



## ARTICLES

# ON THE CONTENT AND SCOPE OF NATIONAL AND EUROPEAN SOLIDARITY UNDER FREE MOVEMENT RULES: THE CASE OF GOLDEN SHARES AND SOVEREIGN INVESTMENTS

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TABLE OF CONTENTS: I. Introduction. – I.1. Structure and aims of the analysis. – I.2. Public services, strategic industries and socio-economic protectionism: solidarity within the EU and the scope of free movement rules *vis-à-vis* EU and non-EU investors. – II. Intra-EU investments and golden shares. – II.1. Public services, social regulation and European solidarity. – II.2. Golden shares, hybrid forms of socio-economic protectionism and freedom of movement: European market-oriented solidarity and economic regulation vs. national welfare-oriented solidarity and social regulation. – II.3. General (economic?) interest and the internal market: the scope of free movement justifications and the role of Art. 106, para. 2, TFEU within a “social market economy”. – III. Non-EU investments, sovereign wealth funds (SWFs) and State owned enterprises (SOEs). – III.1. The capital/establishment dichotomy and the access of non-EU sovereign investors to the European internal market. – III.2. Domestic and EU responses for the restriction of non-EU sovereign investments and the possible convergence of national and European solidarity. – IV. Conclusion.

ABSTRACT: At the core of my article lies the tension between the EU’s aims of market integration and the retention by national authorities of important powers in the carrying out of socio-economic activities. In this respect I have examined the concept of socio-economic protectionism under free movement rules in the context of the relationships between intra-EU golden shares, non-EU sovereign investments, SGEIs and strategic industries. To this end, I have argued that the multifaceted notion of solidarity, at national and EU levels, may serve for reaching a fair balance between the aims of economic/market regulation and those of social regulation.

KEYWORDS: solidarity – golden share – sovereign investment – sovereign wealth fund – state owned enterprise – free movement rules.

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## I. INTRODUCTION

### I.1. STRUCTURE AND AIMS OF THE ANALYSIS

The fundamental, underlying issue that this essay seeks to address is the tension between the EU's aims of market integration, on the one hand, and the intervention of Member States in the economy and the retention by national authorities of important powers in strategic industrial sectors, on the other hand. Therefore, at the core of my article lies the regulation of both public economic services, i.e., services of general economic interest (SGEIs),<sup>1</sup> as well as of sensitive activities related to national security, such as defense. In this connection, it must be stressed that, unlike SGEIs, strategic/national security sectors may not comprise *economic* activities and, as a consequence, (some of them) fall *per se* outside the competence of the EU.<sup>2</sup>

In my discussion, I will not deal with crucial problems concerning the definition and supply of SGEIs, which have been widely covered in the literature.<sup>3</sup> Rather, I will focus on one specific aspect: the case law of the CJEU<sup>4</sup> on the so-called "golden shares"/"golden powers"/"golden rules"/"goldene Aktien"/"actions privilégiées", that is to say, special powers held by the State in formerly public companies where the rights conferred on shareholders by ordinary law are reduced for the benefit of public entities.<sup>5</sup> There is, indeed, a manifest relationship between golden shares and SGEIs: to my knowledge, with the exception of *Commission v. Germany* of 23 October 2007<sup>6</sup> and *Commission v. Germany* of 22 October 2013<sup>7</sup> (both on Volkswagen), all judgments ren-

<sup>1</sup> *Rectius*: economic services of general interest. On this term, namely on the economic element defining the activity rather than the "interest" pursued see, *inter alia*, J.L. BUENDIA SIERRA, *Exclusive Rights and State Monopolies Under EC Law*, Oxford: Oxford University Press, 1999, pp. 301-303; D. GALLO, *I servizi di interesse economico generale. Stato, Mercato e Welfare nel diritto dell'Unione europea*, Milano: Giuffrè, 2010, pp. 363-370.

<sup>2</sup> On the distinction between SGEIs and non-economic services of general interest see, among others, V. HATZOPOULOS, *The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities*, in *European Business Law Review*, 2012, p. 973 *et seq.*

<sup>3</sup> For instance, on SGEIs, social security and social solidarity see, *inter alia*, M. ROSS, *Promoting Solidarity: From Public Services to a European Model of Competition?*, in *Common Market Law Review*, 2007, p. 1057 *et seq.*; D. GALLO, *Social Security and Health Services in EU Law: Towards Convergence or Divergence in Free Movement, Competition and State Aids?*, in *EUI Working Papers*, 2011, cadmus.eui.eu.

<sup>4</sup> On the role of EU Courts in "valuing" solidarity, see G. DAVIES, *The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare*, in Y. BORGSMANN-PREBIL, M. ROSS (eds), *Promoting Solidarity in the European Union*, Oxford: Oxford University Press, 2010, p. 106 *et seq.*

<sup>5</sup> The State is not always a shareholder; for convenience, from now on I will use the broad term "golden shares" to indicate all forms of State intervention in privatized companies. For a clear definition see Opinion of AG Colomer delivered on 3 July 2001, cases C-367/98, C-483/99 and C-503/99, *Commission v. Portugal, France and Belgium*, para. 1.

<sup>6</sup> Court of Justice, judgment of 23 October 2007, case C-112/05, *Commission v. Germany*.

<sup>7</sup> Court of Justice, judgment of 22 October 2013, case C-95/12, *Commission v. Germany*.

dered by the CJEU concerned golden shares held by the State in undertakings entrusted with the provision of SGEIs.<sup>8</sup>

Besides European golden shares, my contribution will deal with access to the EU's market of non-EU public/private hybrids, namely sovereign investors such as sovereign wealth funds (SWFs) and state owned enterprises (SOEs). Since these entities currently invest both in SGEIs and strategic/national security sectors, the companies affected by these investments are those in which the State holds special powers of intervention.

I will begin my analysis by examining the concept of socio-economic protectionism in the context of the relationships between golden shares, sovereign investments, SGEIs and strategic industries. This will be done with the aim of assessing the function and relevance of solidarity within the EU through the lens of the scope and rationale of the free movement rules *vis-à-vis* EU and non-EU investors (section I.2).

The first aim of my research is to investigate in what sense, to what extent and for what reasons the golden shares jurisprudence represents a privileged – although atypical – *sedes materiae* for illustrating the content and extent of EU economic/market integration and its link with the two interrelated concepts of social integration and solidarity at European level, as well as the impact of the EU's twofold (i.e., both economic and social) integration on solidarity at national level. Therefore, this part of the article will focus on the treatment of EU operators who intend to invest in EU companies (section II).

My second general aim is to identify the main concerns raised by the access of SWFs and SOEs to the EU market, verify whether action by the EU is welcome and necessary in this area and, in light of this, clarify meaning and scope of national and European solidarity. The key issue here is the restriction of non-EU investments when the latter are carried out by SWFs and SOEs, rather than by private companies, in SGEIs and strategic/national security sectors where Member States usually retain special powers (section III).

Finally, the discussion will end with some brief concluding remarks (section IV).

<sup>8</sup> Court of Justice, judgment of 23 May 2000, case C-58/99, *Commission v. Italy*; Court of Justice, judgments of 4 June 2002, case C-367/98, *Commission v. Portugal*, case C-483/99, *Commission v. France* and case C-503/99, *Commission v. Belgium*; Court of Justice, judgments of 13 May 2003, case C-98/01, *Commission v. United Kingdom* and case C-463/00, *Commission v. Spain*; Court of Justice, judgment of 2 June 2005, case C-83/03, *Commission v. Italy*; Court of Justice, judgment of 28 September 2006, joined cases C-282/04 and C-283/04, *Commission v. Netherlands*; Court of Justice, judgment of 14 February 2008, case C-274/06, *Commission v. Spain*; Court of Justice, judgment of 17 July 2008, case C-371/05, *Commission v. Italy*; Court of Justice, judgment of 26 March 2009, case C-326/07, *Commission v. Italy*; Court of Justice, judgment of 8 July 2010, case C-171/08, *Commission v. Portugal*; Court of Justice, judgment of 10 November 2011, case C-212/09, *Commission v. Portugal*; Court of Justice, judgment of 8 November 2012, case C-528/10, *Commission v. Greece*.

