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WOLF-GEORG RINGE

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Dr Wolf-Georg Ringe

*University of Oxford, Faculty of Law
Institute of European and Comparative Law
St Cross Building, St Cross Road, Oxford OX1 3UL
georg.ringe@law.ox.ac.uk*

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nothing escapes the European Court?***

Abstract: Company law has long shared an uneasy relationship European Union law. Whereas the traditional approach of the Court of Justice of the European Union was to challenge national company law rules that were applied to foreign companies under the freedom of establishment (*Centros* and its progeny), recent case-law suggests that the Court might embark on a general assessment of domestic company law rules. This tendency is based on an extended interpretation of the free movement of capital, which became most prominently relevant in the recent *Volkswagen* case.

A systematic analysis of the latter fundamental freedom and its relationship to company law demonstrates that this tendency is not without risk and might well end up in a ‘quality control’ of national company law through the European Court. However, differentiated outcomes will be found depending on the actor in question (private party or State), and depending on the beneficiary of the measure at stake. It is argued that State measures potentially will always trigger the scope of application of the free movement of capital, irrespective of their nature or objective. Hence, even general statutory company law can be caught by this fundamental freedom. However, the decisive test will be identified as whether the measure has a ‘detering effect’ on potential investors from other Member States. Special rights for the State are one extreme example which are surely caught by EU law, and purely private arrangements within the articles of association, are the other extreme. This test is recommended to serve the Court as guidance in future cases.

Keywords: free movement of capital, company law, golden shares, public ownership, privatisation, state prerogatives, multiple voting rights, voting caps

***Domestic company law and free movement of capital:
nothing escapes the European Court?***

WOLF-GEORG RINGE*

I. INTRODUCTION

EU law has long shared an uneasy relationship with national company law. Under the heading of ‘positive integration’, an ambitious and active harmonisation programme for company law was set up, most notably in the 1970s and 1980s.¹ This heavy-loaded programme has become restrained in recent years and has now been replaced with a more careful nuanced approach towards EU lawmaking, examples of which are optional instruments and recommendations.² By contrast, ‘negative integration’, *i.e.* the striking down of national barriers to cross-border business activity, has become more influential in the field of company law, subjecting many domestic company law rules to the fundamental freedoms of the Treaties.³ Of the four freedoms⁴ – goods, services, establishment and capital – the latter two are the most relevant for the field of company law. Whilst in the past the focus for the Court of Justice of the EU⁵ in this context may have been on the

* Dr Wolf-Georg Ringe, MJur (Oxon), Lecturer at the University of Oxford, Deputy Director of the Institute of European and Comparative Law, Fellow at Christ Church. Earlier versions of this paper were presented at the Society of Legal Scholars’ Annual Meeting at the London School of Economics, at the European University Institute in Florence, Italy, at a Research Conference at University College Dublin and at the Corporate Finance LLM Course, University College London. In addition to the participants of these events, I would like to thank Frank Benyon, Alexander Hellgardt, James Morrison, Dan Prentice, Arad Reisberg, Morris Schonberg, Heike Schweitzer and Derrick Wyatt.

¹ V Edwards, *EC Company Law* (Clarendon Press, Oxford 1999) p 15 ff.

² G Hertig and JA McCahery, ‘Optional rather than Mandatory EU Company Law: Framework and Specific Proposals’ (2006) 3 *European Company and Financial Law Review* 341.

³ The ‘economic freedoms’ were previously contained in the EC Treaty and are now found in the Treaty on the Functioning of the European Union (TFEU).

⁴ See C Barnard, *The Substantive Law of the EU – The Four Freedoms* (2nd edn, Oxford, OUP 2007).

⁵ The Court of Justice of the European Union (CJEU) is the former European Court of Justice (ECJ). In what follows, both denominations will be used, depending on the context.

tension between company law and freedom of *establishment*,⁶ the most recent case-law of the Court on free movement of *capital*, particularly *Commission v Germany* concerning the German law on Volkswagen (the ‘VW law’)⁷, has opened up a new front. The question to be considered here is to what extent general rules of company law, which are non-discriminatorily applied to all market participants, can be subject to an assessment under EU law, and consequently how likely a ‘quality control’ review of national company law by the Court of Justice may become.

The significance of this question lies at the heart of the broader discussion about the role of the State and State intervention in private markets.⁸ The Court of Justice appears to have assumed the task of developing and maintaining an equilibrium between the drive of free, competitive markets and the reflexive action on the part of some Member States to retain autonomy in the sphere of domestic economic policy. The current position of this equilibrium (that for now is expressed in the *Volkswagen* case) is that the continued involvement of the State in a company impacts upon the competitive process and the whole corporate governance regime. But the *Volkswagen* case may go even further than this, touching upon the limits which EU law places on Member States when they attempt to organise the internal affairs of their companies. This means that the Court is in fact creating a set of EU-based values on regulating companies, rather than purely safeguarding the interests of market integration. In the case law relating to golden shares, we can observe that in addition to reviewing ‘special rights’ (golden shares), the Court is becoming more willing to assess general provisions of company law. This entails that not only the State exercising public authority, but also the State acting as a regular shareholder, and ultimately even individuals acting in their private capacity might be subjected to a substantive control by Luxembourg. In more recent times, this has become ever more

⁶ See e.g. W.H. Roth, ‘From *Centros* to *Ueberseering*: Free Movement Of Companies, Private International Law, and Community Law’ (2003) 52 I.C.L.Q. 177; J. Armour, ‘Who Should Make Corporate Law? EC Legislation versus Regulatory Competition’ 58 (2005) Current Legal Problems 369; M. Becht, C. Mayer and H. Wagner, ‘Where do firms incorporate? Deregulation and the cost of entry’ (2008) 14 Journal of Corporate Finance 241.

⁷ Case C-112/05 *Commission v Germany* [2007] ECR I-8995, the ‘*Volkswagen* case’.

⁸ See E. Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford 2007); C. Barnard, ‘Restricting Restrictions: Lessons for the EU from the US?’ (2009) 68 Cambridge Law Journal 575.

relevant, since the 2008/09 nationalisations of banks and other industrial companies show that Member States continue to oscillate between nationalisation and privatisation. The State as a significant shareholder in companies of national importance will be closely watched by European institutions over the next years.

In order to contribute to this broader discussion, this paper revisits the relationship between company law and free movement of capital along with the latest developments in both case-law and legislation, and systematically analyses the doctrinal concepts informing the case-law of the European Court. Starting with the *Volkswagen* case, this analysis concludes that the Court will eventually end up engaged in a ‘quality control’ of domestic company law through European Union law, and demonstrates that such a development is not without risk. The current case-law presents a confusing and inconclusive picture of the capital freedom and thus needs to be reconsidered. It is here submitted that the decisive test should be whether the measure at stake has a ‘detering effect’ on potential investors from other Member States. The existence of special rights for the State constitutes one extreme which is surely caught by EU law, whilst the existence of purely private arrangements within the articles of association, is the other extreme. The findings will be of general importance for our understanding of the applicability of EU law in general and the future development of state involvement in companies. Ultimately, implications can be drawn from the extent to which – in the absence of express harmonisation – national company law (or, indeed, any other area of the law) will be controlled by the European Court and may be subjected to the Court’s own values.

II. FREEDOM OF ESTABLISHMENT AND FREE MOVEMENT OF CAPITAL

The European Commission has long been engaged in assessing the compatibility of company law rules with EU law. At first, the Commission’s focus was on the potential for company law rules to infringe the freedom of *establishment* (now Articles 49-55 TFEU⁹). This was partly on account of the relative under-

⁹ ex Articles 43-48 EC Treaty.

development of the free movement of capital, but was also incited by the encouragement from the Court's rulings in *Factortame*¹⁰ and *Commission v France* for an expansive scope of the freedom of establishment¹¹.

Over the years, the freedom of establishment has been regularly used as a legal tool to assess the validity of corporate mobility rules (*i.e.* company law rules that provide for a relocation or reorganisation of a company in other Member States) and of rules discriminating against migrating companies by the respective host Member State. The famous series of cases from *Centros*¹² to *Cartesio*¹³ has had a huge impact on our business world.¹⁴ Recent case-law has confirmed, however, that its application can be triggered independently from the question of whether a Member State applies provisions of domestic company law to foreign companies or not. Whilst *Centros*, *Inspire Art*¹⁵ and other establishment cases concerned the applicability of domestic company law to *foreign* companies, thereby hindering the establishment of this company in its host Member State, establishment can also catch rules – applicable to domestic companies – that make a control transaction (*e.g.* a takeover) by a foreign offeror more difficult. The reasoning is that the foreign offeror will find it more difficult to 'establish' itself through this takeover in the target company's market.

However, the assessment of company law rules as to their compatibility with the free movement of *capital* (now Articles 63-66 TFEU) is potentially far more potent than a compatibility assessment with the freedom of establishment. This is because unlike the latter freedom, the applicability of free movement of capital is not limited to investments that confer control. Article 63 TFEU provides that '[...] all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'. While the Treaty does not define the concept of 'movement of capital', the Court's case-law treats

¹⁰ Case C-221/89 *R. v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905.

¹¹ Case 270/83 *Commission v France* [1986] ECR 273.

¹² Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

¹³ Case C-210/06 *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641.

¹⁴ As to the practical consequences, see M. Becht, C. Mayer and H. Wagner, 'Where do firms incorporate? Deregulation and the cost of entry' (2008) 14 *Journal of Corporate Finance* 241.

¹⁵ Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

the terminology used in Council Directive 88/361/EEC¹⁶ as an indicative list of capital movements.¹⁷ Movements of capital for the purposes of Article 63(1) TFEU thus include in particular investments in the form of a shareholding which confers the possibility of effectively participating in the management and control of an undertaking ('direct investments') and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing its management and control ('portfolio investments').¹⁸ The applicability of the capital freedom is therefore – unlike establishment – not dependent upon someone seeking a permanent 'establishment' abroad, but already comes into play when a potential investor wishes to invest into shares of a company in another Member State. A violation is possible if the national measure in question deters such potential investors from acquiring a share in a company.¹⁹ Thus, the scope of applicability of the free movement of capital is much wider and could even be prone to encompass all general rules of company law.

In a recent case, the Court of Justice has reattempted to specify the delineation between the two freedoms. It reiterated that the criterion of 'control' or 'definite influence' is the decisive delineation factor between the two. Provisions of national law which apply to shareholdings allowing a definite influence or control of the company's decisions and to determine its activities fall within the ambit *ratione materiae* of the freedom of establishment, whereas 'direct investments', *i.e.* investments establishing lasting and direct links between investor and issuer and allowing the investor to participate effectively in the management of that company or in its control fall within the ambit of the free movement of capital.²⁰ The same holds true (although not explicitly mentioned) for portfolio investments.²¹ The Court went on to give concrete guidelines as to

¹⁶ Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [1998] OJ L178, 5.

