Limited But Not Lost: A Comment on the ECJ's Golden Share Decisions

Christine O'Grady Putek
LIMITED BUT NOT LOST: A COMMENT ON THE ECJ’S GOLDEN SHARE DECISIONS

Christine O’Grady Putek*

INTRODUCTION

Consider the following scenario:¹ Remo is a large industrialized nation with a widget manufacturer, Well-Known Co. ("WK") which has a strong international reputation, and is uniquely identified with Remo. WK is an important provider of jobs in southern Remo. Because of WK’s importance to Remo, for both economic and national pride reasons, Remo has a special law (the "WK law"), which gives the government of southern Remo a degree of control over WK, all in the name of protection of the company from unwanted foreign takeovers and of other national interests, such as employment. The law caps the number of voting shares that any one investor may own, and gives the government of Southern Remo influence over key company decisions by allowing it to appoint half the board of directors.

Now imagine that Remo is a member of the European Union (the "EU"), and the EU forbids members from implementing such restrictive measures. Remo has impeded the accomplishment of an internal market by keeping this law, and violated fundamental principles of the European Community in so doing. Remo is being taken to court over this WK law. How should the Community court balance the interests of Remo and the Community? Remo has a clear interest in promoting and protecting its industry, but the Community

* J.D. Candidate, 2005, Fordham University School of Law. I would like to dedicate this Comment to the memory of my father, John L. O’Grady, who taught me to live life well. I would like to thank my family and friends, especially my husband Michael, my parents Leeda and Ralph, and my brother Michael, for all of their love and support. I would also like to thank Harvey Sperry for his encouragement and advice over the years. I am grateful to Professor Roger Goebel for leading me to the topic of golden shares.

¹. This hypothetical is based on the German Volkswagen law, and the current controversy between the European Commission and Germany regarding the compatibility of that law with Community law. See infra Part III.A. See infra notes 48-50 for an introduction to the European Court and its role in the EU.
has a conflicting interest—promoting an internal market with minimal interference.

Since 2000, the Court of Justice of the European Communities (the "ECJ" or the "Court") has decided six pivotal cases in which the free movement of capital and the freedom of establishment were directly or indirectly restricted through the state holding of "golden shares," a term used to cover a number of special rights retained by a government with regards to a formerly state-owned enterprise. The use of golden shares is widespread throughout the EU as well as in Central and Eastern European nations, many of which eventually hope to join the EU. These six golden share cases, which will probably be followed by many more, demonstrate the commitment of the European Commission (the "Commission") to challenging any national law which might conflict with the provisions of the Treaty Establishing the European Community (the "EC Treaty" or "the Treaty"). Moreover, the manner in which the Court has addressed the issue provides important guidelines to those nations who still hold golden shares, or those who plan to reserve such special rights as they go through the privatization process.

Part I of this Comment introduces the concept of golden shares, and


3. Treaty Establishing the European Community, Nov. 10, 1997, art. 43, O.J. (C 340) 173 (1997) (Amsterdam Consolidated Version) [hereinafter EC Treaty]. For purposes of EU law, the right of establishment is defined by EC Treaty article 43, which reads:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

EC Treaty art. 43. Article 43 essentially allows a company or citizen from one Member State to go into business in any other Member State. It removes obstacles for a company to set up branches, agencies or subsidiaries in any Member State, or to establish its principal place of business in any Member State. The second clause of Article 43 affords this right to self-employed persons as well. Id.

4. A golden share refers to a single share retained by the government to which special rights attach, such as the right to veto or pre-approve certain company decisions. The term golden share is used to refer to rights retained by the government even in the absence of an actual share being held.
discusses the relevant background of the free movement of capital and freedom of establishment, which are the Treaty rights primarily affected by the use of golden shares. Part I.A. presents the purpose and background of golden shares, as well as the nature of the golden share rights to which the Commission objects. Part I.B. provides a synopsis of relevant EU Treaty Law. Part I.C. introduces some important ECJ decisions which define the scope of the Treaty rights affected, and Part I.D. describes the Commission’s 1997 Communication, which provides the backdrop against which these cases were brought. Part II of this Comment analyzes each of the six golden share cases in turn, beginning with the case against Italy in 2000 and ending with the decisions of May 2003. Finally, Part III considers the implications of these decisions for the EU and for those states hoping to gain entry into the Union, and concludes that carefully crafted golden shares are still a viable means of retaining governmental control over industries that are imperative to the national interest. Moreover, these decisions have played a key role in accomplishing the internal market.

I. GOLDEN SHARES AND TREATY OBLIGATIONS

Golden share devices only became necessary with the relatively recent introduction of privatization. Many nations privatized important industries, but, reluctant to give up all control, implemented restrictive measures which allow varying degrees of governmental control over the privatized company.5 The EC Treaty forbids the use of restrictive measures to hinder the free movement of capital or the freedom of establishment, with limited exception.6 As case law has developed regarding these two rights, the Court has defined the scope of the exceptions, and inferred others by looking to the case law of other Treaty rights.7

A. Privatization and Golden Shares

A nation may opt to privatize an enterprise for a variety of reasons: political accountability, efficiency, a desire to attract capital and/or a policy supporting a move towards a market economy, among others.8 In the late 1980s a movement towards privatization swept through Western Europe, affecting many industries.9 The governmental role

5. See infra Part II.
7. See infra Part I.B.
8. See generally Cosmo Graham & Tony Prosser, Privatizing Public Enterprises: Constitutions, the State, and Regulation in Comparative Perspective 21-24 (1991) (discussing the economic and political motivation for the British privatization scheme under Prime Minister Margaret Thatcher).
9. See generally Alice Pezard, The Golden Share of Privatized Companies, 21 Brook. J. Int’l L. 85 (1995); Graham & Prosser, supra note 8, at 72 (illustrating the
in the process was to "protect[] national interests and preserve[] national independence." In an effort to do so, governments often retained some power and influence with regard to the newly privatized company.

One common protective tool is the golden share. Golden shares were first used in the United Kingdom during privatization in the 1980s for companies in which the government wanted to maintain some influence, such as Britoil. A golden share, or "action spécifique," as it is known in France, vests special rights in the government vis-à-vis the privatized company. These control rights can take many forms, and are often granted through the conversion of a regular share into a "special share" to which these special control increase in number of privatizations through receipts from privatization in Great Britain). For example, the petroleum industry was often privatized. In the U.K., Britoil was privatized in the early 1980s. See id. at 82. Société Nationale Elf-Aquitaine in France was privatized in 1994, with the French government retaining a golden share. See Roger Benedict, France's Privatization of Elf Aquitaine Rated Rousing Success (Société Nationale Elf Aquitaine S.A.), Oil Daily, Feb. 23, 1994, available at 1994 WL 12778955. That golden share was the subject of one of the six golden share cases discussed in this note. See infra Part II.B.2. for discussion of the golden share case against France.

10. Pezard, supra note 9, at 85.
11. See, e.g., id. passim.
12. Paulo Câmara, The End of the "Golden" Age of Privatisations?—The Recent ECJ Decisions on Golden Shares, 2002 Eur. Bus. Org. L. Rev. 503, 504. Another such tool employed to achieve ongoing control in France is the "hard core." Hard cores are specific pre-selected investors "to whom a proportion of the capital on privatisation is allocated by the government, restrictions being imposed on disposal for a period of five years." Cosmo Graham & Tony Prosser, Golden Shares: Industrial Policy by Stealth, 1988 Public Law 413, 421 (discussing the matters most commonly involved in the golden share). Hard cores were used in France. Unlike the U.K., France lacked large institutional investors, and privatization solely via disposing of shares through the financial markets would have resulted in massive disbursement of shares, with no one investor owning a large percentage of shares. Fear that such disbursement would leave the companies at "the mercy of raiders" led the government to the adoption of hard cores, allowing state influence over the enterprise after privatization. Id. at 422. Hard cores were used far more frequently than golden shares, and were heavily criticized. Id. Though it is likely that the Commission would object to the hard core as a restriction on the free movement of capital, it is also likely that the argument against them would be more difficult, because the shares are no longer in the hands of the government. Nonetheless, strong public opposition to the hard core within France led to Ministerial response and, at least superficially, some concessions on their use. Id. at 423.


15. See Graham & Prosser, supra note 12, at 415.
16. See Kronenberger, supra note 13, at 122-23; Câmara, supra note 12, at 503.
17. See, e.g., Câmara, supra note 12, at 503; see also Pezard, supra note 9, at 88-93 (discussing the scope of rights reserved to the state in France, specifically).
rights attach. Alternatively, ministerial veto power can substitute for an actual share, or can be a supplemental power along with the special share. The most common control rights, and those which have come under attack by the Commission, are: (1) the right to restrict the acquisition of shares; (2) the right to appoint directors to the board; (3) the right to veto certain critical company decisions; and (4) the right to limit the number of foreign directors on the board of the company. In France, golden shares are held for a limited duration—five years at most. But in the United Kingdom there is no maximum time limit for the controls to remain in place.

One purpose of the golden share is to give the newly privatized company protection against hostile takeovers. As former Secretary of State for Energy for the U.K. Nigel Lawson said, "[t]he very existence of these powers will act as the most formidable deterrent to anyone who tries to take over control of the board, of the company or of the majority of its shares, and who the government considers to be unacceptable." Some commentators, however, argue that the usual role of golden shares is not a threat to free markets, but is simply a mechanism by which the government can protect national interests. In some cases, Member States that find golden shares desirable as a national policy (for purposes of national pride) also find them useful as a defensive measure against more powerful state-owned enterprises operating in the same sector in other Member States.