## I.2. PUBLIC SERVICES, STRATEGIC INDUSTRIES AND SOCIO-ECONOMIC PROTECTIONISM: SOLIDARITY WITHIN THE EU AND THE SCOPE OF FREE MOVEMENT RULES *VIS-À-VIS* EU AND NON-EU INVESTORS

The term “solidarity”<sup>9</sup> is here used to denote both “market-oriented” and “welfare-oriented” (i.e., social) solidarity. While the first is grounded on the notions of Single Market, free movement and economic regulation, the second is strongly connected with the concepts of welfare<sup>10</sup> and social regulation.<sup>11</sup> In other words, for the purposes of this analysis, solidarity includes the carrying out of public policies aimed at pursuing both economic and social (extra-commercial) goals. In this respect, “public” does not necessarily imply the State, but also institutions, such as the EU, entrusted with regulatory powers:<sup>12</sup> the “umbrella” concept of the “European Social Model” derives precisely from this combination of economic and social needs.

Since SGEIs<sup>13</sup> are at the heart of my discussion, some preliminary remarks on such activities are necessary. First of all, the idea of solidarity implied in these services must not be confined to Member States; yet, it is strongly intertwined with the EU’s regulatory competence. Secondly, with regard to the provision of SGEIs, the European conception of solidarity seems to have a dual dimension, both “market-oriented” – in terms of liberalization and privatization – and “welfare-oriented” – in terms of public service obligations detected at the EU level and imposed upon Member States and EU institutions. Indeed, there is no doubt that SGEIs currently represent a constitutive element of the “European Social Model”/“European welfare”, at the top of a social, rather than solely economic, regulation. In this sense, the notion of general interest, from an essential national value – enshrined in derogation clauses – becomes a *positive* European value.<sup>14</sup>

On the other hand, and contrary to what happens in EU secondary law as well as in the CJEU’s case law on SGEIs, the only dimension of European solidarity that seems to

<sup>9</sup> On the multifaceted notion of solidarity and its legal status in the EU see, among others, Y. BORGMANN-PREBIL, M. ROSS, *Promoting European Solidarity: Between Rhetoric and Reality?*, in Y. BORGMANN-PREBIL, M. ROSS (eds), *Promoting Solidarity in the European Union*, Oxford: Oxford University Press, 2010. More generally, from a theory of law perspective, see A. SANGIOVANNI, *Solidarity in the European Union*, in *Oxford Journal of Legal Studies*, 2013, p. 213 *et seq.*

<sup>10</sup> On the close linkages (and overlaps) between the two concepts see, among others, G. DE BÚRCA, *Towards European Welfare?*, in G. DE BÚRCA (ed.), *EU Law and the Welfare State. In Search of Solidarity*, Oxford: Oxford University Press, 2005, p. 1 *et seq.*

<sup>11</sup> On the interplay between (social) regulation and social solidarity, including from a public service perspective, see T. PROSSER, *Regulation and Social Solidarity*, in *Journal of Law and Society*, 2006, p. 364 *et seq.*

<sup>12</sup> On the European dimension of social welfare as going beyond the nation state see J. HABERMAS, *The Postnational Constellation and the Future of Democracy*, in *The Postnational Constellation: Political Essays*, Cambridge: MIT Press, 2001, p. 58 *et seq.*; *contra* T. NAGEL, *The Problem of Global Justice*, in *Philosophy and Public Affairs*, 2005, p. 113 *et seq.*

<sup>13</sup> Along with strategic and national security industries in the case of SWFs and SOEs; see *infra*, section III.

<sup>14</sup> See *infra*, section II.1.

emerge from the golden shares case law is the one defined by internal market aims and values. In this area, unlike what happens with regard to SGEIs, the EU does not erode the discretionary power of the Member States in order to impose “social” objectives (such as universality, as it may be the case with the jurisprudence of the CJEU on the provision of public services), but solely to force the Member States to “disappear” as much as possible from undertakings that are, in various degrees, controlled, through golden shares, by national public authorities. In the field of golden shares, therefore, the risk is that “European [‘market-oriented’] solidarity [...] endangers national [‘welfare-oriented’] solidarity”.<sup>15</sup> To avoid this, the EU allows its Member States, in principle, to rely on “a number of safeguards designed [by the EU itself] to protect national solidarity”.<sup>16</sup> The problem is that these safeguards, represented by general interest exceptions, were not given, by the CJEU, the status they deserve in the field of golden shares. This is the reason why, in my opinion, the CJEU’s case law on golden shares reveals a clash between the European/“market-oriented” and national/“welfare-oriented” dimensions of solidarity, lacking a fair balance between the two.

Moreover, the situation is even more complex if we change perspective and consider investments in SGEIs and strategic sectors carried out by non-EU actors, especially when the latter are entirely public or, albeit being formally private, are subject to the influence of a third country. In this case, the problem is whether the notion of solidarity may take a different shape, and whether considerations of public interest may be successfully used by the EU alone, by the EU and/or its Member States, to prevent or limit those investments thanks to a combination of “welfare-oriented” and “market-oriented” solidarity, both at European and national levels. The main question is how EU institutions and national authorities should act in order to protect the European market and society from investors who might endanger the national as well as European conception of the regulation and provision of SGEIs and strategic services.

## II. INTRA-EU INVESTMENTS AND GOLDEN SHARES

### II.1. PUBLIC SERVICES, SOCIAL REGULATION AND EUROPEAN SOLIDARITY

The distinctive feature of SGEIs, as regulated in the EU, is that they do not merely represent a derogation from competition rules under Art. 106, para. 2, TFEU – and, thus, a negative provision – but also a positive provision, in line with what is now Art. 14 TFEU and with the Lisbon Protocol no. 26 on services of general interest (Protocol no. 26).<sup>17</sup>

<sup>15</sup> G. DE BÚRCA, *Towards European Welfare?*, cit., p. 1.

<sup>16</sup> *Ibid.*

<sup>17</sup> On SGEIs in the post-Lisbon scenario see, *inter alia*, U. NEERGAARD, *Services of General Economic Interest under EU Constraints*, in D. SCHIEK, U. LIEBERT, H. SCHNEIDER (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge: Cambridge University Press, 2011, p. 174 *et seq.*; J.

This means that SGEIs are not seen only as a constitutive element of national citizenship, national solidarity and the welfare state, but also as a European founding value that is strongly connected with the European model of society, the promotion of social cohesion under Art. 14 TFEU, the notion of EU social citizenship, and the exercise of fundamental social rights, as confirmed by the inclusion of access to SGEIs in the “Solidarity” Chapter of the Charter of Fundamental Rights of the European Union, namely in its Art. 36. Moreover, this concept of European solidarity is not conceived merely in economic terms,<sup>18</sup> as is clear when we consider the principles enshrined in Art. 1 of the aforesaid Protocol no. 26,<sup>19</sup> in (binding/sectorial or soft/horizontal) secondary legislation,<sup>20</sup> and in the CJEU’s case law on SGEIs<sup>21</sup> – principles such as universality and equality of access, quality and continuity, just to mention a few. This entails the emergence of a set of core public-service obligations<sup>22</sup> in harmonized and non-harmonized sectors of general interest. The EU’s establishment of universal service is paradigmatic in this regard and must be understood as both a symptom and a catalyst of the positive integration between markets and rights.<sup>23</sup>

The interplay between SGEIs and the EU values mentioned above unfolds, as a consequence, a shift from a purely national concept of social solidarity to a European one, a shift achieved by raising national considerations to the level of EU principles and positive rules that are best able to define and guide the EU’s policies and, in certain areas, may even pre-empt the adoption of national policies. In this way, the relationship between European solidarity and social regulation takes concrete form. There is no conflict in principle between the interests of the EU and the general interest, since public services, as explained above, are included, at primary and secondary law, among the

VAN DE GRONDEN, C.S. RUSU, *Services of General (Economic) Interest post-Lisbon*, in M. TRYBUS, L. RUBINI (eds), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham, Northampton: Edward Elgar, 2012, p. 413 *et seq.*

<sup>18</sup> For a detailed analysis of the connections between public services and social solidarity see M. ROSS, *Promoting Solidarity*, *cit.*

<sup>19</sup> Amongst those principles there are “a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights”.

<sup>20</sup> See, most recently, Communication COM(2011) 900 final of 20 December 2011 from the Commission, *A Quality Framework on Services of General Interest in Europe*.

<sup>21</sup> See, for instance, General Court, judgment of 12 February 2008, case T-289/03, *BUPA and others v. Commission*, paras 166-203.