¹⁷ See, in particular, case C-367/98 *Commission v Portugal* [2002] ECR I-4731, at [37], and case C-112/05 *Commission v Germany* [2007] ECR I-8995, at [18].

¹⁸ See case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-1661, at [21]; case C-483/99 *Commission v France* [2002] ECR I-4781 at [36] and [37]; case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, at [39] and [40]; joined cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, at [19].

¹⁹ *Commission v Netherlands* (above note 18), at [20].

²⁰ Case C-326/07 *Commission v Italy* [2009] OJ C113/7, at [34]-[35].

²¹ See above note 18.

when it will apply which freedom in case they overlap. If a national measure at stake is unspecified enough to apply to either a situation where control or a direct/portfolio investment is at stake, the Court will accordingly apply both freedoms separately and cumulatively.²² By contrast, if a measure exclusively concerns direct or portfolio investments, only the free movement of capital (and not establishment) is applicable. If, however, a national measure only applies to a ‘control’ situation, the Court will normally only apply the freedom of establishment – albeit that usually, in this scenario, the free movement of capital will be triggered as well.²³ This last proposition seems to suggest that a control transaction is a specific form of a direct investment and consequently a sub-category of the latter.

The bottom line is that, when considering the application of the freedoms of establishment and capital to investments in shares, the latter freedom has a much larger scope than the former. Control transactions will predominantly be assessed from an establishment perspective, but the free movement of capital will then be ‘unavoidably’ restricted as well.²⁴ Below the control threshold, other direct investments and portfolio investments can come under the scope of the free movement of capital, thus opening a far broader scope of application than the one of establishment.

Why has the power of the free movement of capital only been ‘discovered’ at a relatively late stage by the Commission? Part of the reason for this is that it was not until the Treaty of Maastricht that the full effectiveness of the freedom was developed, and consequently the (former) EC Treaty has only mandated the complete abolition of all obstacles to capital movement since 1994.²⁵ In subsequent years, the Commission accepted this new task and published a communication ‘on Certain Legal Aspects Concerning Intra-EU Investment’ in

²² *Ibid.*, at para. [36].

²³ *Ibid.*, at para. [39].

²⁴ *Ibid.*

²⁵ J.A. Usher, *The Law of Money and Financial Services in the EC* (2nd ed., Oxford 2000) pp. 22 ff.; D. Chalmers and others, *European Union Law* (Cambridge 2006), p. 509; L. Flynn, ‘Coming of Age: The Free Movement of Capital Case Law 1993-2002’ (2002) 39 C.M.L. Rev. 773. This fundamental freedom is considered as directly effective, see joined cases C-163/94, C-165/94 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera and others* [1995] ECR I-4821, at [41]-[47].

1997.²⁶ In this communication, the Commission explained the conditions for applying the free movement of capital and clarified necessary definitions. In the document, the Commission identified three major obstacles to the free movement of capital:

- prohibitions ‘on investors from another EU country acquiring more than a limited amount of voting shares in domestic companies’
- ‘measures applied without distinction to all investors, [...] in particular general authorisation procedures whereby, for example, any investor (EU and national alike) wanting to acquire a stake in a domestic company above a certain threshold [...] [must be authorised]’
- ‘the rights given to national authorities, in derogation of company law, to veto certain major decisions to be taken by the company, as well as the imposition of a requirement for the nomination of some directors as a means of exercising the right of veto, etc.’

Measures of the first category are clearly discriminatory and are thus liable to violate fundamental freedoms. The second category applies to all investors without distinction, but concerns access to the market and hence violates the freedoms of establishment and capital in the absence of a justification.²⁷ The third category, special rights for public authorities, was at the time a less obvious violation of the free movement of capital. Its theoretical basis is that these special rights constitute ‘national measures’ under the *Gebhard* formula ‘[which are] liable to hinder or make less attractive the exercise of fundamental freedoms.’²⁸

In the following years, the Commission slowly proceeded to bring these special rights before the European Court. In these proceedings since the end of the 1990s, the Court has abolished several national special rights in previously privatised undertakings, the so-called ‘Golden Shares’.²⁹ This is a term for various

²⁶ [1997] OJ 220/15.

²⁷ Case C-302/97 *Klaus Konle v Republic of Austria* [1999] ECR I-3099.

²⁸ Case C-55/94 *Reinhard Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at [37].

²⁹ See on this E. Szyszczak, ‘Golden Shares and Market Governance’ (2002) 29 *Legal Issues of Economic Integration* 255; H. Fleischer, ‘Case Note on the Golden Shares Cases’ (2003) 20 *C.M.L. Rev.* 493; C.O. Putek, ‘Limited but not Lost – A Comment on the ECJ’s Golden Share Decisions’ (2004) 72 *Fordham Law Review* 2219; A. Looijestijn-Clearie, ‘All that glitters is not gold: European Court of Justice strikes down golden shares in two Dutch companies’ (2007) 8 *European*

forms and ways of retaining governments' special rights to intervene in the share structure and management of privatised companies. Although the business of the company is privatised, precautionary measures are often provided for in the articles of association, most notably in the case of public utilities. This includes special provisions designed to enable the executive to prevent takeovers or other changes of control.

The special rights attached to this type of 'share' can vary from case to case. Some golden shares confer the right to outvote all other shareholders at general meetings or to veto certain changes within the company, *e.g.* the sale of core assets. Others include provisions intended to ensure that no shareholder is beneficially entitled to an interest in more than a fixed proportion of voting shares. A third variant enables the government to nominate some of the directors. In some jurisdictions, golden shares can be created even under company law, while elsewhere, special legislation is needed to introduce State privileges in privatised companies. In company law, 'golden shares' are generally regarded as a separate class of shares. Consequently, any attempt to alter the State privileges requires the consent of the special preference class. The Court of Justice found in the overwhelming number of cases before it, that these special rights violated the fundamental freedoms: the cases concerned special rights in privatised companies in France,³⁰ Portugal,³¹ the United Kingdom,³² Spain,³³ the Netherlands³⁴ and Italy.³⁵ By contrast, the Belgian privatised utilities *Distrigaz* and *Société Nationale de Transport par Canalisations* were the only situations in which a Member State was authorised to maintain its 'golden share'. In this case, the Court considered that these special powers were justified, in particular, by the exclusive application of rights to certain decisions on strategic assets of the

Business Organization Law Review 429; S. Grundmann and F. Möslin, 'Die Goldene Aktie – Staatskontrollrechte in Europarecht und wirtschaftspolitischer Bewertung' [2003] Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 317.

³⁰ Case C-483/99 *Commission v France* [2002] ECR I-4781.

³¹ Case C-367/98 *Commission v Portugal* [2002] ECR I-4731.

³² Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641.

³³ Case C-463/00 *Commission v Spain* [2003] ECR I-4581. More recently, see cases C-274/06 *Commission v Spain* [2008] ECR I-26 (summary publication) and C-207/07 *Commission v Spain* [2008] ECR I-111 (summary publication).

³⁴ Joined cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141.

³⁵ Case C-174/04 *Commission v Italy* [2005] ECR I-4933; joined cases C-463/04 and C-464/04 *Federconsumatori and others v Comune di Milano* [2007] ECR I-10419; C-326/07 *Commission v Italy* [2009] OJ C113/7.

companies in question as well as the direct link with public service obligations incumbent on both companies.³⁶

Further detail of these proceedings is not necessary here;³⁷ the general gist of this case-law is that the Court does not allow decisive state influence in companies if this influence unjustifiably and disproportionately favours the state over regular shareholders. In other words: the European Court has always found a violation of fundamental freedoms when under the guise of market participation the State has acted as a regulator.³⁸ Therefore, the Court does not distinguish between statutory law and provisions that are contained in the articles of association of the company.³⁹ Moreover, according to the Court's case-law, infringement of Article 63 TFEU is no longer limited to discriminatory national provisions, but covers all norms that might hinder the free movement of capital, even if their effect is not discriminatory.⁴⁰ The decisive factor – in accordance with the above-mentioned Commission Communication – has always been that the special right at stake conferred a benefit on the State as market coordinator.

In what follows, an account of recent developments is presented which shows that the Court has or is likely to go beyond this limited scope hitherto adopted. The best example to illustrate this process is the *Volkswagen* case from 2007, a judgment of particular relevance for the further development of the free movement of capital.

III. THE VOLKSWAGEN CASE

Decided in 2007, the case concerning the German Volkswagen law brought a new dimension to the debate about special rights in companies.⁴¹

³⁶ Case C-503/99 *Commission v Belgium* [2002] ECR I-4809.

³⁷ For more details, see the literature cited in note 29 above.

³⁸ A Arnulf and others, *Wyatt & Dashwood's European Union Law* (5th ed., London 2006), at [20-021].

³⁹ See especially *Commission v United Kingdom* (above note 32).

⁴⁰ *Commission v Portugal* (above note 31), at paras. [44]-[45]; *Commission v United Kingdom* (above note 32), at para. [43]; see P. Craig and G. de Búrca, *EU Law – Text, Cases, and Materials* (4th ed., Oxford 2007), at p. 725.

⁴¹ Case C-112/05 *Commission v Germany* [2007] ECR I-8995.

A. Background

The VW law (*Volkswagengesetz*) is a federal statute, based on a 1959 agreement between the Federal Republic of Germany and the Land of Lower Saxony.⁴² Its aim was to resolve the long dispute over ownership at *Volkswagen AG* ('VW') and to protect its employees from a large new shareholder.

To this end, the VW law created a specific company law for Volkswagen, which the Federal State and the Land of Lower Saxony benefited from. Among the special rules for Volkswagen were three of particular relevance: (1) a provision capping the voting rights of every shareholder at 20 per cent (section 2(1) of the VW law), (2) a provision implementing an 80 per cent majority requirement for important company decisions (section 4(3) of the VW law) and (3) the right of the Federal State and of the Land of Lower Saxony to appoint two members to the company's supervisory board⁴³, if and as long as the State and the Land were shareholders of VW (section 4(1) of the VW law). Of course, these rights can only be understood in combination with the situation that the Land held 20 per cent of the shares – the 80 per cent majority requirement thus conferred an indirect veto right for important decisions on the Land. This situation attracted the ire of the Commission, in that the VW law was in violation of the free movement of capital (now Articles 63 ff. TFEU) and the freedom of establishment (now Articles 49, 54 TFEU) insofar as it made it substantially less attractive for other EU investors to acquire shares of the company with a view to effectively participating in management decisions or controlling the company.⁴⁴ According to the Commission, these derogations from general German company law result in a special blocking minority right for the Land of Lower Saxony at shareholders' meetings, plus a special right to send representatives onto the supervisory board. These restrictions are the result of the Land of Lower Saxony acting in its capacity as a public authority rather than being the result of the normal operation

⁴² Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk GmbH in private Hand of 21 July 1960, [1960] Bundesgesetzblatt I, 585.

