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The CJEU vis-à-vis EU and Non-EU Investors, between National and European Solidarity: Golden Shares, Sovereign Investment and Socio-Economic Protectionism under Free Movement Rules

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THE CJEU *VIS-À-VIS* EU AND NON-EU INVESTORS, BETWEEN NATIONAL AND EUROPEAN SOLIDARITY: GOLDEN SHARES, SOVEREIGN INVESTMENT AND SOCIO-ECONOMIC PROTECTIONISM UNDER FREE MOVEMENT RULES[*]

Daniele Gallo[**]

Abstract

The fundamental issue underlying this essay is the tension between the EU's aims of market integration on the one hand, and, on the other, the intervention of Member States in the economy and welfare provision and the exercise of public functions by national authorities in sensitive industrial sectors. In this respect I have focused on one specific aspect: the CJEU's case law on the special powers held by the State in formerly public companies where the rights conferred on shareholders by ordinary law are reduced for the benefit of public entities.

Besides European golden shares, my contribution had dealt with the access to the EU's market of non-EU public/private hybrids, namely sovereign investors such as sovereign wealth funds ("SWFs") and state owned enterprises ("SOEs").

The first aim of my research is to investigate in what sense, to what extent and for what reasons the golden shares jurisprudence represents a privileged – although atypical – *sedes materiae* to illustrate the content and extent of EU economic/market integration, the connection between the latter and the two interrelated concepts of social integration and EU solidarity, and the impact of such dual integration (both economic and social) on Member States' solidarity. In this regard, three main questions arise: has the CJEU been too activist in condemning Member States with regard to privat(is)e(d) undertakings, or is its approach justified in the light of the EU's free market objectives? Is the up-to-date case law likely to endanger the solidarity on which the provision of SGEIs is grounded? Is the scope of *manoeuvre* currently accorded to Member States too narrow to justify national socio-economic policies on golden shares under the free movement rules (especially, as will be seen further on, from the point of view of the exceptions to these rules)?.

My second general aim is to identify the main concerns raised by the access of SWFs and SOEs to the EU market and, then, to assess whether action by the EU is welcome and necessary in this area. In this respect, the main questions are: is it conceivable a European golden share to restrict this kind of investments to be shaped on the basis of a European notion of solidarity? Should the CJEU be proactive and, for instance, admit 'new' *Cassis-Gebhard* overriding reasons of general interest that could not be admitted *vis-à-vis* intra-EU investments? Could the derogation provided for in Art. 65.1 b) allow for a restriction that is

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compatible with EU law? And in that case, what kind of connection would there be between national and European solidarity?

SUMMARY: 1. Introduction. 1.1. Structure and aims of the analysis. 1.2. The interplay between public services and strategic industries, golden shares, sovereign investment, and socio-economic protectionism: solidarity within the EU and the scope of the free movement rules *vis-à-vis* EU and non-EU investors. – 2. Intra-EU investments and golden shares. 2.1. Public services, social regulation and European solidarity. 2.2. Golden shares and freedom of movement: European market-oriented solidarity and economic regulation vs. national welfare-oriented solidarity and social regulation. 2.3. The transformation of the public/private divide, the horizontal application of the free movement rules, and hybrid forms of socio-economic protectionism. 2.4. General (economic?) interest and the internal market: the role of Art. 106.2 TFEU within a "social market economy". 3. Non-EU investments, sovereign wealth funds (SWFs) and state owned enterprises (SOEs). 3.1. The capital/establishment dichotomy and the access of non-EU sovereign investors to the European internal market. 3.2. The restriction of non-EU sovereign investments, between EU and national responses: the possible convergence of European and national solidarity. – 4. Conclusion.

1. Introduction

1.1. The fundamental issue underlying this essay is the tension between the EU's aims of market integration on the one hand, and, on the other, the intervention of Member States in the economy and welfare provision and the exercise of public functions by national authorities in sensitive industrial sectors.

By "intervention", I refer to the regulation of public economic services, i.e. services of general economic interest ("SGEIs") or, more precisely, economic services of general interest[1], which must be distinguished from the non-economic social services of general interest that fall beyond the competence of the EU.[2] By "exercise of public functions", I mean strategic sectors related to national security, such as defence, regarding which the EU is generally deferential to Member States' autonomy. In this respect, it must be stressed that while SGEIs are, by their nature, activities that national authorities regard as strategic and sensitive from a socio-economic standpoint, most strategic/national security sectors must not be considered as SGEIs under EU law, since they are non-economic activities *stricto sensu*.

In my discussion, I will not deal with crucial problems concerning the definition and supply of SGEIs, which have been widely covered in the literature.[3] Rather, I will focus on one specific

[1] On this term, namely on the economic element defining the activity rather than the 'interest' pursued see, *inter alia*, BUENDIA SIERRA 1999, 301-303; NEERGAARD 2009 (I), 23-24; GALLO 2010, 363-370; *contra* WACHSMANN, BERROD 1994, 56-68.

[2] On the distinction between SGEIs and non-economic social services of general interest see, amongst others, HATZOPOULOS 2012 (I).

[3] For instance, I will not venture in investigating the evolving and functional – rather than static and institutional – notion of 'economic', in light of antitrust and free movement case laws. On this topic see, *ex multis*, BUENDIA SIERRA 1999, 46-63; ODUDU 2006, 23-56; ID. 2009; SAUTER, SCHEPEL 2009, 75-83; GALLO 2010, 234-372; on SGEIs, social security and the 'solidarity exception' see, *inter alia*, GIUBBONI 2006; ROSS 2007; GALLO 2011; SCHWEITZER 2011, 22-26.

aspect: the CJEU's case law[4] on the so-called 'golden shares'/'golden powers'/'golden rules'/'*goldene Aktien*'/'*actions privilégiées*', that is to say, special powers held by the State in formerly public companies where the rights conferred on shareholders by ordinary law are reduced for the benefit of public entities.[5] There is, indeed, a manifest relationship between golden shares and SGEIs: with the exception of *Commission v. Germany* of 23 October 2007 and *Commission v. Germany* of 22 October 2013 (both on *Volkswagen*), all judgments rendered by the CJEU concerned golden shares held by the State in undertakings entrusted with the provision of SGEIs.[6]

Besides European golden shares, my contribution will deal with the access to the EU's market of non-EU public/private hybrids, namely sovereign investors such as sovereign wealth funds ("SWFs") and state owned enterprises ("SOEs"). Since these entities currently invest both in SGEIs and strategic/national security sectors, it is often the case that SWFs and SOEs invest or intend to invest in companies in which the State often holds special powers of intervention. As a consequence, two main issues arise: whether those powers are *legitimate* under the EU freedoms, and whether the State may block or limit the entry of State-controlled entities in the capital of national companies.

I will begin my analysis by examining the concept of socio-economic protectionism in the context of the relationships between golden shares, sovereign investments, SGEIs and strategic industries. This will be done with the aim of evaluating the function and relevance of solidarity within the EU through the lens of the scope and rationale of the free movement rules *vis-à-vis* EU and non-EU investors (1.2).

