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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

"Golden Shares" and Other Special State Rights: An Assessment Based on CJEU Decisions Within the Scope of EU Internal Market Law

"Altın Hisseler" ve Diğer Özel Devlet Hakları: AB İç Pazar Hukuku Kapsamında ABAD Kararlarına Dayalı Bir Değerlendirme

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Abstract

Liberalization started to take effect in Western countries from the beginning of the 1970s. It manifested itself, among other processes such as deregulation, with privatization movements intensively from the late 1980s. Against it, states established golden shares and special state rights to ensure public safety, continuation of SGI, protection of the rights of workers and minority shareholders, and sometimes to obtain economic interests. Thus, they aimed to maintain the influence of states on related enterprises. However, these reflexes resulted in legal discussions under EU Law, particularly regarding the freedom of capital and establishment. The compliance of the special state rights with the EU internal market had been handled several times by the CJEU through the assessment of infringement of fundamental freedoms, starting from the late 1990s until the mid-2010s. In the text below, the golden shares and other special state rights are assessed in terms of the free movement of capital and establishment by referencing the related CJEU decisions. This assessment will be structured substantially based on the assessment scheme for four freedoms. Although privatization is a tool that has been intensely used in a certain period, there is no guarantee that privatization will not come to the fore again. Furthermore, finding reasonable solutions to the legal problems stemming from the special state rights would be guiding in terms of ensuring the compliance of the new types of state interventions to the economy, as we witnessed during the COVID-19 pandemic, with the fundamental freedoms of the EU internal market.

Keywords

Golden Shares • Special State Rights • EU Internal Market Law • Privatization/Liberalization • Fundamental Freedoms

Öz

Serbestleşme/Liberalizasyon akımı 1970'li yılların başından itibaren etkisini Batı'da hissettirir. Deregülasyon gibi diğer süreçlerin yanı sıra, yoğun anlamda 1980'lerin sonundan başlayarak, kamu teşebbüslerinin özelleştirilmesi hareketleri ile kendisini gösterir. Bunun karşısında devletler kamu güvenliğinin tesisi, kamu hizmetlerinin devamlılığı, işçi ve azınlık hisse sahiplerinin haklarının korunması gibi temelde kamu yararı saikiyle ve kimi zaman ekonomik saiklerle ilgili şirket nezdinde kendi lehlerine altın hisse veya diğer özel haklar tesis etmek yoluna gitmişler, bu şekilde ilgili şirket üzerinde devletin etkisini devam ettirmeyi amaçlamışlardır. Ancak bu durum AB Hukuku kapsamında özellikle AB İç Pazarı bakımından temel özgürlüklerden olan sermayenin ve kuruluşların serbest dolaşımı hususlarında hukuki tartışmalara neden olmuştur. Özel devlet haklarının AB İç Pazarı ile uyumu, temel özgürlüklerin ihlali değerlendirmesi üzerinden, 1990'ların sonundan başlayarak 2010'lu yılların ortasına kadar Avrupa Birliği Adalet Divanı (ABAD) tarafından çok defa

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ele alınmıştır. Aşağıdaki metinde altın hisse ve diğer özel devlet hakları, ABAD kararlarına referanslarla, temel özgürlüklerden ikisi olan sermayenin ve kuruluşların serbest dolaşımı bakımından değerlendirilmektedir. Bu değerlendirmede kıta avrupasında kullanılan değerlendirme şeması takip edilmektedir. Belirtmek gerekir ki özelleştirme belli bir zamanda yoğun bir şekilde kullanılmış bir araç olsa da tekrar gündeme gelmeyeceğinin bir garantisi yoktur. Ayrıca özel devlet hakları üzerinden ortaya çıkan hukuki meselelere çözüm bulunması COVID-19 salgını sırasında da şahit olduğumuz devletin ekonomiye yeni müdahale biçimlerinin AB İç Pazarının temel özgürlüklerine uyumunun sağlanması bakımından yol gösterici olacaktır.

Anahtar Kelimeler

Altın Hisseler • Özel Devlet Hakları • AB İç Pazar Hukuku • Özelleştirme/Serbestleştirme • (AB İç Pazarında) Temel Özgürlükler

A. Introduction

The West encountered a mass tendency towards liberalization starting from the early 1970s. The so-called 'Golden shares', which means special rights in favor of the state, emerged as a natural consequence of the tension between, on the one side, the necessity of liberalization and thus privatization, on the other side, the interests of the state mainly on the basis of public opinion. Europe became exposed to the same movement starting from 1979 in the UK. However, it has gained intensification only after the 1980s.[1]

As a reaction to these developments, the member states started to make arrangements based on their national legal structure of privatization or directly within the articles of association of the public enterprises set into the privatization process. This reflex created an inconsistency between the idea of the internal market and the interest of the member states in the acquired special state rights. This fact showed itself in the judgments of the Court of Justice of the European Union (CJEU) as an assessment based on the four freedoms, particularly the freedom of capital and establishment. Thus, starting from 'the case of Commission v. Italy'[2], we had witnessed the special state rights cases until the late 2000s. However, the global finance crisis vitalized this type of case by ending up in a new liberalization program in certain member states such as Greece. As a matter of fact, the privatization process in Greece was slow until about 1995.[3] In addition, the states of Mediterranean Europe saw the privatization process during the 1990s as a tool to change policy coordination and go after their national interest, instead of focusing on long-run efficiency goals such as reducing the level of deficit and meeting the EU convergence criteria.[4] Thus, the special state rights cases also showed itself in the early 2010s.

The text below will examine the legal issues stemming from the special state rights cases. We will first explain the basic concepts that are crucial to digest the main legal issues related to the special state rights. After that, the principal topic of the article will be examined under section (C) 'The Effect of Golden Shares and Other Special State Rights on Fundamental Freedoms'. The section (D) will be the place of assessment of the matters pertaining to justification and proportionality. Finally, we will complete our text with an evaluative conclusion instead of a summative one in section (E).

The examination of legal issues will be structured, except for section (B), substantially based on the assessment scheme for four freedoms, which has been used

1 David Parker, 'Privatization in the European Union: A Critical Assessment of its Development, Rationale and Consequences' (1999)(1) EID 9, 9-10; Bruno Dallago and Chiara Guglielmetti, 'Chapter 67: Privatisation' in Merkel, Kollmorgen and Wagener (eds.), The Handbook of Political, Social, and Economic Transformation (Oxford 2019) 604, 604.

2 CJEU, Judgement of 23 May 2000, Case C-58/99, Commission v. Italy, ECLI:EU:C:2000:280.

3 Parker (n 1) 16.

4 Venilde Jeronimo, Jose Pagán and Gökçe Soydemir, 'Privatisation and European Economic and Monetary Union' (2000) 26(3) EEJ 321, 321-322.

generally in continental Europe. In terms of the way of handling the issues, we will try firstly to show the background of the related matter, secondly to exemplify the opinion of the CJEU in its judgments in order to show that the Court is engaged in the matter, and lastly to explain the final approach of the Court by supporting with the interference of scholars.

B. The Basic Concepts

I. Liberalization - Privatization

Two of the key concepts in golden state cases are liberalization and privatization. In Golden share cases, we come across the concept of privatization alone[5] or both[6]. So, it is crucial to be familiar with these concepts in order to grasp the legal issues in related cases.

Following World War II, the way out had been found in the welfare state concept to overcome the war's catastrophic consequences. Macroeconomic planning and state management had been seen as the best way to ensure welfare on the continent until the late 1970s.[7] After several global economic challenges, this concept found itself in an existential crisis.[8] The solution was based on a more neoliberal economic policy, which relegated Keynesianism. In this milestone, privatization and liberalization constituted two important concepts through which economic efficiency would be reached.[9]

The concept of privatization means the operation realizing the transfer of the properties of a public enterprise toward the private sector, as opposed to nationalization.[10] In addition, it is indicated that this term has a broader sense of connoting an increase in the role of the private sector and market against the state.[11]

The concept of liberalization signifies mainly a set of policies and technical tools aiming to reduce state interventionism by removing administrative restrictions, particularly pertaining to monetary and market ones.[12]

Liberalization is a concept which is more encompassing and with a theoretical background, while privatization constitutes rather an instrument ensuring the transfer

5 CJEU, Judgement of 23 October 2007, Case C-112/05, Commission v. Germany, ECLI:EU:C:2007:623, pr. 1; CJEU, Judgement of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694, pr. 14.