⁴³ German company law (different from the UK) employs a two-tier board structure which includes a management board (*Vorstand*) and a supervisory board (*Aufsichtsrat*). The board's role of running the company and supervising the management is thus split into two separate bodies.

⁴⁴ European Commission, Press Release of 30 March 2004 – IP/04/400.

of company law. At the same time, these provisions reduce incentives for investors to acquire a bigger block of shares in VW.

B. The Judgment

It has been a long time since the outcome of a European judgment has been as almost unanimously predicted as in this case. Not only did the Advocate General suggest the outcome of the case in a very decisive manner,⁴⁵ the incompatibility of the VW law with EU law was also anticipated by a vast body of literature.⁴⁶ Furthermore, business activity itself anticipated the outcome: with predatory instincts, rival automobile producer *Porsche* increased its stake in *Volkswagen AG* to just above 30 per cent in early 2007, thereby expecting the fall of the VW law. Porsche's goal was said to be the acquisition of total control of VW once the VW law was abolished.⁴⁷

The Court handed down the judgment on 23 October 2007.⁴⁸ It agreed with the Commission and the Advocate General and declared the contested provisions as incompatible with the free movement of capital. Though the Commission had failed to present enough facts that would allow the finding of a violation of the freedom of establishment, the free movement of capital was violated by all three of the contested provisions of the VW law.

⁴⁵ Opinion of Advocate General Colomer of 13 February 2007, [2007] ECR I-8995.

⁴⁶ See e.g. S. Rammeloo, 'Past, Present (and Future?) of the German Volkswagengesetz under the EC Treaty' (2007) 4 European Company Law 118; F. Sander, 'Volkswagen vor dem EuGH – der Schutzbereich der Kapitalverkehrsfreiheit am Scheideweg' [2007] Europäische Zeitschrift für Wirtschaftsrecht (Eu.Z.W.) 106. Cf. already K.J. Hopt, 'Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron' (2003) 3 Journal of Corporate Law Studies 221, 262 ff.

⁴⁷ In early 2009, Porsche did indeed increase its stake in Volkswagen AG to over 50 per cent, announcing that it intends to acquire even more shares to reach over 75 per cent in the future. Cf. M. Buchenau and M.C. Schneider, 'Porsche treibt gemeinsame Führung für das neue Autoreich voran' *Handelsblatt* (Düsseldorf 7 January 2009) 17. Ultimately, however, Porsche failed to gain control in VW; the financial turmoil 2008/09 and its high debt reversed the situation and led finally VW to victoriously merge with Porsche. See 'VW trumps Porsche' *Financial Times* (London 8 May 2009) 16; D Schäfer, 'Ousted Porsche chief receives €50m pay-off as families agree VW merger' *Financial Times* (London 24 July 2009) 1; J Wilson, 'VW seals €3.3bn Porsche deal' *Financial Times* (London 14 August 2009) 13.

⁴⁸ Case C-112/05 *Commission v Germany* [2007] ECR I-8995. For comments on the case, see M. Schmauch, 'Economic Patriotism made in Germany – The Court of Justice overturns parts of the 'VW-Gesetz'' [2007] European Law Reporter 438; F. Sander, 'Case C-112/05, European Commission v. Federal Republic of Germany: The Volkswagen Case and Art. 56 EC – A Proper Result, Yet Also a Missed Opportunity?' (2008) 14 Columbia Journal of European Law 359; P.E. Partsch and G. Dennis, 'The Court of Justice rules on 'golden shares' held in private companies' (2008) 3 J.I.B.F.L. 157; C. Teichmann and E. Heise, 'Das VW-Urteil des EuGH und seine Folgen' [2007] Betriebs-Berater 2577; G Parleani, 'Après l'arrêt Volkswagen du 23 octobre 2007, quelle liberté pour les Etats actionnaires?' [2007] Revue des sociétés 874; W.G. Ringe, 'Case C-112/05, *Commission v. Germany* ('VW law'), Judgment of the Grand Chamber of 23 October 2007' (2008) 45 C.M.L. Rev. 537; H.J. van Harten, 'Zaak C-112/05, Commissie van de Europese Gemeenschappen t. Bondsrepubliek Duitsland (Volkswagenwet)' [2008] Sociaal-economische wetgeving (S.E.W.) 154.

The reasoning of the Court will not be reiterated here.⁴⁹ It suffices to point out that the Court viewed all three challenged elements of the VW law as tools for the State to secure enduring influence in the sense of the golden shares cases. However, one important aspect needs to be further discussed here: how does the Court deal with general rules of company law which do not specifically benefit a public authority?

C. *The Thyssen Krupp Case*

This question was at stake in another recent case concerning German steelmaker *Thyssen Krupp*.⁵⁰ In this case, which ultimately did not make it to the European Court, the plaintiffs had claimed, inter alia, that § 101(2) of the *Aktiengesetz* (German law on public limited companies) violates European free movement of capital rules. § 101(2) allows the company's articles of association to grant individual shareholders the right to appoint supervisory members of their choice.⁵¹ In the *Thyssen Krupp* case, the company's articles of association were amended in that sense so as to grant one major shareholder the right to appoint three supervisory board members as long as the shareholder holds more than 25% of the shares. The plaintiffs, minority shareholders in Thyssen Krupp, alleged that the mere existence of § 101(2) and its concrete use in this case make it less attractive for investors to acquire shares in the company, because it grants the major shareholder an extensive right to control the company, disproportionate to the size of its shareholding. Regrettably, the German courts hearing this case decided not to refer the question to the Court of Justice.⁵²

D. *Consequences and Emerging Questions*

The difference between the golden shares at issue in the traditional golden shares cases and the *Volkswagen* and *Thyssen Krupp* scenarios is that the challenged

⁴⁹ On this Ringe (above note 48).

⁵⁰ Bundesgerichtshof, decision of 8 June 2009 – II ZR 111/08. The lower instances were Landgericht Essen, judgment of 29 June 2007, (2007) 52 Die Aktiengesellschaft 797; Oberlandesgericht Hamm, decision of 31 March 2008, [2008] Neue Zeitschrift für Gesellschaftsrecht 914.

⁵¹ The maximum number of supervisory board members that can be appointed by individual shareholders is one third.

⁵² For this reason, the plaintiffs brought the case even before the German Constitutional Court, however without success.

provisions in the latter two cases, albeit constituting genuine public regulation, only provided for normal rules of company law and did not by any means mention the State as the beneficiary of these rules. For the VW case, this is true at least insofar as it concerned the first two of the challenged provisions (the voting cap and the special majority requirement). Sections 2(1) and 4(3) of the VW law thus applied without distinction to all shareholders.⁵³ Of course, they deviated from the usual rules applicable to German companies. The ordinary requirement for a special majority for important company decisions is 75 per cent according to section 179 of the *Aktiengesetz*.⁵⁴ While shareholders in ordinary companies *can* deliberately agree on higher majority requirements than the usual 75 per cent threshold,⁵⁵ in the case of VW, however, the State introduced the 80 per cent requirement as a mandatory rule of law without any possibility of derogation. As for voting caps, they are still permissible as a widely recognised tool of company law.⁵⁶ In Germany, they are allowed for non-listed companies.⁵⁷

In comparison to this, the VW law has to be seen as a ‘specific company law’ which applies to one single company. However, it employs the same tools as general rules of company law and could theoretically be extended to cover several companies or a larger group of them. Put differently, any legislative provision that applies to a certain number of companies only – say to public companies, or to listed companies only – could arguably deviate from general company law. Accordingly the fact that the VW law applies to *one* company alone cannot in itself be determinative in assessing its validity under EU law.

In other words, the provisions the Court had to scrutinise here were indeed genuine rules of company law – admittedly deviating from the general rules, but making changes for the interior management of VW without any public authority’s interference *per se*. Other private shareholders – irrespective of their Member State of origin – could have benefitted from the provisions in the same

⁵³ Germany had tried to defend the law with these arguments. See para. 32 of the case. Cf. Teichmann and Heise (above note 48) at p. 2579; Ringe (above note 48) at pp. 542 ff.; and – already long beforehand – Hopt (above note 46) at pp. 262 ff.

⁵⁴ German law on public limited companies.

⁵⁵ *Aktiengesetz*, s. 179(2).

⁵⁶ Institutional Shareholder Services, Sherman & Sterling LLP and European Corporate Governance Institute, *Proportionality Between Ownership and Control in EU Listed Companies: Report on the Proportionality Principle in the European Union – External Study Commissioned by the European Commission* (2007), at pp. 8, 20.

⁵⁷ *Aktiengesetz*, ss. 134(1) and 23(5).

way as the German authorities could.⁵⁸ Only when seen together with the existing factual situation, does the sense of these two provisions become clear: self-evidently, the Land of Lower Saxony, holding 20 per cent of the shares, profited from both the voting cap and from the 80 per cent special majority requirement. These two provisions helped the Land to acquire a *de facto* veto right and considerable influence within the company.⁵⁹

In a similar vein, the even more extreme case *Thyssen Krupp* challenged a general rule of company law which applies to all German public companies. In this case, it was obvious that the beneficiary of the rule was not the state; on the contrary, regular private shareholders availed themselves of a general statutory provision in order to amend the company's articles of association for their own private benefit. The minority shareholder challenging the resolution to amend the articles claimed that this private action nevertheless violated the Treaty rules on free movement of capital.

This particular factual matrix raises a number of questions:

(1) In *VW*, it is uncertain how the Court would have decided the case if the Land of Lower Saxony had sold its shares in *VW* to private investors – would the voting cap and the special majority rule still constitute an infringement of Article 56?⁶⁰ In such a case, the special provisions would *not* be for the benefit of the *State*, but for private market actors.

(2) Furthermore, would the outcome be different if the State had acted as a normal shareholder in creating the special rights encapsulated in the *VW* law rather than doing so by legislation⁶¹? In other words, is the State bound only when acting with public authority or even when it acts as a shareholder of *Volkswagen AG* – as a normal (private) market participant?

(3) What would the outcome be if, instead of the State, private shareholders had created similar special rights to those at issue in *Volkswagen* by

⁵⁸ This does of course not apply to the right of the Federal State and of the Land of Lower Saxony to appoint two members of the company's supervisory board if and as long as they are shareholders of *VW*. This rule is a classical golden share which will not be further discussed in the following.