As to the first aim of my research, I will investigate in what sense, to what extent and for what reasons the golden shares jurisprudence represents a privileged – although atypical – *sedes materiae* to illustrate the content and extent of EU economic/market integration, the connection between the latter and the two interrelated concepts of social integration and EU solidarity, and the impact of such dual integration (both economic and social) on Member States' solidarity. Therefore, this part of the article will focus on the treatment of EU operators who intend to invest in EU companies. In this regard, three main questions arise: has the CJEU been too activist in condemning Member States with regard to privat(is)e(d) undertakings, or is its approach justified in the light of the EU's free market objectives? Is the up-to-date case law likely to endanger the solidarity on which the provision of SGEIs is grounded? Is the scope of *manoeuvre* currently accorded to Member States too narrow to justify national socio-economic policies on golden shares under the free movement rules (especially, as will be seen further on, from the point of view of the exceptions to these rules)? (2).

My second general aim is to identify the main concerns raised by the access of SWFs and SOEs to the EU market and, then, to assess whether action by the EU is welcome and necessary in this area. The key issue at the heart of my analysis is the restriction of non-EU

[4] On the role of EU Courts in 'valuing' solidarity see DAVIES 2010. On social solidarity, social rights and welfare see GERSTENBERG 2014, in this volume; ODUDU 2014, in this volume; with respect to the economic crisis, VAN CLEYNENBREUGEL 2014, in this volume.

[5] To be precise, the State does not even need to be a shareholder in order to enjoy certain privileges and greater powers of intervention with respect to former public utilities: these powers, then, can take the form not only of golden shares, but also of 'golden rules'/'special rules'; for convenience, from now on I shall use the broad term 'golden shares' to indicate all forms of State intervention in privatised companies. For a clear definition see AG Colomer's opinion of 3 July 2001, para. 1, in *Commission v. Portugal*, *Commission v. France*, *Commission v. Belgium* of 4 June 2002.

[6] See *Commission v. Italy* of 23 May 2000, *Commission v. Portugal*, *Commission v. France* and *Commission v. Belgium* of 4 June 2002, *Commission v. United Kingdom* and *Commission v. Spain* of 13 May 2003, *Commission v. Italy* of 2 June 2005, *Commission v. The Netherlands* of 28 September 2006, *Commission v. Spain* of 14 February 2008, *Commission v. Spain* of 17 July 2008, *Commission v. Italy* of 26 March 2009, *Commission v. Portugal* of 8 July 2010, *Commission v. Portugal* of 10 November 2011, *Commission v. Greece* of 8 November 2012.

investments when the latter are carried out by SWFs and SOEs, rather than by private companies, in SGEIs and strategic/national security sectors – such as defence –[7] where Member States usually hold special powers. I am here referring to a situation where non-EU investors intend to invest in or buy out 'national champion' companies that provide essential services. In this respect, the main questions are: is it conceivable a European golden share to restrict this kind of investments to be shaped on the basis of a European notion of solidarity? Should the CJEU be proactive and, for instance, admit 'new' *Cassis-Gebhard* overriding reasons of general interest that could not be admitted *vis-à-vis* intra-EU investments? Could the derogation provided for in Art. 65.1 b) allow for a restriction that is compatible with EU law? And in that case, what kind of connection would there be between national and European solidarity? (3).

Finally, some brief concluding remarks will close the article (4).

1.2. The term 'solidarity'[8] is here used to denote both 'market-oriented' and 'welfare-oriented' (i.e., social) solidarity: the first is grounded on the notions of Single Market, free movement and economic regulation, while the second is strongly connected with the concepts of welfare[9] and social regulation.[10] In other words, for the purpose of the present analysis, solidarity includes the carrying out of public policies aimed at pursuing both economic and social (extra-commercial) goals. In this respect, 'public' does not necessarily imply the State, but also institutions, such as the EU, entrusted with regulatory powers[11]: the 'umbrella' concept of 'European Social Model' derives precisely from this combination of economic and social needs.

Since SGEIs – together with strategic and national security industries in the case of SWFs and SOEs[12] – lie at the heart of my discussion, it is certainly true that: first of all, the concept of solidarity implied in those services must not be confined to Member States only; secondly, with regard to the SGEI sector, the EU's notion of solidarity seems to cover both a 'market-oriented' dimension – in terms of liberalization and privatization – and a 'welfare-oriented' dimension – in terms of EU public service obligations imposed upon Member States and EU institutions. Indeed, there is no doubt that SGEIs currently represent a constitutive element of the 'European Social Model'/'European welfare', at the top of a social, rather than solely economic, regulation. In this sense, the notion of general interest, from a national core value – inherent in derogatory clauses – becomes a *positive* European value.

On the other hand, and contrary to what happens in the CJEU's case law on SGEIs, the only dimension of European solidarity that seems to emerge from the golden shares case law is the one defined by internal market aims and values. The EU erodes Member States' discretionary power not in order to impose 'social' objectives, such as universality, but solely in order to

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[7] Therefore the focus will neither be on the nature and objectives of both actors, nor on their interests in finance in their home jurisdiction as well as abroad. On the latter issue, especially on the extent and relevance of SWFs' investment in major global banks, many of which, like Merrill Lynch, are in critical need of capital, see BUTT, SHIVDASANI, STENDEVAD, WYMAN 2008; DREZNER 2008; ALLAYANNIS 2009; GELPERN 2009; PISTOR 2009; PISTOR 2012.

[8] On the multifaceted notion of solidarity and its *status* in the EU see, among others, the contributions in ROSS 2010, especially BORGMANN-PREBIL, ROSS, p. 1 *et seq.*; JACQUÉ 2012; DAGILYTE, KUCUK 2014, in this volume. More generally, from a philosophical perspective, see STJERNØ 2005; SANGIOVANNI 2013.

[9] On the strong linkages (and overlaps) between the two concepts see, among others, the contributions in DE BÚRCA 2005, especially ID., p. 1 *et seq*. and OTTMANN 2008.

[10] On the interplay between (social) regulation and social solidarity, seen also from a public service dimension, see PROSSER 2006.

[11] On the European dimension of social welfare beyond the nation state see HABERMAS 2001; *contra* NAGEL 2005.

[12] See *infra*, § 3.

force Member States to 'disappear' as much as possible from undertakings entrusted with the provision of SGEIs that are, in various degrees, controlled, through golden shares, by national public authorities. In the field of golden shares, therefore, the risk is that "European ['market-oriented'] solidarity […] endangers national ['welfare-oriented'] solidarity".[13] In order to avoid this, the EU allows Member States to use "a number of safeguards designed [by the EU itself] to protect national solidarity".[14] The problem is that these safeguards, represented by general interest exceptions, have not been given, by the CJEU, the status they deserve in the area of golden shares. This is the reason why at the core of the CJEU's case law on golden shares lies a clash between the European/'market-oriented' and national/'welfare oriented' dimensions of solidarity.

When we change perspective and consider investments in SGEIs and strategic sectors carried out by non-EU actors, especially when the latter are entirely public or subject (formally or substantially) to the influence of a third country, the problem is whether the notion of solidarity may take a different shape, and whether considerations of public interest may be successfully used by the EU and Member States to prevent or limit those investments due to a combination of 'welfare-oriented' and 'market-oriented' solidarity, both European and national. The question is how EU institutions and national authorities should act in order to protect the European market and society from investors who might endanger the national as well as the European conception of the regulation and provision of SGEIs and strategic services, for instance in the defence or energy sectors.