6 CJEU, Judgement of 4 June 2002, Case C-367/98, Commission v. Portugal, ECLI:EU:C:2002:326, pr. 9, 12.

7 László Csaba, 'Chapter 58: Liberalization' in Merkel, Kollmorgen and Wagener (eds.), The Handbook of Political, Social, and Economic Transformation (Oxford 2019) 547, 547.

8 OECD, The welfare state in crisis: an account of the Conference on Social Policies in the 1980s, Paris, 20-23 October 1981; see Rosanvallon, 'La Crise de l'Etat Providence' (Seuil 2015).

9 Csaba (n 7) 548.

10 Agathe Van Lange, Geneviève Gondouin et Véronique Inserguet-Brisset, *Dictionnaire de Droit Administratif* (6. Edition, Sirey 2012) 338.

11 Dallago and Guglielmetti (n 1) 605.

12 Csaba (n 7) 547.

of property. Liberalization has different stages, the most important of which is the second one including liberalization of property and market access.[13] The privatization was the main actor of this phase as well as deregulation and had been used densely starting from the initiative of Barbara Thatcher in the 1970s.[14]

Going to the way of privatization was a requirement stemming from the structuring of the welfare state. However, privatization alone was insufficient, and there needed to be more to meet the demands of liberalization. Because the welfare state was based on the state intervention in the markets through public interest justification. One of the effective ways of involvement was taking place under the appearance of public enterprises.

The concept of public enterprises constituted a big diversity in terms of its organizations, structures and activities and didn't exhibit a uniformity. Some of them were focusing on a special field as public service, while others were dealing with purely commercial activities. Some of them had a monopoly in related fields, while others were carrying on business in market conditions. But they have certain common features such as having a legal personality distinct from the state, accomplishing activities whose nature is industrial and commercial, and being under the control of the state through being their property totally or partially belonging to the state or regulations.[15] The last feature constitutes the inappropriate side of public enterprises in terms of the post-welfare state economic policy. Liberalization requires the removal of public control on these enterprises and transforming them into fully private companies by means of the privatization of related enterprises and the deregulation of related markets. The Golden Share Concept emerged at that point where the privatization took place but the public control continued by the way of setting specific conditions by the state through the specification of privatization or regulations.

II. Golden Shares and Other Special State Rights

1. Types of Special State Rights

The Member States have been willing to retain their advantageous position and control ability by keeping certain special rights in favor of them in previously public-owned companies since the beginning of privatization in Europe.[16] These rights are named in several ways such as 'golden shares', 'golden power', 'golden rules',

[13] ibid 548.

[14] Dallago and Guglielmetti (n 1) 604.

[15] Jean-François Escarmelle et Patrick Melis, 'Essai de définition du Concept d'Entreprise Publique' (1981) (47) IRAS 365, 366; Michaël Poyet, 'Le Contrôle de l'Entreprise Publique Essai Sur Le Cas Français' (Phd. these -unpublished-, Jean Monnet University-Saint-Etienne, 2001) 16-27.

[16] Jonathan Rickford, 'Protectionism, Capital, Freedom, and the Internal Market' in Bernitz and Ringe (eds.), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford 2011) 54, 56.

'special powers', 'goldene aktien', and 'actions privilégiées'.[17] However, these special powers are known commonly as 'golden shares' in the related literature. Thus, the concept of "Golden shares" is used in a broad sense. But, as a matter of fact, not all the special rights are based on a special share or minority stake belonging to the state, some of them are formed through regulations/legislations without any participation to the company.[18]

In the text, we will use the 'golden shares' concept in a narrow sense, only as related to share based special rights. The 'special (state) rights' concept will be used in a sense covering all types of state intervention or special powers granted to the state.

Based on these explanations, the special rights include different types of special powers and were identified by Advocate General Colomer in a way of expressing several examples:

> *"...special powers, of which there are various forms (procedures for administrative authorisations, shares to which privileges are attached, appointment of members of company bodies) and which are exercised in various ways (by virtue of the power to object to the acquisition of capital, rights to intervene in dealings affecting assets)...*"[19]

Below we will demonstrate different types of special rights according to being based on share or not. The first will be handled under the title of 'Golden shares', while the latter will be examined under the title of 'Other Special State Rights'.

a. Golden Shares

Golden shares are the stakes that give more competence to their holders than standard shareholders. These rights are given based on shares and their legal sources are the company's constitution/articles of association. So, these are rights given under private law, and which are consistent with general company law.[20]

We can give as an example the power of prior approval (for disposal of major airports and acquisition of more than 15% voting shares) linked to the special share which was created through articles of company association.[21] Another example is the approval competence of the Netherlands State, based on its remaining special share, on the certain decisions of the companies including share issues, distributions and mergers.[22]

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17 Daniele Gallo, 'On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments' (2016)(1) European Papers 823, 824; The Opinion of Advocate General Ruiz-Jarabo Colomer in CJEU, Delivered in 3 July 2001, Cases C-367/98, C-483/99, C-503/99, Commission v. Portugal/France/Belgium, pr. 1. (Hereinafter 'The Opinion of Colomer in 2001').

18 European Commission, 'Staff Working Document: Special rights in privatised companies in the enlarged Union–a decade full of developments' Brussel, (2005) p. 5. (Hereinafter 'Commission: Special rights').

19 The Opinion of Colomer in 2001, pr. 1.

20 Rickford (n 16) 60-61; Commission: Special rights, p. 6.

21 CJEU, Judgement of 13 May 2003, Case C-98/01, Commission v. UK, ECLI:EU:C:2003:273, pr. 1, 8.

22 CJEU, Judgement of 28 September 2006, Case C-282/04, Commission v. Netherlands, ECLI:EU:C:2006:608, pr. 1, 9.

b. Other Special State Rights

Other special state rights are given through legislation or state regulations without any ownership relation with the company. So, these kinds of powers are mostly conferred on the state directly by public law provision.[23] However, there are some examples in which special powers (not share-based) were given by introducing into the articles of association of companies based on a public law provision.[24] We involve these types of special powers within the other special state rights. In addition, there are some special rights based-on shares that find their roots in public law provisions, but we ignore this indirect effect and count them amongst 'Golden shares'.[25]

Under the category of 'other special state rights', we can give as an example the prior authorization of the minister of financial affairs on the acquisition of shares representing more than 10% of voting capital and the upper limit with 25% for participation of foreign entities in the capital of the company.[26]

2. An Overview of the Reasons of Setting up of Special States Rights

The public enterprises have been dealing with a wide range of activities from public services to purely economic activities. The public services constituting activities of public enterprises are ones being industrial and commercial in nature,[27] so, in the EU, mostly services of general economic interest ("SGEIs"). SGEIs are important from a socio-economic perspective and aiming at general (economic) interest. Other areas which are more strategic and related to national security are not economic, so generally stay within the autonomy of MSs.[28] Thus they don't fall within the scope of activity of public enterprises.

When we consider that the so-called the Golden share cases (hereinafter the special state rights cases) are the results of the privatization of public enterprises within the scope of liberalization, there is an obvious relationship between golden shares in the broad sense and SGEIs. Thus, the general (economic) interest emerges as the primary reason for providing such special rights in favor of MSs. Except for the case of

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23 Rickford (n 16) 59.

24 CJEU, Judgement of 26 March 2009, Case C-326/07, Commission v. Italy, ECLI:EU:C:2009:193, pr. 4, 5.

25 For example: *"The provisions of the Royal Decree of 10 June 1994 vesting in the State a 'golden share' in Société nationale de transport par canalisations"* see. CJEU, Judgement of 4 June 2002, Case C-503/99, Commission v. Belgium, ECLI:EU:C:2002:328, pr. 1; for another example: *"maintaining in force Article 2(1) and (3) of Decree No 93-1298 of 13 December 1993 vesting in the State a 'golden share' in Société Nationale Elf-Aquitaine"* see. CJEU, Judgement of 4 June 2002, Case C-483/99, Commission v. France, ECLI:EU:C:2002:327, pr. 1.

26 CJEU, Judgement of 4 June 2002, Case C-367/98, Commission v. Portugal, ECLI:EU:C:2002:326, pr. 13, 14; For other examples such as 'power to veto resolutions for the dissolution of the company' and 'power to appoint a non-voting director' see CJEU, Judgement of 26 March 2009, Case C-326/07, Commission v. Italy, ECLI:EU:C:2009:193, pr. 4.

27 Escarmelle et Melis (n 15) 367.

28 Daniele Gallo, 'The CJEU vis-à-vis EU and non-EU investors, between national and european solidarity: golden shares, sovereign investment and socio-economic protectionism under free movement rules', Working Paper No. 03-2014, LUISS Guido Carli/Department of Law 2.