<sup>22</sup> On the Europeanization of public services see, among many others, M. ROSS, *The Europeanization of Public Services Supervision: Harnessing Competition and Citizenship?*, in *Yearbook of European Law*, 2004, p. 303 *et seq.*; G. NAPOLITANO, *Towards a European Legal Order for Services of General Economic Interest*, in *European Public Law*, 2005, p. 565 *et seq.*; T. PROSSER, *The Limits of Competition Law: Markets and Public Services*, Oxford: Oxford University Press, 2005, pp. 121-173.

<sup>23</sup> See, for instance, W. SAUTER, *Services of General Economic Interest and Universal Service in EU Law*, in *European Law Review*, 2008, p. 167 *et seq.*; J. DAVIES, E. SZYSZCZAK, *Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest*, in E. SZYSZCZAK *et al.* (eds), *Developments in Services of General Interest*, The Hague: TMC Asser Press, 2011, p. 155 *et seq.*

elements and objectives on which (not only national interests, but also) the European common interest is based.

Now, upon a review of the relevant case law, it appears, firstly, that, when the provision and regulation of SGEIs is at stake, the area of EU law involved is normally competition law. Conversely, the question of the *ex-ante* (il)legality of golden shares and, most frequently, of their *ex-post* compatibility with EU law raises issues concerning the internal market rather than antitrust law. Secondly, unlike the case law on SGEIs under competition rules, the multiform concept of “general interest” under free movement rules and the golden shares case law seems to be always considered as an obstacle to the completion of the internal market, i.e., an exception that Member States may invoke and successfully rely on – rather than a positive rule enshrined in EU law. There is no shift from national general interests to a European concept of general interest when golden shares and restrictions to free movement are at stake. In this respect, European solidarity functions as a corollary to economic integration – and not to social regulation –, with the principal aim of implementing and guaranteeing market access for EU investors within the European market.

## II.2. GOLDEN SHARES, HYBRID FORMS OF SOCIO-ECONOMIC PROTECTIONISM AND FREEDOM OF MOVEMENT: EUROPEAN MARKET-ORIENTED SOLIDARITY AND ECONOMIC REGULATION VS NATIONAL WELFARE-ORIENTED SOLIDARITY AND SOCIAL REGULATION

Due to their being included in a company's articles of association, the golden shares held by the State formally have a private law nature. So far, they have been introduced either following a privatization law passed by the Parliament or, more directly, following a decision by a shareholders' meeting, without prior formal action by national authorities.<sup>24</sup>

As is well known, the Court now recognizes the horizontal direct effect of the fundamental freedoms in an ever-increasing number of sectors.<sup>25</sup> The original scope *ratione personae* of the fundamental freedoms has thus been extended so as to embrace situations which otherwise would not be covered by the Treaties and, therefore, to provide a legal framework for the socio-economic changes produced by the privatization and liberalization of services originally supplied by public utilities. In the field of golden shares, the recognition of a horizontal direct effect must be considered in light of both the principle of private autonomy and the rise of (relatively) new, hybrid and *sui generis* forms of regulatory socio-economic protectionism that, while induced by the State, are

<sup>24</sup> On the topic see, recently, N. RUCCIA, *The New (and Shy) Approach of the Court of Justice Concerning Golden Shares*, in *European Business Law Review*, 2013, p. 275 *et seq.*

<sup>25</sup> See most recently H. SCHEPEL, *Who's Afraid of the Total Market? On the horizontal application of the free movement provisions in EU law*, in I. LIANOS, O. ODUDU (eds), *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration*, Cambridge: Cambridge University Press, 2012, p. 301 *et seq.*

actually implemented by the private sector itself, i.e. by privatized companies. In other words, even though golden share provisions are contained in the articles of association of a company, that is not enough for the Court to exclude the involvement of the “Chameleon State”,<sup>26</sup> regardless of whether or not the government concerned has previously introduced said powers in its privatization laws. Indeed, an interest or “stimulus” on the part of the State in introducing special rights in the laws governing former public companies is sufficient evidence to establish the existence of a relevant public involvement. Therefore, in order for the adoption of provisions in favour of the State to be considered legal under the European treaties, not only must it be shown that the adoption of those provisions is not a direct consequence of the exercise of state authority, but any pressure from public authorities must also be excluded. In the golden shares case law, the Court has used the same functional approach as the one used in other cases. The purpose of this approach is always the same: to enable the Court to address changes that can no longer be viewed within the context of a clear distinction between the public and private spheres.

This being so, the question arises as to when regulation, which pertains to public law, is likely to result in illegal market restrictions that, as such, are prohibited by the rules on free movement. The answer of the Court is straightforward: whenever regulation is guided not by the economic interests of the privatized company concerned, but by general principles which may affect private law provisions, whose primary objective is to generate profit. Quite clearly, this approach leads almost inevitably to a finding of infringement, since separating regulation, general (non-private) interest and profit is in itself very difficult, if not impossible, especially in the context of public services.<sup>27</sup> And this “automatism” is precisely what seems to raise issues, since the Court’s legal reasoning is grounded on the firm belief (and the presumption) that the State performs a regulatory function with the primary aim of restricting market access, rather than exercising its power to “direct” and guide market forces. In this connection, what needs to be assessed is whether the CJEU, in respect to golden shares, has established a sound legal framework and fully addressed the socio-economic changes begun in the eighties with liberalization and privatization processes, changes which can no longer be viewed within the context of an ideal-type dichotomy between public and private spheres.<sup>28</sup>

<sup>26</sup> M. POIARES MADURO, *L’État-caméléon. Formes publique et privée de l’Homo Economicus*, in *Mélanges en l’honneur de Philippe Léger. Le droit à la mesure de l’homme*, Paris: Editions A. Pedone, 2006, p. 79 et seq.

<sup>27</sup> Although the Court does not expressly say so, this approach seems to rely on the same logic as that behind the abstract principle of a private investor in a market economy which, as stressed by some scholars, can be found in EU State aid law. On this aspect see A. BIONDI, *When the State is the Owner – Some Further Comments on the Court of Justice “Golden Shares” Strategy*, in U. BERNITZ, W.-G. RINGE (eds), *Company Law and Economic Protectionism. New Challenges to European Integration*, Oxford: Oxford University Press, 2010, pp. 99-102.

<sup>28</sup> Among monographs on this topic, see J. BAQUERO CRUZ, *Between Competition and Free Movement*, Oxford: Hart, 2002; O. ODUDU, *The Boundaries of EC Competition Law. The Scope of Article 81*, Oxford: Oxford



The underlying purpose of golden shares – at least on paper – is the protection of national general interests, since, as a result of privatization, these run the risk of being ignored in favour of profit making, which is the ultimate goal of companies that are no longer public. As duly noted in the literature, golden shares are “often deployed to justify the State’s traditional duty to provide public services”: they are usually associated with enterprises that are regarded as “national champions” or “a symbol of the State”. Thus, “it would be difficult to persuade electorates that similar services or goods could be provided, not only by the private sector, but also by *non-nationals*”.<sup>29</sup> Concurrently, however, golden shares raise issues with regard to the self-regulation and *de facto* protectionist behaviour of companies that, while having by their own corporate governance rules, operate under State control.

Now, the case law of the CJEU seems to be based on a “redeeming” view of the market and its inherent dynamics, according to which the establishment of fully competitive regimes is the most appropriate incentive to ensure efficiency and the respect of users’ rights. In line with the Commission’s findings, the Court has found violations of Arts 49 *et seq.* and/or Arts 63 *et seq.* by Member States in all cases but one, which concerned Belgium.<sup>30</sup> As a result, the EU’s market access jurisprudence on golden shares has been highly invasive, both in the past and in recent times. This is due to one main factor, which forms the cornerstone of the reasoning behind the decisions of the CJEU:<sup>31</sup> a very strict interpretation of the exceptions to the general interest principle, combined with a clear neglect of Art. 106, para. 2, TFEU.<sup>32</sup>

University Press, 2006; E. SZYSZCZAK, *The Regulation of the State in Competitive Markets in the EU*, Oxford: Hart, 2007; W. SAUTER, H. SCHEPEL, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts*, Cambridge: Cambridge University Press, 2009.

<sup>29</sup> E. SZYSZCZAK, *Golden Shares and Market Governance*, in *Legal Issues of Economic Integration*, 2002, p. 262.