2. *Intra-EU investments and golden shares*

2.1. As is widely known, over the decades EU law has penetrated areas previously falling under the domestic jurisdiction and socio-economic sovereignty of the Member States, such as education, social security and health care.[15] This is even truer for SGEIs which, insofar as activities of an economic/commercial nature, have been privatized and liberalized – and, thus, are now open to the (not always symmetric) infiltration of antitrust law and free movement rules.[16]

The distinctive feature of SGEIs, as regulated in the EU, is that they do not act merely as a derogation under Art. 106.2 TFEU[17] from free market rules but, in line with what is now Art. 14 TFEU and the Lisbon Protocol n. 26 on services of general interest (SGIs)[18], also as a positive rule. A corollary of this dual legal nature is that at the core of SGEIs lies a kind of positive rather than merely negative integration, i.e. an integration aimed not only at removing intra-EU obstacles, but also at imposing positive behavior upon (both European and national) public institutions. Most importantly, this also means that SGEIs are not seen only as a constitutive element of national citizenship, national solidarity and the welfare state, but also as a European founding value that is strongly connected with the European model of

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[13] DE BÚRCA 2005, 1.

[14] *Ibidem*.

[15] The term "social sovereignty" is borrowed from LATHAM 2000; see also FERRERA 2005.

[16] On the relationship between antitrust and free movement (including assonances and divergences), also with a focus on SGEIs, see STUYCK 1999; MORTELMANS, 2001; BAQUERO CRUZ 2002; GALLO 2011.

[17] "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union".

[18] On SGEIs in the post-Lisbon scenario see, *inter alia*, NEERGAARD 2011; VAN DE GRONDEN, RUSU 2012.

society, the promotion of social cohesion under Art. 14 TFEU[19], the notion of EU social citizenship, and the exercise of fundamental social rights, as confirmed by the inclusion of access to SGEIs in the Nice Charter – namely, in Art. 36[20], which is contained in the Chapter on "Solidarity". Moreover, this solidarity is not conceived merely in economic terms[21], as is clear when we consider the principles enshrined in Art. 1 of the above-mentioned Lisbon Protocol, in (binding/sectoral or soft/horizontal) secondary legislation[22], and in the CJEU's case law on SGEIs[23]: namely, access, universality, quality, equality, and continuity, just to mention a few. This entails an essential nucleus of public services' obligations[24] in harmonized and non-harmonized sectors of general interest: the EU's concept of universal service, to be understood as symptom as well as a tool for positive markets and rights integration, is paradigmatic in this regard.[25]

The interplay between SGEIs and the EU values mentioned above reveals, as a consequence, a shift from a purely national concept of social solidarity to a European one, through the elevation of national considerations to the level of EU principles and positive rules that are best able to define and guide the EU's policies, even with the result of pre-empting, in some areas, the adoption of national policies. In this way, the relationship between European solidarity and social regulation takes concrete form. All those principles/values/obligations are at the heart of a social – rather than solely economic – regulation that has an impact on the redistributive and allocative policies of the Member States: a social regulation whose basic elements are detected at EU level, and according to which SGEIs do not perform a purely subsidiary function when competition and free market cannot meet the needs of the community, but, rather, represent an alternative method by which to better prevent market failures. There is no conflict in principle between the interests of the EU and the general interest, since public services are included among the elements and objectives on which (not only national interests, but also) the European common interest is based.

From the analysis of the relevant case law, it can be inferred that, when the provision and regulation of SGEIs is at stake, the area of intervention of EU law is (with some exceptions) competition law. On the other hand, the issue of the *ex ante* (il)legality of golden shares and, most frequently, of their *ex post* compatibility with EU law, raises issues concerning the internal market, rather than antitrust issues. Unlike the case law on SGEIs, under free movement rules the multiform concept of 'general interest' is always considered as an obstacle to the completion of the internal market, i.e. an exception to be invoked by Member

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[19] " Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services".

[20] "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union".

[21] For a detailed analysis of the linkages between public services and social solidarity see ROSS 2009.

[22] See, most recently, Commission's Communication of 20 December 2011 on *A Quality Framework on Services of General Interest in Europe*.

[23] See, for instance, *BUPA* of 12 February 2008, paras 166-203.

[24] On the Europeanization of public services see, *ex plurimis*, ROSS 2004; NAPOLITANO 2005; PROSSER 2005, 121-173; SZYSZCZAK 2007, 211-253; NEERGAARD 2009 (II); WERNICKE 2009.

[25] See, for instance, SAUTER 2008; DAVIES, SZYSZCZAK 2011.

States. There is no shift from national general interests to a European concept of general interest when golden shares and free movement restrictions are at stake. In this respect, European solidarity functions as a corollary to economic integration, with the principal aim of implementing and safeguarding market access for EU investors within the European market.

2.2. In order to better understand the CJEU's rationale in its case law on golden shares and then focus on the role and value of solidarity within that jurisprudence, it is necessary to legally frame such issue by investigating the principal features of the legal framework established by the EU institutions in relation to the socio-economic changes wrought by privatisation and liberalisation since the 1990s. In other words, what needs to be assessed is whether the EU institutions, especially the CJEU, have fully grasped these changes, which can no longer be viewed within the context of an ideal-type dichotomy between public and private spheres.[26] To this end, it is imperative to understand if, in what sense, and to what extent the erosion of the so-called 'public/private divide' has been legally – and successfully - systematized by the CJEU. To do so, different aspects inherent in the Court's case law on golden shares should be considered: (i) the overlapping of private and public law instruments, the former pertaining to company law, the latter reflecting the executive and/or legislative powers of the Member States; (ii) the gradual intervention of the State or its entities in the market and the simultaneous expansion of the role of the private sector in the provision of welfare; and (iii) the confusion between the core social and economic objectives that underpin the concept of general interest.

In short, the question of golden shares raises issues that lie between two extremes: on the one hand, the *de facto* protectionist behaviour of private companies acting under the influence of the State, which is (supposedly) aimed at protecting the general interest; on the other, the principles and aims of the EU's economic integration which form the basis of the self-regulation objectives of (formally) private companies, as reflected in their corporate governance rules. More in particular, the reasons that justify the granting of special powers to the State are, on the one hand, the need to control, and possibly clamp down on, any abuses that private shareholders with more or less sizeable holdings in formerly public companies might engage in; and, on the other hand, the need to prevent, or to reduce to a minimum, the entry as shareholders in the company (i.e., takeover bids) on the part of investors that national public authorities regard as 'troublesome' or unreliable.

The underlying purpose of golden shares is, therefore, the protection of national general interests, since, as a result of privatisation, the latter run the risk of being ignored in favour of profit making, which is the ultimate goal of companies that are no longer public. As duly noted in the literature, golden shares are "often deployed to justify the State's traditional duty to provide public services": they are usually associated with enterprises that are regarded as "national champions" or "a symbol of the State". Thus, "it would be difficult to persuade electorates that similar services or goods could be provided, not only by the private sector, but also by *non-nationals*".[27]

For instance, there could be a concern that the acquisition by the French company *EDF* of a sizeable number of shares in the Italian energy group *ENI* may, unless subject to particular conditions and restrictions, affect the procurement of energy products by the Italian State and the supply of essential services to customers in Italy. After all, it is at least legitimate to question whether, despite having an interest in increasing its profits, the French company, due to its (direct or indirect) ties to French public authorities, may be inclined to improve the

[26] On this issue see, amongst monographs, BAQUERO CRUZ 2002; ODUDU 2006; SZYSZCZAK 2007; SAUTER, SCHEPEL, 2009; see also AZOULAI 2010; ROBIN-OLIVIER 2010; ODUDU 2010.