Commission v. Germany of 23 October 2007 (Volkswagen I) and Commission v. Germany of 22 October 2013 (Volkswagen II), all the judgments of the Court of Justice (CJEU) pertain to special rights for states in the undertakings performing SGEIs.[29] In addition, public security concerns are frequently asserted as justification[30], but it may be said that these are indirect concerns stemming from the possible distortion of related services. As a matter of fact, the CJEU also accepted public security concerns by including under the notion of general interest similar to other indirect justification reasons such as national defense, public policy and health emergency concerns.[31]

Moreover, even though it wasn't accepted as a valid justification by CJEU, we encounter economic concerns asserted by states in some cases.[32] The details of the reasons for special rights in favor of states will be analyzed in section (D) under the title of *'Basis for Justification and Proportionality'*.

III. The Fundamental Freedoms and Cases of the CJEU

The European Union was created based on a common market idea which transformed into the current internal market concept[33] aiming at increasing efficiency. This requires liberalizing intra-union trade by removing borders and preventing national economic protectionism.[34]

As indicated in the art. 26(2) TFEU "*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*". Achieving this goal requires positive and negative integration. Positive integration occurs through harmonization. But the more important one is negative integration in terms of special state rights cases. Because negative integration necessitates the utilization of legal prohibitions that inhibit member states from restricting fundamental freedoms.[35]

According to the communication of the European Commission in 1997 on intra-EU investment, the special rights granted to national authorities constitute restriction of

[29] ibid 3; see for example CJEU, Judgement of 23 May 2000, Case C-58/99, Commission v. Italy, ECLI:EU:C:2000:280; CJEU, Judgement of 28 September 2006, Case C-282/04, Commission v. Netherlands, ECLI:EU:C:2006:608; CJEU, Judgement of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694.

[30] CJEU, Judgement of 14 March 2000, Case C-54/99, Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister of France, ECLI:EU:C:2000:124, pr. 7; CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 72.

[31] Gallo, 'On the Content and Scope of National and European Solidarity Under Free Movement Rules' (n 17) 832.

[32] CJEU, Judgement of 14 February 2008, Case C-274/06, Commission v. Spain, ECLI:EU:C:2008:86, pr. 44; CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 70.

[33] For the transformation process see. Jukka Snell, 'The Internal Market and the Philosophies of Market Integration' in Barnard and Peers (eds.), European Union Law (3th Edition, Oxford 2020) 334-363.

[34] Armin Cuyvers, 'The EU Common Market' in Ugirashebuja, Ruhangisa, Ottervanger and Cuyvers (eds.), East African Community Law: Institutional, Substantive and Comparative EU Aspects (Brill 2017) 294; Niamh Dunne, 'Liberalisation and the Pursuit of the Internal Market' (2018) 43(6) ELR 803, 807-808.

[35] Cuyvers (n 34) 297-98.

fundamental freedoms, particularly the free movement of capital and establishment.[36] This approach had been evidently embraced and clarified by the CJEU starting from 2000 with the case of Commission v. Italy and continued until the last case of Commission v. Hellenic Republic.[37] There is not any sign showing that the CJEU has given up on this approach till now.

C. The Effect of Golden Shares and Other Special State Rights on Fundamental Freedoms

I. Scope of Application:

1. Ratione Materiae:

a. Which Freedom is Applicable: Veiling Effect of Freedom of Capital on Freedom of Establishment or Vice Versa

Ratione materiae means the substantive scope of application, thus requires determining which fundamental freedom will be applied to the case. In the special state rights cases we encounter two types of freedom, freedom of capital and establishment.

The Commission stated in its Communication in 1997 that *"...the acquisition of controlling stakes in a domestic company by an EU investor, in addition to being a form of capital movement, is also covered under the scope of the right of establishment."*[38] The CJEU followed the same line and applied both freedoms and found infringements in the first special state rights case.[39] However, most of the CJEU decisions following the first case left this approach and analyzed the state measures only under the free movement of capital.[40] The general approach of the CJEU in these cases exhibits a veiling effect of freedom of capital on the freedom of establishment by indicating that "*such restrictions (on freedom of establishment) are a direct consequence of the obstacles to the free movement of capital.., since an infringement of article 73b of the treaty has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment.*"[41]

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[36] European Commission, Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment, 1997, C 220/15, pr. 4, 7, 8. (Hereinafter 'Commission: Intra-EU Investment').

[37] Commission: Special rights, p. 6; CJEU, Judgement of 23 May 2000, Case C-58/99, Commission v. Italy, ECLI:EU:C:2000:280; CJEU, Judgement of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694.

[38] Commission: Intra-EU İnvestment, pr. 4.

[39] CJEU, Judgement of 23 May 2000, Case C-58/99, Commission v. Italy, ECLI:EU:C:2000:280, pr. 20.

[40] Martha O'Brien, 'Case C-326/07, Commission of the European Communities v. Italian Republic, Judgment of the Court of Justice (Third Chamber) of 26 March 2009' (2010)(1) CMLR 245, 254; Tomas Szabados, 'Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union' (2015)(5) GLJ 1099, 1102.

[41] CJEU, Judgement of 4 June 2002, Case C-367/98, Commission v. Portugal, ECLI:EU:C:2002:326, p. 56; CJEU, Judgement of 4 June 2002, Case C-483/99, Commission v. France, ECLI:EU:C:2002:327, p. 56; CJEU, Judgement of 13 May 2003, Case C-463/00, Commission v. Spain, ECLI:EU:C:2003:272, p. 86.

After a stable application based on freedom of capital, the CJEU came up with a more subtle approach and set a distinction between the freedom of capital and establishment in the Judgement of Commission v. Italy.[42] The distinction brought by the CJEU was based on the existence of the 'definite influence' of the special right on the company's decisions and determination of its activities. If the special rights concern only the shareholdings that enable the holder to have a definite influence on a company's decisions, the freedom the case will be examined under its provision would be the freedom of establishment. In this case, the freedom of capital would be under the veiling effect of the freedom of establishment, because it would be only an unavoidable consequence of the latter.[43] But if '*National legislation not intended to apply only to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Article 43 EC and Article 56 EC*'.[44] As a natural consequence of this perspective, it should be stated that if there is a special right which doesn't have any 'definite influence' on a company's decisions it will fall only into the ambit of the freedom of capital.

This new approach was not pursued in its totality in the following cases. The CJEU returned to its previous approach embracing the veiling effect of the freedom of capital on the freedom of establishment. The court didn't mention the distinction based on 'definite effect' in the first following case and accepted the freedom of establishment as ancillary to the freedom of capital.[45] In the next two cases, even though the court evaluated the special state rights one by one based on 'definite influence' and classified them, it indicated at the end that since an infringement of the freedom of capital occurred there is no need for a separate examination of the freedom of establishment.[46]

The following and last case about special state rights returned to the approach embraced in the judgment of Commission v. Italy. The CJEU embraced the distinction based on 'definite influence', and the veiling effect of the freedom of establishment by foregrounding it from freedom of capital in the case of the special rights concern only the shareholdings which enable the holder to have a definite influence on a company's decisions.[47]

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42 Szabados (n 40) 1103-1105.

43 CJEU, Judgement of 26 March 2009, Case C-326/07, Commission v. Italy, ECLI:EU:C:2009:193, pr. 39.

44 ibid pr. 36.

45 CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 80.

46 CJEU, Judgement of 11 November 2010, Case C-543/08, Commission v. Portugal, ECLI:EU:C:2010:669, pr. 41-44, 99; CJEU, Judgement of 10 November 2011, Case C-212/09, Commission v. Portugal, ECLI:EU:C:2011:717, pr. 41-45, 98.

47 CJEU, Judgement of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694, pr. 21-23.

b. Assessment of the New Approach

As explained above the applicable law issue creates a tension between the two economic freedoms. The early judgments of the CJEU steadily gave a veiling effect to the free movement of capital, while the later cases presented an inconsistent approach although they generally observed the distinction between the two economic freedoms. Afterwards, the case of Commission v. Italy brought a more coherent approach, but the CJEU didn't follow this line coherently in the sequent judgments. But the case of Commission v. Hellenic Rep. returned to the approach embracing distinction between the two freedoms based on the existence of the 'definite influence' of the special right on the company's decisions and determination of its activities.