<sup>30</sup> See *Commission v. Belgium*, cit.

<sup>31</sup> An additional reason is the CJEU’s narrow interpretation of the principle of neutrality *vis-à-vis* the ownership of companies operating in the European market envisaged in Art. 345 TFEU. See the recent Court of Justice, judgment of 22 October 2013, joined cases C-105/12 to C-107/12, *Essent and others*, which concerned a Dutch law prohibiting the privatization of undertakings entrusted with the distribution of gas and electricity. The case is only indirectly relevant for the purposes of our article, since it concerned a national law which did not confer upon the State any special powers/golden shares over privatized companies. Indeed, that law did not come into play in the phase following privatization – as is the case, instead, with golden shares/golden powers –, but rather prohibited *ex-ante* and *ex se* the privatization of public undertakings. While confirming that Art. 345 TFEU is not *per se* exempt from the application of EU provisions on the free movement of capital, the Grand Chamber clarified that the general interest objectives invoked by the Dutch Government as well as by the referring court (objectives which were deemed by the Court as being both non-economic and, quite surprisingly, economic) could “be taken into consideration as overriding reasons in the public interest to justify the restriction on the free movement of capital” (paras 66-68). On such issue see *infra*, section II.3. On the *Essent* judgment see, among others, P.J. VAN CLEYNENBREUGEL, *No privatisation in the service of fair competition?: Article 345 TFEU and the EU market-State balance after Essent*, in *European Law Review*, 2014, p. 264 *et seq.*

<sup>32</sup> See *infra*, section II.3.

### II.3. GENERAL (ECONOMIC?) INTEREST AND THE INTERNAL MARKET: THE SCOPE OF FREE MOVEMENT JUSTIFICATIONS AND THE ROLE OF ART. 106, PARA. 2, TFEU WITHIN A “SOCIAL MARKET ECONOMY”

According to the CJEU, “it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services”.<sup>33</sup>

By focusing on mandatory requirements as a justification for retaining golden shares, the Court has found that the notion of general interest includes, in particular: the minimum supply of goods and services essential to the public as a whole; the continuity of public service; the security of the facilities used to provide public services; national defence; the protection of public policy and public security; and health emergencies.<sup>34</sup> This applies *in abstracto*, as a matter of principle, as in practice the CJEU has always found Member States in breach of free movement rules (with the exception of one case concerning Belgium) for two reasons. First of all, the Luxembourg judges have rejected certain objectives of general interest invoked by Member States because of their economic nature, in accordance with the so-called “doctrine of non-economic considerations”. Moreover, in *Commission v. Portugal* (4 June 2002), the Court rejected the argument put forward by the Portuguese Republic that the granting of special powers was justified by the need to safeguard the financial interest of the State: not only that kind of general interest did not fall within the ambit of the reasons set out in Art. 65 TFEU, but, being an economic consideration, it could not be accepted based on the “*Cassis-Gebhard* rule of reason doctrine”. According to the CJEU, the same reasoning was applicable to the other objectives mentioned by the Portuguese Government, namely choosing a strategic partner, strengthening the competitive structure of the market concerned, modernising and increasing the efficiency of the means of production.<sup>35</sup>

Secondly, with respect to the reasons of general interests invoked by the Member States, the Court has interpreted the principle of proportionality in the sense that a number of cumulative requirements must be met in order for national legislation to be compatible with EU law. Said requirements, interpreted in a restrictive way by the EU judges, include: the specific nature of the special powers at issue; a provision for judicial review to determine whether they are illegal; a system of *ex-post* control, rather than prior authorisation or systematic approval, of corporate resolutions; and, most importantly, the unavailability, even in the abstract, of less restrictive measures by which to achieve the object pursued. Particularly in this last regard, the Court has tied the jus-

<sup>33</sup> See *Commission v. Belgium*, cit., para. 43.

<sup>34</sup> See, for instance, *Commission v. Portugal*, C-171/08, cit., para. 72.

<sup>35</sup> *Commission v. Portugal*, C-367/98, cit., paras 49-54.

tification of golden shares provisions to the existence of a “genuine and sufficiently serious threat” to the supply of public services which, as such, affects “one of the fundamental interests of society”.<sup>36</sup>

As a result, the governments’ discretionary powers have been greatly reduced and their socio-economic sovereignty undermined. In other words, priority has been given to a “market-oriented” dimension of solidarity, to free market objectives and, finally, to EU economic integration over national considerations of a social, welfare and general-interest nature, i.e. to the “welfare-oriented” dimension of solidarity.

In this regard, it seems to me that there is another means of achieving a fair balance between the interests of the market and those of the State; a tool that can be used not only to find the right equilibrium between European market-oriented solidarity and national social solidarity, but also to ensure that values and goals, rather than having a purely national dimension, fall within the competence of the EU. I am here referring to Art. 106, para. 2, TFEU.<sup>37</sup>

After the strong “neoliberalism” which followed the privatization and liberalization period and was aimed at market integration, and since the judgment in *Corbeau* of 19 May 1993,<sup>38</sup> there has been a tendency in the CJEU’s case law, even if somewhat wavering and disharmonious,<sup>39</sup> towards a more flexible interpretation of Art. 106, para. 2, TFEU.<sup>40</sup> This emerges from the approach of the CJEU with regard to the scope, extent and limits of Art. 106, para. 2, TFEU, whereby it is stated that such derogation could be invoked (by States and/or undertakings entrusted with the operation of public services) only “in so far as the application” of internal market and competition rules “does not obstruct the performance, in law or in fact, of the particular tasks” assigned (by the State, at national, regional or local levels) to undertakings in charge of providing essential services. With respect to the interpretation of the concept of “obstruction”, there has indeed been a remarkable shift in the CJEU’s case law, a move from the notion of an *absolute incompatibility* between the application of competition rules and the performance of a general interest task under “economically acceptable conditions”,<sup>41</sup> to the requirement that the application of EU rules makes that performance *more difficult*, rather than

<sup>36</sup> See *Commission v. Spain*, C-274/06, cit., para. 47.

<sup>37</sup> On this rule see, most recently, V. HATZOPOULOS, *Regulating Services in the European Union*, Oxford: Oxford University Press, 2012, pp. 86-96.

<sup>38</sup> Court of Justice, judgment of 19 May 1993, case C-320/91, *Corbeau*.

<sup>39</sup> See, for instance, Court of Justice, judgment of 25 June 1998, case C-203/96, *Chemische Afvalstoffen Dusseldorp and others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, para. 67.

<sup>40</sup> See, among others, Court of Justice, judgment of 15 November 2007, case C-162/06, *International Mail Spain*, paras 34-36; on the topic see also the considerations made by H. SCHWEITZER, *Services of General Economic Interest: European Law’s Impact on the Role of Markets and of Member States*, in M. CREMONA (ed.), *Market Integration and Public Services in the European Union*, Oxford: Oxford University Press, 2011, p. 11 *et seq.*

<sup>41</sup> *Corbeau*, cit., paras 16-18.

(also) *indispensable*. This has resulted in an extension of the Member States' scope for action with respect to the regulation of welfare and the economy.

Based on all of the above, one may legitimately ask whether Art. 106, para. 2, TFEU could offer Member States a wider scope for intervention with regard to golden shares, given that the criterion of "economically acceptable conditions" does not seem as strict as that used in the golden share case law in relation to overriding requirements in the general interest – namely, the notion of a "genuine and serious threat" to the performance of the particular tasks assigned to the companies concerned. So far, national governments have not realized the potential of Art. 106, para. 2, TFEU, as an effective tool of social/welfare solidarity, in the area of golden shares. The provision has been invoked – if at all – only superficially and almost incidentally, even though the Court implicitly recognized its applicability in *Commission v. Belgium* of 4 June 2002<sup>42</sup> and *Commission v. Spain* of 13 May 2003.<sup>43</sup> As a matter of fact, in the first of the two cases just cited, the Belgian Government, supported by the United Kingdom, argued – in the alternative to its first argument, which was based on the free movement rules – that "any impediments to the freedoms enshrined in the Treaty which may result from the legislation in issue are justified by [Art. 106, para. 2, TFEU]" because that provision "expresses the general principle that the Treaty rules must be subject to derogations where there exists a threat to the interests involved in the performance of the tasks carried out by services of general interest".<sup>44</sup> Even if the Court remained silent on Art. 106, para. 2, TFEU, it did not exclude its application. Indeed, having noted that "[t]he legislation in issue is therefore justified by the objective of guaranteeing energy supplies in the event of a crisis", the judges pointed out that "[i]n those circumstances, there is no need to consider the alternative plea put forward by the Belgian Government, alleging the existence of a principle derived from Art. 90(2) of the Treaty [Art. 106, para. 2, TFEU]".<sup>45</sup>

In *Commission v. Spain*, the Court rejected the Spanish Government's argument that Art. 106, para. 2, TFEU was applicable in the case at hand, but it did not exclude, in principle, its application as a justification for golden shares. Indeed, the CJEU noted that the Government had failed to lay down "objective, precise criteria" clarifying why, in the case at issue, the fact that the State held privileged shares in certain undertakings providing public services, had to be regarded as proportionate to the general interest objective relied on by Spain.<sup>46</sup> The Court pointed out that, although it was true that Art. 106, para. 2, TFEU seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or social policy with the Community's interest in ensuring compliance with the rules on competition

<sup>42</sup> See *Commission v. Belgium*, cit.