[27] SZYSZCZAK 2002, 262.

quality standards of the services delivered to *ENI*'s customer base, which is composed of Italian citizens, as much as it is inclined to do so in the case of French citizens, to whom it remains, in a broad sense, more accountable.[28]

Against this the point could be made, based on a 'redeeming' view of the market and its inherent dynamics, that the establishment of a fully competitive regime in the electricity or gas sector is the most appropriate incentive to ensure that, in order to maintain its market shares, the French shareholder will use its best endeavours for the benefit of the company and its service users. However, since it relies merely on a *postulate,* the point is not only indecisive, but also open to criticism. Now, the case law of the CJEU does not seem to take into account the above considerations. In line with the Commission's findings, the Court has condemned Member States under Articles 49 ff. and/or 63 ff. in all cases but one, which concerned Belgium.[29] As a result, the EU's market access jurisprudence on golden shares has been highly expansive and invasive, both in the past and in recent times. This has been due to two main reasons, which represent the cornerstones of the reasoning adopted by the CJEU[30]: (i) horizontality under the free movement rules[31] and (ii) a very strict interpretation of the exceptions to the general interest principle and neglect of Art. 106.2 TFEU.[32]

2.3. Due to their being included in a company's articles of association, the golden shares held by the State formally have a private law nature. So far, they have been introduced either following a privatisation law passed by the Parliament or, more directly, following a decision by a shareholders' meeting, without prior formal action by national authorities.[33]

In this regard, the fact that, in the golden shares cases, the Court has ruled against the Member States on the basis of free movement provisions, confirms, in line with the approach adopted in *Viking* of 11 December 2007 and *Laval* of 18 December 2007, that the distinction between fundamental freedoms, directed towards Member States, and antitrust law, directed

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[28] The example is not that unrealistic when we consider, again with regard to Italy, the agreement concluded between the shareholders of Telco in order to enable Telefonica España to acquire the majority of shares of – and, thus, *de facto* control – Telecom Italia, of which Telco already holds 22%. Since news broke that the agreement had been concluded, the debate in Italy has focused, among other things, on the need for the Government to enact the implementing regulations provided for in Decree Law No. 21 of 15 March 2012, starting with the one identifying relevant networks and plants and aimed at ensuring the minimum provision and the operation of essential public services, as well as the supply of goods and relationships of strategic importance for the national interest in the communications sector. The Decree Law, which was converted with amendments into Law No. 56 of 11 May 2012, lays down rules on the special powers of the State with regard to companies operating in the defence and national security sectors or carrying out strategic activities in the energy, transport and communications sectors.

[29] See *Commission v. Belgium* of 4 June 2002.

[30] Another reason is the reductive interpretation, conducted by the CJEU, of the principle of neutrality *vis-à-vis* the ownership of companies operating in the European market foreseen in Art. 345 TFEU, which provides that "[the] Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". The Court, as observed by some authors (see THIRON 2003, 262-266; CARBONE 2011, 311-319; GALLO 2013 (I), 190-195) and by the AG involved in most cases, intentionally disregards the scope of the autonomy that Article 345 appears to confer on the Member States, with the result of sidestepping "the legal consequences that follow from Article 295 EC [now Article 345 TFEU]" (see AG Colomer's opinion, of 3 July 2001, para. 39, in *Commission v. Portugal*, *Commission v. France*, *Commission v. Belgium* of 4 June 2002). Even if fundamental, the principle of freedom of movement, that is to say the pivot around which revolves the European 'market oriented' solidarity, is not in itself an absolute principle, for it must be balanced against other rules and constitutive principles, including the principle of neutrality. Such a comparison is clearly impossible if the Court requires, as it did in its recent ruling in *Commission v. Greece* of 8 November 2012, that Article 345 TFEU be applied only if such application is compatible with the Treaty's freedom of movement provisions, thus suggesting that the latter are hierarchically superior.

[31] See *infra*, § 2.3.

[32] See *infra*, § 2.4.

[33] On the topic see, *ex multis*, GRUNDMANN, MOSLEIN 2003; SCARCHILLO, 2012; RUCCIA 2013.

towards private persons, is no longer an absolute principle of EU law.[34] In other words, the case law on golden shares reflects once for all the tendency of the Court to put forward interpretations which recognize the inherent complementarity of the provisions on competition and those on the fundamental freedoms. As a result, the EU judges have extended the application of the former to public entities and that of the latter to private operators, undermining the assumption that competition law always regulates private interests (insofar as concerning solely undertakings), whereas the fundamental freedoms always relate to collective interests (insofar as applicable solely to state authorities). This (re-)convergence of rules is justified by the objective of preventing certain activities from receiving special treatment based (only) on the legal status of the entity entrusted with their operation.

In particular, the Court now seems to recognize the horizontal direct effect of the fundamental freedoms in an ever-increasing number of situations.[35] As a result, the original scope of application *ratione personae* of the rules on the fundamental freedoms is being extended so as to embrace situations which otherwise would not be covered by the Treaties and, therefore, to give a legal framework to the socio-economic changes produced by the privatisation and liberalisation of services originally supplied by public utilities.

In the field of golden shares, the recognition of a horizontal direct effect must be considered in light of both the principle of private autonomy and the rise of (relatively) new and hybrid forms of regulatory socio-economic protectionism that, while driven by the State, are actually implemented by the private sector itself, i.e. by privatised companies. In other words, even though golden share provisions are contained in the articles of association of a company, that is not enough for the Court to exclude the involvement of the 'Chameleon State'[36], regardless of whether or not the government concerned has previously introduced said powers in its privatisation laws. Indeed, an interest or 'stimulus' on the part of the State in introducing special rights in the laws governing former public companies is sufficient evidence to establish that public involvement. Therefore, in order for the adoption of provisions in favour of the State to be considered legal under the treaties, not only must it be shown that such adoption is not a direct consequence of the exercise of state authority, but any pressure from public authorities must also be excluded.

The Court, with regard to golden shares, adopts the same functional approach used in the rest of its case law. The purpose is the same: to enable the Court to address changes that can no longer be viewed within the context of a clear distinction between the public and private spheres. The only real difference is that, whereas in its case law on the notion of economic activity the Court adopts a substantive approach in order to determine whether an activity should be considered as economic, in the golden share cases that approach is used to assess whether, and when, measures formally adopted by privatised companies are attributable to the State. Moreover, from a comparison between the golden shares jurisprudence and the judgments in *Viking* and *Laval*, the Court's conclusion seems inevitable. Since in those two cases the Court found that the rules on free movement are applicable to the autonomous regulatory power of private persons (trade unions) – that is, a power exercised without the direct or indirect intervention of the State – the same conclusion must hold true, *a fortiori*, for golden share cases where the State exerts, more or less directly, some degree of influence over formerly public companies, which thus represent the long arm of national authorities and their regulatory powers.

This being so, the question arises as to when regulation, which pertains to public law, is likely to result in illegal market restrictions that, as such, are prohibited by the rules on free

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[34] See authors cited in footnote 25.

[35] See most recently SCHEPEL 2012.

[36] MADURO 2006.

movement. In this respect, the answer of the Court is very clear: whenever regulation is guided not by the economic interests of the privatised company, but by general principles which may affect private law provisions, whose primary objective is to generate profit. Quite clearly, this approach leads, almost inevitably, to a finding of infringement, since separating regulation, general (not private) interest and profit is in itself very difficult, if not impossible, especially in the context of public services. That is to say that, in the field of SGEIs, the two dimensions of 'market-oriented' and 'welfare-oriented' solidarity/regulation are naturally interconnected.