Even though the last approach is more coherent and systematic, there are some critics on it. The first is related to the ambiguity of the 'definite influence' concept. Because the Court didn't determine the limits of a definite influence on the company's decisions and the determination of its activities.[48] On the other hand, according to the CJEU, the movement of capital comprises a wide range of scope from direct investment which requires the holding of shares conferring the possibility of effectively participating in the management and control of the company, to indirect/portfolio investments whose intention is only financial without any influence on the management and control of the undertaking.[49] Thus, the vagueness of the border between the concept of 'definite influence' and 'effectively participating' makes the determination of applicable law quite difficult, in the case of direct investment.[50]

Another problem stemming from the new approach emerges in the case of the special rights concerning only the shareholdings which enable the holder to have a definite influence on a company's decisions. This is related to the extended scope of the freedom of capital and the third country dimension. So, the details will be given under the following title.

2. Ratione Personae

The problem pertaining to the extended scope of the freedom of capital and the third country dimension emerges in the case of the special rights concerning only the shareholdings which enable the holder to have a definite influence on a company's decisions. Then the free movement of capital stays under the shadow of freedom of establishment and is left out of assessment according to the CJEU.[51] This situation doesn't constitute a problem in the intra-EU context, because there is not any

48 Szabados (n 40) 1106.

49 CJEU, Judgement of 26 March 2009, Case C-326/07, Commission v. Italy, ECLI:EU:C:2009:193, pr. 38; CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 49.

50 O'Brien (n 40) 255.

51 CJEU, Judgement of 26 March 2009, Case C-326/07, Commission v. Italy, ECLI:EU:C:2009:193, pr. 39.

difference between the two freedoms in terms of the procedure to be applied, such as the application of the restriction test, the proportionality condition, and the possible result of infringement.[52]

However, in the case of third countries, the veiling effect of freedom of establishment may constrain non-EU entities to assert infringement of freedom of capital before the CJEU. Because, unlike other freedoms, art. 63 TFEU covers third country transactions without treating them differently from intra-EU ones.[53] But the new approach of the CJEU makes this opportunity unusable for third country citizens and entities. Thus, as indicated by AG Colomer "*even if a measure such as a power of veto in the decision to dissolve a company in a strategic sector were found to be incompatible with Article 43 EC, it would still be effective as against shareholders of non-member countries.*"[54]

After all, we should remark that all the special state rights cases have related intra-EU capital movement or establishment. However it is indicated that such a non-EU transaction is very likely only a matter of time.[55]

3. Ratione Territorii

The territorial scope is important for fundamental freedoms. Because the provisions don't apply to wholly internal situations and require a cross-border element. However, the Court broadly interprets this condition.[56] There is not any unique legal issue in the cases of special state rights pertaining to territorial scope. So, we suffice by stating only the general principle.

II. Determination of Obstacles on the Internal Market

1. Common Issues

a. The Use of art. 345 TFEU as a Shield Against Infringement of Fundamental Rights

Article 345 TFEU indicates that "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.*" The states can use this article as a shield to exempt special state rights from the provisions related to

[52] O'Brien (n 40) 257; Szabados (n 40) 1112, supra note 64.

[53] Leo Flynn, 'Free Movement of Capital' in Bernard and Peers (eds.), *European Union Law* (3th Edition, Oxford 2020) 490; Audronė Steiblytė and Jonathan Tomkin, 'Chapter 4: Capital and Payments' in Kellerbauer, Klamert and Tomkin (eds.), *Commentary on The EU Treaties and The Charter of Fundamental Rights* (Oxford 2019) 748.

[54] The Opinion of Advocate General Ruiz-Jarabo Colomer in CJEU, Delivered in 6 November 2008, Case C-326/07, Commission v. Italy, pr. 46. (Hereinafter: 'The Opinion of Colomer in 2008').

[55] O'Brien (n 40) 256.

[56] Steiblytė and Tomkin (n 53) 752; Jonathan Tomkin, 'Chapter 2: Right of Establishment' in Kellerbauer, Klamert and Tomkin (eds.), *Commentary on The EU Treaties and The Charter of Fundamental Rights* (Oxford 2019) 647, 656; Flynn (n 53) 489.

fundamental freedoms.[57] For example, in the case in which Greece was given special state rights such as prior authorization for the acquisition of voting rights and ex-post control in terms of strategic limited undertakings, Greece argued that "*..The measures taken by a Member State for the purposes of the privatization of those strategic undertakings controlled by the State fall outside of the scope of the fundamental freedoms enshrined in the Treaty..*"[58]

The expression of "*in no way prejudice*" in article 345 TFEU shows that the EU embraces a neutral position towards Member States' way of regulation of their system of property ownership.[59] So, as indicated also by the CJEU, a member state is fully competent to decide to privatize a public enterprise, because it is an economic policy choice.[60] So it can be concluded that the art. 345 could be used as a base of exemption from being subject to the provisions of fundamental freedoms before the privatization of public undertakings.[61]

However this neutrality shouldn't infringe the idea of an open market economy with free competition, ensuring allocative efficiency of sources.[62] So the CJEU stated in diverse wording repeatedly that "*The Member States cannot plead their own systems of property ownership by way of justification for obstacles to the fundamental freedoms guaranteed by the Treaty, resulting from a system of administrative authorisation relating to privatized undertakings*.."[63] In this respect, once a member state decides to privatize a public undertaking, it cannot rely on its property ownership system to evade from being subject to the provisions of the fundamental freedoms. Otherwise, it would create an unjustified legal gap which is convenient for arbitrary usage of the states in the system of protection of fundamental rights.[64]

This understanding which differentiates pre-privatization from the phase of once to start privatizing is based on the distinction between the existence and exercise of privatization and special state rights in terms of the art. 345 TFEU. In brief, it is stated that the art. 345 fulfills the conferral principle so the measures have a presumption of validity and cannot be seen per se as incompatible with the treaty, however, this does not exempt them from being subject to the fundamental rules of the Treaty. So

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57 CJEU, Judgement of 18 July 2007, Case C-503/04, Commission v. Germany, ECLI:EU:C:2007:432, pr. 37; CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 42, 63.

58 Judgment of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694, pr. 14.

59 Bram Akkermans and Eveline Ramaekers, 'Article 345 TFEU (ex-Article 295 EC), Its Meanings and Interpretations' (2010) 16(3) ELJ 292, 298.

60 Commission: Intra-EU Investment, p. 1, supra note 1; Judgment of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694, pr. 17.

61 Szabados (n 40) 1120.

62 Tomas Papadopoulos, 'Privatized Companies, Golden Shares and Property Ownership in the Euro Crisis Era: A Discussion After Commission v. Greece' (2015)(1) ECFR 1, 6.

63 CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 33; see also Judgment of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694, pr. 17, 18.

64 CJEU, Judgment of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694, pr. 18.

the existence of measures doesn't infringe in itself the fundamental freedoms, while their exercise may.[65]

As we saw above the CJEU embraces a narrow interpretation of the art. 345. Because it knows that the more the scope of art. 345 extends the more the fundamental rules would be breached.[66] In this respect, the court started to incorporate the ownership systems which resulted in the prohibition of privatization into the scope of fundamental rights. As we see in the Essent case, if the court detects any previous will of preference towards privatization in the national ownership system in terms of related public undertakings, it subjugates the related part of the system to the obligation of compliance with fundamental freedoms.[67] In our view, the CJEU did not completely differentiate from the distinction based on the existence and exercise of property rights as some authors claimed[68], rather it brought a narrower interpretation than before.

It should be lastly noted that the effect of the usage of the art. 345 in terms of the special state rights are mentioned as 'exemption' and 'justification'.[69] In our opinion, the effect of art. 345 shouldn't be discussed under the name of justification. Because a justification requires, as a precondition, the existence of an infringement. But the art. 345 is another article of the TFEU and could be seen as a 'lex specialis' in the face of the provision pertaining to fundamental freedoms, in the presumption of positive derogating effect against fundamental freedoms. In this assumption, there would not be an obstacle and infringement. Rather, at the beginning of the fundamental freedom assessment scheme, the measure would be out of the scope of the provisions of the fundamental freedoms and thus constitutes an exemption. Based on this opinion, we mentioned this matter under the title of 'Determination of Obstacles on the Internal Market', not under section (D). We embraced the same approach also in the following two subtitles (b) and (c).

b. The Horizontal Application of Art. 49 and 63 TFEU in the Special State Rights Cases: Public or Private?