<sup>43</sup> See *Commission v. Spain*, C-463/00, cit.

<sup>44</sup> See *Commission v. Belgium*, cit., para. 34.

<sup>45</sup> See *Commission v. Belgium*, cit., paras 55-56.

<sup>46</sup> See *Commission v. Spain*, C-463/00, cit., para. 80.

and the preservation of the unity of the common market, “it is none the less the case that the Member State must set out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised”.<sup>47</sup>

Nevertheless, the Court subsequently called into question the possibility of invoking Art. 106, para. 2, TFEU in *Commission v. Portugal* (10 November 2011).<sup>48</sup> This was partly the result of the inadequate reasons put forward by the State concerned, and partly a deliberate choice. The Commission had argued that Art. 106, para. 2, which the Portuguese government had invoked, was inapplicable to the case at issue, for two reasons: first, because that provision was addressed “to a particular category of undertakings and not to the Member States”; and, second, because it only concerned the special rights granted by the State to the privatized company in question, rather than “the State’s special rights within that company”.<sup>49</sup> To this argument, the Court responded that Art. 106, para. 2, TFEU seemed inapplicable because the Portuguese legislation was not concerned with the justification of the special or exclusive rights granted to a formerly public company but, rather, with “the lawfulness of attributing to the State, as a shareholder of that company, special rights in connection with golden shares” which it holds in the share capital of the company.<sup>50</sup> Now, in the paragraph immediately following the passage just quoted, the Court added that

“[i]n any event, since a Member State must set out in detail the reasons why, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardised [...], the Portuguese Republic has given no explanation whatsoever as to why that is the case here”.<sup>51</sup>

This statement seems to contradict the previous point and, therefore, suggests that, had the Portuguese government’s justification been more grounded and detailed, the Court would have been able, if not to accept the argument put forward by the Portuguese government in its entirety, then at least to regard a justification based on Art. 106, para. 2, TFEU as, in principle, admissible.

The Court’s lack of clarity on the role and function of Art. 106, para. 2, TFEU in the context of golden shares and, more generally, fundamental freedoms, must be sharply criticized: not only because it surely raises problems of legal certainty on the role and potential of such provision, but, most importantly, because it might be construed in the

<sup>47</sup> *Ivi*, para. 82.

<sup>48</sup> See *Commission v. Portugal*, C-212/09, cit.

<sup>49</sup> *Ivi*, para. 76.

<sup>50</sup> *Ivi*, para. 93.

<sup>51</sup> *Ivi*, para. 95.

sense of preventing, or greatly limiting, the use of a provision that, by its nature, is applicable also with respect to the fundamental freedoms.

In this connection, it must be noted, first of all, that Art. 106, para. 2, TFEU is an atypical antitrust derogation. As such, it is directed not only towards undertakings, but also towards Member States, even if its position in Section 1 (“Rules applying to undertakings”) of the TFEU may suggest otherwise. This is clearly demonstrated by the fact that, in practice, the European institutions apply it when addressing public authorities, which thus become the addressees of the provision together with the companies concerned. Secondly, Art. 106, para. 2, TFEU does not simply introduce a derogation from Art. 106, para. 1, TFEU: the personal scope of application of the two paragraphs is not identical, since not all undertakings operating SGEIs within the meaning of para. 2 are undertakings which have been granted special or exclusive rights under para. 1.<sup>52</sup> Thirdly, Art. 106, para. 2, TFEU, in providing that “[u]ndertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in the Treaties, *in particular* to the rules on competition, in so far as the application of such rules does not obstruct the performance [...] of the particular tasks assigned to them”, makes it clear that these undertakings can be treated differently not only in relation to antitrust law, but also to other primary law rules, including the freedoms of movement.<sup>53</sup> Finally, it is worth noting that the application of Art. 106, para. 2, TFEU in the context of golden shares would clear up a remarkable inconsistency concerning the supposed irrelevance of economic considerations in the context of fundamental freedoms. A problem which, as already noted, stems from the fact that the Court has so far rejected justifications of a purely economic nature.<sup>54</sup> Indeed, a strict and radical application of the “doctrine of non-economic considerations” is unconvincing for two reasons.<sup>55</sup> First, while the main justification invoked by Member States on protection of the

<sup>52</sup> See *BUPA*, cit., para. 179.

<sup>53</sup> As acknowledged, for instance, in the jurisprudence on Art. 37 TFEU. Interestingly, this provision has been defined as being characterized by an “obscure clarté” (C.A. COLLIARD, *L’obscure clarté de l’article 37*, in *Dalloz*, 1964, p. 263 *et seq.*), which is the same expression used by AG Tesouro with reference to Art. 106, para. 1, in his opinion delivered on 13 February 1990, case C-202/88, *France v. Commission*, para. 11. As known, Art. 106, para. 2, TFEU is applicable also to State aids; on this regard see, among recent contributions, D. GALLO, *Social Services of General Interest*, in L. HANCHER, T. OTTERVANGER, P.J. SLOT (eds), *EU State Aids*, London: Sweet & Maxwell, 2016, p. 295 *et seq.*, and T. JAEGER, *Services of General Economic Interest*, in L. HANCHER, T. OTTERVANGER, P.J. SLOT (eds), *EU State Aids*, cit., p. 245 *et seq.*

<sup>54</sup> See, *inter alia*, Court of Justice, judgment of 7 February 1984, case 238/82, *Duphar*, paras 21-22 and Court of Justice, judgment of 5 June 1997, case 398/95, *SETTG*, paras 22-24.

<sup>55</sup> In this regard see also J.L. BUENDIA SIERRA, *Exclusive Rights and State Monopolies*, cit., pp. 301-303, 337-338, 355-358; V. HATZOPOULOS, *Recent Developments in the Free Movement of Services*, in *Common Market Law Review*, 2000, pp. 78-79; K. MORTELMANS, *Towards Convergence in the Application of the Rules on Free Movement and on Competition?*, in *Common Market Law Review*, 2001, p. 637; J. SNELL, *Economic Aims as Justification for Restrictions on Free Movement*, in A. SCHRAUWEN (ed.), *Rule of Reason – Rethinking another Classic of European Legal Doctrine*, Groningen: Europa Law Publishing, 2005, p. 35 *et seq.*; N. GEORGIADIS,

financial balance of the State has been rejected by the Court in the golden shares case law, such a goal has been accepted by EU judges (mainly, but not only) in its case law under free movement rules on social security<sup>56</sup> and on cross-border patients' rights.<sup>57</sup> Second and most importantly, when public services are at stake in the context of fundamental freedoms, economic and non-economic interests inevitably interpenetrate and overlap,<sup>58</sup> as can be inferred from a number of decisions in which the CJEU has implicitly or explicitly declared admissible the considerations invoked by the Member States despite their economic character.<sup>59</sup>

The possible infiltration of economic reasons as justifications for free movement restrictions connected with the provision of SGEIs is confirmed by the *Essent* case, which concerned a Dutch law prohibiting the privatization of public undertakings entrusted with the distribution of gas and electricity. Here, the CJEU stated that national legislation may constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature in the pursuit of an objective in the public interest and, on the basis of this premise, concluded that "the objectives of combating cross-subsidisation in the broad sense, including exchange of strategic information, in order to achieve transparency in the electricity and gas markets, and to prevent distortions of competition may, as overriding reasons in the public interest, justify restrictions on the free movement of capital".<sup>60</sup>

Ensuring financial balance and the provision of public services is precisely the objective underlying Art. 106, para. 2, TFEU, as confirmed by many judgments, starting with *Corbeau*. Now, also in the field of golden shares, financial balance constitutes an

*Derogation Clauses: The Protection of National Interests in EC Law*, Brussels: Bruylant, 2006, pp. 199-203; C. BARNARD, *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?*, in C. BARNARD, O. ODUDU (eds), *The Outer Limits of European Union Law*, Oxford: Hart, 2009, pp. 279-280; D. GALLO, *La progressive et inévitable avancée des considérations économiques dans le domaine des justifications d'intérêt général aux restrictions du marché intérieur*, in C. BLUMANN, F. PICOD (dir.), *Annuaire de droit de l'Union européenne 2015*, Paris: Éditions Panthéon-Assas, 2016, p. 65 et seq.