18. See Graham & Prosser, supra note 12, at 414; Pezard, supra note 9, at 88.
19. See generally Câmara, supra note 12, at 504 (discussing the various types of golden share rights and the forms in which they have developed); Holger Fleisher, Case C-367/98, Commission of the European Communities v. Portuguese Republic (Golden shares); C-483/99 Commission of the European Communities v. French Republic (Golden shares); and C-503/99, Commission of the European Communities v. Kingdom of Belgium (Golden shares). Judgments of the Full Court of 4 June 2002, 40 Common Mkt. L. Rev. 493, 494 (2003) (discussing how golden shares can take the form of varying governmental rights); see also Pezard, supra note 9, at 91-92 (discussing the French right to veto asset disposal, which is embedded in the golden share).
20. Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment, 1997 O.J. (C 220) 15, ¶¶ 7-8 [hereinafter Communication]. See generally Câmara, supra note 12, at 504 (noting the specific golden share rights involved in the 2002 golden share cases before the ECJ); Pezard, supra note 9, at 88-89 (outlining the various kinds of rights that the French government retains with a golden share).
21. See Graham & Prosser, supra note 12, at 420-21; Pezard, supra note 9, at 95.
22. See Graham & Prosser, supra note 12, at 414.
23. See generally Pezard, supra note 9, at 85; see also Câmara, supra note 12, at 511 (discussing how, intentional or otherwise, golden shares are a defense against takeovers).
24. Graham & Prosser, supra note 12, at 428 (citation omitted) (discussing the golden share created in Britoil).
25. See, e.g., Pezard, supra note 9, at 95 (asserting that this is the role of the golden share in France).
26. See Richard Orange, Europe Demands End to Restrictive Rules in Italy, Spain,
are a valuable tool for protecting specified industries because they make a takeover much less likely.\textsuperscript{27}

Regardless of the motive for creating and retaining a golden share, the Commission decided in the mid-1990s that golden shares can conflict with Community law\textsuperscript{28} and infringe upon two fundamental freedoms: the free movement of capital and the freedom of establishment.\textsuperscript{29} Obstacles inhibiting investment from other Member States have generally occurred in two ways:\textsuperscript{30} as exchange controls or company law,\textsuperscript{31} or through privatization legislation. Furthermore, such restrictions can be of two distinct types, requiring two forms of review: discriminatory, applying only to foreign investors, or non-discriminatory, applying to all investors alike.\textsuperscript{32} In either case, such measures are restrictive and both forms can conflict with Community law.\textsuperscript{33} It is precisely this conflict which has led the Commission to argue vehemently against the use of golden shares by Member States.

\textsuperscript{27} See Graham & Prosser, supra note 8, at 144-45 (discussing the reasons for the British government to use its golden share in Britoil to thwart a takeover attempt by British Petroleum ("BP") precisely because a concentration of so much market power in one domestic company would have an undesirable effect on competition). This is true for both domestic and foreign takeover initiatives. Id.

\textsuperscript{28} See Communication, supra note 20. For a more detailed discussion of the Communication, see infra Part I.D.

\textsuperscript{29} See Communication, supra note 20. For discussion of how these rights are infringed, see infra Part II. See also Fleisher, supra note 19, at 495-98; Kronenberger, supra note 13, at 120-22.

\textsuperscript{30} See, e.g., Câmara, supra note 12, at 503-04; see also Kronenberger, supra note 13, at 116. It should be emphasized at the outset that obstacles inhibiting investment from other Member States are not necessarily created during the process of privatization through the adoption of measures like the golden share, but when they are, such obstacles are most often the subject of criticism.

\textsuperscript{31} See Câmara, supra note 12, at 503-04. For example, in the golden share case against the U.K., the U.K. argued that any restriction imposed was a result of company law, and thus not assailable under Treaty obligations. Case C-98/01, Commission v. United Kingdom, 2003 E.C.R. I-4641, ¶¶ 25-26, [2003] 2 C.M.L.R. 19 (2003), ¶¶ 25-26. Though the U.K.’s argument did not prove successful in this instance, it was not because company law \textit{cannot} restrict capital flows, but rather because in this case, the restriction was not the result of normal company law operations. See id. ¶ 48; see also infra Part II.C.2.

\textsuperscript{32} See Communication, supra note 20, ¶ 6.

\textsuperscript{33} See EC Treaty arts. 43, 56.
B. Treaty Rules

The creation and continued integration of the European Union is one of the most interesting and complex developments of the twentieth and twenty-first centuries. The goals and aspirations of the Union, created as the European Economic Community (the "EEC"), were first declared in the Treaty of Rome on March 25, 1957. Since that initial agreement the Community has grown in size and in scope, adding nine members and adopting a larger, more comprehensive structure, the EU. Even before the founding nations created the European Community in Rome in 1957, they recognized the importance of a judicial body, with the mission of ensuring the consistent interpretation and application of law. Therefore, in 1952 they created the Court of Justice to guarantee that the eventual European unification would be guided by common legal principles.

Community obligations frequently come into conflict with the national law of Member States. The Court established the
supremacy of the EU law over national law early on. In 1964, in *Costa v. E.N.E.L.*, the ECJ held that where a direct conflict arises between Community law and national law, Community law takes precedence.\(^4\)

The Court further clarified the relationship between Community law and national law in *Wilhelm v. Bundeskartellamt*,\(^4\) holding that:

[N]ational authorities may take action against an agreement in accordance with their national law, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law . . . .\(^4\)

Thus, where there is no direct (or indirect\(^4\)) conflict between the Community and national law, they operate in tandem.\(^4\)

With the increased integration of the EU in the past ten years, conflicts have arisen between national law and the proper interpretation of Community law.\(^4\) Treaty Article 226 grants the Commission the power to sue Member States not only for violations
of the Treaty, but also for violations of EC legislation or decisions. The Commission takes this responsibility seriously: In 2002, the Commission brought ninety-three actions against Member States for violations of Treaty obligations. In ninety of those cases, the ECJ held that a violation occurred. Though most of the violations were for relatively minor infractions—such as non-implementation of enabling legislation for various EU enactments nationally—at least some of them were for more serious infringements of Treaty obligations. The ECJ has developed standards for reviewing violations of these Treaty obligations over the past five decades.

Some of the most important judgments concern Member State infringements of the four "fundamental freedoms" defined by the EC Treaty: (1) free movement of goods; (2) free movement of persons; (3) free movement of services and the right of establishment; and (4) free movement of capital. Early in Community history, the Court held that the first three of the fundamental freedoms had direct legal effect. Because the initial Rome Treaty text on free movement of capital was limited by a clause referring to the necessity for discretionary action, the Court initially

50. For an overview of enforcement actions, see Hartley, supra note 41, at 294-323.
52. Id.
53. Community law created by directives requires national enablement legislation. A directive is binding Community law, which can be issued by the Council, the Parliament in conjunction with the Council (though not by the Parliament acting alone), or the Commission. Though directives create binding Community law, it is left to the Member States to enact legislation determining the form and method of implementation in the individual states. See generally Bermann et al., supra note 36, at 75-76.
54. E.g., Case C-6/02, Commission v. France, 2003 E.C.R. I-2389 (alleging that France had not met its obligations under Article 28, which prohibits qualitative restrictions on imports).
57. EC Treaty art. 23 (previously art. 9).
58. EC Treaty art. 39 (previously art 48). Article 39 refers specifically to workers, but its reach has been expanded through several directives, discussed infra note 81.
59. EC Treaty art. 49 (previously art. 59).
60. EC Treaty art. 43 (previously art. 52). Articles 43 and 49 are frequently read together as different facets of the same right. See Bermann et al., supra note 36, at 654.
61. EC Treaty art. 56 (previously art. 73(b)).
62. Direct effect means that a Community law generates not only obligations between the Member States, but also creates rights which private parties may seek to enforce against national governments. See Bermann et al., supra note 36, at 252. For an excellent discourse on both vertical and horizontal direct effect, see Hartley, supra note 41, at 206-08.
declined to give this freedom direct effect. However, the Treaty of Maastricht, effective November 1, 1993, introduced a new provision regarding the free movement of capital, which mandated total liberalization of capital movements. Protection of the first three freedoms remains explicit and unequivocal in the EC Treaty.

1. Free Movement of Goods

Chapter 2 of the EC Treaty specifically forbids any restriction of the free movement of goods, either directly or through indirect but equivalent measures. Customs duties, or charges which are the equivalent, are impermissible as between Member States on either imports or exports, as are quantitative limitations on the movement of goods, or comparable measures. In 1978, the Court announced a new doctrine in the field of free movement of goods in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")* holding that restrictions "necessary in order to satisfy mandatory requirements relating... to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer" might be acceptable.
The Commission embraced the opinion as a pivotal one furthering free movement of goods.\(^7\) Moreover, the decision became important in other fields as well, as the Court carried the concept that only “mandatory requirements”\(^7\) can justify a restrictive national law forward into free movement of services,\(^7\) and into the field of the right of establishment.\(^7\) By now, it is well-established that measures necessitated by the general/public interest can justify restriction of a fundamental freedom.\(^7\)

2. Free Movement of Persons

Article 39 guarantees the free movement of workers,\(^7\) though certain exceptions exist where justified by reason of public policy, security or health.\(^7\) Article 17 extended this freedom to other persons as well by conferring European Citizenship to the nationals of all Member States.\(^8\) Furthermore, three directives adopted in the early 1990s extended the right of residence to retired or disabled persons, students, and those who otherwise did not have such a right under other areas of Treaty or Community law.\(^8\)

State, there should be a presumption in favor of its ability to be sold in another. See id. \[14\] (“There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State . . . “). The Court allowed that some restrictions may be imposed, but only those which were “necessary in order to satisfy mandatory requirements.” Id. \[8\]. The Court held that, because the restriction did not fall into one of the Treaty’s explicit exceptions, the German law violated EC Treaty article 28 (then Art. 30). Id. \[14-15\].

\(^73\). See Bermann et al., supra note 36, at 511.

\(^74\). Case 120/78, Cassis de Dijon, 1979 E.C.R. 649, \[8\], [1979] 3 C.M.L.R. 494, \[8\].

\(^75\). Case 205/84, Commission v. Germany (In re Insurance Services), 1986 E.C.R. 3755, \[1987\] 2 C.M.L.R. 69 (1986). The term “mandatory requirements” has recently been replaced by the terms “general good” or the “general or national interest,” both of which are frequently referred to by the Court when discussing the acceptability of a restrictive national measure. See, e.g., Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, \[47\], [2002] 2 C.M.L.R. 48 (2002), \[47\]; see also Bermann et al., supra note 36, at 510 (“‘Mandatory requirements’ is an awkward translation of the French ‘exigences imperatives,’ which has been better translated in later judgments as imperative state or public interests.”).


\(^77\). For a more complete discussion of the development of this exception, see infra notes 92-99 and accompanying text.

\(^78\). EC Treaty art. 39.

\(^79\). These exceptions are explicitly enumerated in EC Treaty article 39(3).

\(^80\). EC Treaty art. 17.

3. Free Movement of Services and the Right of Establishment

The free movement of services, including both the right to provide and receive the same, is protected by Articles 49 and 50, and the related right of establishment is definitively protected by Article 43:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Articles 45 and 46 identify acceptable reasons to restrict freedom of establishment by stipulating specific circumstances within which national law may restrict the rights created by this freedom. The most important exception is for measures that a) discriminate against non-nationals; and b) are justified by reasons pertaining to public policy, security, or health.