As indicated above, under the title of 'types of special state rights', many privileges in favor of states have been given through articles of association, so seemingly stem from private law. Relying on this structure, Member States argued that the privileges have a private nature, so they couldn't be subject to the provisions of fundamental freedoms. For example, in the case of Commission v. Portugal, Portugal argued that:

65 The Opinion of Colomer in 2008, pr. 40, 41.

66 Papadopoulos (n 62) 9.

67 CJEU, Judgement of 22 October 2013, Case C-105/12, Netherlands v. Essent NV and others, ECLI:EU:C:2013:677, pr. 48.

68 Papadopoulos (n 62) 11.

69 CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 64; The Opinion of Colomer in 2008, pr. 39, 40.

> "The shares at issue are merely preferred shares under private law which cannot be assimilated to golden shares. Decree-Law No 44/95 merely envisages the possibility of providing for golden shares in PT's articles of association, without requiring that they actually be created. Consequently, the existence of those shares can be attributed only to the will of the company itself and not that of the State."[70]

The general approach of the CJEU in terms of this reasoning is negative. The court rejected this argument and found the privileges attributable to the state by indicating that the creation of golden shares was authorized by the state itself through the intermediary of its legislature, and they are not the result of the application of company law. In addition, the Court gives importance to the time of adoption of the related provisions and finds them attributable to the state relying on that they were adopted when the state had the majority of voting share and thus exercised control over the company.[71]

There are different opinions pertaining to the horizontal effect of fundamental freedoms, even varying with different types of freedom. As accepted by the Court, freedom of establishment may apply to the measures that are not public due to being issued by private entities such as trade unions, but to the extent these rules aimed at regulating in a collective manner certain areas.[72] However, the horizontal effect of freedom of capital is obscure. Because most of the cases related to capital have a vertical character, so the court hasn't shed light on the matter.[73] Furthermore, the member states argued in the special state rights cases that the provision stemmed from the private law transaction[74] or they didn't act in their capacity as a public authority.[75] Thus they argued that the art. 63 TFEU doesn't have a horizontal effect. But the CJEU rejected this argument and counted the related provisions within the scope of fundamental rights, nevertheless, it abstained from mentioning the horizontal effect.

The Court said for the first reasoning that once an agreement being subject of a legislation it sufficed to be considered as a state measure. Thus, the CJEU interpreted the state measure broadly.[76]

The second reasoning brings another discussion such as whether the art. 63 TFEU

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70 CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 41; see also CJEU, Judgement of 11 November 2010, Case C-543/08, Commission v. Portugal, ECLI:EU:C:2010:669, pr. 48.

71 CJEU, Judgement of 11 November 2010, Case C-543/08, Commission v. Portugal, ECLI:EU:C:2010:669, pr. 51-53; CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 53-56.

72 CJEU, Judgement of 11 December 2007, Case C-438/05, Commission v. Finland, ECLI:EU:C:2007:772, pr. 33; see also Tomkin (n 56) 654.

73 Ilektra Antonaki, 'Capital, Market and the State: Reconciling Free Movement of Capital with Public Interest Objectives' (Brill 2022) 110.

74 CJEU, Judgement of 23 October 2007, Case C-112/05, Commission v. Germany, ECLI:EU:C:2007:623, pr. 22, 26.

75 The Opinion of Advocate General Poiares Maduro in CJEU, Delivered on 6 April 2006, Case C-282/04, Commission v. Netherlands, ECLI:EU:C:2006:234, pr. 19. (Hereinafter 'The Opinion of AG Maduro').

76 CJEU, Judgement of 23 October 2007, Case C-112/05, Commission v. Germany, ECLI:EU:C:2007:623, pr 26; see also CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 53-56.

comprises the capacity of the state only as a public authority or together with its capacity as a private shareholder. There are different views on this issue amongst scholars. Some of them such as Rickford argue that according to the Art. 4(3) TEU saying "*Member states shall take any appropriate measure… to ensure fulfillment of the obligations arising out of the Treaties…*", the Member states are subject to the provisions of fundamental freedom without looking at the legal basis of their power to act in such a way.[77] He embraces the approach of AG Maduro in the case of Commission v. Netherlands where Maduro says "*Member States are subject to the rules on free movement,..., not on account of their functional capacity as public authority, but on account of their organic capacity as signatory of the Treaty.*"[78] Ringe shares the same idea by describing the EU law as a system based on analyses of the effect of a national measure rather than confining itself with formal characterizations.[79] Gerner-Beuerle supported this approach by finding the extension of the scope of the free movement of capital vertically towards the state actions taken without *ius imperii* reasonable.[80] However there are some scholars asserting, based on the related judgments of the CJEU, that the Court finds the state measures violative only if they provide to the state an unproportionate power compared to its shareholdings.[81]

The judgments of the CJEU doesn't show complete stability in this matter and didn't give place evidently to the distinction based on the public and private capacity of the state. In the case of Commission v. Netherlands, the Court didn't touch upon the approach brought by AG Maduro and classified the related special right as a state measure by embracing a similar approach in the case Commission v. Germany.[82] In the case of Commission v. Portugal, the Court connoted, in obiter dictum, that the state might not restrict the movement of capital when it acts in its capacity as a shareholder[83] by saying that:

> "The right to appoint a director constitutes a restriction on the free movement of capital since such a specific right constitutes a derogation from general company law and is laid down by a national legislative measure for the sole benefit of the public authorities… While it is true that that facility can be conferred by legislation as a right of a qualified minority, it is clear that it must, in such a case, be accessible to all shareholders and must not be reserved exclusively to the State."[84]

77 Rickford (n 16) 77.

78 The Opinion of AG Maduro, pr. 22; For a similar approach see The Opinion of Advocate General Mengozzi in CJEU, Delivered on 2 December 2009, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2009:743, pr. 65.

79 Wolf-Georg Ringe, 'Company Law and Free Movement of Capital' (2010)(2) CLJ, p. 378, 398.

80 Carsten Gerner-Beuerle, 'Shareholders Between the Market and the State. The VW Law and Other Interventions in the Market Economy' (2012)(49) CMLR 97, 131.

81 See Bruno Mestre, 'The ECJ's Decision on Portugal's "Golden Share": Broader Implications of a Restatement', (2010)(9) EUR. L. REP. 283, 286; and see Jan Lieder, 'Staatliche Sonderrechte' in Aktiengesellschaften, p. 172 and 'Zeitschrift Für Das Gesamte Handelsrecht und Wirtschaftsrecht' (2008) 306, 313-14 (both) as cited in Szabados (n 40) 1106-footnote 30, 1122-footnote 114.

82 CJEU, Judgement of 28 September 2006, Case C-282/04, Commission v. Netherlands, ECLI:EU:C:2005:712, pr. 22; see also CJEU, Judgement of 23 October 2007, Case C-112/05, Commission v. Germany, ECLI:EU:C:2007:623, pr 26.

83 Antonaki (n 73) 114.

84 CJEU, Judgement of 11 November 2010, Case C-543/08, Commission v. Portugal, ECLI:EU:C:2010:669, pr. 62.

c. The Role of art. 106(2) on the Assessment of Special State Rights Within the Scope of Four Freedoms

One of the ignored points in the literature and the judgments of the CJEU pertaining to special state rights is whether art. 106(2) could secure a measure from being subject to the compliance assessment based on the four freedoms. The governments couldn't realize the potential of the art. 106(2) as a means of securing their position in the special state right cases.[85] However the art. 106(2) ensures that the operators of SGEI's may keep the related special state rights exempted from being subject to the provisions in the EU Treaties, if they can prove that the measure is essential to fulfill the duty conferred on them.[86]

There are a few cases where the government demanded an exemption based on art. 106(2). In the case of Commission v. Spain, the government depended on art. 106(2) without expressing its argument in detail.[87] In its assessment, the CJEU accepted that the art. 106(2) "*seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.*", in so far as this assertion is proved by the government in detail about why the related SGEI would be jeopardized in the absence of the related measure.[88] Based on this explanation the court rejected the government's demand,[89] while didn't exclude the exemption potential of the art. 106(2).[90]

Subsequently, the case of Commission v. Portugal involves the same argument by the government, similar to the previous case, without going into the details of its argument. The court rejected this demand based on two reasons. The second was the same with the case of Commission v. Spain.[91] However, the first consideration of the CJEU was different and seems to have changed the approach of the CJEU in terms of application of art. 106(2) to golden shares. The Court firstly indicated that the art. 106(2) may justify the special or exclusive rights granted to the undertaking, which is entrusted with provision of a SGEI, when they are contrary to the rules of the Treaties.[92] Following this consideration, the Court said that:

"*Those provisions do not involve the granting of special or exclusive rights to GALP or the*

85 Gallo, 'On the Content and Scope of National and European Solidarity Under Free Movement Rules' (n 17) 834.

86 Manuel Kellerbauer and Maxian Rusche, 'Art. 106 TFEU' in Kellerbauer, Klamert and Tomkin (eds.), *Commentary on The EU Treaties and The Charter of Fundamental Rights (*Oxford 2019) 1097.