Although the Court does not explicitly say so, this approach relies on the same logic as that behind the principle, both abstract and comparative, of a private investor in a market economy which, as stressed by some scholars, can be found in the EU legislation on State aid.[37] In both cases (golden shares and State aids), State intervention, whether in the form of official authority or economic activity, is considered legitimate only when the State acts as a market participant. In the field of SGEIs – which, as we have seen, are inextricably linked to the creation of golden shares – the Court interpreted this principle in a restrictive way when examining the question of whether State compensation for the discharge of public service obligations may be classified as State aid. Its interpretation, however, is more flexible and expansive with reference to Art. 106(2) TFEU and the balancing of rules and exceptions following failure to comply with the famous *Altmark* requirements.[38] The resulting increase in Member State autonomy has been such that, at present, it would seem more appropriate for the Court to speak of 'a private investor in a *social* market economy' when, having ascertained that the conditions for the application of Article 107 TFEU (i.e., classification as State aid) are satisfied, it must assess, *ex post*, whether State aids are compatible with EU law.

2.4. According to the CJEU, "it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services".[39]

In relation to the *Cassis-Gebhard* clause, the Court found that the notion of general interest includes, in particular: the minimum supply of goods and services essential to the public as a whole; the continuity of public service; the security of the facilities used to provide public services; national defence; the protection of public policy and public security; and health emergencies.[40] This has been stated in *abstracto*, since, in practice, the CJEU has always (with the exception of one case concerning Belgium) found Member States in violation of free movement rules on the basis of two arguments. Firstly, the Luxembourg judges did not accept that certain interests might be invoked on account of their economic character, in accordance with the so-called 'doctrine of non-economic considerations'. In *Commission v. Portugal* of 4 June 2002, moreover, the judges rejected the argument put forward by the Portuguese Republic that the granting of special powers was justified by the need to safeguard the financial interest of the State: not only that kind of general interest did not fall within the ambit of the reasons set out in Article 65 TFEU, but, being an economic consideration, it could not be accepted based on the '*Cassis-Gebhard* exception'. According to the Court, the same reasoning was applicable to the other objectives mentioned by the Portuguese Government,

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[37] See BIONDI 2010, 99-102.

[38] On these requirements see *Altmark* of 23 July 2003, paras 89-93.

[39] See *Commission v. Belgium* of 4 June 2002, para. 43.

[40] See, for instance, *Commission v. Portugal* of 8 July 2010, para. 72.

namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of the means of production.

Secondly, with respect to the general interests invoked by the Member States, the Court interpreted the principle of proportionality in the sense that a number of cumulative requirements must be met in order for national legislation to be compatible with EU law. Said requirements, interpreted in a restrictive way by the EU judges, include: the specific nature of the special powers at issue; a provision for judicial review to determine whether they are illegal; a system of *ex post* control, rather than prior authorisation or systematic approval, of corporate resolutions; and, most importantly, the unavailability, even in the abstract, of less restrictive measures by which to achieve the object pursued. Particularly in this last regard, the Court tied the justification of golden shares provisions to the existence of a "genuine and sufficiently serious threat" to the supply of public services which, as such, affects "one of the fundamental interests of society".[41]

The result has been the priority given to a 'market-oriented' dimension of solidarity, to free market objectives and, finally, to EU economic integration over social, welfare and general interest national considerations, i.e. the 'welfare-oriented' dimension of solidarity.

Together with the restrictive interpretation of the principle of proportionality, the transposition of the 'doctrine of non-economic considerations' to the sphere of golden shares has led the Court to rule against EU governments and their respective national legislation, from the point of view not only of the *ex ante* legitimacy of special rights, but also of their actual compatibility with the treaties, so that, *de facto*, the Member States' discretionary powers have been greatly reduced and their socio-economic sovereignty undermined.

In this regard, it seems to me that there is another tool to reach a fair balancing between the interests of the market and those of the State and to find the right equilibrium not only between European market-oriented solidarity and national social solidarity, but also to attract in the EU competence values and goals detaching them from a dimension purely national. I am referring to Art. 106(2) TFEU, which provides, as is well known, that "[u]ndertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".[42]

After the strong 'neoliberalism' which followed the privatisation and liberalisation period and was aimed at market integration, and since the judgment in *Corbeau* of 19 May 1993, there has been a tendency, even if somewhat wavering and disharmonious[43], towards a more flexible interpretation of the provision.[44] More specifically, with regard to the concept of 'obstacle', there has been a shift from the *absolute incompatibility* of the application of competition rules with the performance of a general interest task under "economically acceptable conditions"[45] to the requirement that the application of EU rules make that performance not *indispensable* but (only) *more difficult*. This has resulted in an extension of the Member States' scope for action with respect to the regulation of welfare and the economy.

[41] See *Commission v. Spain* of 14 February 2008, para. 47.

[42] On such rule see, most recently, NEERGAARD 2011; BUENDIA SIERRA 2012; HATZOPOULOS 2012 (II), 86-96.

[43] See, for instance, *Dusseldorp* of 25 June 1998, para. 67.

[44] See, amongst others, *Correos* of 15 November 1997, paras 34-36; on the topic see also the considerations made by SCHWEITZER 2011.

[45] *Corbeau*, paras 16-18.

Based on what has been said so far, the question may legitimately be asked whether Art. 106(2) TFEU can offer Member States a wider scope for intervention with regard to golden shares, given that the criterion of "economically acceptable conditions" does not seem as strict as that adopted in the golden share case-law in relation to overriding requirements in the general interest – namely, the notion of a 'genuine and serious threat' to the performance of the particular tasks assigned to the companies concerned. So far, national governments have not realised the potential of Art. 106(2) TFEU, as an effective tool of social/welfare solidarity, with respect to golden shares. The provision has been invoked – if at all – only superficially and almost incidentally, although its applicability has been implicitly established in *Commission v. Belgium* of 4 June 2002 and *Commission v. Spain* of 13 May 2003, but challenged in the recent judgment in *Commission v. Portugal* of 10 November 2011.

The Court's lack of clarity on the role and function of Art. 106(2) TFEU in the context of golden shares and, more generally, fundamental freedoms, must be sharply criticized: not only because it obviously raises problems of legal certainty, but, most importantly, because it might be construed in the sense of preventing, or greatly limiting, the use of a provision that, by its nature, is applicable also with respect to the fundamental freedoms.

First of all, Art. 106(2) TFEU is an atypical derogation from competition law.[46] As such, it is directed not only towards undertakings, but also towards Member States, even if its position in Section 1 ("Rules applying to undertakings") of the TFEU may suggest otherwise. This is clearly demonstrated by the fact that, in practice, the European institutions apply it when addressing public authorities, which thus become the addressees of the provision together with the companies concerned. Second, Art. 106(2) TFEU does not simply introduce a derogation from Art. 106(1) TFEU: the personal scope of application of the latter is similar but not identical to that of the former, since not all undertakings which operate SGEIs within the meaning of paragraph 2 are undertakings which have been granted special or exclusive rights under paragraph 1.[47] Third, Art. 106(2) TFEU, in providing that "[u]ndertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in the Treaties, *in particular* to the rules on competition, in so far as the application of such rules does not obstruct the performance [...] of the particular tasks assigned to them", makes it clear that these undertakings can be treated differently not only in relation to antitrust law, but also other primary law rules, especially the freedoms of movement (and state aid rules).

As a final observation, it is worth noting that the application of Art. 106(2) in the context of golden shares would clear up a major inconsistency between earlier case law and a number of decisions on special powers. The inconsistency concerns the supposed irrelevance of economic considerations in the context of fundamental freedoms, a problem which, as already noted, stems from the fact that the Court has refused to accept justifications of a purely economic nature.