As early as 1974, the Court interpreted the free movement of services and the freedom of establishment as having vertical direct the later adoption of Directive 93/96. See also Bermann et al., supra note 36, at 631.

82. Though the freedom to provide services is all that is enunciated in the Treaty, the right to free movement to receive services is well established in case law. See, e.g., Joined Cases 286/82 & 26/83, Luisi & Carbone v. Ministero del Tesoro, 1984 E.C.R. 377, ¶ 10, [1985] 3 C.M.L.R. 52 (1984), ¶ 10.

83. EC Treaty art. 43.

84. EC Treaty art. 45 (stipulating that activities connected with the exercise of official authority are exempt from the provisions of the chapter on the right of establishment); EC Treaty art. 46 (excepting national laws “providing for special treatment for foreign nationals on grounds of public policy, public security or public health”).

85. EC Treaty art. 46. See infra notes 193-98 and accompanying text for a discussion of how the Court has applied the public security exception only insofar as the national measure in question is compatible with the principle of proportionality. A less frequently used exception is that for activities which are connected to the implementation of “official authority.” See EC Treaty art. 45. Though the inclusion of activities connected with “official authority” appears to broaden the possible applications of the exceptions, in practice, that clause has been interpreted very narrowly, and only activities with a “direct and specific connexion with the exercise of official authority” can restrict the right of establishment. Case 2/74, Reyners v. Belgian State, 1974 E.C.R. 631, ¶ 54, [1974] 2 C.M.L.R. 305 (1974), ¶ 54. In Reyners, the Court was faced with the question of whether the legal profession is excepted from the right of establishment due to the fact that it is “organically [connected] with the functioning of the public service of the administration of justice.” Id. ¶ 35. Holding that since only certain activities of the profession are connected with official authority, and that those activities are separable, the Court determined that the legal profession is not excluded from the right of establishment. Id. ¶ 55. An entire profession would only be excepted in the unusual case where “such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.” Id. ¶ 46. The Court applies the official authority exception in rare and narrow circumstances.
effect, and as such, vested in individuals the right to challenge national measures which allegedly infringe upon these rights. In *van Binsbergen*, the Court was asked to provide a preliminary ruling as to whether Articles 49 and 50 had direct effect. Van Binsbergen challenged a Dutch law which prevented him from using the services of a legal representative whose primary place of residence was not in the Netherlands. The Court held Articles 49 and 50 had direct effect, and that national law may not impede trans-border services simply because the service provider resides in another member state, and not locally. In its analysis, the Court looked to the parallel conclusion in *Reyners* that the right of establishment has direct effect.

Through judgments in several cases, the Court has clearly established that even non-discriminatory restrictive measures will only be permitted under limited circumstances. In *van Binsbergen*, the Court considered the effect of the restriction on the right to provide services, and noted that all requirements that a person providing service must be a national of the Member State in question, or which mandated habitual residence in the Member State would "depriv[e] Article 59 [now Article 49] of all useful effect." The Court recognized that such requirements may be compatible with Treaty law when necessary for the "general good."

---

86. Vertical direct effect permits a citizen of a Member State to challenge the Member State’s national regulations, laws or measures that infringe upon a freedom granted by the Treaty or a directive with direct effect. Thus there is a private right of action, not simply an obligation as between the members of the Community. *See* Hartley, *supra* note 41, at 206-15 (explaining direct and indirect effect); Bermann et al. *supra* note 36, at 252. Horizontal direct effect, on the other hand, creates rights of action between private parties. *Id.* Thus, where there is horizontal effect, a person has Treaty rights and obligations vis-à-vis other people, not just against the Member State.

87. *See* Case 33/74, *van Binsbergen* v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299, ¶ 18, [1975] 1 C.M.L.R. 298 (1974), ¶ 18 ("The Court is also asked whether the first paragraph of Article [49, previously Article 59] and the third paragraph of Article [50, previously Article 60] of the EEC Treaty are directly applicable and create individual rights which national courts must protect.").

88. *See id.* ¶ 4 (noting also that the legal representative was a Dutch national who moved to Belgium during the proceedings).

89. *See id.* ¶¶ 15-16 (deciding that in the absence of a requirement of special qualifications or "professional regulation" a requirement that the provider of services be a habitual resident of the locale is not acceptable).


94. *Id.* ¶ 11.

95. *Id.* ¶ 12.
The general good or public interest exception was carried forward over a decade later in another significant Court decision in *In re Insurance Services.* The Court held that restrictions upon the freedom to provide services could only be accepted if “in the field of activity concerned there are imperative reasons relating to the public interest.” More recently, the public interest exception was critical to the Court’s reasoning in *Gebhard,* when the Court stated that any acceptable restriction “must be applied in a non-discriminatory manner [and] must be justified by imperative requirements in the general interest.” These three cases illustrate the development of the rule that non-discriminatory measures, like discriminatory ones, will only rarely be tolerated.

4. Free Movement of Capital

Finally, with the amendments to the Treaty in Maastricht, effective on November 1, 1994, free movement of capital is now also specifically and indisputably protected by Article 56. The original EEC Treaty included a chapter devoted to capital movements, within which Article 67 obligated Member States to “progressively abolish between themselves all restrictions on the movement of capital.” The Chapter allowed the Council to adopt directives to further this goal, and in the 1960s two such directives were adopted.

However, Article 67 was limited by Article 73, which allowed the Commission to authorize, and Member States to implement,
restrictive measures designed to protect the functioning of the Member States’ capital markets.\textsuperscript{105} Such an exception was susceptible to broad application, which in fact occurred throughout the economic turmoil of the 1970s and 1980s.\textsuperscript{106} Moreover, because of this limitation, in \textit{Casati}\textsuperscript{107} the Court declined to interpret Article 67 as one having direct effect.

In contrast to the original treatment of capital in Article 67 of the Treaty of Rome, the amended Treaty now states: "[A]ll restrictions on the movement of capital between Member States . . . shall be prohibited."\textsuperscript{108} Despite the initial appearance of clarity and objectivity of the exceptions to the freedom, which are detailed in Article 58, subsequent judicial analysis has demonstrated that some ambiguity remains as to the extent and nature of these exceptions, particularly that relating to public security.\textsuperscript{109} Notably, the Court has imported

\begin{itemize}
  \item \textsuperscript{105} See \textit{id.} at 1173 (detailing the various articles within the chapter on capital movements in the original EEC Treaty).
  \item \textsuperscript{106} See \textit{id.} at 1174 (discussing the frequency of Commission authorization for restrictive schemes throughout the two decades).
  \item \textsuperscript{108} EC Treaty art. 56(1). The Treaty still permits a few restrictions, however, which are expressly set out in Article 58(1). \textit{See} EC Treaty art. 58. Article 58(1)(a) provides an exemption for restrictions imposed to distinguish between taxpayers based on residence. \textit{See} EC Treaty art. 58(1)(a). Article 58(1)(b) exempts restrictions imposed to “prevent infringements of national law” specifically, laws relating to taxation and supervision of financial institutions, as well as those procedures requiring declaration of capital movements, where the purpose is explicitly administrative or for gathering statistical information. EC Treaty art. 58(1)(b). Article 58(1)(b) also includes an exception for public security or public policy. \textit{Id.} The exceptions detailed in Article 58 are narrower than those found elsewhere in the Treaty, which systematically also include public health (clearly of limited relevance to capital movements). \textit{See} Flynn, \textit{supra} note 65, at 796. However, the chapter of the Treaty on free movement of goods also contains a public morality exception, and the freedom of establishment and the right to provide services each include an exception for the exercise of official authority. \textit{See} EC Treaty arts. 45, 55. Both exceptions could also have been inserted in Article 58. It is not impossible to imagine a nation regulating investment in sectors which may be closely connected with morality, such as lotteries and gambling. \textit{Cf.} Case C-275/92, Her Majesty's Customs & Excise v. Schindler, 1994 E.C.R. I-1039, ¶¶ 60-61, [1995] 1 C.M.L.R. 4 (1994), ¶¶ 60-61 (determining that legislation which allows small scale lotteries, but prohibits larger ones is an acceptable restriction on the freedom to provide services, because “it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States”).
  \item \textsuperscript{109} For example, the Court must still interpret which activities are meant to fall into the public security realm. There is little doubt that activities surrounding national security are exempted. \textit{See} EC Treaty art. 296(1)(b). However, there are other activities which are also vital to public security, and the Court has begun to identify these through case law. \textit{See} Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 34, [1984] 3 C.M.L.R. 544 (1984), ¶ 34 (finding that protecting petroleum supplies is vital to the public security); Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50 (2002), ¶ 46 (holding that protection of energy supplies is analogous to protecting petroleum supplies).
\end{itemize}
from the sector of services and establishment doctrines the notion of "overriding national interests" as an acceptable reason to restrict capital movements. However, as illustrated by the golden share cases, what constitutes an overriding national interest is not well defined and is open to varying interpretations, thus introducing more uncertainty and allowing the use of more subjective criteria in evaluating the justification of a Member State restriction.

Over time, the Court has developed an impressive body of case law from which to draw upon when evaluating infringements of EU law and Treaty obligations. In 2002 alone the Court heard 513 cases. Decisions pertaining to the fundamental freedoms account for a substantial percentage of the ECJ's recent judgments. In 2002, the Court handed down many decisions relating to the free movement of capital, as well as numerous decisions regarding infringements of the right of establishment. In order to better comprehend the Court's reasoning in the golden share cases, a basic understanding of judicial interpretation of the free movement of capital and the freedom of establishment is necessary. This Comment now describes that judicial interpretation.

B. The Coming of Age of Capital and Establishment Case Law

The use of golden shares implicates two fundamental freedoms: the free movement of capital and the freedom of establishment. Therefore, principles from both bodies of law are relevant in analyzing golden share restrictions.

1. Interpretation of Article 43: The Freedom of Establishment

Freedom of establishment, detailed in Article 43, "include[s] the right to take up and pursue activities as self employed persons and to

110. See, e.g., Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 49, [2002] 2 C.M.L.R. 48 (2002), ¶ 49. The notion of "overriding requirements of the general interest" (also referred to as requirements of the national interest) was brought to capital case law from the right of establishment, which had borrowed it from free movement of goods. See supra notes 70-77 and accompanying text for a discussion of the extension of "overriding national interests" from the case law of the right to provide services into the related right to establishment. See also Bermann et al., supra note 36, at 676 (noting that the concept of a national interest exception was extended to the free movement of services in In re Insurance Services from free movement of goods, specifically, from Cassis de Dijon).