87 CJEU, Judgement of 13 May 2003, Case C-463/00, Commission v. Spain, ECLI:EU:C:2003:272, pr. 48.

88 ibid pr. 82.

89 ibid pr. 83.

90 Gallo, 'On the Content and Scope of National and European Solidarity Under Free Movement Rules' (n 17) 834.

91 CJEU, Judgement of 10 November 2011, Case C-212/09, Commission v. Portugal, ECLI:EU:C:2011:717, pr. 94.

92 ibid pr. 91.

classification of GALP's activities as services of general economic interest, but are concerned with the lawfulness of attributing to the Portuguese State, as a shareholder of that company, special rights in connection with golden shares."[93]

As a matter of fact, this approach was firstly embraced by the CJEU, only one year before, in another special state right judgment of Commission v. Portugal.[94] In addition, the Court was criticized based on this approach due to not being precise on the effect and role of art. 106(2) on the assessment of special state rights within the scope of four freedoms.[95]

2. Free Movement of Establishment and Special State Rights

The art. 49 has been seen as a specific expression of the principle of non-discrimination. However, the locution of this article is not confined with only discriminatory restrictions, accordingly, the CJEU incorporates all restrictions which hinder or render less attractive the exercises of the freedom of establishment by another member state's citizens into the scope of prohibition, without giving importance to being discriminatory or not.[96]

In accordance with this broad interpretation of the prohibition of the restriction of the freedom of establishment, there are some examples of restrictions on freedom of establishment in the special state right cases. In the judgment of Commission v. Italy, a law provision provided an opportunity to create special rights by decree of the President of the Council of Ministers. The CJEU mentioned the Gebhard formula and decided that the Italian Republic had failed to fulfill its obligation under the art. 49 and 63 TFEU.[97] The Court assessed the assertions of restrictive measures made by the Commission based on their, even possible, effect without referring to the Gebhard formula and found infringement of the freedom of establishment in the judgments of Commission v. Italy and Commission v. Hellenic Republic.[98]

3. Free Movement of Capital and Special State Rights

Art. 63 TFEU prohibits the restriction on the free movement of capital amongst member states. It covers non-discrimination-based restrictions as well as directly

93 ibid pr. 93.

94 CJEU, Judgement of 11 November 2010, Case C-543/08, Commission v. Portugal, ECLI:EU:C:2010:669, pr. 93-96; see also Antonaki (n 73) 125, footnote 257.

95 For a sharp critic see Gallo, 'On the Content and Scope of National and European Solidarity Under Free Movement Rules' (n 17) 835-838.

96 Tomkin (n 56) 658; Catherine Barnard and Jukka Snell, 'Free Movement of Legal Services and the Provision of Services' in Barnard and Peers (eds.), *European Union Law* (3th Edition, Oxford 2020) 449-450; see CJEU, Judgement of 25 July 1991, Case C-76/90, Manfred Säger v Dennemeyer & Co. Ltd, ECLI:EU:C:1991:331, pr. 12; For the 'hinder or render less attractive' formula see CJEU, Judgement of 30 November 1995, Case C-55/94, Gebhard v. Italy, ECLI:EU:C:1995:411, pr. 37; CJEU, Judgement of 22 January 2015, Case C-463/13, Stanley International Betting Ltd/Stanleybet Malta Ltd v. Ministero dell'Economia e delle Finanze/Agenzia delle Dogane e dei Monopoli di Stato, ECLI:EU:C:2015:25, pr. 45.

97 CJEU, Judgement of 23 May 2000, Case C-58/99, Commission v. Italy, ECLI:EU:C:2000:280, pr. 13, 20.

98 CJEU, Judgement of 26 March 2009, Case C-326/07, Commission v. Italy, ECLI:EU:C:2009:193, pr. 56, 66, 72, 75; CJEU, Judgement of 8 November 2012, Case C-244/11, Commission v. Hellenic Rep., ECLI:EU:C:2012:694, pr. 86, 87.

and indirectly discriminatory ones.[99] Because the CJEU embraces a broad interpretation. Thus, the case law covers a lot of measures such as which are liable to dissuade its residence from obtaining loans or making investments in other member states, excessive fines, and prior authorization systems.[100]

The CJEU embraced a broad interpretation in special state right cases as well, similar to the over-extensive application within Dassonville and Cassis de Dijon cases.[101] When it confronted the distinction between discrimination-based and non-discrimination-based restrictions, the CJEU said that "*...prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.*"[102]

Member states have continuously made opposition against this extensive understanding pertaining to the restriction of capital and asserted a distinction similar to the Keck decision between the acquisition of shareholding and the management of the company by making an analogy between the golden shares and selling arrangements.[103]

In the judgment of Commission v. Spain, The UK, as an intervening party, made an assertion based on a distinction between the acquisition of shareholding and the management of the company and said that there is not any restriction on market access. But the CJEU considered this argument as cannot be accepted and indicated that "*The measures at issue do not have comparable effects to those of the rules which the judgment in Keck and Mithouard..*"[104]

The CJEU substantially embraced the same approach in the case of Commission v. The UK. Against the argument of the UK government similar to the judgment above, the CJEU said that "*The measures at issue are not comparable to the rules concerning selling arrangements.*"[105] and rejected this assertion. However, according to our evaluation, even though some authors found the rejection of the CEJU in this case very strong[106], the following argument of the CJEU leaves the door open by making an assessment based on the effect on market access, similar to its approach in the cases of Doc Morris I and III.[107]

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99 Steiblytė and Tomkin (n 53) 752-753.

100 CJEU, Judgement of 26 September 2000, Case C-478/98, Commission v. Belgium, ECLI:EU:C:2000:497, pr. 18; CJEU, Judgement of 16 July 2015, Case C-255/14, Robert Michal Chmielewski v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- És Pénzügyőri Főigazgatósága, ECLI:EU:C:2015:475, pr. 30; CJEU, Judgement of 14 March 2000, Case C-54/99, Association Eglise de Scientologie de Paris and Scientology International Reserves Trust v The Prime Minister of France, ECLI:EU:C:2000:124, pr. 14.

101 Antonaki (n 73) 149-150.

102 CJEU, Judgement of 4 June 2002, Case C-483/99, Commission v. France, ECLI:EU:C:2002:327, pr. 40.

103 Antonaki (n 73) 149-150; Szabados (n 40) 1124.

104 CJEU, Judgement of 13 May 2003, Case C-463/00, Commission v. Spain, ECLI:EU:C:2003:272, pr. 49, 58,59.

105 CJEU, Judgement of 13 May 2003, Case C-98/01, Commission v. UK, ECLI:EU:C:2003:273, pr. 32.

106 Andrea Biondi, 'When the State is the Owner—Some Further Comments on the Court of Justice 'Golden Shares' Strategy' in Bernitz and Ringe (eds.), *Company Law and Economic Protectionism: New Challenges to European Integration* (Oxford 2011) 96.

107 See CJEU, Judgement of 13 May 2003, Case C-98/01, Commission v. UK, ECLI:EU:C:2003:273, pr. 46, 47; The court referred in pr. 46 to the case of Alpine Investment, pr. 37. for a similar -in a certain respect- evaluation based on the case of Alpine Investment pr. 36-38 see Antonaki (n 73) 152.