A strict and fundamentalist application of the "doctrine of non-economic considerations"[48] is unconvincing for two reasons.[49] First, the protection of the financial balance of the State – as the main justification invoked by Member States in the golden shares case-law – has a central importance and has been subsequently accepted by the Court (mainly, but not only[50]) in its

[46] See GALLO 2013 (II).

[47] See *BUPA*, para. 179, cited above.

[48] See, *ex multis*, VAN DER WOUDE 1992, 63; WACHSMANN, BERROD 1994, 56-58.

[49] In this regard see also BUENDIA SIERRA 1999, 301-303, 337-338, 355-358; HATZOPOULOS 2000, 78-79; MORTELMANS 2001, 637; SNELL 2005; GEORGIADIS 2006, 199-203; BARNARD 2009, 279-280.

[50] See, for instance, *Openbaar Ministerie* of 6 October 1987, *Rosks* of 24 February 1994, *Jørgensen* of 6 April 2000, *Finalarte* of 25 October 2001.

case law on services, social security and patients' rights[51]. Second, when public services are at stake in the context of fundamental freedoms, economic and non-economic interests inevitably interpenetrate and overlap.[52]

Ensuring financial balance and the provision of public services is precisely the objective underlying Art. 106(2), as confirmed by many judgments, starting with *Corbeau*. Now, also in the field of golden shares, financial balance constitutes an objective that serves to achieve a further purpose: to provide that service adequately and under economically acceptable conditions.

To conclude, Art. 106(2) TFEU is a derogation originally introduced in antitrust law, under which the only admissible exceptions should be those of an economic nature. This, however, does not constitute a significant obstacle to its application in the area of the freedoms of movement. On the one hand, the European judges – as they did in the case of the '*Cassis-Gebhard* exception' with regard to the infiltration of (*de facto*) economic considerations – have already established and applied rules of reason of a non-economic nature to justify derogations from competition law.[53] On the other, as repeatedly emphasized in this article, Art. 106(2) TFEU, which may be invoked by both Member States and undertakings performing SGEIs, is applicable to and practically effective in areas other than antitrust law, and the more so in relation to the control of privatised companies, a form of state intervention in the economy which is structurally linked to "the activities of general economic interest associated with th[ose] compan[ies]".[54]

3. Non-EU investments, sovereign wealth funds (SWFs) and state owned enterprises (SOEs)

3.1. In this part of the article I will deal with sovereign investors who enter or aim to access the EU market, namely SWFs[55] and SOEs[56], whose legal status and personality may vary significantly due to the nature of the relationship with the home State. In any case, the common denominator is that these operators, be they public, private or mixed entities, are always connected in various ways and degrees with non-EU public authorities: they are all State-controlled actors. In addition, they invest both in strategic sectors which belong to the State, such as defence and national security, and in companies entrusted with the operation of SGEIs that, although formally private, are under State influence.[57]

This poses a twofold problem: whether the golden shares held by the State are admissible under EU law, considering that what is at stake is the behaviour of non-EU actors rather than of EU companies[58], and whether the State can (more or less) expressly forbid the entry of said

[51] From *Decker* of 28 April 1998 to *Elchinov* of 5 October 2010; on the most recent case law see CISOTTA 2013.

[52] See also AG Tesauro's opinion of 9 February 1993 in *Corbeau*, para. 15.

[53] See *Albany* of 21 September 1999, *Wouters* of 19 February 2002, *Meca-Medina* of 18 July 2006.

[54] See AG Maduro's opinion of 6 April 2006 in *Commission v. The Netherlands* of 28 September 2006 para. 30.

[55] For an overview on SWFs, from a judicial standpoint, see, *inter alia*, CATÁ BACKER 2007-2008; BASSAN 2011; CUOCOLO, MISCIA, 2012. With a focus on international (investment) law and the problems of national restricting measures *vis-à-vis* the exercise of their activities see AUDIT 2008; GIGANTE, LIGUSTRO 2010; ALVAREZ 2012; on SWFs and the economic crisis see MOSTACCI 2009; SUBACCHI 2012.

[56] For an overview of SOEs, see CATÁ BACKER 2010, 59-74; SHAPIRO, GLOBERMAN 2012.

[57] On similarities and differences between SWFs and SOEs see CATÁ BACKER 2010, 66-74; BASSAN 2011, 3-35; SCHMIT JONGBLOED, SACHS, SAUVANT 2012.

[58] See *supra*, § 2.

non-EU actors into the EU market.[59] The EU has provided no clear solution to this problem: there are no binding EU instruments or judgments which regulate SWFs and SOEs in the European market or their investment limits. The only initiative taken at EU level is the European Commission's Communication of 28 February 2008, "A common European approach to Sovereign Wealth Funds".

A preliminary question to be examined concerns the law applicable to State-held golden shares: freedom of establishment or free movement of capital? Opting between the two sets of provisions is not so crucial with respect to intra-EU trade since, in relation to capital and establishment, the approach adopted in the case law on the extent of market restrictions and that taken in decisions concerning general interest justifications have been in the years very similar.[60] This is why this topic has not been examined in § 2 above. Choosing between freedom of capital and freedom of establishment becomes essential, however, in connection with third country investment because, insofar as non-EU investors are concerned, the rules on capital, as is well known, have a wider scope of application *ratione personae* than those on establishment. As a consequence, non-EU investors may invoke Art. 63, but not Art. 49, when claiming before an EU national court that their rights have been infringed by a special power held by a government of an EU Member State in a privatised company operating within its territory.

In its first decisions on the matter[61], the Court focused its reasoning only on the rules relating to capital movements, in line with the so-called "centre-of-gravity" approach first adopted in *Fidium Finanz* (3 October 2006) with regard to the banking sector: in the event of an overlap between Art. 63 and Art. 49, the ECJ may apply "only that provision which it finds to be most directly affected if the other is thought to be 'entirely secondary'".[62] Subsequent case law[63], however, saw growing importance being attached to Articles 49 *et seq.* TFEU, in line with the so-called "*Baars* criterion"[64], according to which, when a national of a Member State has a holding in the capital of a company established in another Member State, the applicable national legislation falls within the purpose and scope of the freedom of establishment if that holding "gives him definite influence over the company's decisions and allows him to determine its activities".[65] In later years, the Luxembourg court took an opposite view to that of *Commission v. Italy* of 26 March 2009, once again revising its previous jurisprudence. More precisely, it returned to its original approach.[66] Finally, in the judgment of 8 November 2012 in *Commission v. Greece* the Court, on the basis of the "*Baars* criterion", revised its jurisprudence yet one more time, moving back to the approach outlined in *Commission v. Italy* of 26 March 2009.

The case law is, therefore, patchy and ambiguous.[67]

The issue is complicated by two elements: first, the absence of a Treaty definition of 'movement of capital'; second, the potential impact that the choice of the applicable provision

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[59] For a discussion of SWFs and SOEs in a European perspective [oppure: in a European context], see BARYSCH, TILFORD 2008; SCHWEITZER 2010; CHAISSE 2012.

[60] See O'BRIEN 2010, 257.

[61] See, for instance, *Commission v. France* of 4 June 2002.

[62] SCHWEITZER 2010, 103.

[63] See, for instance, *Commission v. Germany* of 23 October 2007.

[64] On the said criterion and its application also in the CJEU's jurisprudence on golden shares see RICKFORD 2010, 81-93.

[65] See *Commission v. Italy* of 26 March 2009, para. 39.