111. For more detailed discussion of the Court's evaluation of potentially restrictive measures, see infra Part II.

112. Though the ECJ does not have a doctrine of stare decisis, "the Court does follow its previous decisions in almost all cases." Hartley, supra note 41, at 75.

113. See 2002 Annual Report, supra note 42, at 158.

114. See id. at 161. In 2002, it was nineteen percent. Id.

115. There were twenty-four such judgments in 2002. See id.

116. Eleven judgments pertaining to the freedom of establishment were handed down in 2002. See id.
set up and manage undertakings\textsuperscript{117} as well as enabling nationals of any Member State to establish "agencies, branches or subsidiaries"\textsuperscript{118} throughout the Community. Freedom of establishment covers investments as well,\textsuperscript{119} and thus is closely related to the free movement of capital.\textsuperscript{120} Not surprisingly, an infringement of one is often linked with an infringement of the other.\textsuperscript{121} Since the Treaty of Maastricht, the ECJ has applied the laws governing the two freedoms in parallel.\textsuperscript{122}

The provisions of Article 43 apply to investments which grant control of a company, but do not apply to those which represent a passive investment, such as one taken for portfolio diversification. However, the actual line between a purely passive investment and an investment with control rights is sometimes difficult to draw, and no clear answer exists.\textsuperscript{123} Advocate General\textsuperscript{124} ("A.G.") Alber addressed

\begin{itemize}
  \item[117.] EC Treaty art. 43.
  \item[118.] \textit{Id.}
  \item[120.] See \textit{id.} \S 13. The distinction between the two freedoms is difficult to draw specifically because they are often intertwined. The acquisition of company shares obviously requires a capital movement, but can easily also involve establishment, particularly if the acquisition is great enough to give the purchaser some control rights vis-à-vis the company. Kronenberger likens the purchase of company shares to the purchase of real estate, which also, by its very nature, requires a movement of capital in order to achieve an establishment (in that case, the real estate). Kronenberger, \textit{supra} note 13, at 127. Though Kronenberger notes that the wording of the Treaty chapter on capital movements seems to imply that the two freedoms should not be applied concurrently, he recognizes that this is by no means clear. \textit{Id.} Notably, A.G. Alber argues that the rules of both freedoms can, and in some instances, should, be applied together. See \textit{id.} at 129-30; see also \textit{supra} Part I.B.3.
  \item[121.] See, e.g., Case C-484/93, Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955, \S\S 10, 15 (finding infringements of both freedom of establishment and free movement of capital where a Luxemburg regulation precluded interest rate subsidies for those who take a loan from an institution which was not one approved in Luxemburg); see also Flynn, \textit{supra} note 65, at 788; Kronenberger, \textit{supra} note 13, at 127.
  \item[122.] See Case C-251/98, Baars, 2000 E.C.R. I-2787, Opinion of A.G. Alber, \S 15, [2000] 1 C.M.L.R. 49, Opinion of A.G. Alber, \S 15. See \textit{infra} Part I.C.3. for a discussion of how and why the Court usually opts to apply the law pertaining to either the free movement of capital or the freedom of establishment, but not both, when infringements of both are alleged.
  \item[123.] See, e.g., Flynn, \textit{supra} note 65, at 788 ("When distinguishing between the internal market freedoms, the line dividing establishment and capital is the hardest of all to draw.").
  \item[124.] The role of the Advocate General ("A.G.") is unparalleled in the U.S. system. An A.G. is a legal professional having the same rank as an ECJ judge. See EC Treaty art. 222. The A.G. derives his power directly from the Treaty: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it." \textit{Id.} Though
this issue in *Baars*, which involved a Dutch decision to deny a tax exemption to a Dutch national for his investment in an Irish enterprise, of which he was the sole shareholder. Though Dutch law provided for just such an exemption, when *Baars* applied the exemption to his taxes, it was denied. The Dutch government argued that the specific tax provision in question was intended to prevent the double taxation of a sole shareholder who would have to pay both the wealth tax and the company tax. *Baars* challenged the denial on two grounds: It infringed upon freedom of establishment and also on the free movement of capital. The Commission and the Dutch government disagreed as to which rule was truly applicable, which is not surprising, as the law implicated both freedoms.

Advocate General Alber ultimately determined that the line between a capital movement and the right of establishment was “...at the point where a shareholder ceases to confine himself to the mere provision of capital in support of a particular business activity carried on by another person, and begins to become involved himself in conducting the business.” Of course, where the shareholder is merely providing capital, his rights are still protected under Article 56. Because golden shares often limit the number of shares which an individual can hold precisely because a large holding may permit—and in practice often does permit—the investor to have some influence, the right of establishment is certainly at issue.

For this reason, the development of EU law regarding the freedom of establishment has implications for the golden share cases. The

the A.G. hears the case alongside the Court, he does not take part in its deliberations, and his opinion is separate from that of the Court. See Hartley, *supra* note 41, at 54-56. The A.G.’s opinion is rendered before the Court issues its decision, and the Court takes it into consideration in its deliberations. *Id.* The Court is not obligated to follow the A.G.’s opinion, but the A.G.’s opinion carries much weight, and even where not adopted by the Court in the specific case, these opinions are influential in the development of future Community law. See *id.*; Bermann et al., *supra* note 36, at 61-62 (discussing the Advocate General’s role and qualifications).

126. *Id.* ¶¶ 1-3.
127. *Id.* ¶¶ 5-6.
128. *Id.* ¶ 7.
129. *Id.* ¶ 10.
130. *Id.* ¶ 11.
131. *See id.* ¶ 33.
132. *See* EC Treaty art. 56 (prohibiting any restriction on capital movements).

[1] If the holding in a company reaches a size which enables the investor to exercise a decisive influence over the undertaking’s decision-making, the right of establishment will supplement free movement of capital. Such an investment would then additionally fulfill the criteria set out in Article 52(2), and would be protected by the EC Treaty under two separate heads.

*Id.*
Court's approach to establishment cases imports much from recognized principles involving the free movement of services. Specifically, the notion that only those regulations necessitated by national interests can justify a restriction of a fundamental freedom was carried over from precedent regarding freedom of services. Thus, the Court imported the test it applied to freedom of establishment in Gebhard from previous case law on free movement of services.

_Gebhard_ discussed the right of establishment as relating to self-employed persons, specifically a lawyer attempting to establish himself in another Member State. In evaluating an Italian law which restricted Gebhard's ability to open a legal practice in Milan, the Court held:

[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

134. See _supra_ notes 70-77 and accompanying text (discussing the development of the general good exception in the free movement of goods sector, and its subsequent application in freedom of services and establishment cases).

135. See _Bermann et al._, _supra_ note 36, at 669 (explaining "this doctrine is not only crucial in the area of free movement of services, but has now been carried over to the right of establishment"). Compare _Case C-58/98, Proceedings Against Corsten_, 2000 _E.C.R._ I-7919, ¶ 35 (holding that, in the context of movement of services and the right of establishment, where the host state's interest is not protected by the rules governing the service provider in his home state, any regulation in the host state which restricts the freedom must be "based only on rules justified by overriding requirements relating to the public interest"), with _Case C-279/80, Criminal Proceedings Against Webb_, 1981 _E.C.R._ 3305, ¶ 17, [1982] 1 _C.M.L.R._ 719 (1981), ¶ 17 (finding that the freedom to provide services, as a fundamental freedom, can only be obstructed by rules "justified by the general good").


137. See _Case 205/84, Commission v. Germany (In re Insurance Services)_, 1986 _E.C.R._ 3755, ¶ 33, [1987] 2 _C.M.L.R._ 69 (1986), ¶ 33. [T]here are imperative reasons relating to the public interest which may justify restrictions on the freedom to provide services, provided, however, that the rules of the State of establishment are not adequate in order to achieve the necessary level of protection and that the requirements of the State in which the service is provided do not exceed what is necessary in that respect. _Id._ There are similarities between _In re Insurance Services_ and _Corsten_. See _supra_ note 135. _In re Insurance Services_ borrowed from _Cassis de Dijon_, wherein the Court noted the "imperative requirements" exception. See _supra_ notes 70-77 and accompanying text.


139. _Id._ ¶ 39.
The Court has applied this four-prong test in many cases involving a restriction of a fundamental freedom.\textsuperscript{140} The Court applies the wording of Article 43 literally, and will not permit restrictions which violate the letter of its text. \textit{Centros Ltd. v. Erhvervs-Og Selskabsstyrelsen,}\textsuperscript{141} involved Denmark's refusal of Centros's application to register a branch in Denmark because Centros, though incorporated in the U.K., did not actually conduct business in the U.K. The sole purpose for Centros's incorporation in the U.K. was to evade the Danish paid-in capital requirements.\textsuperscript{142} For this reason, Denmark believed that refusing to allow registration did not violate the right of establishment.\textsuperscript{143} In finding that the refusal
\begin{itemize}
\item[142.] \textit{Id.} \textsection{} 13, 23. Danish law required a certain minimum amount of capital be paid into a company as a pre-requisite to incorporation (presumably intended as a protective measure for investors), whereas the U.K. does not have the same mandate for limited liability companies. Therefore, incorporating in the U.K. saved the shareholder 200,000 Danish kroner. \textit{See} \textit{id.} \textsection{} 7.
\item[143.] Denmark argued that Centros's actions fell within the "\textit{van Binsbergen exception}". The so-called \textit{van Binsbergen exception} provides that a Member State may take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. Case 33/74, \textit{van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid}, 1974 E.C.R. 1299, \textsection{} 13, [1975] 1 C.M.L.R. 298 (1974), \textsection{} 13; \textit{see Case C-148/91, Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media, 1993 E.C.R. I-487, }\textsection{} 12-14 (finding acceptable, based on the \textit{van Binsbergen exception}, a Dutch law which prohibited domestically established broadcasting organizations from participating in the establishment of broadcasting organizations in other Member States which would direct broadcasts into the Netherlands, where the establishment of the second broadcast organization is done to evade Dutch regulations regarding the non-commercial character of programs, and types of broadcast content). Finding that the Danish law failed to satisfy the four conditions
violated Centros's right of establishment, the Court noted that "[t]he right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty." If the company was not violating the law of the nation in which it was established, its intent to evade certain obligations of the company law of another Member State was unimportant and the literal application of Article 43 demanded this result.

