63 TFEU cannot be reconciled with the discretion of the Member States in the field of corporate governance and the existence of different kinds of national company law regimes, which do not adhere strictly to the principle of proportionality between ownership and management.

This by no means should be interpreted as leaving room for suspicious State interferences that could lead to serious market abuses and distortions of competition. The Court should not refrain from disapplying distinctly or indistinctly national measures that obstruct capital flows and undermine the process of economic integration. However, it should respect the discretion of the Member States to decide on the corporate governance regime of their national economy, and it should intervene only when the national choices seriously undermine the objectives of market integration either by discriminating against foreign investors or by hindering the market access of foreign investors in derogation from ordinary company law.

Its prime objective should not be the maximisation of shareholders' profit, but the establishment of a well-functioning and integrated market economy, which respects the national policy choices as expressed through various mechanisms of national company law. This is why the question of whether the contested measure derogates from domestic company law has been a recurring theme in the golden shares case law and rightly so. It appears that it is the only criterion so far that can contribute to the development of a reasonable and coherent test to assess whether special shareholding in privatised undertakings constitutes restrictions on capital movements.[95]

It is thus proposed that a refined three-step test could be adopted in order to define capital restrictions.[96] It operates in the following way:

1. *Discrimination on grounds of nationality*. The first step asks whether there is discrimination on grounds of nationality. Special shareholding that discriminates between domestic and foreign investors constitutes a blatant restriction on the free movement of capital, which can be justified only by the grounds provided for in the Treaty.
2. *Derogation from ordinary company law*. The special shareholding that does not discriminate on grounds of nationality may be divided into two subcategories: (a) indistinctly applicable special shareholding that does not derogate from ordinary company law and does not exclude private shareholders can be regarded as investment arrangements (i.e. rules that structure the market and form the corporate governance regime of a Member State). These investment arrangements fall outside the scope of Article 63 TFEU. (b) Indistinctly applicable special shareholding that derogates from ordinary company law and it is available only to the State (to the exclusion of private investors) that constitutes a restriction on the free movement of capital prohibited under Article 63 TFEU. It can then be examined whether it can be justified by overriding reasons in the public interest in accordance with the principle of proportionality.

91. *Ibid*., at 152. On the highly topical issue of the interplay between capital liberalisation and social inequalities, *see* the recent bestseller of T. Piketty, *Capital in the Twenty-First Century* (2014). But it is not only left-wing economists who question the positive outcomes of capital liberalisation. Recently, the critique emanated from the International Monetary Fund (IMF), the institutional advocate of the international financial system. In an article published in its flagship magazine, three of the IMF's top economists argue that instead of delivering growth, two neoliberal policies have increased inequality, and in turn jeopardised the level and sustainability of growth. These two policies are, first, capital account liberalisation (i.e. removing restrictions on the movement of capital across a country's borders) and, second, fiscal consolidation (i.e. austerity). *See* J.D. Ostry, P. Loungani & D. Furceri, 'Neoliberalism: Oversold?', 53 *Finance & Development* 38 (2016).
92. Gerner-Beuerle, above n. 73, at 125, especially in the light of the political controversies during the negotiations for the adoption of the European Takeover Directive. For a thorough analysis, *see* Höpner and Schäfer, above n. 83.
93. The problem of securing respect for the rule of law by the Union itself and the debate about 'competence creep' by the Union institutions (including the Court of Justice in the exercise of its judicial functions) has been aptly addressed by the recent Editorial of the Common Market Law Review, wondering whether this is a Union that sacrifices its own rule of law on the altar of political expediency. *See* Editorial Comments, 'The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems', 53 *Common Market Law Review* 597, at 599-600 (2016).
94. Gerner-Beuerle, above n. 73, at 126.
95. *Ibid*., at 108. However, the author admits that company law is a highly complex field of law with many different variations, exceptions and special provisions, making the determination of what complies with or derogates from ordinary company law a rather intricate and challenging exercise, at 138.
96. It should be noted that this article focuses on how to determine whether a special shareholding constitutes a capital restriction. The question of whether a capital restriction is justified by a legitimate objective and proportionate to the attainment of that objective is not addressed here.