<sup>56</sup> See, for instance, Court of Justice, judgment of 24 February 1994, case C-343/92, *Roks and others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, paras 35 and 37; Court of Justice, judgment of 6 April 2000, case C-226/98, *Jørgensen*, paras 40-41; Court of Justice, judgment of 25 October 2001, joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others*, para. 70.

<sup>57</sup> Beginning with Court of Justice, judgment of 28 April 1998, case C-120/95, *Decker v. Caisse de maladie des employés privés*; on the most recent case law see R. CISOTTA, *Limits to Rights to Health Care and the Extent of Member States' Discretion to Decide on the Parameters of Their Public Health Policies*, in F. BENYON (ed.), *Services and the EU citizen*, Oxford: Hart, 2013, p. 113 et seq.

<sup>58</sup> See also the reflections made by AG Tesauero on the interaction between economic and non-economic in respects to public services in his opinion delivered on 9 February 1993, case C-320/91, *Corbeau*, para. 15.

<sup>59</sup> See Court of Justice, judgment of 10 July 1984, case 72/83, *Campus Oil*, paras 35-36 and Court of Justice, judgment of 26 April 1988, case 352/85, *Bond*, paras 34-35.

<sup>60</sup> *Essent*, cit., paras 52 and 68.

intermediate (economic) objective that serves to achieve a further, ultimate (non-economic) purpose: to deliver the service adequately and under acceptable conditions.

To conclude, Art. 106, para. 2, TFEU, which may be invoked by both Member States and undertakings performing SGEIs, is applicable to and practically effective in areas other than antitrust law, and the more so in relation to the control of privatized companies, a form of state intervention in the economy which is structurally linked to “the activities of general economic interest associated with th[ose] compan[ies]”.<sup>61</sup>

### III. NON-EU INVESTMENTS, SOVEREIGN WEALTH FUNDS (SWFs) AND STATE OWNED ENTERPRISES (SOEs)

#### III.1. THE CAPITAL/ESTABLISHMENT DICHOTOMY AND THE ACCESS OF NON-EU SOVEREIGN INVESTORS TO THE EUROPEAN INTERNAL MARKET

In this part of the article I will deal with sovereign investors who enter or aim to enter the EU market, namely SWFs<sup>62</sup> and SOEs,<sup>63</sup> whose legal status and personality may vary significantly due to the nature of their relationship with the home State. What all these operators, be they (formally) public, private or mixed entities, have in common is that they are always connected in various ways and degrees with non-EU public authorities. Put differently, they are all State-controlled actors. In addition, they invest both in stra-

<sup>61</sup> See Opinion of AG Maduro delivered on 6 April 2006, joined cases C-282/04 and C-283/04, *Commission v. Netherlands*, para. 30.

<sup>62</sup> For an overview of SWFs from a judicial standpoint, see, *inter alia*, L.C. BACKER, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, in *Tulane Law Review*, 2007-2008, p. 1801 *et seq.*; F. BASSAN, *The Law of Sovereign Wealth Funds*, Cheltenham, Northampton: Edward Elgar, 2011; D. CARREAU, *Les fonds souverains: un 'ovni' juridique?*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l'Union européenne: les liaisons dangereuses du marché et du politique*, Paris: Editions A. Pedone, 2014, p. 151 *et seq.*; F. BASSAN, *Sovereign Wealth Funds: A Definition and Classification*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, Cheltenham, Northampton: Edward Elgar, 2015, p. 41 *et seq.* On the international soft law regulating sovereign investment, including the *Generally Accepted Principles and Practices for SFWs* – the so-called “Santiago principles”, see International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices. “Santiago Principles”*, October 2008, [www.iwg-swf.org](http://www.iwg-swf.org) – see M. GORDON, S. NILES, *Sovereign Wealth Funds: An Overview*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, Oxford: Oxford University Press, 2012, p. 24 *et seq.*; R. BISMUTH, *Les ‘Principes de Santiago’: Un instrument de diversion au service des fonds souverains*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l'Union européenne*, cit., p. 57 *et seq.*; L. HSU, *Santiago GAPPs and Code of Conducts: Limits and Chances of Negotiated Rules*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 99 *et seq.*

<sup>63</sup> For an overview of SOEs, see L.C. BACKER, *Sovereign Investing in Times of Crises: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience*, in *Transnational Law and Contemporary Problems*, 2010, pp. 59-74; D. SHAPIRO, S. GLOBERMAN, *The International Activities and Impacts of State-Owned Enterprises*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 98 *et seq.*



tegic sectors that fall under state control, such as defence and national security, and in companies entrusted with the operation of SGEIs which, albeit formally private, are under state influence.<sup>64</sup>

The access of SWFs to the European market poses a twofold problem: whether the golden shares held by the State are admissible under EU law, considering that what is at stake is the behaviour of non-EU actors, rather than of EU companies;<sup>65</sup> and whether the State can (more or less) expressly forbid or restrict the entry of said non-EU actors into the EU market.<sup>66</sup> The EU has provided no clear solution to this problem: there are no binding secondary measures or judgments which address the extent and limits of SWF and SOE investments in the European market. The only initiative taken at EU level is the European Commission's Communication of 28 February 2008, "A common European approach to Sovereign Wealth Funds".<sup>67</sup> In this document the Commission rightly highlights that such entities raise several concerns as amongst them there are those with opaque governance,<sup>68</sup> those connected with non-democratic countries, and those whose intention is to pursue political objectives and access confidential information, advanced technologies or natural resources (especially energy materials) thanks to their influence on "companies operating in area of strategic interest or governing distribution channels of interest to the sponsor countries".<sup>69</sup> Yet, the Communication does not spec-

<sup>64</sup> On the similarities and differences between SWFs and SOEs see W. SCHMIT JONGBLOED, L. SACHS, K. SAUVANT, *Sovereign Investment: An Introduction*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 3 et seq.

<sup>65</sup> See *supra*, section II.

<sup>66</sup> For a discussion of SWFs and SOEs in a European perspective, see K. BARYSCH, S. TILFORD, P. WHYTE, *State, money and rules: An EU policy for Sovereign Investments*, Centre for European Reform, October 2008, [www.cer.org.uk](http://www.cer.org.uk); H. SCHWEITZER, *Sovereign Wealth Funds: Market Investors or "Imperialist Capitalists"?* *The European Response to Direct Investment by Non-EU State-Controlled Entities*, in C. HERRMANN, J.P. TERHECHTE (eds), *European Yearbook of International Economic Law*, Berlin: Springer, 2011, p. 79 et seq.; J. CHAISSE, *The Regulation of Sovereign Wealth Funds in the European Union: Can the Supranational Level Limit the Rise of National Protectionism?*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, p. 462 et seq.; F. MARTUCCI, *Les fonds souverains et l'Union européenne: les liaisons dangereuses du marché et du politique*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l'Union européenne*, cit., p. 69 et seq.; A. DE LUCA, *The EU and Member States: FDI, Portfolio Investments, Golden Powers and SWFs*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 178 et seq.; D. GALLO, *The Rise of SWFs and the Protection of Public Interest(s): The Need for a Greater External and Internal Action of the EU*, in *European Business Law Review*, 2016, p. 459 et seq.

<sup>67</sup> Communication COM(2008) 115 final of 28 February 2008 from the Commission, *A common European approach to Sovereign Wealth Funds*.