2. Article 56—The Free Movement of Capital

Before 1994, Member States were under no absolute obligation to "open up their frontiers to capital from other Member States." Prior to the amendments adopted in Amsterdam, the ECJ considered that EC Article 67 did not itself accomplish the free movement of capital, but rather required legislative implementation. Thus Article 67 urged liberalization of capital movements, but did not have direct effect; rather it required legislation to impose measures loosening such restrictions. Two directives issued in the early 1960s

---

1. See Hartley, supra note 41, at 199-200 (noting that, at least as originally understood, the Treaty authors did not intend directives to have direct effect, but rather required national legislation be enacted for their implementation). For a discussion of the Court's role in the expansion of direct effect, see id. at 199-204.

2. See generally Joined Cases 286/82 & 26/83, Luisi & Carbone v. Ministero del Tesoro, 1984 E.C.R. 377, ¶ 27-33, [1985] 3 C.M.L.R. 52 (1984), ¶ 27-33 (recognizing that Article 67 does not require full liberalization of capital flows and that Member States may still impose restrictions on capital movements); Case 203/80, Criminal Proceedings Against Casati, 1981 E.C.R. 2595, ¶ 10, [1982] 1 C.M.L.R. 365 (1981), ¶ 10 (noting that unlike the Treaty provisions on the free movement of goods, persons and services, capital movements, under Article 67 need only be liberalized to the extent necessitated by the functioning of the common market). The Court addressed the issue of whether or not Article 67 had direct effect in Casati. In Casati, an Italian national who resided in Germany was prevented from exporting a large sum of Italian currency which capped the export of national currency (at that time, Lira) at 500,000. Id. ¶ 4. In March of 1981, the equivalent of ITL 500,000 was approximately $500. See Currencies, Money and Gold, Fin. Times, Mar. 2, 1981, at 18 (showing the range at which the Italian Lira traded against the U.S. dollar on March 2). Casati argued that Article 67 had direct effect, and therefore he challenged the
implemented Article 67. Together, they liberalized the most common forms of both commercial and private capital movements.

Prior to the Treaty of Maastricht and the launch of the "internal market project," there was little case law regarding the free movement of capital as an independent right. That is not to say that Article 67 imposed no duty on Member States to liberalize capital movements—particularly where capital movement was linked to the exercise of the other fundamental freedoms, the Court did not permit excessive restriction.

In 1985, the Commission released a White Paper on Completing the Internal Market, which advocated even greater liberalization of capital movements. After the White Paper, efforts to achieve free movement of capital were renewed. Thus, in 1988, the Council
issued Directive 88/361/EEC to address the issue.156 Prior to Directive 88/361/EEC, restricting capital flows was the norm for some Community members.157 The purpose of the directive was to accomplish the absolute liberalization of capital flows: “Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States.”158 The directive was subject to certain exceptions which included allowing measures required to protect bank liquidity and protective measures against short term capital movements which would threaten the Member State’s foreign exchange balance.159 The Directive included an illustrative list of what would constitute a capital movement; the list included direct investments,160 and the Directive achieved free movement of capital upon the expiration of the stated implementation period,161 but it was not until the Treaty was amended in Amsterdam that free movement of capital was elevated to a “constitutional” right by adoption of Article 56.162 Article 56 mandates that “all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”163 The Commission has continued to make free movement of capital a priority in recent years.164

Article 56 liberalizes both capital flows and payments, but for the purposes of golden shares, only the movement of capital is relevant. Capital movements are “those resources used for, or capable of, investment intended to generate revenue.”165 In the Commission’s view, direct investments—included in the definition of capital laid out in Directive 88/361/EEC—are to be treated as a capital movement,

157. See Bermann et al., supra note 36, at 1172-73 (noting that while some Member States, such as the Netherlands and Germany permitted liberal movement of capital, others, specifically France, Italy, Greece, Spain and Portugal, were much more restrictive); see generally Kronenberger, supra note 13, at 123; see also Case C-251/98, Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 23, [2000] 1 C.M.L.R. 49 (2000), Opinion of A.G. Alber, ¶ 23.
159. Id. at 6.
160. Id. at 11.
162. See Kronenberger, supra note 13, at 123 (noting the elevation of free movement of capital to “constitutional” status).
163. EC Treaty art. 56, ¶ 1; see also Kronenberger, supra note 13, at 124 (discussing the effect of adopting Article 56).
164. See generally Kronenberger, supra note 13, at 124 (“From approximately ten judgments between 1957 and 1993, the Court delivered 17 judgments directly concerning capital movements between 1994 and 2002.”).
165. Flynn, supra note 65, at 776.
and thus protected by the Treaty.\textsuperscript{166} The Court has also adopted this view, accepting the definition as appropriate.\textsuperscript{167}

The ECJ has defined the reach of this freedom broadly: In \textit{Svensson \& Gustavsson}\textsuperscript{168} the ECJ held that legislation which "[is] of a nature to dissuade individuals"\textsuperscript{169} from the exercise of their Treaty rights is restrictive.\textsuperscript{170} A law which has the potential to restrict an investment is therefore contrary to the obligations of Article 56.\textsuperscript{171} In \textit{Trummer \& Mayer} the Court held that a law permitting only mortgages backed in Austrian shillings to be recorded constituted a restriction in the free movement of capital.\textsuperscript{172} Fearing that such a requirement would inhibit the exercise of free movement of capital, the Court declared it incompatible with Treaty law.\textsuperscript{173} Thus, not only would the Court disallow direct restrictions, but it would also strike down measures which may indirectly restrict the free movement of capital as well.\textsuperscript{174}

Not long after the amendments in Maastricht mandated the free movement of capital, the Court held that free movement of capital had direct effect.\textsuperscript{175} In \textit{Sanz de Lera},\textsuperscript{176} the Court reviewed a Spanish law which required prior authorization for the exportation of currency over a certain value.\textsuperscript{177} First, the Court determined that requiring

\begin{enumerate}
\item[166.] \textit{See} Communication, supra note 20, ¶ 3, 8.
\item[167.] \textit{See}, e.g., C-222/97, \textit{In re The Application to Register Land by Trummer \& Mayer}, 1999 E.C.R. I-1661, ¶ 21, [2000] 3 C.M.L.R. 1143 (1999), ¶ 21 ("[T]he nomenclature in respect of movements of capital annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of [Article 56] et seq.").
\item[169.] \textit{See} Flynn, supra note 65, at 779 (stating that the "starting-point for the identification of a restriction is \textit{Svensson \& Gustavsson}).
\item[171.] \textit{See} Kronenberger, supra note 13, at 125.
\item[173.] The law did not per se forbid people from holding mortgages backed by other currencies, \textit{id.} ¶ 5, but did forbid the registration of such mortgages, and the Court found that the inability of people to record those mortgages might deter them from obtaining such mortgages, \textit{id.} ¶ 34. The regulation might impair the free movement of capital because "rules are liable to dissuade the parties concerned from denomining a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments." \textit{Id.} ¶ 26.
\item[174.] \textit{See id.} ¶ 26.
\item[176.] \textit{Id.}
\item[177.] \textit{Id.} ¶¶ 5-6. Any individual taking more than PTA 1,000,000 out of the country was required to obtain prior authorization for its removal. \textit{Id.} ¶ 6. As of December 14, 1995, that equaled approximately $8,300. \textit{Currency and Money}, Fin. Times, Dec. 14, 1995, at 34.
\end{enumerate}
consent from governmental authorities effectively gave those authorities discretionary powers over whether to restrict the free movement of capital.\textsuperscript{178} Permitting the freedom to be dependent upon the discretion of an administrative authority is "such as to render that freedom illusory."\textsuperscript{179} Despite the validity of the purpose of the scheme—to prevent illegal activity such as money laundering—the Court held that the means chosen were not proportionate.\textsuperscript{180} Because the Spanish government could have achieved its objective with less restrictive means, by instead implementing a system of prior declaration,\textsuperscript{181} the Court held that the principle of proportionality was not met.\textsuperscript{182} Thus, the holding of \textit{Sanz de Lera} was very important in the golden share cases, for it illustrated that any acceptable restrictive scheme must be the least restrictive means by which to achieve the stated objective.\textsuperscript{183} The Court applies this principle of proportionality\textsuperscript{184} whenever a fundamental freedom is restricted, from the free movement of goods in \textit{Cassis de Dijon},\textsuperscript{185} to the right to provide services in \textit{In re Insurance Services}.\textsuperscript{186} \textit{Sanz de Lera} established the importance of the principle in the context of capital movements.

Despite such broad interpretations, it is also clear that the protection against restrictions is not absolute. Thus, even where there is a valid justification under the EC Treaty, the Court will scrutinize a national law which infringes upon a fundamental freedom.\textsuperscript{187} Certain principles must be met in order to permit a restriction. Using the four

\begin{itemize}
  \item \textsuperscript{179} Id. ¶ 25.
  \item \textsuperscript{180} Id. ¶¶ 26-28.
  \item \textsuperscript{181} See id.
  \item \textsuperscript{182} Id. ¶¶ 22-23 (stating that since Spain's objective can justify a restriction in the free movement of capital, it is necessary to determine if it is using the least restrictive means possible to meet that goal). The principle of proportionality is one of several foundational general principles of law that the ECJ has adopted which allow the Court's review to have more bite. See generally Bermann et al., \textit{supra} note 36, at 31, 171-79 (presenting the case law pertaining to the development of the principle of proportionality); see also infra notes 188-91 and accompanying text.
  \item \textsuperscript{184} See infra note 191 and accompanying text (defining proportionality).
\end{itemize}
step analysis developed in In re Insurance Services,\textsuperscript{188} carried over to the right of establishment in Gebhard,\textsuperscript{189} the Court first examines if the objective is acceptable. If it is, the means implemented must still be limited in scope so as to not go beyond what is needed to achieve them.\textsuperscript{190} This is the principle of proportionality.\textsuperscript{191}

The Court has found that some restrictions might be within the parameters permitted by the Treaty, though such instances are rare.\textsuperscript{192} For example, the ECJ interpreted the scope of Article 58’s public security exception in Albore.\textsuperscript{193} An Italian law forbade the sale of land to foreign nationals where the land was located in an area decreed by the Minister of Defense to be one of military importance.\textsuperscript{194} Despite the Court’s recognition of a public security exception under Article 58, it held that the infringing law must still meet the principle of proportionality.\textsuperscript{195} In order to satisfy the requirements for such an exception, the threat posed by foreign ownership of the land in question must be “real, specific and serious”\textsuperscript{196} as well as one which could not “be countered by less restrictive procedures.”\textsuperscript{197} Not having sufficient factual information regarding the specific nature of the threat to the public security by foreign ownership of the coastal land, the Court left it to the Italian court to determine whether such a threat existed, and, if it did, whether the measure was as minimally restrictive as possible in addressing it.\textsuperscript{198}