⁵⁹ This is the way the Court saw it, see paras. [50] ff. of the judgment.

⁶⁰ See on this the considerations at Ringe (above note 48) at p. 542 f.

⁶¹ This is what *de facto* happened much later, see below notes 167 f. and accompanying text.

amending the company's articles of association?⁶² This would be similar to the *Thyssen Krupp* scenario. Thus, is the scope of application of the free movement of capital confined to action by public authorities or can activities by private shareholders violate this freedom?

These questions explore the limits which EU law places on the Member States when they attempt to regulate the internal affairs of a company. To resolve them, we must engage in a systematic analysis of the free movement of capital, identifying who are the addressees of the freedom, and the aim which these persons must pursue to violate the freedom. We will consider the questions in turn, beginning with the last (on private shareholder activity) before we explore the question of the role of the State in governing the company.

IV. SYSTEMATIC ANALYSIS OF THE FREE MOVEMENT OF CAPITAL

In order to discuss the aforementioned problems, we have to distinguish precisely between the respective actors relating to each relevant measure. Firstly a distinction must be made between State action and private action, and secondly, within these categories, we have to ascertain who the beneficiary of the measure actually is.

A. Private Action

First, we assess whether private parties can be bound by the provisions of the free movement of capital; in other words whether this freedom has horizontal direct effect.⁶³ In our VW example, this would correspond to the situation where private shareholders of any company deliberately agree on a certain provision in the articles of association, which requires a special majority of 80 per cent for important company decisions.⁶⁴ Similarly, as in *Thyssen Krupp*, private

⁶² Which is permissible under Aktiengesetz, s. 179(2).

⁶³ L. Flynn, 'Coming of Age: The Free Movement of Capital Case Law 1993-2002' (2002) 39 C.M.L. Rev. 773, 786 f. More recently D. Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality after *Viking* and *Mangold*, and the Implications for Community Competence' (2008) 4 Croatian Yearbook of European Law and Policy 1-48.

⁶⁴ This would be permitted by both English and by German company law. See P.L. Davies, *Gower and Davies' Principles of Modern Company Law* (8th ed. London 2008) at [15-25] ('up to and including unanimity'). For Germany, see

shareholders created a special appointment right of supervisory board members for the benefit of a major shareholder.⁶⁵ The starting point for a possible violation of free movement provisions could be the fact that – as with the VW law – such a provision might deter potential investors from other Member States from investing in the company.⁶⁶

1. *Directly bound private parties*

This raises the fundamental question of who is bound by the Treaty freedoms. For a long time, there has been unanimous consent that the State is the sole addressee of the fundamental freedoms, and that the freedoms are designed only to remove state-made obstacles to the Internal Market.⁶⁷ In recent times, however, a concept of quasi-horizontal effect of fundamental freedoms has gradually emerged. This doctrine has developed in various situations.

Firstly, private organisations can be bound by EU law when they act as a regulator.⁶⁸ The Court's case-law holds that under certain conditions the collective regulation of economic activities by private operators under private law may be caught by the fundamental freedoms. The most well-known example of this is the European football association UEFA, an association under Swiss law, the transfer rules of which were declared incompatible with the free movement provisions of (now) Article 45 TFEU in the *Bosman* case.⁶⁹ The UEFA was considered to be a direct addressee of a fundamental freedom, at least concerning the prohibition of discrimination.⁷⁰ Following its judgment in *Bosman*, the Court decided in *Kolpak* that the principles from *Bosman* were applicable to the free

Aktiengesetz, s. 179 (2), which expressly allows for an agreement on different majority requirements. On this, see C.H. Seibt, 'Commentary on § 179' in K. Schmidt and M. Lutter (eds.), *Aktiengesetz Kommentar* (Cologne 2008), at [29] f.

⁶⁵ This is permitted under § 101(2) Aktiengesetz.

⁶⁶ This is the Court's reasoning on the corresponding rule in the VW law, see para. [52] of the judgment.

⁶⁷ For instance, joined cases 177 and 178/82 *Officier van Justitie v Van de Haar* [1984] ECR 1797 suggest that competition law rules are addressed to undertakings, whereas the free movement of goods seeks to eliminate measures taken by Member States. Cf. case 311/85 *Vlaamse Reishureaus* [1987] ECR 3801. See J. Snell, *Goods and Services in EC Law* (Oxford 2002), 129, 139; Fleischer (above note 29), at p. 500; Parleani (above note 48), at para. [4]; G. Spindler, 'Deutsches Gesellschaftsrecht in der Zange zwischen Inspire Art und Golden Shares?' [2003] *Recht der Internationalen Wirtschaft* 850, 854.

⁶⁸ Usher (above note 25) at pp. 25-27.

⁶⁹ Case C-415/93 *Union royale belge des sociétés de football association v Jean-Marc Bosman* [1995] ECR I-4921. Cf. already case 36/74 *Walrave v Union cycliste internationale* [1974] ECR 1405. See C. Barnard, *The Substantive Law of the EU – The Four Freedoms* (2nd ed. Oxford 2007), 284 f.

⁷⁰ By joined cases C-51/96 and C-191/97 *Christelle Deliège* [2000] ECR I-2549, this approach was extended to the provisions concerning freedom to provide services (ex Article 49 EC).

movement provisions in the Europe agreements which were considered to be directly effective. Therefore, the limited admission of foreign players by the German handball association of players from the accession states, in this case from Slovakia, was found to be subject to EU law.⁷¹ Finally, in *Wouters*⁷² and *Viking Line*⁷³, the ECJ extended the cases of ‘collective regulation’ to the freedom of establishment.⁷⁴

The second source of binding force on private parties stems from the judgment of the Court in *Defrenne v Sabena*⁷⁵, dealing with the principle of equal pay. In this case, the Court held that the fact that a Treaty provision is formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who is interested in the performance of the obligations imposed in the provision.⁷⁶ Technically, this result was achieved by interpreting the reference to ‘Member States’ as referring to all public institutions which may usefully contribute to the implementation of the provision, and hence also including Member States’ Courts.⁷⁷ This line of reasoning has also been transposed to the freedom of establishment.⁷⁸

Furthermore, reference has to be made to *Angonese*⁷⁹, according to which an Italian private bank in Bolzano was not allowed to impose discriminatory requirements for language knowledge. The case dealt with the question of whether the command of language that was required for the particular job could only be proven by a language test which was locally taken. The Court held that

⁷¹ Case C-438/00 *Deutscher Handballbund v Kolpak* [2003] ECR I-4135.

⁷² Case C-309/99 *Wouters* [2002] ECR I-1577, at [120].

⁷³ C-438/05 *International Transport Workers’ Federation and others v Viking Line* [2007] ECR I-10779, at [33] ff.

⁷⁴ A further example from recent time is the case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* [2007] ECR I-11767, at [98]. See on the problem in both cases J. Malmberg and T. Sigeman, ‘Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’ (2008) 45 C.M.L. Rev. 1115; N. Reich, ‘Gemeinschaftliche Verkehrsfreiheiten versus Nationales Arbeitskampfrecht’ [2007] Eu.Z.W. 391, 392.

⁷⁵ Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

⁷⁶ *Ibid.*, at para. [31].

⁷⁷ *Ibid.*, at para. [35]. Cf. opinion of AG Maduro of 23 May 2007 in case C-438/05 *Viking Line* (above note 73), at paras. [39], [40].

⁷⁸ *Viking Line* (above note 73), at para. [59].

⁷⁹ Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

the bank was bound by the discrimination ban in (what is now) Article 45 TFEU.⁸⁰

These various instances of the case-law taken together seem to suggest that horizontal effect finds its most important justification in the fact that collective confederation rules – like the ones issued by large sport federations – *de facto* have an effect that is similar to legislation. Insofar as powerful federations act in a quasi-regulatory manner, they are subject to EU law because the effect of their actions is comparable to law. We can speak of *private governance* in this context.⁸¹ This notion describes a model that no longer relies on the imputability of a certain action or actors to the State (*e.g.* via control), but concentrates on the factual, and societal effects of an action. Private actors can often effectively govern a certain area of life, be it on their own initiative, on behalf of the State or supported by the State. Indeed, this may often be the case with associations. In these situations, private action can be equalised with State action and can trigger an obligation to respect EU law. Moreover, it is noteworthy that the Court, as has become clear particularly in *Angonese*, is poised to apply the principle of non-discrimination horizontally in extreme cases even if there is no *private governance* situation.⁸² The concept of non-discrimination is therefore considered to have such an eminent status that it triggers effects on private or third parties, *i.e.* that private persons are directly bound by it. Otherwise, private persons would be able to reintroduce those obstacles that the Member States had to abolish.

For the matter of the enquiry here, private arrangements in company law, it follows that private parties are only exceptionally bound by the free movement of capital.⁸³ Apart from ‘mandatory rules’ (discrimination bans of the fundamental freedoms and equal pay provisions), this has only been recognised when private parties enact norms in a role similar to that of a State (‘collectively regulating’, *e.g.* as a federation). It may be worth considering the question of whether a commercial company, which collectively decides for all investors,

⁸⁰ J. Shaw and others, *Economic and Social Law of the European Union* (Basinstoke 2007), pp. 143, 300.

⁸¹ S. Wernicke, *Die Privatwirkung im Europäischen Gemeinschaftsrecht* (Baden-Baden 2002), 225 ff., 253 f.

⁸² This is the Court’s approach in *Angonese* (above note 79).

⁸³ Similarly, Usher (above note 25), at pp. 25-27.

fulfils this test and thus can be subject to this line of case-law.⁸⁴ However, according to the current law in force, the situation of *private governance* only concerns federations which are legally autonomous and can issue collective rules in the area of labour or services, so-called ‘intermediary powers’.⁸⁵ As explained, the norms that have been challenged so far concerned transfer rules and other abstract general norms, covering a whole market or market branch. Decisions of a single company will not necessarily cross this threshold in the absence of any further particular circumstances. However, it remains possible that discriminatory behaviour of a company may amount to a restriction of fundamental freedoms.

2. Indirectly bound private parties

On the other hand, the Court has developed a line of case-law on indirectly bound private parties, which may be relevant here. The foundation of this line of case law lies in a duty on the Member States to act.