<sup>68</sup> On the issue of transparency see M. DE BELLIS, *Global Standards for Sovereign Wealth Funds: The Quest for Transparency*, in *Asian Journal of International Law*, 2011, p. 349 et seq.; R. AVENDAÑO, J. SANTISO, *Are Sovereign Wealth Fund Investments Politically Biased? A Comparison with Mutual Funds*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 221 et seq.

<sup>69</sup> See Communication COM(2008) 115, cit., para. 2.2. On such concerns see J. COOKE, *Finding the Right Balance for Sovereign Wealth Fund Regulation: Open Investment vs. National Security*, in *Columbia Business Law Review*, 2009, p. 728 et seq.; E. TRUMAN, *Sovereign Wealth Funds: Threat or Salvation?*, Washington, DC:

ify how and to what extent national and EU authorities may successfully and legitimately justify trade restrictions.

Since neither binding EU secondary law nor the case law of the CJEU provide any solutions, a preliminary question is whether freedom of establishment or free movement of capital shall apply. Choosing between the two sets of provisions is essential insofar as non-EU investors are concerned, the rules on capitals, as is well known, have a wider scope of application *ratione personae* than those on establishment. As a consequence, non-EU investors may invoke Art. 63 TFEU, but not Art. 49 TFEU, when claiming before an EU national court that their rights have been infringed by a special power held by a government of an EU Member State in a privatized company operating within its territory.

The CJEU's case law on the matter is not clear<sup>70</sup> and is complicated by the absence of a Treaty definition of "movement of capital",<sup>71</sup> notwithstanding the (minimalistic) explanation of what direct investment is pursuant to Annex I to Council Directive 88/361/EEC.<sup>72</sup> Without venturing in an in-depth analysis of such jurisprudence, it will suffice here to note that while a general application of the rules on establishment in the context of golden shares could lessen the concerns raised by the intervention of undesirable entities in the European internal market, serious problems would remain. As a matter of fact, at present, neither secondary law nor the case law based on Art. 54 TFEU may prevent non-EU natural or legal persons, including SWFs and SOEs, from establishing companies in accordance with the law of a Member State for the purpose of enjoying the rights arising under Art. 49 *et seq.* TFEU – companies whose registered office, central administration or principal place of business is located within the Union and

Peterson Institute for International Economics, 2010; P. DESOUZA, W. MICHAEL REISMAN, *Sovereign Wealth Funds and National Security*, in K. SAUVANT, L. SACHS, W. SCHMIT JONGBLOED (eds), *Sovereign Investment. Concerns and Policy Reactions*, cit., p. 283 *et seq.*; A. CUMMINE, *Ethical Sovereign Investors: Sovereign Wealth Funds and Human Rights*, in J.P. BOHOSLAVSKY, J.L. ČERNIČ (eds), *Making Sovereign Financing and Human Rights Work*, Oxford: Hart, 2014; S. GHAHRAMANI, *SWFs and Human Rights Protection*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 321 *et seq.*; F. MUNARI, *SWFs and Environmental Protection*, in F. BASSAN (ed.), *Research Handbook on Sovereign Wealth Funds and International Investment Law*, cit., p. 333 *et seq.*

<sup>70</sup> See also D. GALLO, *Corte di giustizia, golden shares e investimenti sovrani*, in *Diritto del Commercio Internazionale*, 2013, p. 916 *et seq.*

<sup>71</sup> See F. BENYON, *Direct Investment, National Champions and EU Treaty Freedoms. From Maastricht to Lisbon*, Oxford: Hart, 2010, p. 1; J. RICKFORD, *Protectionism, Capital Freedom, and the Internal Market*, in U. BERNITZ, W.-G. RINGE (eds), *Company Law and Economic Protectionism*, cit., pp. 91-93; R. TORRENT, *Pourquoi un revirement de la jurisprudence "golden share" de la Cour de justice de l'Union européenne est-il indispensable?*, in *A Man for All Treaties. Liber Amicorum en l'honneur de Jean-Claude Piris*, Brussels: Bruylant, 2012, pp. 548-560.

<sup>72</sup> Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty. In such annex direct investment is defined as the "establishment and extension of branches or new undertakings belonging solely to the person providing the capital" and "the acquisition in full of existing undertakings".

which, as a result, must be treated in the same way as natural persons who are nationals of Member States.<sup>73</sup>

Lastly, on the freedom of establishment/free movement of capital dichotomy, what can be inferred from the most recent case law of the CJEU is that Art. 63 TFEU shall generally apply, unless, in line with the criterion elaborated in the *Baars* judgment,<sup>74</sup> the holding of a Member State's national in the capital of a company established in another Member State "gives him definite influence over the company's decisions and allows him to determine its activities".<sup>75</sup> Only in that case, the applicable national legislation shall fall within the purpose and scope of the freedom of establishment.

### III.2. DOMESTIC AND EU RESPONSES FOR THE RESTRICTION OF NON-EU SOVEREIGN INVESTMENTS AND THE POSSIBLE CONVERGENCE OF NATIONAL AND EUROPEAN SOLIDARITY

In the case of EU golden shares, two (and possibly even more) national interests clash against each other; instead, in the context of special powers directed at limiting or even impeding the entry of SWFs and SOEs, national interests seem to overlap with EU interests.<sup>76</sup> Here we have European concerns, rather than purely national ones, as can be inferred from the core objective of Communication COM(2008) 115, i.e., the development of a *European common* approach on the treatment of such actors. In this area, the concept of national solidarity seems to blend with that of EU solidarity, since both imply not only an economic dimension, but also – and most importantly – a "welfare"/social dimension of solidarity, unlike in the case of intra-EU golden shares, where the two dimensions (i.e., national "welfare solidarity" and EU "economic solidarity") counteract each other.<sup>77</sup> In this respect, there are numerous questions to be answered: what kind of general interest exceptions can Member States invoke to restrict investments made by SWFs and SOEs? Should those exceptions operate differently when the investment is aimed at acquiring shares in "traditional" economic operators, such as Sainsbury and Real Madrid, or when assets belong to public services' providers or national securi-

<sup>73</sup> An additional interesting issue – which falls beyond the ambit of this article – is that of the interplay between the rise of sovereign investors in Europe and the new EU's exclusive competence envisaged in Arts 206 and 207, para. 1, TFEU (read with Art. 3 TFEU) on foreign direct investments. On such matter see, among others, A. DIMOPOULOS, *EU Foreign Investment Law*, Oxford: Oxford University Press, 2011.

<sup>74</sup> See Court of Justice, judgment of 13 April 2000, case C-251/98, *Baars*. On the said criterion and its application also in the CJEU's jurisprudence on golden shares see J. RICKFORD, *Protectionism, Capital Freedom, and the Internal Market*, cit., pp. 81-93.

<sup>75</sup> See *Commission v. Italy*, C-326/07, cit., para. 39.

<sup>76</sup> On such issue see the observations made elsewhere, namely in D. GALLO, *The Rise of SWFs and the Protection of Public Interest(s)*, cit., pp. 480-482.

<sup>77</sup> See *supra*, section II.

ty/defense institutions? Should they operate differently depending on the provisions on disclosure, transparency and accountability contained in the laws of individual SWFs and SOEs or, rather, on the level of protection and respect of human rights and the rule of law afforded in the home country? Finally, and above all: how can the EU and Member States respond to the threats represented by the possible entry into the European market of undesirable non-EU State-controlled entities? Quite clearly, at stake is the problem of reaching a fair balance between market access and public interest considerations inasmuch as, should Member States and the EU decide to restrict the access to the European market of non-EU investors, the only available means would be the application of general interest exceptions admissible under free movement rules.

Despite the fact that “a common EU approach would maximise European influence in these wider discussions”, as noted by the European Commission in its Communication COM(2008) 115, at EU level there is still a lack of clarity and legal certainty in this respect.<sup>78</sup> Moreover, if the EU fails to agree on a common line of action, each Member State may resort to its own measures.

At EU level, a possible option might be the adoption of a binding act through which the EU could address concerns related to the nature, aims and origins of those actors who intend to invest in strategic sectors of EU Member States, thus raising such concerns from a national to a European level. This measure would enable the EU institutions to distinguish between different types of investors, as well as between the different types of EU companies whose assets those investors intend to acquire. A possible legal basis for such a measure is Art. 64, para. 3, TFEU, which derogates from the principle of liberalization of capital movements to and from third countries by stating that “only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries”. However, the requirement of unanimity clearly represents an obstacle for the adoption of such measures. In addition, it must be recalled that, if a horizontal measure – in the form of a regulation, for instance – is adopted, the EU institutions will obviously need to address the problem of standardizing and unifying the existing provisions on the scope and limits of the Member States’ powers of intervention over non-EU investors, as contained in sectorial secondary legislation on electricity, gas, and air transport.<sup>79</sup>

<sup>78</sup> See Communication COM(2008) 115, cit., para. 3.2.