In Konle v. Austria\textsuperscript{199} the Court considered a law mandating prior authorization for non-nationals wishing to purchase land in the Tyrol (Alpine) region of the country, which was of environmental concern.\textsuperscript{200} The stated purpose of the law in question was for the

\textsuperscript{190}. See James Hanlon, European Community Law 67 (2d ed. 2000).
\textsuperscript{191}. See generally id. Hanlon notes that the principle of proportionality, though similar to the U.S. “reasonableness” test, is a more rigorous inquiry. Id. The principle is embodied in Article 5 of the EC Treaty. EC Treaty art. 5 (“Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.”). For a more comprehensive analysis of the principle of proportionality, as well as examples of its application in various sectors of Community law, see Hanlon, supra note 190, at 67-70.
\textsuperscript{192}. The Treaty expressly permits some restrictions. See supra notes 108-09 and accompanying text.
\textsuperscript{194}. Id. ¶ 5.
\textsuperscript{195}. Id. §§ 19, 24.
\textsuperscript{196}. Id. ¶ 22.
\textsuperscript{197}. Id.
\textsuperscript{198}. Id. ¶ 23.
\textsuperscript{200}. Id.
general national interest of urban planning. While the Court accepted that such an environmental concern was valid, it reiterated the principle that "[a] procedure of prior authorisation... which entails, by its very purpose, a restriction on the free movement of capital, can be regarded as compatible with Article 73b [now 56] of the Treaty only on certain conditions." Austria had secured a derogation to maintain discretionary rules regarding the acquisition of secondary residences in its accession agreement. The purpose of the restriction, though not one explicitly condoned in Article 58, was considered an imperative interest, and thus could, under the right circumstances, justify some restriction.

However, since the specific law that prohibited Konle's purchase was not one which had existed at the date of accession, but rather was a replacement (and significantly different) law for one which had subsequently been declared unconstitutional, it was not covered by the derogation. Because the system of review in place was not proportionate to the purpose of the restriction, it conflicted with Treaty obligations.

In Église de Scientologie the Court evaluated a French law that required prior authorization for any foreign investment which might be connected to the exercise of public authority, or which might pose a threat to public policy, health or security. The Court determined that a system of prior authorization is per se restrictive, and, to be acceptable, such a system must clearly delineate the criteria required for authorization. The French law in question was neither specific

---

201. See id. ¶ 37.
202. See generally id. ¶ 40.
203. See id. ¶ 39. Those conditions are that the measure be non-discriminatory, necessary and proportionate. See id. ¶¶ 40, 42.
204. See id. ¶¶ 14, 25. The derogation allowed Austria to continue to apply restrictions which existed at the time of accession, even those which were applicable only to foreigners. See id. ¶¶ 22-25.
205. See id. ¶ 40 (finding that certain goals of town and country planning can fall within the general interest and thus justify restrictive measures, provided that the measures are proportionate and do not go beyond what is necessary to achieve the objective).
206. See id. ¶¶ 53-54.
207. Id. ¶ 54.
208. Id. ¶ 56.
210. See id. ¶ 14.
211. See id. ¶¶ 21-22.
nor clear enough to permit such broad restrictions.\textsuperscript{212} However, the Court did state that there may be cases where a system of prior declaration is not sufficient to safeguard the interests of public policy or public security, and a system of prior authorization may be acceptable.\textsuperscript{213} Thus, the Court left some hope for the defense of such schemes in the future.

But \textit{Église} also shows that this is a high burden to meet. The law must relate to a “genuine and sufficiently serious threat”\textsuperscript{214} and indicate to investors the specific circumstances in which prior authorization is needed.\textsuperscript{215} Legal certainty is required so as to apprise individuals as to the extent of any rights and duties that they have under the Treaty.\textsuperscript{216}

3. Which Freedom to Use?

The Court often develops a test for one freedom, and extends its application to another when an appropriate case is brought.\textsuperscript{217} Thus, some important doctrines apply to several, or all, fundamental freedoms.\textsuperscript{218} In some cases more than one Treaty obligation is at

\textsuperscript{212} Id. The French law in question was very broad, and required a foreign investor to get prior authorization from the Minister in charge of the Economy for any investment in an endeavor which was involved, even occasionally, with the exercise of official authority, or which might threaten public policy, security or health. Id. \S 7. The Court noted that in order for an activity to qualify for inclusion in the public policy, health or security exception there must be a “sufficiently serious threat to a fundamental interest of society,” and that such determination could not be made unilaterally by a Member State. Id. \S 17.

\textsuperscript{213} See id. \S 19.

\textsuperscript{214} Id. \S 20.

\textsuperscript{215} Id. \S 21.

\textsuperscript{216} Id. \S 22. \textit{Église de Scientologie} holds:

Article 73d(1)(b) of the EC Treaty must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.

Id. Legal certainty, like proportionality, is a general principle of Community law, and is therefore always a consideration. See Hartley, \textit{supra} note 41, at 142. It requires that laws be predictable and certain, thus providing notice as to what satisfies the law. Id. For further discussion on the principle of legal certainty, see id. at 142-47.

\textsuperscript{217} See Flynn, \textit{supra} note 65, at 804-05. Flynn notes that in five years, the Court has developed capital law as fully as the law pertaining to other freedoms, which took thirty years to develop. Because the Court does take from one to apply to another, this huge development with regard to capital movement will impact the Court’s analysis of violations of other freedoms. Id. The Court is able to, and will, “pick elements from the case law on capital and to relay echoes from it in those fields.” Id. at 805; see also \textit{supra} notes 134-40 and accompanying text (noting the development of the four-prong test in the services case law and its subsequent utilization in establishment case law and discussing the extension of the concept of “overriding national interests” from free movement of goods to services and establishment).

\textsuperscript{218} See \textit{supra} notes 70-77 and accompanying text.
issue, and it is unclear which body of law the Court will apply.\textsuperscript{219} Frequently there is overlap between free movement of capital and the freedom of establishment.\textsuperscript{220} In such instances, the law relating to either freedom may be applied.\textsuperscript{221} Compounding the confusion is the clause in Article 43 that states that the freedom of establishment is “subject to the provisions of the Chapter relating to capital.”\textsuperscript{222} Likewise, Article 58 includes the reservation that the Chapter on capital “shall be without prejudice to the applicability of restrictions on the right of establishment.”\textsuperscript{223} This may imply that protection is only extended to one freedom where both are implicated, but as Advocate General Alber noted in \textit{Baars}:

\begin{quote}
[T]he reservations do not signify that conduct can be protected only under one of these fundamental freedoms. Were any reference to capital movements ipso facto to preclude application of the chapter on the freedom of establishment, that fundamental freedom would lose any practical meaning, since establishment in another Member State generally involves a transfer of capital.\textsuperscript{224}
\end{quote}

Certainly, the Court only addresses those questions that are presented. However, as is evident from the golden share cases, the Court is selective about which law it uses to ground its decision. In \textit{Baars}, Advocate General Alber suggested:

\begin{enumerate}
\item where the free movement of capital is directly restricted such that only an indirect obstacle to establishment is created, only the rules on capital movements apply; \(2\) where the freedom of establishment is directly restricted such that the ensuing obstacle to establishment leads indirectly to a reduction of capital flows between Member States, only the rules on the freedom of establishment apply . . . ; \(3\) where there is direct intervention affecting both the free movement of capital and the freedom of establishment, both fundamental freedoms apply, and the national measure must satisfy the requirements of both.\textsuperscript{225}
\end{enumerate}

Theoretically this is a sound formula, but in practice the line may be more difficult to draw. Accordingly, the Court has often avoided the issue by making a decision on one of the freedoms, and not addressing the other, even if it is raised.\textsuperscript{226}

\begin{flushright}
\textsuperscript{219} See, e.g., Flynn, supra note 65, at 788-91.
\textsuperscript{220} See generally id.
\textsuperscript{221} See id.
\textsuperscript{222} EC Treaty art. 43.
\textsuperscript{223} EC Treaty art. 58.
\textsuperscript{225} Kronenberger, supra note 13, at 129-30.
\textsuperscript{226} See Flynn, supra note 65, at 789. Flynn notes that the Court followed the same pattern in \textit{X & Y v. Riksskatteverket}, Case C-200/98, X & Y v. Riksskatteverket, 1999 E.C.R. I-8261, where “it ruled that, in the absence of justification, such a difference of
In the past, the Court pragmatically opted to decide only the establishment issue, because "once an incompatibility appears to arise, [regarding the right of establishment] there is no purpose in examining the implications of the provisions on capital." Now that there is a wealth of capital case law, the Court has declined to address the freedom of establishment issue in any of the golden share cases.

It seems the Court bases its rulings on the law most amenable to the precise issue at bar. The Court logically relied on its existing precedent in deciding the golden share cases. There were other options, however: In the opinions presented by Advocate General Ruiz-Jarabo Colomer in each of the golden share cases, he advocated analysis under the right of establishment. Ruiz-Jarabo Colomer found that in the golden share cases the restriction of the free movement of capital was incidental to the restriction on the freedom of establishment. This is similar to A.G. Alber's line-drawing

treatment is contrary to the rules on freedom of establishment and that it was not necessary to examine whether the rules on free movement of capital preclude legislation such as that in question in the main proceedings." Flynn, supra note 65, at 789 (paraphrasing X & Y, at ¶¶ 28, 30). But see Case C-484/93, Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955 (discussing both the freedom of establishment and the free movement of capital issues).

227. Flynn, supra note 65, at 804.
228. See id. passim for an excellent discussion of the development of case law pertaining to the free movement of capital.
formula in *Baars*, where he concluded that the appropriate rules to apply were those relating to establishment, because Baars' owned all of the shares in a company. This indicates that some cases infringe both freedoms, and the reason for the Court's application of one body of law over another may be apparent only by considering the development of relevant precedent.

C. The 1997 Communication

Since the mid-1990s, the Commission has made it clear that it will not tolerate restrictions on the free movement of capital and freedom of establishment. In fact, in 1997, the Commission issued a Communication which unambiguously stated its position on Article 56, expressly "indicat[ing], to national authorities and economic operators in Member States" how it interprets Articles 43 and 56. Because acquiring a controlling stake in a company is considered a capital movement, Article 56 must be considered with regard to investment. Additionally, such acquisitions are "also covered under the scope of the right of establishment," thus also requiring compatibility with Article 43. Therefore, the Commission, at least, recognizes that golden share devices, which directly or indirectly regulate the acquisition of shares, implicate both Treaty rights.