[66] See *Commission v. Portugal* of 8 July 2010 and *Commission v. Portugal* of 10 November 2011.

[67] In these terms also VAN BEKKUM 2010.

(freedom of establishment *and/or* freedom of capital movement) may have on the flow of investments from non-EU countries and, consequently, on the factors contributing to the growth and development of the EU's economy.

As to the first element, the Court has held that movements of capital include both direct investments and portfolio investments.[68]

Since there is no doubt about portfolio investments being a form of capital movement, the real problem lies with the notion of direct investment *vis-à-vis* that of establishment. Indeed, the fine line between the two concepts may indeed explain the shifting jurisprudence of the CJEU. More specifically, what is unclear is the difference between the direct investments covered, in the eyes of the Court, by Art. 63 (i.e., investments aimed at "establishing or maintaining lasting economic links" with a company and involving "*at least participation in* the control of the entity subject of the investment"[69]) and the transactions that, according to part of the case law and based on the "*Baars* criterion", are covered by Art. 49. In other words, it is not discernible, *stricto iure*, why direct investments, which Annex I to Council Directive 88/361/EEC defines as the "*establishment* and extension of branches or new undertakings belonging solely to the person providing the capital" and "the acquisition in full of existing undertakings", should not fall within the scope *ratione materiae* of Art. 49.[70]

A general application of the rules on establishment in the context of golden shares would have the advantage of eliminating right away the concerns raised by the proliferation on the European market of undesirable entities that are not covered by any binding regulations at international level.[71] Said entities include those with opaque governance[72], those connected with non-democratic countries, and those whose intention is to pursue political objectives and access confidential information, advanced technologies or natural resources (especially energy materials) thanks to their influence on "companies operating in area of strategic interest or governing distribution channels of interest to the sponsor countries".[73] Therefore, when the provision of SGEIs is at stake, the main concerns are defence, national security, and welfare.[74]

The reasons why, under EU law, direct investments are currently covered by Art. 63 are first of all political, as well as economic - and here we have the second element mentioned above. The choice to opt for Art. 49 alone would, in fact, have a potentially devastating impact on investment flows, and thus affect the growth and competitiveness of the European market, insofar as it would prevent precisely the inflow of capital from third country investors, who would not be able to exercise the free movement rights conferred on them by Art. 63, but not Art. 49. However, there are also other reasons of a legal nature: the application of Art. 49 would run the risk of being in conflict with international agreements of the EU with third

[68] Generally on the topic see HINDELANG 2009.

[69] BENYON 2010, 1.

[70] See also RICKFORD 2010, 91-93; TORRENT 2012, 548-560.

[71] On the international soft law regulating sovereign investment, including the *Generally Accepted Principles and Practices for SFWs* – so-called 'Santiago principles' – available at http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf, as well as on the need for global standards for SWFs DE BELLIS 2011; DAS, MAZAREI, STUART 2012; GORDON, GAUKRODGER 2012.

[72] On the issue of transparency see REED 2009; WONG 2009; BELLIS 2011; AVENDAÑO, SANTISO 2012; CLODFELTER, GUERRERO 2012; DESOUZA, REISMAN 2012.

[73] See European Commission's Communication "A common European approach to Sovereign Wealth Funds", para. 2.2.

[74] On these concerns see COOKE 2009; SAXON 2009.

countries as regards the new exclusive competence provided for in Articles 206[75] and 207(1)[76] TFEU with Art. 3 TFEU[77], where the agreements themselves permit the entry of said investments into the European internal market.[78]

Apart from the obvious consideration that, besides presenting a threat to the Union, the new economic-financial actors which have emerged on the international scene represent important opportunities for economic growth and provide liquidity[79], it must be stressed that, in any event, a different approach to the rules on the right of establishment would not be a solution to all the problems related to the access to the EU's internal market of third-country investors whom EU governments regard as undesirable. At present, neither secondary law nor the case law based on Art. 54 TFEU prevent non-EU natural or legal persons from establishing companies in accordance with the law of a Member State for the purpose of enjoying the rights arising under Art. 49 *et seq.* TFEU – companies whose registered office, central administration or principal place of business is located within the Union and which, as a result, must be treated in the same way as natural persons who are nationals of Member States. Since that constitutes a circumvention of prohibitions contained in EU law, the question may thus arise as to whether, and under what conditions, the principle of abuse of law applies to the establishment of such companies.[80] As with all situations in which rules are evaded, what needs to be determined here is the dividing line between the indirect but legitimate exercise of the right of establishment and the deliberate circumvention of that right, which is contrary to the principles and rules of the Union.

3.2. Choosing, once again, the notion of solidarity as the main tool of analysis, the main questions are: what kind of restrictive measures can Member States adopt *vis-à-vis* non EU sovereign investors? Is a European golden share a viable option? And, if so, how could it be regulated at the secondary normative level?

Unlike EU golden shares, where two national interests clash against each other, in the context of special powers directed at limiting or even impeding the entry of SWFs and SOEs, the national interest overlaps with the EU interest. Here, the concerns, rather than purely national, are European concerns. The concept of national solidarity seems, indeed, to blend with that of EU solidarity, since both imply not only an economic dimension, but also - and most importantly - a 'welfare'/social dimension of solidarity, unlike what happens in the case of intra-EU golden shares, where the two dimensions (i.e., national 'welfare solidarity' and EU 'economic solidarity') clash against each other.[81]

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[75] "By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers".

[76] "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

[77] "The Union shall have exclusive competence" in the field of "common commercial policy".

[78] On the EU and foreign investments see the contributions in BUNGENBERG, GRIEBEL, HINDELANG 2011 and DIMOPOULOS 2011.

[79] On the topic see SUBACCHI 2012.

[80] On the various dimensions of the said principle see CERIONI 2006 and the contributions in DE LA FEIRA, VOGENAUER 2011.

[81] See *supra*, § 2.

There are numerous questions to be answered: what kind of general interest exceptions can Member States employ to restrict investments made by SWFs and SOEs? Should those exceptions operate differently when the investment is aimed at acquiring shares in 'normal' economic operators, such as Sainsbury and Real Madrid, or when assets belong to public services' providers or national security/defence institutions? Should they operate differently depending on the provisions on disclosure, transparency and accountability contained in the bylaws of individual SWFs and SOEs or, rather, on the level of protection and respect of human rights and the rule of law afforded in the home country? Finally, and most importantly: how could the EU and Member States respond to the threats represented by the possible entry into the European market of undesirable non-EU State-controlled entities? Quite clearly, what is at stake is the problem of reaching a fair balance between market access and public interest considerations.

Despite the importance of the above issues and the fact that – as noted by the European Commission in its Communication, "A common European approach to Sovereign Wealth Funds" – "a common EU approach would maximise European influence in these wider discussions", at EU level there is still a lack of clarity and legal certainty in this respect.[82] Moreover, if the EU fails to agree on a common line of action, each Member State may resort to its own measures.

At EU level, a possible option could be the adoption, at normative level, of a binding act through which the EU could address concerns related to the nature, aims and origins of those actors who intend to invest in strategic sectors of EU Member States, by elevating them from a national level to a European one.[83] This measure would enable EU institutions to distinguish between different types of investors, as well as between the different types of EU companies whose assets those investors intend to acquire. To my knowledge, the only possible legal basis for such a measure would be Art. 64(3) TFEU, which provides for a derogation from the principle of liberalization of capitals with third countries where it is stated that "only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries". However, the requirement of unanimity clearly represents an obstacle for the adoption of such measures, due to the existence of numerous divergences among Member States in the field. In this respect, it must also be recalled that, if a horizontal measure – in the form of a regulation or decision – is adopted, EU institutions will obviously need to address the problem of standardizing and unifying the existing provisions on the scope and limits of Member States' powers of intervention over non-EU investors, as contained in sectoral secondary legislation on electricity, gas, and air transport[84].