<sup>79</sup> See Art. 11 of Directive 2009/72/CE of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, and Directive 2009/73/CE of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, as well as Art. 4 of Council Regulation (EEC) 2407/92 of 23 July 1992 on licensing of air carriers. On the topic see R. TORRENT, *Pourquoi*

Another option could be to rely on the evolution brought by the Treaty of Lisbon in the area of foreign direct investments, where the competence in the conclusion of the agreements has shifted from the Member States to the EU in accordance with Arts 206, 207, para. 1, TFEU in combination with Art. 3 TEU.<sup>80</sup> In this respect, the EU should include in the agreements a clause on the protection of the general interests that may be put at risk by the infiltration of SWFs and SOEs in the European market.

The EU could also rely on Art. 66 TFEU, which states that, where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, “the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary”. However, the existence of the two conditions foreseen in this provision – a danger for the operation of the economic and monetary union, such as the speculative intentions of SWFs and SOEs, and the time limit – confirms the difficulty for the EU to exploit Art. 66 in this area.

Another rule contained in the TFEU seems to have a very limited scope, namely Art. 75 TFEU, pursuant to which

“[w]here necessary to achieve the objectives set out in Art. 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities”.

The provision may thus apply only if the EU institutions succeed in identifying a link between the non-EU investors and a terrorist organization.<sup>81</sup>

Finally, a more feasible option could be a clarification, made by the CJEU, on the potential of general interest exceptions under free movement provisions in the case of non-EU State-controlled entities. So far, the Court has not been asked by SWFs and SOEs, by national judges, or by the European Commission to specify the scope and limits of the derogations envisaged under the TFEU, or those of the jurisprudential justifications that the CJEU has itself provided and may consider admissible under EU law.<sup>82</sup>

*un revirement de la jurisprudence “golden share” de la Cour de justice de l’Union européenne est-il indispensable?*, cit., pp. 558-561.

<sup>80</sup> On the topic see, *inter alia*, A. DIMOPOULOS, *EU Foreign Investment Law*, cit.

<sup>81</sup> On Arts 66 and 75, from the standpoint of SWFs, see F. MARTUCCI, *Les fonds souverains et l’Union européenne*, cit., p. 146.

<sup>82</sup> On national legislation allowing restrictions on non-EU investors within the European territory, see, among others, J. CHAISSE, *The Regulation of Sovereign Wealth Funds in the European Union*, cit., pp. 486-493; J.-P. KOVAR, *Les réponses nationales à l’émergence des fonds souverains: Quelle compatibilité avec le droit de l’Union européenne?*, in P. BODEAU-LIVINEC (dir.), *Les fonds souverains et l’Union européenne*, cit., pp. 128-129.

Therefore, while possibly advantageous, it is still uncertain whether the CJEU's jurisprudence on golden shares could be transposed in respect to SWFs and SOEs.

In this connection, with regard to the derogations, Member States may rely on Art. 65, para. 1, let. b), TFEU, which allows national authorities "to take [restrictive] measures which are justified on grounds of public policy or public security". In this regard, the Court observed that a trade restriction is legitimate only when there is a "genuine and sufficiently serious threat" to public policy and public security affecting "one of the fundamental interests of society".<sup>83</sup> This is the case of Member States willing to restrict investments in the defence and military industries.<sup>84</sup> As there is not yet a ruling of the CJEU on the potential of Art. 65, para. 1, let. b), in the context of non-EU State controlled entities, it is unsettled whether such provision could be used outside this field. More specifically, considerations that are strongly connected with the provision of SGELs, such as energy, security, telecommunications, the protection of other critical infrastructures and the preservation of the control of natural resources by the host State, may fall within the scope of Art. 65, para. 1, let. b), as far as non-EU sovereign investors are concerned.<sup>85</sup>

In the absence of secondary legislation and CJEU decisions on the subject, it is my opinion that, at present, mandatory requirements are better suited than Art. 65, para. 1, let. b), to respond to the concerns raised by SWFs and SOEs investing in the European market. It seems correct to argue that such requirements may be interpreted more broadly<sup>86</sup> and/or that one or more reasons of general interest may be established *ex novo* in the future with respect to the entry of sovereign investors into the EU market. I am referring, for instance, to the lack of transparency of the operator making the investment. More in general, national authorities may successfully restrict the access to the market should they be able to demonstrate that the activity carried out by a sovereign investor is influenced by purely political interests and, for this reason, endangers the regular provision of essential strategic services.<sup>87</sup> As a result, it could be envisaged a different treatment between non-EU investors and EU investors with regard to the interpretation and application of mandatory requirements under free movement rules. Such an asymmetry is not a novelty *per se*<sup>88</sup> as the CJEU, in its case law on taxation, has already argued in favour of a broadening of the mandatory requirements, combined

<sup>83</sup> See, for instance, *Commission v. Spain*, C-463/00, cit., paras 72-74.

<sup>84</sup> On this point, see J. CHAÏSSE, *The Regulation of Sovereign Wealth Funds in the European Union*, cit., p. 486.

<sup>85</sup> See H. SCHWEITZER, *Sovereign Wealth Funds*, cit., pp. 108-109.

<sup>86</sup> For a discussion of the topic in relation to SWFs see F. MARTUCCI, *Les fonds souverains et l'Union européenne*, cit., p. 142; for a more general discussion of the possible interpretation of mandatory requirements depending on the origin of the investment, see F. PICOD, *Libre circulation des capitaux*, in *Jurisclasseur Europe*, 2010, p. 111 *et seq.*

<sup>87</sup> In that case, national measures would not have to be considered illegal merely because they provide for a regime of *ex-ante* control over investments made by third country operators in privatized public utilities or public institutions in the security sector.

<sup>88</sup> On the topic see H. SCHWEITZER, *Sovereign Wealth Funds*, cit., pp. 103-108.

with a flexible interpretation of the principle of proportionality, in respect to third country investors, with the final outcome of strengthening national control over the access of specific categories of non-EU actors to the EU internal market.<sup>89</sup> It seems therefore feasible to apply the principles set out in this area of case law to the field of (extra-EU) golden shares and, therefore, allow EU Member States to use specific justifications for restricting investments made by certain non-EU State-controlled actors that may threaten the national as well as the EU conception of public policy, public security and SGEIs regulation.<sup>90</sup> This is precisely the role of EU solidarity and the way in which national and European concerns, internal market considerations and extra-commercial values, economic integration and welfare integration, “market-oriented” regulation/solidarity and “welfare-oriented” regulation/solidarity may be finally and successfully reconciled.

#### IV. CONCLUSION

My main conclusion is that, while the CJEU has been quite activist in eroding the discretionary power of the Member States with regard to golden shares aimed at restricting EU investment, it has been much more hesitant in clarifying important issues concerning the access of State-controlled entities such as SWFs and SOEs to the European internal market, including the possible application of new or differently shaped overriding reasons of general interest.

Yet, with regard to this matter as well as to the other issues examined in this article, it is essential for the EU institutions to take a resolute course of action in order to ensure greater legal certainty and strike a fair balance between internal market purposes and socio-economic regulation, i.e., between the Single Market and the European Social Model. So far, the approach adopted by the CJEU in its jurisprudence on golden shares has favoured an economic rather than a social dimension of solidarity, reinforcing the misconception that “more Europe” (always) means more market and economic integration, to the detriment of social regulation and integration. A change of attitude by the EU institutions would be most welcomed, particularly in respect to the regulation of both SGEIs and strategic/national security industries, as far as EU and non-EU investors are concerned. Arguably, the multifaceted concept of solidarity may play an important role in this development.

<sup>89</sup> See, for instance, Court of Justice, judgment of 20 May 2008, case C-194/06, *Orange European Smallcap Fund*, para. 90, where the Court stated as follows: “[i]t may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States”.

<sup>90</sup> In this regard see Art. 194 TFEU, which connects solidarity with the EU policy on energy.