The National Treatment Principle prohibits discriminatory treatment of the nationals of other Member States. The principle has always been a part of the Treaty; initially embodied in Article 7, and now in Article 12: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." Only in very limited circumstances can any law which violates this principle be acceptable. Because a discriminatory regulation unequivocally

---

233. See supra note 225 and accompanying text.
234. Case C-251/98, *Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem*, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 34, [2002] 1 C.M.L.R. 49 (2000), Opinion of A.G. Alber, ¶ 34 ("The distinction in question presents no problems in the present case. It is clear that the situation is one of establishment, since all the shares are owned by one person.").
235. See, e.g., Communication, supra note 20, at ¶ 1.
236. Id. ¶ 2.
237. Id. ¶ 3.
238. Id. ¶ 4.
239. See id. ¶¶ 6-9.
240. EC Treaty art. 12. Though not expressed in the treaty, Article 12 mandates non-discrimination based on nationality, and thus requires that a citizen from another Member State be treated equivalently to a citizen of the Member State in question. The Court has interpreted this to be a "general doctrine of equality." Hartley, *supra* note 41, at 130. The National Treatment terminology comes from GATT. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 3, 61 Stat. A-11, A-18, 55 U.N.T.S. 188, 204-06.
241. EC Treaty art. 12.
242. See Communication, supra note 20, ¶¶ 5(i)-7. The Commission recognized
conflicts, not only with provisions in the Treaty, but with the underlying purpose of the EU, such measures presumptively infringe upon Treaty obligations. Such measures can only co-exist with Treaty obligations if they are one of the few exceptions explicitly granted by the Treaty itself.

Regulations that are non-discriminatory on their face are also scrutinized carefully, though the criteria are slightly more ambiguous, leaving more to the court’s discretion. Applying by analogy judicial doctrines that were developed to limit Member State restrictions on the free movement of services and the right of establishment, the Commission argued, and the Court has held, that such laws must meet four conditions. First, they must not be applied discriminatorily. Second, the law must achieve “imperative requirements in the general interest.” Third, the measure must be appropriate for attaining the

---

that discriminatory measures which were related to activities connected with “official authority” might be accepted. See, e.g., Case 2/74, Reyners v. Belgian State, 1974 E.C.R. 631, ¶ 54, [1974] 2 C.M.L.R. 305 (1974). Additionally, the Commission recognized that when a regulation discriminated on the basis of nationality and was justifiable under explicit Treaty exceptions—public security, health or policy—it might be acceptable, though “these exceptions must be understood in a narrow sense... and exclude any interpretation based on economic considerations.” Communication, supra note 20, ¶ 5(i).

243. See EC Treaty pmbl. (stating that the Community was created because the Members were “[determined] to lay the foundations of an ever closer union among the peoples of Europe, ... [recognising] that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition”).


245. See Communication, supra note 20, ¶ 5; see also supra notes 82-85 and accompanying text (discussing the specific exceptions to the prohibition on restriction of the freedom of establishment); supra note 108 and accompanying text (identifying the Treaty exceptions permitting restrictions of the free movement of capital).

246. See generally Communication, supra note 20, ¶ 9 (“[T]hey are permitted in so far as they are based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest. In all cases, the principle of proportionality has to be respected.”).


249. Communication, supra note 20, ¶ 5(ii).

250. Id.

251. Id. The Commission draws upon the Court’s analysis in previous case law pertaining to the free movement of services and the right of establishment. Cf. Case C-55/94, Gebhard, 1995 E.C.R. I-4165, ¶ 37, [1996] 1 C.M.L.R. 603, ¶ 37 (reiterating the four conditions necessary for a restriction on a fundamental freedom, the second of which is that the measure “must be justified by imperative requirements in the general interest”); Case 33/74, van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 298 (1974), (finding that the Dutch refusal to permit a Dutch legal representative, residing in Belgium, to
Finally, the regulation must not impose any restriction beyond that which is necessary to achieve the objective.253

The Commission also recognized that Article 296(1)(b) generates a clear and overriding exception.254 Article 296 unequivocally permits Member States to implement regulations needed “for the protection of the essential interests of its security... connected with the production of or trade in arms, munitions and war material.”255 However, the Commission expressed reliance on the continued narrow interpretation of this caveat by the ECJ, and remained confident that this exception would not become “a general proviso covering all measures taken for reasons of public security.”256

The Commission applied this interpretation to various mechanisms currently in place in some Member States to determine compatibility with EU law.257 Essentially, the Commission declared that any scheme requiring prior authorization for an investment, any retention of state veto rights over important company decisions, or the right to appoint directors to a company’s board were inherently incompatible with the obligations of Articles 56 and 43, and therefore could only be acceptable in narrowly defined situations.258 All of these objectionable measures are common devices employed when Member States use golden shares.259

The Commission’s interpretation of the relevant Treaty Articles provided the basis for initiating the six golden share cases.260 The choice to privatize a previously state owned enterprise remains the decision of the Member State.261 However, what the golden share

---

252. Communication, supra note 20, ¶ 5(ii).
253. Id.
254. Id. ¶ 5(i).
255. EC Treaty art. 296(1)(b).
256. Communication, supra note 20, ¶ 5(i).
257. Id. ¶¶ 7-8.
258. Id. ¶ 8.
259. See infra Part II (discussing the various golden share mechanisms which have come before the ECJ).
260. See EC Treaty art. 226. Article 226 provides the procedure for the Commission to initiate proceedings against a Member State before the ECJ.
261. Communication, supra note 20, n.1 (noting that such a decision is an “economic policy choice which... falls within the exclusive competence of Member States”); see also EC Treaty art. 295 (previously Art. 222) (“This Treaty shall in no
cases prove is that, post-privatization, Member States do not have free rein to regulate those companies in a manner inconsistent with the free movement of capital and the freedom of establishment.

This Communication expressed the opinion of the Commission, and was not binding law. Actual rules pertaining to such matters "should be left for Parliament and the Council, acting on a proposal from the Commission." By the end of the 1990s, efforts to further integrate the internal market and eliminate—or at least diminish—measures designed to inhibit cross-border company activity were increased. The Commission began initiating actions against Member States using restrictive protective devices, such as golden shares. The obvious restrictive nature of golden shares made them uniquely vulnerable to challenge.

II. THE GOLDEN SHARE CASES

This part discusses the six golden share cases in turn. Each case provides unique insight into the Court's method of interpreting Treaty law and building upon precedent. Furthermore, analyzing each case in turn demonstrates how these cases incrementally defined the scope of the free movement of capital.

Even before the commencement of infringement proceedings related to golden shares, commentators criticized golden shares for their "sweeping legal nature." Despite the recent judicial activity, way prejudice the rules in Member States governing the system of property ownership."

262. The Commission does not have the ability to create binding law. For a discussion of the Commission's role in the EU, see Bermann et al., supra note 36, at 42-51; Hartley, supra note 41, at 11-17.

263. Eur. Parl. Doc. O.J. 2002 (C 21E) 338, 339 (Minutes, Apr. 5, 2001). The European Parliament has asked the Commission to stop using the Communication alone as the basis for the infringement proceedings against Member States and urged it to replace the Communication with a proposed directive. Id. at 339 ("Calls on the Commission to cease using the abovementioned communication as the basis for its infringement procedures and immediately to propose a directive to replace the abovementioned communication.").


265. See supra notes 12-27 and accompanying text for a discussion of the various ways in which golden shares protect a company or governmental interest by implementing restrictions on a number of activities.

266. Kronenberger, supra note 13, at 123.
golden shares are still quite common throughout the EU, and thus an analysis of the Court's decisions will assist in predicting the nature of the Court's scrutiny and the outcome of future cases.

The 1988 Directive included direct investments in the illustrative list of operations to be liberalized, which was subsequently understood to have been incorporated into Article 56. For the purposes of the directive, direct investments are defined as:

Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.

A golden share, by its very nature, potentially restricts investments. In some cases, the golden share sets caps on the amount of shares that an individual may own. In others, the government maintains such a level of control as to render the investment less attractive. In recent years, the Court has had the...
opportunity to evaluate both of these schemes.\footnote{275} Because the movement of capital is at issue, there are only a few permissible justifications for any restriction, and the Court has also begun to identify which motives can be acceptable.\footnote{276}

A. Commission v. Italy

In May 2000, the Court decided the first of the golden share cases.\footnote{277} An Italian law required that, prior to relinquishing control of any state controlled company operating in certain sectors, a provision be installed to reserve certain powers to the Minister of the Treasury.\footnote{278} These special powers in effect constitute a golden share retained by the state. The government reserved the right to appoint at least one director to the board and the ability to veto certain company decisions.\footnote{279} The government inserted these provisions into the statutes of ENI SpA, STET SpA and Telecom Italia SpA.\footnote{280} The companies operated in the energy sector (ENI) and the telecommunications sector (STET and Telecom Italia).\footnote{281}

Following the necessary procedure, the Commission brought the case to the ECJ, pursuant to Article 226.\footnote{282} Before the Court, the

\footnote{275} See infra Part II.A.-C. for a discussion of the six cases in which the court has evaluated various golden share schemes, and its determination of which motivations can be acceptable.

\footnote{276} See Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809 (permitting the use of the Belgian golden share); Case C-463/00, Spain, 2003 E.C.R. I-4581, § 71 (identifying certain industries which might merit some protective measures). Because the principles of proportionality and legal certainty are general legal principles of the Community, they apply in all circumstances. For a comprehensive discussion of the origin and application of general principles of Community law, see Hartley, supra note 41, at 130-54. Thus, only those schemes which ensure the protection interest of the affected investor can be justified. Such safeguards include judicial review, precisely worded restrictions, and specific constraints on the governmental restriction. See, e.g., Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶¶ 48-52, [2002] 2 C.M.L.R. 50 (2002), ¶¶ 48-52.


\footnote{278} See id. ¶ 3.

\footnote{279} Id.

\footnote{280} Id. ¶¶ 5-6.