A Keck-like distinction was demanded also in the three cases related to measures set by the Portugal government. The CJEU didn't find related national measures comparable to the rules concerning selling arrangements and rejected a Keck-like application.[108]

It should be indicated that we encounter a Keck-like approach in a preliminary ruling of the CJEU on freedom of establishment. The court drew a distinction between 'business-related' and 'establishment-related' issues[109], without mentioning explicitly the Keck approach, by saying that "*the application of a provision of (such a) national law… in no way concerns the formation of a company in a given Member State or its subsequent establishment in another Member State, to the extent that that provision of national law is applicable only after that company has been formed…*"[110]

This ruling of the CJEU was interpreted as a deviation from its broad interpretation of the freedom of establishment in the case of Centros.[111] It also drew criticisms from scholars. Ringe said that "*the scope of art.49 TFEU does not differentiate but rather applies broadly to 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings' without there being any room for a differentiated interpretation.*"[112]

However, we have not encountered a keck analogy in the special state right cases which were assessed based on the freedom of establishment. Among other special state right cases, even though the government made a keck analogy for art. 49 and 63 TFEU together[113], the court accepted the veiling effect of the art. 63 on the art. 49[114] and assessed the related Keck-like distinction only based on the freedom of capital.[115]

D. Basis for Justification and Proportionality

I. Basis for Justification

The benefits stemming from the internal market object are crucial for the EU. However, these are not inviolable and absolute. So, a restriction of freedom of capital or establishment could be justified based on so-called written/treaty-based

[108] CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 43, 65-67; CJEU, Judgement of 11 November 2010, Case C-543/08, Commission v. Portugal, ECLI:EU:C:2010:669, pr. 32, 66-68; CJEU, Judgement of 10 November 2011, Case C-212/09, Commission v. Portugal, ECLI:EU:C:2011:717, pr. 37, 63-65.

[109] Wolf-Georg Ringe, 'Kornhaas and the Challenge of Applying Keck in Establishment' (2017)(2) ELR 270, 278.

[110] CJEU, Judgement of 10 December 2015, Case C-594/14, Simona Kornhass v. Thomas Dithmar, ECLI:EU:C:2015:806, pr. 28.

[111] Wolf-Georg Ringe, 'Kornhaas and the Limits of Corporate Establishment'(Oxford Business Law Blog 25 May 2016) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/05/kornhaas-and-limits-corporate-establishment> (last accessed on 20/04/2023).

[112] Ringe, 'Kornhaas and the Challenge of Applying Keck in Establishment' (n 109) 276.

[113] CJEU, Judgement of 10 November 2011, Case C-212/09, Commission v. Portugal, ECLI:EU:C:2011:717, pr. 37.

[114] ibid pr. 98.

[115] ibid pr. 63-65.

justifications or so-called unwritten/jurisprudence-based justifications.[116] If there is a directly or indirectly discriminatory measure this could be justified by relying on grounds expressly provided for in the treaty. If the restrictive measure applies without distinction (non-discriminatory) but nevertheless hinders or restricts market access, these could be justified based on overriding reasons relating to the general interest.[117]

According to art. 52 TFEU, the reasons for justification cover public policy, public security, and public health, while art. 65 TFEU involves public policy and public security. The overriding reasons relating to the general interest comprise innumerable bases for justification such as 'consumer protection'[118], 'minority shareholder and employee'[119], and 'environmental protection'[120].

As indicated under the title of '*An Overview of the Reasons of Setting up of Special States Rights*' member states have certain reasons underlying the related measures. When we observe the judgment of the CJEU, there are various bases for justification asserted by member states and accepted by the court. These cover the objectives from public interest to the economic ones. Below, we will show the most prominent reasons for justification by exemplifying from cases.

1. Treaty Based Reasons for Justification

a. The Objective Based-on Public Security

The special state rights emerge in the period of privatization. Some of these privatizations are related to undertakings operating in critical and sensitive industries such as energy and telecommunication. Naturally, a complete loss of control over these public enterprises raises public security concerns for member states.

One example of this concern related to the energy sector is the case of Commission v. France. The concern of the French government was the safeguarding of supplies of petroleum products in the event of a crisis (, war or terrorism). The CJEU found this objective acceptable under the public security consideration.[121]

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116 Flynn (n 53) 498; Barnard and Snell (n 96) 455-456.

117 Tomkin (n 56) 658; Steiblytė and Tomkin (n 53) 753.

118 CJEU, Judgement of 7 June 2012, Case C-39/11, VBV - Vorsorgekasse AG v. Finanzmarktaufsichtsbehörde (FMA), ECLI:EU:C:2012:327, pr. 35.

119 CJEU, Judgement of 5 November 2002, Case C-212/09, Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC), ECLI:EU:C:2002:632, pr. 92.

120 CJEU, Judgement of 11 March 2010, Case C-384/08, Attanasio Group Srl v. Comune di Carbognano, ECLI:EU:C:2010:133, pr. 50.

121 CJEU, Judgement of 4 June 2002, Case C-483/99, Commission v. France, ECLI:EU:C:2002:327, pr. 47; CJEU, Judgement du 17 Juillet 2008, Case C-207/07, Commission v. Spain, ECLI:EU:C:2008:428, pr. 46; CJEU, Judgement of 10 November 2011, Case C-212/09, Commission v. Portugal, ECLI:EU:C:2011:717, pr. 82.

Another case was related to the telecommunication sector. In this case, the CJEU held that the objective of ensuring the security of availability of the telecommunications network in case of crisis, war or terrorism may constitute a ground of public security.[122]

2. Overriding Reasons for Justification

a. The Objective Based-on Guaranteeing the Services of General Interest

The notion of 'service public' whose source is France was transposed to the EU as Services of General Economic Interest (SGEI) with a narrower scope and certainty compared to the first. As indicated above some special right cases were linked to the public undertakings whose metier was performing SGEI's. So, the governments of member states tried to guarantee the services of general interest in certain cases by arranging special rights in favor of themselves.

In the case of Commission v. Netherlands, the government argued that the measure is necessary to guarantee universal postal service, particularly by saving the continuity of the related undertaking. The Court accepted that the universal postal service is a SGEI and the guarantee of a service of general interest may constitute an overriding reason.[123]

b. Protection of Workers and Minority Shareholders

One of the main tensions in company law stems from the weak position of workers and minority shareholders in the face of majority shareholders who have a decisive effect on the management board. Hence, we can encounter the protection of workers and minority shareholders as a base for justification in the special state right cases.

In the case of Commission v. Germany, the government asserted these two objectives as overriding reasons in the general interest before the court.[124] Even though the opposition of the commission indicated that the aim of the related law is seeking to satisfy the interests of economic policy, the Court assessed that the related concerns may constitute legitimate interest and justify the legislative intervention.[125]

c. Economic Objectives

As indicated above the member states asserted economic concerns as overriding reasons in the general interest. In the case of Commission v. Portugal, the Portuguese government argued the measure is justified based on overriding reasons of the

[122] CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 72.

[123] CJEU, Judgement of 28 September 2006, (joined) Cases C-282/04-C-283/04, Commission v. Netherlands, ECLI:EU:C:2006:608, pr. 37, 38.

[124] CJEU, Judgement of 23 October 2007, Case C-112/05, Commission v. Germany, ECLI:EU:C:2007:623, pr. 70.

[125] ibid pr. 71, 74, 77.

general interest by relying on *'safeguarding its financial interest',* and *'economic policy objectives'*.[126] The CJEU held, in its decision, that neither safeguarding the financial interest of the government nor economic policy objectives may constitute a valid justification.[127] Because, as indicated by the CJEU in various special state right cases by referring to its settled case law[128], economic grounds such as 'avoiding economic disruption of the capital market', 'strengthening the competitive structure of the market', 'ensuring the condition of competition', or 'modernizing and increasing the efficiency of means of production' cannot provide a valid basis for justification.[129]

II. Proportionality

The assessment scheme of four freedoms requires investigating whether the possible justification basis, which is considered as valid by the CJEU, is proportionate. The proportionality test includes three phases that should be fulfilled in order for a state measure to be justified and abstain from infringement of one of four freedoms. These phases are suitability, necessity and appropriateness. Under the phase of suitability, we check whether the measure is capable of reaching the desired goal. The phase of necessity investigates whether there is an alternative measure that should be capable of reaching the same goal at the same extent. The appropriateness phase ensures to see whether the desired goal is in balance with the burden incurred due to the restriction stemming from the state measure.

As we saw in the previous subtitle (D.I) there are various justification bases asserted by governments and held as a valid justification by the CJEU. However, all these assertions, with the exception of the case of Commission v. Belgium[130], have not reached their goal due to not being able to pass the proportionality test, thus the CJEU found the related measure infringing the freedom of capital or/and freedom. This situation is a result of that while the CJEU's extensive interpretation created a vast ground in which various types of justification could bring forward, on the other hand, it embraces a tough attitude and assesses more firmly the matter of justification in terms of proportionality.[131] In addition, the Court emphasized that '*the requirements of [the related justification] must be interpreted strictly*' in certain special state

[126] CJEU, Judgement of 4 June 2002, Case C-367/98, Commission v. Portugal, ECLI:EU:C:2002:326, pr. 31, 32.

[127] ibid, pr. 52; see Antonaki (n 73) 127.