According to consistent case-law of the Court, Member States have the obligation to ensure that private actors do not hinder the effective exercise of the fundamental freedoms.⁸⁶ The ‘omission’ of intervention by the State itself may be considered as violating the fundamental freedoms, relying on the so-called ‘effet utile’.⁸⁷ Article 4(3) TEU states, *inter alia*, that ‘Member States shall [...] refrain from any measure which could jeopardise the attainment of the Union’s objectives’. When interpreting this, the Court acknowledged that the ‘objectives’ of the Union include the Internal Market, and therefore that the rules on freedom of movement can indirectly limit the autonomy of individuals, notably when private action jeopardises the objectives of the freedom, and consequently held that private individuals must not be allowed to act without appropriate concern for the rights that other private individuals draw from the rules on freedom of

⁸⁴ Considering this Wyatt (above note 63), at pp. 37 ff.

⁸⁵ ‘Intermediäre Gewalten’, see A. Haratsch and others, *Europarecht* (5th ed. Tübingen 2006), at para. 695.

⁸⁶ Case C-265/95 *Commission v France* [1997] ECR I-6959; case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659. These proceedings concerned private actions that amounted to a violation of the *free movement of goods*; however, in para. [62] of the latter judgment, the ECJ generally considered ‘restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty [...], which result from actions taken by individuals’.

⁸⁷ Article 10 EC, now Article 4(3) TEU.

movement.⁸⁸ Applying this to the subject matter of our enquiry, should the shareholders agree on articles of association which deter potential investors from other Member States, the relevant Member State could be forced to intervene or to refuse to accept the legality of the articles of association in the first place. Furthermore, this approach could compel every Member State to ensure that its own company law does not contain any rules which would allow such arrangements by shareholders or other private parties.⁸⁹ How far this obligation extends or where the boundary will be set is not yet fully clear.⁹⁰ Admittedly, the case-law grants the Member State in principle a margin of discretion how to deal with the situation and will only interfere when a ‘manifest and persistent breach’ is at stake.⁹¹

3. Limits

In an effort to regiment the Court’s case-law, various commentators have tried to establish the dividing line between private activities that would be caught by fundamental freedoms and unobjectionable behaviour.

It has been proposed that, for policy reasons, two limitations to ‘horizontal effect’ should be set: first, ‘normal market behaviour’ would not in itself amount to a restriction of a fundamental freedom;⁹² secondly, if the application of fundamental freedoms places an ‘excessive burden’ on private operators, the same shall hold true.⁹³

By contrast, a more far-reaching approach was chosen by Advocate General Maduro in his opinion to *Viking Line*.⁹⁴ He asserted that it would be wrong in principle to categorically exclude private action from the scope of application of the fundamental freedoms. Rather the demarcation between permissible and restrictive behaviour should be where the private activity ‘is

⁸⁸ Interestingly, this was also referred to in *Viking Line* (above note 73), at para. [62].

⁸⁹ This could theoretically support the plaintiffs’ argument in *Thyssen Krupp* (above note 50).

⁹⁰ For instance, based on a similar reasoning, Germany abolished shares with multiple voting rights in 1998. See on this the legislative explanation for the reform act (‘KonTraG’), Bundestagsdrucksache 13/9712, at p. 12.

⁹¹ *Commission v France* (above note 86) at para. [65].

⁹² Wyatt (above note 63), at p. 11 f.

⁹³ *Ibid.*

⁹⁴ Opinion of AG Maduro of 23 May 2007 in case C-438/05 *Viking Line* (above note 73), at paras. [31] ff.

capable of effectively restricting others from exercising their right to freedom of movement’⁹⁵, by ‘raising an obstacle that they cannot reasonably circumvent’.⁹⁶ His example is a small shopkeeper who refuses to purchase goods from other Member States, and he points out that this activity would surely not be capable of restricting EU trade. Where the boundary is, however, remains unclear; we will revisit this problem at a later stage.⁹⁷

For now, it suffices to note that the dividing line in relation to private market activity is still unresolved. We will revisit this issue below in the context of general company law.⁹⁸ Next, we turn to State activity and the various ways in which it can come into conflict with the fundamental freedoms.

B. State Action

In analysing State activity in the company law context we have to distinguish between State action that is based on public authority on the one hand and State action that is private in nature on the other; furthermore, special attention has to be paid to the distinction between situations where the State is beneficiary and where it is not.

1. Actions with public authority

When the State acts on the basis of public authority and establishes an advantage for its own benefit, the situation seems to be an obvious case of application of the fundamental freedoms. In our context, this is exemplified by the golden-shares case law.⁹⁹ The State creates special rights for itself on the grounds of public authority, which favours the State over all other market participants. According to the Court’s case-law, it is irrelevant whether these measures have been introduced in a statutory form or by private mechanisms, for example within the articles of association. The latter case had to be decided in the British BAA case, where the

⁹⁵ *Ibid.*, at para. [43].

⁹⁶ *Ibid.*, at para. [48].

⁹⁷ See below part IV.C.

⁹⁸ See below part IV.C.

⁹⁹ See above part II.

United Kingdom tried to defend its position by pointing to the fact that its special rights originated in the articles of association of the company rather than statutory law.¹⁰⁰ The Court of Justice did not accept this argument, but referred to the reservation of prior approval by the competent Secretary of State, which was contained in the Airports Act 1986.¹⁰¹ In this case, a *prima facie* private arrangement was found to be based in effect on public authority.

Furthermore, public-authority based norms that allow the State in its capacity as a shareholder to implement prerogatives that are comparable to special rights fall in the same category: in this situation, the empowering legislation itself already restricts the free movement of capital.¹⁰²

The Court's point of view can be summarised as 'no escape into private law'.¹⁰³ Otherwise, Member States could easily evade the application of the free movement of capital by enabling the creation of a special share and then using their position as shareholders within the general rules of company law for achieving the same objectives that they would have reached by enacting legislation.

2. State action without public authority

On the other hand, there may be State activity by which the State genuinely acts as a private person and takes part in business life as an entrepreneur.¹⁰⁴ In our context, we can think of examples such as the influence of the State as a regular and equal shareholder on a company or the private acquisition of shares in a company. The basic consideration for these activities is straightforward. Actions that are not based on public authority are primarily not caught by the fundamental

¹⁰⁰ Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, at [31].

¹⁰¹ *Ibid.*, at para. [48].

¹⁰² Joined cases C-463/04 and C-464/04 *Federconsumatori and others v Comune di Milano* [2007] ECR I-10419.

¹⁰³ R. Ruge, 'Goldene Aktien V: Flugverkehrskontrolle in Großbritannien' [2003] Eu.Z.W. 540, 541; W. Kilian, 'Vom sinkenden Wert der "Goldenen Aktien"' [2003] Neue Juristische Wochenschrift (N.J.W.) 2653; cf. in the context of administrative law R. Seerden and F. Stroink, *Administrative Law of the European Union, its Member States and the United States* (Mortsel 2002), 117.

¹⁰⁴ Cf. P. Craig, *Administrative Law* (5th ed., London 2003), p. 811; P. Leyland and G. Anthony, *Textbook on Administrative Law* (5th ed., Oxford 2005), pp. 253-255; S. Arrowsmith, 'Judicial Review and the Contractual Powers of Public Authorities' (1990) 106 L.Q.R. 277.

freedoms, since the State does not act as market regulator, but as market participant.¹⁰⁵

On closer examination however, some doubts emerge. Advocate General Maduro suggested a completely different approach in his opinion on the Dutch golden shares cases. From his point of view, the fundamental freedoms impose obligations on the Member States regardless of whether they act in their capacity as a public authority or as an entity under private law.¹⁰⁶ According to Maduro, Member States are subject to the fundamental freedoms not only on account of their functional capacity as public authority, but on account of their organic capacity as signatory of the Treaty.¹⁰⁷ ‘To the extent that those rules do not create obligations for individuals, Member States, when operating as a market participant, may be subject to constraints that do not apply to other market participants.’¹⁰⁸ In a similar vein, Advocate General Mengozzi has recently treated special shares that the Portuguese State created for itself by virtue of its majority shareholding in Portuguese Telecom as subject to the free movement of capital. The State acting in its capacity as majority shareholder effectively created the privileged shares by amending Portugal Telecom’s Articles of Association, in accordance with the right conferred on it by a special privatisation law.¹⁰⁹

To support this point of view, other similar instances of EU law can be put forward. One example is public procurement: when the State wants to implement public appointments, construction plans or large acquisition proposals, thereby acting under private law, the State is subject to additional requirements as to transparency, tender and accountability that do not have to be met by individuals.¹¹⁰ In contrast to a private market actor, the State is not free to choose

¹⁰⁵ A. Arnulf and others, *Wyatt and Dashwood’s European Union Law* (5th ed., London 2006), p. 860 f.; K. Wellige, ‘Weg mit dem VW-Gesetz!’ [2003] *Eu.Z.W.* 427, 430.

¹⁰⁶ Opinion by A.G. Maduro in case *Commission v Netherlands* (above note 34) [2006] ECR I-9143. In a similar vein: *Haratsch and others* (above note 85), at para. [694].

¹⁰⁷ See also, by analogy, case 152/84 *Marshall* [1986] ECR 723, [49], and Case C-188/89 *Foster v British Gas* [1990] ECR I-3313, [17].

¹⁰⁸ Opinion by Advocate General Maduro (above note 106), at para. [22].

¹⁰⁹ Opinion by A.G. Mengozzi of 2 December 2009 in case *Commission v Portugal* (C-171/08) not yet reported.

¹¹⁰ In more detail P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford 2004).

its contract partners deliberately.¹¹¹ Another example is the area of state aid law: again, the State – in contrast to private persons – is not allowed to grant loans under private law to companies. While, this general rule is somewhat qualified by the ‘private market actor’ test: the Court will not qualify a loan or an acquisition of equity as ‘aid’ when a private market participant would have acted similarly,¹¹² nevertheless, the existence of state aid law within the EU law framework shows that the State *per se* is treated with more suspicion than private market actors, and that State activities, whether they occur under public authority or by operation of private law (*e.g.* as a loan) can distort the functioning of the common market.¹¹³

The concept developed by Advocate General Maduro would lead to the consequence that all State action, based on public authority or not, could be classified as ‘national measure’ and could be subject to the free movement of capital provisions.¹¹⁴

In the Dutch golden shares case, the Court did not dwell on this reasoning of the Advocate General, but interpreted the special right as ‘national measure’ without further explanation.¹¹⁵ If one limits the proposition of this judgment to the situation that was specifically at stake in this case, it follows that the State is at least not allowed to construct special rights in the meaning of the golden-shares case-law, even when it acts as a regular shareholder.¹¹⁶ But what would be the outcome when the State acts as a shareholder, but its activities do not cross the threshold of a ‘special right’? This problem arises in the case of a purely private law constellation similar to the VW law – if the voting cap and the special

¹¹¹ Even if a contract falls outwith the scope of the relevant Directives, it is still subject to the general principles of EC law, most obviously the relevant Treaty provisions on free movement and the requirements of non-discrimination on grounds of nationality. See *e.g.* case C-231/03 *Coname v Comune di Cingia de' Botti* [2005] ECR I-7287; also case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585. On this, *cf.* the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006] OJ C179/2.