3. *Positive effect on capital movements*. The third step relates only to indistinctly applicable special shareholding that derogates from ordinary company law (subcategory (b) in step 2). Such measures are presumed to hinder the market access of foreign investors. However, this presumption is rebuttable. The Member State can provide convincing evidence proving that the existence of the golden shares in the undertaking concerned has actually encouraged capital movements. Although it is acknowledged that this criterion bears certain weaknesses, it could nevertheless temper the premise that the mere existence of golden shares restricts capital movements.

Overall, the conceptual foundation of the test that is being proposed here is the theory of *economic supranationalism* as opposed to *economic constitutionalism*.[97] Indistinctly applicable measures should be regarded as restricting the free movement of capital only if the Member State is making use of its public regulatory powers to structure the market in its favour by derogating from ordinary company law. The mere assumption that the State participation in a corporate structure in accordance with national company law hinders the market access of foreign investors is an overly broad interpretation of Article 63 TFEU, which oversteps the boundaries of the constitutional foundations of market integration. The refined test on capital restrictions would allow the Court to exercise thorough and scrupulous oversight of national rules that unjustifiably grant privileges to the State, while at the same time ensuring that it does not oversteps the boundaries of its judicial powers by implicitly imposing a specific corporate governance regime on the Member States.

5 Conclusion

The 'great transformation'[98] of modern economies has brought about fundamental changes in the structure and functioning of the Internal Market. These changes require a redetermination of the rationale underlying negative integration and a refinement of the market access test applied by the Court in the free movement case law. This test has undergone a significant evolution since the 1970s, and it can now be said that it has emerged as the predominant criterion for the establishment of a trade restriction. The *Keck*-distinction between product rules and selling arrangements – despite its theoretical appeal – has proved inadequate in practice. Nevertheless, it contributed greatly to the growing awareness of the need to clearly delineate the outer limits of the free movement provisions. This delineation guarantees legal certainty and allows democratically elected governments to exercise their national regulatory autonomy within the framework of the Internal Market. In the field of the free movement of goods, while the *Keck*-formula is ostensibly still considered to be good law, the market access test has practically prevailed, though in a shape that is qualified by de *minimis* considerations expressed in the form of a 'substantial hindrance on market access'. This serves as a safety net that allows the Court to uphold the legality of regulatory requirements with inappreciable effect on trade, while at the same time ensuring that national measures substantially hindering market access of foreign operators are set aside. Most of the time, this test has been applied successfully and together with the justifications/mandatory requirements and the prudent proportionality test has managed to strike a fair balance between economic freedom and societal values expressed in the form of overriding reasons in the public interest.
However, this has not been achieved in capital case law. The free movement of capital is different from the other freedoms in that it presupposes the existence of a regulatory framework.[99] Many national rules that could be regarded as obstacles to capital movements essentially 'establish the market and thus make capital movements possible in the first place'.[100] This means that the identification of capital restrictions is a particularly delicate exercise.
So far the Court's reasoning is based on the premise that all golden shares are by definition restrictions on capital movements, as they discourage foreign investors from acquiring shares in privatised undertakings in which the State retains some special rights. This article has attempted to identify the potential flaws in this legal reasoning and has questioned the assumption that the free movement of capital as enshrined in the Treaty advocates a corporate governance regime based on the shareholders' primacy principle. Drawing from the case law in goods, it is argued that the wide interpretation of capital restrictions could be narrowed down by the application of a *Keck*-inspired test that would allow Member States acting as shareholders of strategically sensitive privatised companies to protect public interest requirements, especially when the undertaking concerned provides services of general economic interest. While the acceptance of investments arrangements in the capital case law might seem unlikely in the near future,[101] the Court could nevertheless further develop the derogation from ordinary company law criterion in order to promote capital liberalisation, without, however, imposing a certain model of capitalism and corporate governance on the Member States.

97. Gerner-Beuerle, above n. 73, at 141.
98. To borrow the title of the seminal work by K. Polanyi, *The Great Transformation* (1944).
99. Gerner-Beuerle, above n. 73, at 136.
100. *Ibid*., at 137 citing Barnard (2014), above n. 8, at 245.
101. Biondi, above n. 4, at 96-97.