[128] In the judgment of 4 June 2004 'the settled case law' referred to the cases about freedom of goods (Case C-265/95, *Commission* v *France* [1997]) and providing services (Case C-398/95 *SETTG* [1997]). But in the following cases 'the settled case law' referred to the related paragraph of the previous special state right cases, for example the judgment of 8 July 2010 (Commission v. Portugal) referred to the judgment of 4 June 2004 (Commission v. Portugal) as a settled case.

[129] CJEU, Judgement of 4 June 2002, Case C-367/98, Commission v. Portugal, ECLI:EU:C:2002:326, pr. 52; CJEU, Judgement of 2 June 2005, Case C-174/04, Commission v. Italy, ECLI:EU:C:2005:350, pr. 37; CJEU, Judgement of 14 February 2008, Case C-274/06, Commission v. Spain, ECLI:EU:C:2008:86, pr. 44; CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 70.

[130] CJEU, Judgement of 4 June 2002, Case C-503/99, Commission v. Belgium, ECLI:EU:C:2002:328, pr. 59.

[131] Catherine Barnard, 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?' in Catherine Barnard and Okeoghene Odudu (eds.), *The Outer Limits of European Law* (Hard 2009) 299.

right cases.[132] So the member states should present a high degree of evidence so as to be found justified for the related measures.[133]

The justification assertions in the special state right cases have been found unproportionate based on different reasons. Below, we will examine case law by indicating the related phase of proportionality in which the CJEU is beset with a problem.

In the case of Commission v. Germany, the CJEU said that Germany couldn't explain "*why [the measure] is appropriate and necessary for the federal and state authorities to maintain a strengthened and irremovable position in the capital of that company*".[134] According to this statement, we can infer that the Court couldn't find a suitable the measure in order to reach the desired aim due to the failure of Germany to demonstrate the link between the measure and the objective which is 'protection of workers and minority shareholders'.[135]

The CJEU made a systematic assessment based on the phase of necessity in the case of 'Église de Scientologie' in which the measure is prior authorization. The Court firstly mentioned the criteria by indicating that "*in so far as those objectives cannot be attained by less restrictive measures.*"[136] After that, the Court made a determination through an example measure which is a prior declaration and found it inadequate, so not suitable to counter the related threat to public policy and security. In the following paragraph, this time, the court handled the prior authorization system in the real case and found there a lack of precision and a contradiction with the principle of legal certainty.[137] We can infer from the course of the assessment, followed by the CJEU, that the lack of certainty gave wide discretion to the state, so the measure couldn't pass the phase of necessity.

As a matter of fact, the court affirmed this interference evidently in the case of Commission v. France in which the government set a prior approval process by the Minister for Economic Affairs for direct or indirect shareholding which exceeds certain limits. The Court accepted the justification base of ensuring minimum supply of petroleum products in the event of a crisis, but found in the prior approval system lack of precision in terms of its exercise, and marked it as contrary to the principle

[132] CJEU, Judgement of 4 June 2002, Case C-483/99, Commission v. France, ECLI:EU:C:2002:327, pr. 48; CJEU, Judgement of 10 November 2011, Case C-212/09, Commission v. Portugal, ECLI:EU:C:2011:717, pr. 82.

[133] Antonaki (n 73) 128.

[134] CJEU, Judgement of 23 October 2007, Case C-112/05, Commission v. Germany, ECLI:EU:C:2007:623, pr. 74, 78; For a similar consideration see CJEU, Judgement of 2 June 2005, Case C-174/04, Commission v. Italy, ECLI:EU:C:2005:350, pr. 40.

[135] For a determination of not being suitable of the measure of 'prior declaration' due to its inadequateness see CJEU, Judgement of 14 March 2000, Case C-54/99, Association Eglise de Scientologie de Paris and Scientology International Reserves Trust v The Prime Minister of France, ECLI:EU:C:2000:124, pr. 20.

[136] ibid pr. 18.

[137] ibid pr. 20, 21.

of legal certainty.[138] Based on these determination the court said that "the legislation in issue goes beyond what is necessary in order to attain the objective indicated."[139], hence held the related measure as unproportionate based on necessity criteria.

As indicated above the proportionality consists of three phases in literature. But The CJEU clearly mentioned only the phases of suitability and necessity in the special state right cases.[140] We could not encounter the technical use of appropriateness in the special state right cases.[141] In fact it is already hard to find a clear assessment of this phase, because most justifications are eliminated in the first two phases.

E. Conclusion

The special state right concept emerged as a reaction of the member states against the privatization movement gained density in continental Europe between the years 1990s and the first half of the 2000s. The Global financial crisis in 2008 extended this period to the mid of 2010s.

Starting from the first judgment, the CJEU had dealt with these state measures with respect to its convenience with the freedom of capital or/and establishment, during a relatively sufficient period of about 15 years. However, there remained a lot of legal sub-issues unanswered clearly or inconsistent such as 'the selection of applicable law', 'the derogative effect of art. 345 TFEU in favor of special state rights in the face of Fundamental Rights', 'Horizontal application of Art. 49 and 63 TFEU in the special state rights cases', and 'the role of art. 106(2) on the assessment of special state rights within the scope of four freedoms'. Further, even though there are a lot of academic studies, of different types, related to the topic, academia couldn't sufficiently clarify these points of obscurity. Notwithstanding, we observed, in the special state right cases, the continuity of consistent application of the CJEU is particularly related to the phase of justification and proportionality.

It can be argued that the privatization in Europe was a limited period and completed predominantly, so it is a rare possibility to encounter new special state right cases. However, we don't adopt such an approach embraced in this determination in the social and legal fields. Because these fields are like tides. With the emergence of similar conditions, the concepts in these fields can reappear exactly the same or slightly changed. So, in any case, it is important to develop a clear understanding for

[138] CJEU, Judgement of 4 June 2002, Case C-483/99, Commission v. France, ECLI:EU:C:2002:327, pr. 50.

[139] ibid, pr. 53; For a similar ruling see CJEU, Judgement du 17 Juillet 2008, Case C-207/07, Commission v. Spain, ECLI:EU:C:2008:428, pr. 44.

[140] CJEU, Judgement of 4 June 2002, Case C-503/99, Commission v. Belgium, ECLI:EU:C:2002:328, pr. 45; CJEU, Judgement of 2 June 2005, Case C-174/04, Commission v. Italy, ECLI:EU:C:2005:350, pr. 35.

[141] The word 'appropriate' was used in the meaning of 'suitable' in several cases. For example see CJEU, Judgement of 28 September 2006, (joined) Cases C-282/04-C-283/04, Commission v. Netherlands, ECLI:EU:C:2006:608, pr. 33; CJEU, Judgement of 23 October 2007, Case C-112/05, Commission v. Germany, ECLI:EU:C:2007:623, pr. 74, 78; CJEU, Judgement of 8 July 2010, Case C-171/08, Commission v. Portugal, ECLI:EU:C:2010:412, pr. 69.

each one of the legal issues the special state right cases brought to light. As a matter of fact, we witnessed this waving in the last century where classical liberalism left its place to the regulation under controlled state interventionism/welfare state in the post-war circumstances, regulation left its place deregulation under the effect of neo-liberalism.[142] After the millennium, the deregulation movement transformed into re-regulation in the phase of so-called post-neoliberalism. Actually, we saw that there is a rising trend in state intervention into the markets starting from the global financial crisis and accretive with the Covid-19 Pandemic.[143]

Based on these explanations, the judgments of the CJEU on the special state right cases are important and necessitate to be clarified by scholars, and, in the case of granting a new special right, by the CJEU. It may create a well-structured legal understanding for the possible new cases pertaining to special state rights, as well as supporting the development of consistent legal approaches for new types of state intervention in terms of four freedoms.

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[142] Rosanvallon (n 8) 10; Jonathan D. Ostry, Prakash Loungani and Davide Furceri, 'Neoliberalism: Oversold' (2016)(2) FD 38, 38; Csaba (n 7) 547.

[143] Peter Camesasca and Horst Henschen, '"No Issues" with Member State Participations – State-backed EU Companies as the New Normal?' (Covington Competition, 15 April 2020) <https://www.covcompetition.com/2020/04/no-issues-with-member-state-participations-state-backed-eu-companies-as-the-new-normal/> (last accessed on 24/04/2023); see also Jens Maeße, 'Post-neoliberalism in Europe? How economic discourses have changed through COVID-19 pandemic' (2020)(13) Post-Filosofie 119-145.

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