¹¹² Case 40/85 *Belgium v Commission* [1986] ECR 2321; joined cases 296 and 318/82 *The Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* [1985] ECR 809; joined cases C-278 to C-280/92 *Spain v Commission* [1994] ECR I-4103; case C-56/93 *Belgium v Commission* [1996] ECR I-723; case C-39/94 *SFEI and others v La Poste and others* [1996] ECR I-3547; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, [41]; Case C-256/97 *DM Transport* [1999] ECR I-3913, [22]; case T-46/97 *SIC v Commission* [2000] ECR II-2125, [78].

¹¹³ See in more detail C. Quigley, *European State Aid Law and Policy* (2nd ed., Oxford 2009), pp. 13 ff.; L. Hancher, ‘The General Framework’ in L. Hancher, T. Ottervanger and P.J. Slot *EC State Aids* (3rd ed., London 2006), [3-065] ff.

¹¹⁴ A.G. Mengozzi (above note 109) followed this approach.

¹¹⁵ Parleani (above note 48), at para. [14].

¹¹⁶ Similarly, J. van Bakkum, J. Kloosterman and J. Winter, ‘Golden Shares and European Company Law: the Implications of Volkswagen’ (2008) 5 *European Company Law* 6, 9.

majority rule of the VW law are not introduced by legislation but by the State voting on a resolution as an equal (majority) shareholder.¹¹⁷ This is indeed what happened at VW in very recent times, *i.e.* after the judgment was handed down.¹¹⁸ The same problem may become relevant for all corporate governance regimes in which the State is significantly involved as a shareholder.

The answer to this question remains open. The logical consequence of the approach taken so far leads us conclude that these arrangements, introduced by the State in its capacity as private shareholder, may well fall within the scope of application of the free movement of capital. EU law always analyses the *effect* or the consequences of a national measure and does not satisfy itself with formal characterisations.¹¹⁹ If this is true, there can be no difference for the question in applying Article 63 TFEU between the situation comparable to a special right (golden share) or a company law arrangement below this threshold. However, the difference can become relevant when assessing the next criterion in examining a violation of the Treaty: after examining the ‘State measure’, the Court would need to clarify whether the measure at stake constitutes a ‘restriction’. According to the common definition by the Court of Justice, a national measure must be regarded as a ‘restriction’ within the meaning of Article 63(1) TFEU if it is ‘likely to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital’.¹²⁰ This would appear to be a more adequate test: asking whether the measure in question ‘deters potential investors’, makes it much easier to do justice to the specific circumstances of a particular case than applying a black-and-white solution as differentiating between State measures with or without public authority. It is fully imaginable that the State acting by operation of private law produces a result that deters potential investors even more than a negligible operation under public

¹¹⁷ *Ibid.*, at p. 9.

¹¹⁸ See below part IV.D.

¹¹⁹ See *e.g.* case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, [20]-[22]; case C-241/94 *France v Commission (Kimberly-Clark)* [1996] ECR I-4551, [20] ff. *Cf.* E. Szyszczak (above note 8), at p. 10; G. Bitter, ‘Niederlassungsfreiheit für Kapitalgesellschaften in Europa: Gläubigerschutz in Gefahr?’ [2004] *Yearbook of young civil law scholars* (Jb.J.Z.R.Wiss.) 299, 310 ff.; E.M. Kieninger, ‘Internationales Gesellschaftsrecht nach ‘Centros’, ‘Überseering’ und ‘Inspire Art’: Antworten, Zweifel und offene Fragen’ [2004] *Zeitschrift für Europäisches Privatrecht* 685, 697.

¹²⁰ Joined cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141 [20] with further references to *Commission v France* (above note 30), at para. [41]; case C-174/04 *Commission v Italy* [2005] ECR I-4933, [30]-[31]; case C-265/04 *Margaretha Bouanich v Skatteverket* [2006] ECR I-923, [34], [35].

authority. This points towards an effects-based test, which asks whether the objective result of the action deters potential investors from other Member States.

In sum, the compatibility of the State measure with the free movement of capital will depend on the extent to which it is liable to deter nationals from other Member States from investing in the company.¹²¹

3. General (company) law

Finally, we have to discuss a third category for which the relationship to the free movement of capital remains unexplained: State action which relies on public authority but does not benefit the State or by which it does not directly profit. In this category, we find for the purposes of our enquiry, provisions of general company law that do not represent golden shares but generally arrange the internal or external organisation of the company or concern the general appearance of the company in the business world. This question was pertinent in the *Volkswagen* case¹²² and was explicitly left open by the Court in a different, more recent case, *Federconsumatori*.¹²³

So far, there has been little discussion of this question in the academic literature.¹²⁴ This reticence is difficult to explain because the idea of a review of domestic company law for compatibility with free movement of capital is remarkable and difficult to overlook. In fact, this development threatens to morph into a ‘substantive control’ or ‘quality control’ of domestic company law in a way that the Court not only assesses questions of cross-border discrimination or market access, but rather measures the company law as designed by each Member State against the Court’s own substantive values.¹²⁵ Ultimately, this would create a situation where all company law rules may constitute a barrier to free movement and consequently are presumptively unlawful; the burden rests on the Member State to justify the continued existence of the rule and to show that it is

¹²¹ See on this part IV.C. below.

¹²² See Ringe (above note 48), at p. 537.

¹²³ Joined cases C-463/04 and C-464/04 *Federconsumatori and others v Comune di Milano* [2007] ECR I-10419, [31].

¹²⁴ See e.g. D. Chalmers and others, *European Union Law* (Cambridge 2006) 511; S. Grundmann, *European Company Law – Organization, Finance and Capital Markets* (Antwerpen – Oxford 2007), [674].

¹²⁵ See part I. above.

proportionate.¹²⁶ There has been some discussion in Germany on the topic, which might be explained by the special problem of German co-determination which might now be under threat.¹²⁷ Also, French scholars have recently picked up the idea.¹²⁸

The Court of Justice has not explicitly dealt with the problem; in the proceedings against the German VW law, the Court failed to make a clear statement. As explained above, the special aspect of this case was that two of the three provisions under scrutiny did not benefit the State but instead applied to or against the benefit of all shareholders of *Volkswagen AG* alike without any differentiation.¹²⁹ The Court avoided taking a clear position by stating that the two critical provisions, the voting cap and special majority requirement, at least indirectly served the State.¹³⁰ These rules were enacted, the Court explained, to help the two 20 per cent shareholders in 1960, the Federal State and the Land of Lower Saxony. As the Federal State had meanwhile chosen to sell its share, the remaining public shareholder who profited from these rules was the Land. This raises an interesting question: what would have been the situation if the Land had sold its share as well – in that case, would the voting cap and the special majority rule still constitute an infringement of Article 63?¹³¹ Would the same legal provisions, now without advantage for the State but serving a private shareholder, have the same impact on the free movement of capital? Could the factual situation make a difference for the assessment of the statute, given that its wording remains exactly the same? The Court is not clear on this, but it seems that the answer is

¹²⁶ This would correspond to what Catherine Barnard has termed ‘high impact approach’, but in fact comes close to a ‘total impact approach’, because of the wide interpretation of the free movement of capital. See C. Barnard, ‘Restricting Restrictions: Lessons for the EU from the US?’ (2009) 68 Cambridge Law Journal 575, 580 ff.

¹²⁷ On this specific point W. Meilicke, ‘Die Niederlassungsfreiheit nach ‘Überseering’ - Rückblick und Ausblick nach Handelsrecht und Steuerrecht’ [2003] GmbH-Rundschau 793, 805; F.J. Säcker, ‘Die Zukunft der Unternehmensmitbestimmung in Deutschland’ [2008] Die Aktiengesellschaft 17, 19. See on the German discussion in general S. Grundmann and F. Möslin, ‘State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects’ (2004) 4 European Banking and Financial Law Journal (EURELIA) 623; G. Spindler, ‘Deutsches Gesellschaftsrecht in der Zange zwischen Inspire Art und Golden Shares?’ [2003] Recht der internationalen Wirtschaft 850, 853; M. Habersack, *Europäisches Gesellschaftsrecht* (3rd ed., Munich 2006) § 3 paras. [29] f.; J. Oechsler, ‘Erlaubte Gestaltungen im Anwendungsbereich des Art. 56 I EG – Zugleich zur Entscheidung EuGH, NZG 2006, 942 – Golden Shares VI’ [2007] N.Z.G. 161, 163; C. Teichmann and E. Heise, ‘Das VW-Urteil des EuGH und seine Folgen’ [2007] Betriebs-Berater 2577, 2581.

¹²⁸ G. Parleani, ‘Après l’arrêt Volkswagen du 23 octobre 2007, quelle liberté pour les Etats actionnaires?’ [2007] Revue des sociétés 874.

¹²⁹ See above pp. 11 ff.

¹³⁰ *Commission v Germany* (above note 48), at paras. [48] ff.

¹³¹ On this Ringe (above note 48), at p. 542.

no. The Court only deduces that there is a violation of the free movement of capital from the fact that the special rules help the public authorities:¹³² ‘The VW law ... enables the Federal and State authorities to exercise considerable influence on the basis of such a reduced investment.’¹³³ From there, the Court concluded, it was clear that this would deter direct investors from other Member States.¹³⁴ The entire passage of this judgment seems to be based on the (classic) understanding that it is the State which profits. Interestingly, the State does not benefit from a statute, but from the ‘situation’,¹³⁵ which resulted from a combination of the statute and the shareholding. Therefore, we cannot draw any conclusions from this statement concerning the compatibility of company law with free movement of capital.¹³⁶

Turning to more conceptual matters, at an early stage, the Court has already prepared the ground for submitting general rules of company law to a free movement of capital test, with the expansion of this freedom from a ban on discrimination to a prohibition of non-discriminatory measures which deter or restrict free movement.¹³⁷ For the free movement of goods, it has long been recognised that the *Dassonville* formula of a ‘potential obstacle’¹³⁸ to cross-border trade potentially covers all provisions that differ from the market participant’s domestic law, simply because the exporter has to adapt to legal rules in the Member State of destination that are different from the ones which he is used to.¹³⁹ This formulation, which was further reinforced by *Cassis de Dijon*,¹⁴⁰ eventually had to be limited by the Court itself, since the scope of application of

¹³² See e.g. the wording of para. [48]: ‘However, ...’ and the statement in para. [51].