Another, more feasible option could be a statement of views put forward by the CJEU with regard to the scope of general interest exceptions to the free movement provisions in the case of non-EU State-controlled entities.

So far, the Court has not been encouraged by SWFs and SOEs, by national judges, or by the European Commission to specify the scope and limits of the derogations envisaged under the

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[82] See para. 3.2.

[83] A directive or regulation on SWFs and SOEs could, in addition, be preceded by the adoption of a new soft-law instrument aimed at updating the European Commission's Communication of 28 February 2008 entitled "A common European approach to Sovereign Wealth Funds".

[84] See Art. 11 of Directive 2009/72/CE and Directive 2009/73/CE as well as Art. 4 of Regulation 2407/92. On the topic see TORRENT 2012, 558-561.

TFEU, or those of the justifications the CJEU has itself provided and may consider admissible under EU law.[85]

As to the derogations, the only provision that Member States may employ is Art. 65.1 b), according to which national authorities have the right to "to take [restrictive] measures which are justified on grounds of public policy or public security". This is of course the case of those national measures that restrict investments in the defence and military industries.[86] More problematic is whether serious dangers for public policy and public security outside these industries may fall within the scope of the provision. I am referring to national security considerations that are strongly connected with the provision of SGEIs, such as energy security, telecommunications, the protection of other critical infrastructures and the preservation of the control of natural resources by the host State.[87] Moreover, since there is no case law yet on the restrictions which the Members Stats may impose on SWF and SOE investments (i.e., case law which could help clarify the issue), an additional problem is whether the CJEU's jurisprudence on golden shares should be transposed with regard to investors in non-EU State-controlled entities. In this connection, not only has the Court maintained that, in order to be admissible, policy and security objectives must be clearly articulated and the criteria for the State intervention must be specified in objective terms; it has also stated that a restriction is legitimate and proportionate under free movement rules only when there is a "genuine and sufficiently serious threat" to public policy and public security affecting "one of the fundamental interests of society".[88]

In my opinion, considering the absence of secondary legislation or a CJEU decision on the subject, at present it is not Art. 65(1)(b) [TFEU??], but rather an extension of the '*Cassis-Gebhard* exception' to non-EU investments that leaves room for a broader and more flexible interpretation of the requirements concerning the scope of general interest exceptions. It seems correct to argue that one or more imperative requirements may be established in the future with respect to the entry of SWFs and SOEs into the EU market: they may concern, for example, the transparency (or lack thereof) of the operator making the investment, or whether the activity carried out by the latter is influenced by purely political interests and, thus, may put at risk the regular provision of essential sensitive activities. In that case, national measures would not have to be considered illegal merely because they provide for a regime of *ex ante* control over investments made by third country operators in privatised public utilities or public institutions in the security sector.

The result would be a distinction in treatment between EU and non-EU investors, with regard to situations which might be dangerous for the Member State that receives the investment and where the company in which SWFs and SOEs intend to invest operates. In itself, this would be nothing new.[89] In its case law on taxation, the CJEU relied on both the extension of the '*Cassis-Gebhard* exception' and a flexible interpretation of the principle of proportionality, arguing in favour of a wider autonomy for the Member States and, at the same time, of stricter control over the access of specific categories of third country investors to the EU internal market.[90] The transposition of the principles set out in this area of case law

[85] On some national legislation, within the European territory, admitting restrictions *vis-à-vis* non EU investors see, amongst others, CHAISSE 2012, 486-493; JOST 2012, 453-462.

[86] On this point see CHAISSE 2012, 486.

[87] See SCHWEITZER 2010, 108-109.

[88] See, for instance, *Commission v. Spain* of 13 May 2003, paras 72-74.

[89] See the observations made by SCHWEITZER 2010, 103-108.

[90] See, for instance, *Orange European Smallcap Fund* of 16 June 2011, where the Court stated as follows: "[i]t may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third

to the field of golden shares is certainly desirable, since that would mitigate the concerns raised by the application of the free movement of capital to third-country direct investments by 'disreputable' operators that may possibly endanger the national as well as the EU conception of public policy, public security and SGEIs regulation.[91] It seems therefore feasible that EU Member States may be admitted to use specific justifications to restrict the investment made by certain non EU State-controlled actors. This is precisely the role of EU solidarity and here is the overlap between national and European concerns, internal market considerations and extra-commercial values, economic integration and welfare integration, 'market-oriented' regulation/solidarity and 'welfare-oriented' regulation/solidarity.

Moreover, an act of secondary legislation, possibly accompanied by a clear statement of views put forward by the Commission in the form of a communication and/or by a judgment of the Court, would ensure that the measures adopted by the Member States in order to restrict third-country investments (especially SWFs and SOEs) do not end up having protectionist effects [92] also on EU investors.[93]

To conclude, it will be interesting to see in what ways and to what extent the various dimensions of solidarity – national/European, market-oriented/welfare-oriented – may interact with each other to ensure that the protection of socio-economic policies is legitimate, insofar as determined by needs and objectives that are economic as well as social.

4. Conclusion

The aim of this article has been to assess how and to what extent the EU institutions, especially the CJEU, have addressed the following issues: the socio-economic changes wrought by the privatisation and liberalisation of public services, the resulting blurring of the so-called public/private divide both in the European Union (EU golden shares) and at international level (SWFs and SOEs), and the retention, within national public authorities' competence, of the regulation of strategic sectors. In order to do so, the concept of solidarity has been used as an analytic tool.

With regard to the role of the CJEU, my main conclusion is that, while the Court has been (too) activist in eroding the discretionary power of the Member States in the field of golden shares *vis-à-vis* EU investors, it should be more proactive in clarifying important issues concerning the access of State-controlled entities such as SWFs and SOEs to the European internal market, including the interpretation of Art. 65.(1)b) TFEU and the application of the '*Cassis-Gebhard*' exception.

In this respect, it is to be hoped that the EU institutions, rather than considering the issues and problems examined above only cursorily, will 'face up' to them in order to ensure greater legal certainty and strike a fairer balance between the internal market, private autonomy and State regulation – that is, between the Single Market and the European Social Model. Only at

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countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States" (para. 90).

[91] See, in this regard, Art. 194 TFEU, where solidarity is put in connection with the EU policy on energy.

[92] As noted by the Court, the intention to target only non-EU investors was clearly expressed by the Portuguese Government in *Commission v. Portugal* (judgment of 10 November 2011, paras. 84-85) and by the Greek Government in *Commission v. Greece*, paras. 26-28).

[93] In this connection, it seems desirable that the EU institutions clarify once and for all whether the adoption by national legislators of market access provisions that, with regard to crucial economic sectors, discriminate only against non-EU investors violates the principle of equal treatment of shareholders set out, for instance, in Art. 3 of Directive 2004/25/CE on takeover bids and/or whether it is contrary to the substantive and functional approach adopted by the Court, according to which no economic operator can be discriminated against merely on the ground of nationality, regardless of any serious public interest concerns.

that moment will it be possible to fully grasp the true nature of European solidarity with regard to the regulation of SGEIs and strategic/national security industries, golden shares, SWFs and SOEs, once the social, rather than purely economic dimension of these notions, has been understood.

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