¹³³ Para. [51].

¹³⁴ Para. [52].

¹³⁵ See on this the Commission Communication (above note 26), at p. 17.

¹³⁶ Ringe (above note 48), at pp. 537, 542 f. Equally, Van Bakkum and others (above note 116), at pp. 11 f.

¹³⁷ Explicitly in case C-367/98 *Commission v Portugal* [2002] ECR I-4731, [44]; ever since steady case-law, see case C-174/04 *Commission v Italy* [2005] ECR I-4933, [12]; lastly in joined cases C-463/04 and C-464/04 *Federconsumatori and others v Comune di Milano* [2007] ECR I-10419, [19]. Cf. Teichmann and Heise (above note 127), at p. 2581; S. Grundmann and F. Möslin, ‘Die Goldene Aktie – Staatskontrollrechte in Europarecht und wirtschaftspolitischer Bewertung’ [2003] *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 317, 330 ff.; S. Grundmann and F. Möslin, ‘Die Goldene Aktie und der Markt für Unternehmenskontrolle im Rechtsvergleich – insbesondere Staatskontrollrechte, Höchst- und Mehrfachstimmrechte sowie Übernahmeabwehrmaßnahmen’ (2003) 102 *Zeitschrift für vergleichende Rechtswissenschaft (ZVglRWiss)* 289, 315 ff. See also Habersack (above note 127) § 3 paras. [29] f.; J. Oechsler, ‘Erlaubte Gestaltungen im Anwendungsbereich des Art. 56 I EG’ [2007] *N.Z.G.* 161, 162.

¹³⁸ Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

¹³⁹ This is explained in detail at Barnard (above note 69), at pp. 113 ff.

¹⁴⁰ Case 120/78 *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

the free movement of goods became too broad. This is why the Court later excluded ‘certain selling arrangements’ from the scope of applicability of the free movement of goods in *Keck*, correcting its own over-expansive interpretation.¹⁴¹

For the other fundamental freedoms, the development is not yet that advanced. For the free movement of capital, we are currently at the point where we must still wait and see whether the Court goes as equally far as it did in *Dassonville* and *Cassis de Dijon* for the free movement of goods. If the Court chooses the same path here, a correction at a later stage as in *Keck*, will be inevitable.¹⁴² If it does not choose to construe the free movement of capital equally broadly, it may avoid these difficulties but will then fail to apply this freedom to its maximum effectiveness.

So far, the Court has never officially transferred the *Keck* approach to the free movement of capital.¹⁴³ In the two golden shares cases concerning the United Kingdom and Spain, it refused to do this on the basis that the restrictions at stake in these two cases would not be ‘arrangements’ in the sense of the *Keck* case-law, but instead concerned the situation of investment itself.¹⁴⁴ By means of this factual analysis, the Court left open the legal question of applying an analogous approach as in *Keck*.¹⁴⁵

If the extension of the free movement of capital to general rules of company law is to be possible, it is necessary to deal with important counter-arguments. The main argument relates to the *intention* of the fundamental freedoms. Their objective is primarily to facilitate cross-border private

¹⁴¹ Case C-267/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097. It is still unclear to what extent very recent case-law differs from *Keck*: see case C-110/05 *Commission v Italy* [2009] 2 C.M.L.R. 34; case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] All E.R. (EC) 842

¹⁴² In tax cases such as case C-513/04 *Mark Kerckhaert and Bernadette Morres v Belgium*, [2006] ECR I-10967 or case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11673 the Court has exempted one particular field, namely taxation, from the scope of (then) Article 56 EC. See on this below note 162 and accompanying text.

¹⁴³ M. Andenas, T. Gütt and M. Pannier, ‘Free Movement of Capital and National Company Law’ (2005) 16 *European Business Law Review* 757, 770 f.

¹⁴⁴ *Commission v United Kingdom* (above note 100), at paras. [45]-[47]; similarly, case C-463/00 *Commission v Spain* (above note 33), at paras. [59]-[61].

¹⁴⁵ Cf. H. Altmeppen, ‘Europäische Niederlassungsfreiheit’ in B. Kropff and J. Semler, *Münchener Kommentar zum Aktiengesetz* (2nd ed., Munich 2006), ch. 6 para. [58]. Even further going Wellige (above note 105), at p. 432, and F. Kainer, ‘Binnenmarktrechtliche Grenzen des Übernahmerechts’ (2004) 168 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (Z.H.R.) 542, 556: The ECJ has indirectly transposed the *Keck* case-law to the free movement of capital. See also Spindler (above note 127), at p. 853.

autonomy.¹⁴⁶ When this market-opening role of EU law is considered, it is difficult to see how instruments of private law that provide for the necessary tools – such as the general rules of company law providing for the legal forms – could violate the fundamental freedoms.¹⁴⁷ Second, the internal coherence of a system of company law could suffer if EU law penetrates at various points without regard to the overall context of this area of the law.¹⁴⁸ However, both arguments may be rejected. The danger of system discontinuities in domestic law has very rarely convinced the Court to refrain from finding a fundamental freedom violated.¹⁴⁹ And naturally, while the institution of private law as a tool to facilitate cross-border activities has to be clearly appreciated, this cannot however relieve the legislator from the burden to respect EU law when forming its private law.¹⁵⁰

Again, the result therefore has to be that rules of general company law that have been enacted by legislation and do not necessarily secure any prerogatives for the State and do not benefit the State in any other way, but merely shape the legal relations between private persons can potentially be subject to the free movement of capital. This conclusion can be reached from a consistent extrapolation of the Court's interpretation of the fundamental freedoms. If the Court further develops its own case-law in a consistent and stringent way, this conclusion will inevitably be settled upon in a future judgment. On the other hand, it is unrealistic to expect that the Court will scrap national rules to a large extent. Whether the necessary restraint will be attained via a limitation of the scope of application of the freedom as in *Keck*, or via an enhanced interpretation of the concept of a 'too uncertain and indirect' restriction¹⁵¹ or via a generous justification test, remains to be seen. In any case, again it seems wrong to distinguish between 'golden shares' (special rights) on the one side and general company law on the other as to whether the scope of applicability of the free

¹⁴⁶ Kainer (above note 145), at p. 558 with further references.

¹⁴⁷ Kainer *ibid.*

¹⁴⁸ Teichmann and Heise (above note 127), at p. 2581.

¹⁴⁹ Only exceptionally, when a considerable financial burden is at stake, *e.g.* in a situation 'seriously undermining the financial balance of the social security system': Case C-120/95 *Nicolas Decker v Caisse de maladie des employés privés* [1998] ECR I-1831, [39]; case C-158/96 *Raymond Kohll v Union des caisses de maladie* [1998] ECR I-1931, [41].

¹⁵⁰ Opinion by Advocate General Colomer in cases C-463/00 and C-98/01, [2003] ECR I-4584, [48].

¹⁵¹ See on this joined cases C-418/93 and others *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco* [1996] ECR I-2975, [32]; case C-412/97 *ED Srl v Italo Fenocchio* [1999] ECR I-3845, [11].

movement of capital is triggered. A more flexible and appropriate test would be to include both situations in the scope of applicability, but to scrutinise whether the effect of the measure at stake will deter potential investors. This leads us to consider the different situations discussed above together and to develop a common test applicable to all of them.

C. A Common Approach

Drawing the different categories together – private action, State action with or without public authority, general company law – a common approach to solve the joint problems seems to emerge.

1. Towards an effects-based test

The formal criterion of ‘how much State’ involvement seems to be unsuitable for the reasons that were discussed. Instead, the main focus of assessment should be directed towards the question of whether the particular rule at stake actually ‘deters’ potential investors from other Member States from investing in the company in a way comparable to golden shares.¹⁵²

This test has a number of advantages. First of all, it overcomes the Court’s current scattered and unsystematic approach where formally the Court seems to stick to ‘State influence’ as a formal precondition of a Treaty violation but then allows various unconnected and arbitrary exceptions. Thereby, it may support the (unexplained) results found in the *Volkswagen* case¹⁵³ and in the Dutch golden shares case¹⁵⁴. Secondly, it will be in line with the wording of Article 63 TFEU, which does not at all, on the face of it, refer to the State.¹⁵⁵ Most importantly, though, an effects test will produce adequate results for the various situations discussed in this paper: The Court may apply different levels of scrutiny, depending on the actor and/or seriousness of the impediment to the free capital movement, and on the force and validity of competing claims of market actors. To illustrate, it will presumably be more difficult to find a ‘detering effect’ when it

¹⁵² See on this criterion already the references at note 120 above.

¹⁵³ See above notes 129 ff. and accompanying text.

¹⁵⁴ See above notes 115 ff. and accompanying text.

¹⁵⁵ Craig and de Búrca (note 40) 724.

comes to rules of general company law or to private activities, rather than for special rights introduced by the State. In other words, private actors may often still do things that public authorities may not. On the other hand, the test is flexible enough not to categorically exclude general company law or even private action *per se*. Of course, it is possible that general company law rules render an acquisition of control of a domestic company for a foreign investor more difficult (or are even designed to do so), and it is also fully imaginable that private activity in a specific situation can make the market access for certain investors entirely impossible or that private actors act in a discriminatory way; then the deterring effect of the respective measures will be obvious.

Still, the effects test would rest firm in the economic reasoning that seems to underpin the Court's existing case-law: the 'deterring' effect of golden shares results to a large extent from the fact that it is the State as a shareholder which takes decisions that do not necessarily correspond to general rational and profit-maximising decisions of a private market participant. Instead, the State often pursues other objectives with its investments, often explicitly of a non-profit seeking but more political nature, such as the avoidance of industry relocations or the preservation of unprofitable employment.¹⁵⁶ Furthermore, a private investor can count only on his own resources in order to finance his investments and is liable, up to the limits of those resources, for the consequences of his decisions. The public investor, on the other hand, has access to resources flowing from the exercise of public power, in particular from taxation.¹⁵⁷ This is why, under the test proposed here, the State as an influential shareholder is always very likely to generate the 'deterring' impact mentioned above. By contrast, a major private shareholder who holds shares with multiple voting rights will normally not deter investors to the same extent as would the State holding the same type of shares. This follows from the basic assumption that shareholders are a sufficiently homogenous group, all sharing ultimately the goal of profit-making.¹⁵⁸

¹⁵⁶ In this way, Bundesgerichtshof, judgment of 17 March 1997 – II ZB 3/96, BGHZ 135, 107 = [1997] N.J.W. 1855; cf. also Wellige (above note 105), at p. 430.

¹⁵⁷ Joined cases T-228/99 and 233/99 *Westdeutsche Landesbank Girozentrale and others v Commission* [2003] ECR II-435, [272].

¹⁵⁸ Naturally, there may be differences between the shareholders' individual interests, e.g. in relation to a short term / long term investment perspective.

Finally, and very importantly, the effects test will help explain an important situation: in the context of a corporate *group*, one may find measures that will be caught by this test. It is common practice for parent companies to implement measures that are detrimental to their subsidiaries, but make sense in the overall group strategy.¹⁵⁹ Such measures may be explained by the desire to safeguard the reputation of the group, by a price strategy decided on at group level, for which the group may consider it appropriate to tolerate losses in one subsidiary for a certain period, or by a programme of progressive disinvestment, where the group may decide to bear the losses suffered during the final years of operation of one of its members. These measures might be just as unattractive for investors as State measures. If this is the case, it cannot be excluded that the parent company's behaviour may amount to a 'detering effect' within the meaning of Article 63 TFEU.

2. Critique and counter-critique

The problems associated with the test supported here are obvious: it will be difficult to define where a specific arrangement 'deters' foreign investors or not; legal uncertainty and unpredictability might be the consequence. Put differently, if a specific rule 'deters' investors through its very existence, the floodgates for a 'total control' of any national (company) law rule may open.¹⁶⁰ If this were the consequence, an effects-based test may indeed not remedy the problem identified above – the lack of a clear test to attribute legislative freedom to Member States and capital freedom for individuals – but indeed make it worse. In this sense, the UK government had already warned in the BAA case that a broad interpretation of free movement rights may lead to a repetition of the problems generated by *Dassonville* and *Cassis de Dijon*, which the Court has corrected later in *Keck*.¹⁶¹

It is not the aim of this paper to propose going down this route. Rather, it is submitted, an effects-based test can serve as the better alternative in comparison

¹⁵⁹ As an example, see the following two state aid cases: case C-303/88 *Italy v Commission* [1991] ECR I-1433; case C-305/89 *Italy v Commission* [1991] ECR I-1603.

¹⁶⁰ See the examples given by Barnard (note 126) at p. 594.

¹⁶¹ Case C-98/01 *Commission v UK* [2003] ECR I-4641, [28].

to the Court's current case-law in that it allows a reliable doctrinal concept for the matter of enquiry here. It has been demonstrated that the Court's case-law is largely scattered, partly inconsistent and fails to explain the differences between private versus State activity in company law, or even between State activity with public authority or the State as a private market operator. It is to be expected that a test asking whether a measure actually *deters* potential investors will on the one hand be wide enough to give appropriate answers to the problematic situations raised here, yet also preventing a *Dassonville*-like opening of the floodgates. First positive signs in this direction are found in the taxation context: the Court has repeatedly emphasised that, in the absence of discrimination, the mere disparity between different Member States' tax regimes is not enough to trigger the application of the free movement of capital.¹⁶² This tendency rests within a market-based test, but avoids the mistakes that were made with the free movement of goods. Any fear, it is submitted, that the effects-test may be too wide, is therefore unfounded.

In any case, the test should not turn on whether the actor is private or public, or whether it is with or without public authority. The examples given illustrate that the distortion of the single market is a threat that can occur in either of these situations. The better approach, it has been suggested, is therefore to test each measure for its *detering effect* on actual or potential investors. This test allows for a much more flexible assessment as to whether the activity gives rise to concern or not.

D. Volkswagen – The Aftermath

In the proceedings surrounding the VW law, new, further problems are expected. At the end of 2008, Germany amended the VW law, abolishing the right to nominate directors and the voting cap, but retaining the 80 per cent special majority requirement for important company decisions. Furthermore, a rule imposing a majority requirement of two-thirds of the supervisory board for a

¹⁶² Case C-387/01 *Harald and Ingrid Weigel v Finanzlandesdirektion für Vorarlberg* [2004] ECR I-4981, [55]; C-365/02 *Lindfors* [2004] ECR I-7183, [34]; Case C-392/05 *Georgios Alevizos v Ipourgos Ikonomikon* [2007] ECR I-3505, [76]; case C-67/08 *Margarete Block v Finanzamt Kaufbeuren* [2009] ECR I-0000, [35]. See, e.g., J. Snell, 'Non-discriminatory Tax Obstacles in Community Law' (2007) 56 I.C.L.Q. 339.

decision about the business location of the company is retained.¹⁶³ The new statute was immediately criticised and was broadly considered to be incompatible with the free movement of capital.¹⁶⁴ The European Commission soon brought new legal action against Germany, claiming that the new version of the law still violates EU law.¹⁶⁵ However, things have become silent since then: This has to do with unexpected changes at VW. After Porsche's unsuccessful attempt to acquire full control of Volkswagen¹⁶⁶, the latter launched a counter-attack and ultimately managed to merge with Porsche, thereby degrading Porsche as one of now ten different makes assembled under the Volkswagen roof. In the new, significantly bigger *Volkswagen AG*, Lower Saxony still owns 20% of the shares, and the emirate of Qatar is set to become a new, strong minority shareholder. The shareholders have now amended the articles of association in a way which is extremely relevant for the purpose of this paper. As if they wanted to test some of the problems discussed above, the shareholders (including the State) passed a resolution restating some of the former provisions from the VW law into the articles of association. At the General Meeting on 3 December 2009, the shareholders agreed *inter alia* to include in the articles that 'The State of Lower Saxony is entitled to appoint two members of the Supervisory Board of the Company for as long as the State of Lower Saxony directly or indirectly holds at least 15 percent of the Company's ordinary shares'¹⁶⁷ and that 'Resolutions by the General Meeting that are required by law to be adopted by a majority consisting of at least three-quarters of the share capital represented when the resolution is adopted, require a majority of more than four-fifths of the share capital of the Company represented when the resolution is adopted. This applies in particular, but not exclusively, to all measures to increase and decrease the share capital, to

¹⁶³ This provision was not subject to the EU proceedings.

¹⁶⁴ See e.g. T. Käseberg and F. Möslin, 'Auch die Mitbestimmungsregeln im VW-Gesetz sind fragwürdig' *Frankfurter Allgemeine Zeitung (FAZ)* (Frankfurt 12 March 2008), 23. The German Industry Federation BDI was strictly against the new version, see K. Mrusek, 'BDI mobilisiert Merkel gegen das VW-Gesetz' *FAZ* (Frankfurt 27 February 2008), 13.

¹⁶⁵ The Commission initiated new proceedings against Germany on 5 June 2008. See --, 'Porsche and Volkswagen – See you in Court' *The Economist* (London 14 June 2008), at p. 86; H. Kafsack and others, 'EU-Verfahren gegen neues VW-Gesetz' *FAZ* (Frankfurt 6 June 2008), at p. 13. After the law had passed through the German Parliament, the Commission submitted a reasoned opinion pursuant to (then) Article 228(2) EC Treaty, giving Germany two months to respond. See European Commission, Press release of 27 November 2008, 'Free movement of capital: Commission calls again on Germany to apply a Court ruling on Volkswagen law' IP/08/1797.

¹⁶⁶ See above note 47.

¹⁶⁷ Section 11(1) of the new articles of association of Volkswagen AG.

other amendments to the Articles of Association and measures in accordance with the *Umwandlungsgesetz* (German Reorganisation Act), and to resolutions in accordance with the *Wertpapiererwerbs- und Übernahmegesetz* (German Securities Acquisition and Takeover Act) for which the law prescribes a majority amounting to at least three-quarters of the share capital represented when the resolution is adopted'.¹⁶⁸

In essence, this prescribes two of the former key provisions of the VW law into the articles of association of Volkswagen and makes them independent from the existence of the VW law.¹⁶⁹ The new situation resembles to some of the scenarios discussed here: is the State when acting as a shareholder subject to a free movement control? Are private shareholders when doing the same thing?

At the moment, the matter is off the agenda. But should the matter ever come to the Court again, several of the questions posed here will need to be answered.

V. CONCLUSION

Company law rules and company law actors can come into conflict with EU law on different levels. The systematic analysis of the free movement of capital undertaken here in respect to company law suggests a multi-faceted view. The capital freedom has the capacity to be applied to company law matters on an even broader scale than that previously enjoyed by the freedom of establishment, ultimately ending up in a 'quality control' of domestic company law against the scrutiny of the Court of Justice of the European Union.

This paper has demonstrated that the Court of Justice lacks a clear doctrinal and consistent approach to tackle the problems. So far, the case-law presents a scattered picture: First, the *actor* in relation to the measure at stake is important. While company law measures by *private parties* are only exceptionally subject to the provisions of free movement of capital, *State* measures potentially always trigger the scope of application of this fundamental freedom, irrespective

¹⁶⁸ Section 25(2) of the new articles of association of Volkswagen AG.

¹⁶⁹ G Haake and M Hucko, 'VW legt bei Porsche-Übernahme den Turbo ein' *Financial Times Deutschland* (Hamburg 3 December 2009).

of their nature or objective. Secondly, so far the Court has predominantly seen the scope of application of the capital freedom triggered when the State is the *beneficiary* of the measure in question. Both criteria, however, have numerous exceptions, and it is difficult to see an underlying policy rationale.

Although the Court was reticent in *Volkswagen*, the extension of the free movement of capital as covering non-discriminatory obstacles with a general scope will ultimately open the door to assessing the merits of all provisions of general company and capital markets law. On the current fundament, this approach is not without risk and is certainly not desirable.

This paper offers a better test that the Court should focus on. From a policy perspective, the Court should apply an ‘effects-based’ test, namely, the decisive test should be the ‘detering effect’ of the measure at stake on potential investors from other EU Member States. This criterion will yield appropriate results, both for private and for public market participants or regulators. It offers a flexible tool to create a scale of different ‘impediments’ to cross-border capital flows: The existence of golden-shares type special rights for the State constitutes one extreme which is surely caught by EU law, while the existence of purely private shareholder arrangements within the articles of association, is the other extreme.

The issues discussed in this paper help one to understand an EU view on some aspects of the (current and future) State involvement in companies and also to what extent private actors may be held liable for the violation of the market freedoms. Both problems have enormously gained in importance since the 2007/08 financial turmoil, which has produced new challenges for the State as owner of companies and produced severe governance problems.¹⁷⁰ Ultimately, the Court will have to draw the line – and thereby decisively design the future diversity or unity of the canon of European company law.

¹⁷⁰ See, e.g. the discussion at the Transatlantic Corporate Governance Dialogue meeting in Washington DC on 17 September 2009 on ‘The New Role of Government in Corporate Governance’ and the corresponding newsletter at <http://www.ecgi.org/research/research_newsletter/vol7.pdf>.