\footnote{281} Though the specific industries involved were unimportant in this case, retrospectively, it is possible that Italy might have successfully defended the system as necessary for the protection of overriding reasons in the national interest, because the Court has since stated that both sectors are important enough to justify restricting a fundamental freedom. See Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, § 71, [2003] 2 C.M.L.R. 18 (2003), § 71 (noting that protecting the telecommunications industry may constitute a valid public security justification for restricting the free movement of capital); see also Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50 (2002), ¶ 46 ("[T]he safeguarding of energy supplies in the event of a crisis . . . falls undeniably within the ambit of a legitimate public interest."). Of course, the regulation would still have to be proportionate. See, e.g., Case C-54/99, Association Eglise de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, ¶ 18.

\footnote{282} Case C-58/99, Italy, 2000 E.C.R. I-3811, ¶¶ 7-11; see also EC Treaty art. 226.
Commission argued that the law conflicted with Treaty obligations and failed to meet the necessary four conditions, as outlined in the 1997 Communication.\(^\text{283}\) Furthermore, the Commission argued that the law gave the Italian government too much discretion, and therefore the ability to apply the law in an arbitrary and discriminatory manner.\(^\text{284}\)

Here, the Italian government conceded that Law No. 474 was incompatible with the law of the European Community.\(^\text{285}\) Accordingly, the Court had no need to scrutinize the law to determine whether it actually restricted capital movements or establishment, or if any such restriction was in fact impermissible. But the Court did not have to wait long before the issue again appeared.

**B. The Original Golden Share Cases**

On June 4, 2002, the ECJ decided three cases regarding the use of golden shares.\(^\text{286}\) The Court's analysis of the various forms of the golden shares outlines the basic structure of the current test of golden share compatibility with Community law.\(^\text{287}\) Each case resolves different and important issues.

Before rendering its decision, the Court considered the opinion of Advocate General Ruiz-Jarabo Colomer,\(^\text{288}\) who recommended that the Court dismiss the Commission's actions against the non-discriminatory measures of Portugal, Belgium, and France.\(^\text{289}\) The

---

Article 226 provides the proper procedure for the Commission to bring an action before the ECJ:

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

\emph{Id.} Thus, the Commission sent a formal notice to the Italian Republic, informing it that in the Commission's opinion, the law violated Articles 43, 49, and 56. Case C-58/99, \emph{Italy}, 2000 E.C.R. 1-3811, \^\emph{7}. After receiving a response from the Italian government, the Commission sent a reasoned opinion, giving Italy two months to comply. \emph{Id.} \^\emph{8}. Italy failed to respond within the time limit. \emph{Id.} \^\emph{9-10}.

283. See \emph{supra} note 20 and text accompanying note 249.
284. \emph{See Case} C-58/99, \emph{Italy}, 2000 E.C.R. I-3811, \^\emph{13}.
285. \emph{Id.} \^\emph{14}.
287. \emph{See generally} Fleisher, \emph{supra} note 19.
288. See \emph{supra} note 124 (explaining the role of the A.G.). For a more complete discussion of the A.G.'s opinion in the golden share cases, see \emph{infra} Part II.D.
A.G. relied primarily on Article 295, which asserts that the Treaty laws do not prejudice the property law of the Member States.290 Company shares and the rights which they entail are property.291 The Court, however, did not agree, and only briefly addressed the Advocate General’s argument before swiftly rejecting it, noting that Member States’ systems of property ownership are not exempt from Treaty rules.292 The Court cited one of its important precedents, Factortame II, to show that Member States may only exercise the powers that they retain consistently with Community law.293

1. Commission v. Portugal

The Commission’s strongest case was against the Portuguese golden share rules.294 The Portuguese law in question established a framework for all privatizations.295 One objective of the law was “to permit widespread participation by Portuguese citizens in the share capital of undertakings.”296 Presumably to further that goal, Article 13(3) of Law No. 11/90 was discriminatory on its face, allowing legislation to “limit the overall amount of shares which may be acquired or subscribed for by foreign entities.”297 The Commission brought the action to challenge specific decree laws, three of which implemented a discriminatory measure.298 Additionally, the Commission objected to certain decree laws which, though not facially discriminatory, nonetheless restricted free movement of capital by limiting to ten percent the total number of shares any individual or entity could legally hold without government authorization.299

C.M.L.R. 48 (2002), Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 92. One of the laws in question capped the amount of voting shares any single person (or legal entity) could own at ten percent. This law applied irrespective of the shareholder’s nationality, and applied to any “single, natural or legal person.” Id. ¶ 14.

290. EC Treaty art. 295.


296. Id. ¶ 10 (quoting Article 3 of Law No. 11/90).

297. Id.

298. See id. ¶ 13.

299. See id. ¶ 14.
Regarding the discriminatory aspect of the Portuguese law in question, the Commission's argument followed the rationale of the 1997 Communication. First, the Commission contended that the true purpose behind such protective measures was to control intra-Community investment. The Commission further noted that discriminatory measures are clearly incompatible with Article 43 and Article 56, unless they are within one of the express exceptions. The Portuguese government contended that since it had endeavored "as a matter of policy, not to use the powers conferred on it by those provisions," Portugal had not in practice violated its obligations under the EC Treaty.

As for the non-discriminatory measures, the Commission again referred to the 1997 Communication, claiming that the measures were incompatible with Community law. Only those laws which are "based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest" and which meet the principle of proportionality, can be accepted. The Commission contended that Portugal did not meet these requirements. Portugal argued that (a) the scheme was applied to both foreigners and nationals, and was therefore non-discriminatory, and (b) the measures were justified by "overriding requirements of the general interest." Portugal asserted that safeguarding its nation's financial interests was an imperative national interest, which justified a restriction of the freedom of establishment and the free movement of capital.

The Court disregarded entirely A.G. Ruiz-Jarabo Colomer's analysis of Article 295 and instead evaluated the national measures under Article 56. The Court seized upon this opportunity to formulate an appropriate structure of analysis for golden share restrictions based on the free movement of capital. First, the Court noted that Article 56 bars such restrictions.
clearly held that such a restriction need not have a direct restrictive effect; it is enough that the measure may indirectly hinder the free movement of capital.\(^\text{315}\)

The Court then addressed the discriminatory aspects of the measure. The Court rejected Portugal’s argument that because the discriminatory rules were not actually used they did not violate Article 56,\(^\text{316}\) because such a policy failed to meet the principle of legal certainty.\(^\text{317}\) Portugal’s practice “cannot be regarded as constituting the proper fulfilment of a Member State’s obligations under the Treaty, since they maintain, for the persons concerned, a state of uncertainty.”\(^\text{318}\) Thus, an administrative policy of not applying an existing measure discriminatorily was not a valid defense to an alleged breach of EC Treaty obligations.\(^\text{319}\) This remains well-settled Community law.\(^\text{320}\)

Next the Court evaluated the non-discriminatory measure embedded in Decree-Law No. 380/93, which required prior authorization before an individual or entity could hold shares totaling more than ten percent of the voting capital.\(^\text{321}\) Having already dealt with systems of prior authorization in *Sanz de Lera*\(^\text{322}\) and *Église de Scientologie*,\(^\text{323}\) the Court had a well-developed body of law from which to draw.

Without hesitation, the Court dismissed Portugal’s argument that

\(^{315}\) See Case C-222/97, Trummer & Mayer, 1999 E.C.R. I-1661, ¶ 26, [2000] 3 C.M.L.R. 1143 (1999), ¶ 26 (holding that measures which may deter investment, even if they do not prohibit or directly restrict it, violate Article 56).


\(^{317}\) Id.

\(^{318}\) Id.

\(^{319}\) See id. ¶¶ 41-42. Interestingly, in earlier days, the Commission seemed to accept such promises not to use discriminatory measures which existed. See Graham & Prosser, *supra* note 8, at 151. In the days of the EEC, the Commission objected to France’s attempt to limit a sale resulting in foreign ownership to fifteen percent but accepted a limit of twenty percent on the condition that such limits would not be enforced against other members of the Community. Though this specifically applied to the original sale of the company, the golden share was inserted to ensure adequate State control in the post-privatization period. *Id.* at 151-52.

\(^{320}\) See, e.g., Case 167/73, Commission v. France, 1974 E.C.R. 359, ¶¶ 47-48, [1974] 2 C.M.L.R. 216 (1974), ¶¶ 47-48 (holding that even though a French requirement that at least seventy-five percent of the crew on some vessels be French was not applied against nationals of other Member States, the wording of the regulation created uncertainty, and thus France had failed to meet its obligation of free movement of workers).

\(^{321}\) See Case C-367/98, Portugal, 2002 E.C.R. I-4731, ¶¶ 43-44, [2002] 2 C.M.L.R. 48, ¶¶ 43-44 (declining to accept Portugal’s argument that because the measure is not discriminatory, it is acceptable).


\(^{323}\) Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335; see also *supra* notes 209-16 and accompanying text.
because the measure did not discriminate based on nationality, it was compatible with the Treaty. Article 56 does not permit such restrictions. Any rule with the potential to dissuade investors from other Member States from investing is "liable... to render the free movement of capital illusory," and as such is incompatible with Article 56. This is firmly settled case law.

Since no blanket rule permits non-discriminatory restrictions, the Court considered whether the scheme in question fulfilled the requirements of any of the express exceptions of Article 58, or could be justified by some "overriding requirements of the general interest." The Court found that the statute was not justified by any overriding need in the general interest, since "general financial interests of a Member State cannot constitute adequate justification." Therefore, the scheme failed to meet the acceptable justification condition.

The Court did not need to evaluate whether the measure was proportionate and narrowly tailored to meet the objective, but briefly discussed both legal certainty and proportionality. The Court was not swayed by the argument that the "administrative decisions had to be reasoned" because knowledge of the criteria ex post facto failed to meet the burden of legal certainty. As for the principle of proportionality, the Court declared that a system of ex-post facto declaration would have to be completely incapable of achieving the objective in order for a system of prior authorization to ever be acceptable.

Portugal was the least complicated of the three golden share cases decided on June 4, 2002. The first law challenged was

---

325. Article 56 permits no restrictions on either capital or payment flows between Member States and Member States and third parties. EC Treaty art. 56.
329. Id.
332. See Câmara, supra note 12, at 508.
333. See supra note 216 and accompanying text (defining legal certainty).
discriminatory on its face, and thus could only be allowed to stand under extremely limited circumstances, none of which were presented by the Portuguese.336 The second law, which applied to all persons wanting to purchase shares with a voting weight of more than ten percent, failed the first of the four necessary conditions,337 as the objective could not justify a restriction of a fundamental freedom.338 The harder questions, those relating to proportionality and necessity, did not need to be addressed.

2. Commission v. France

The question of proportionality became the pivotal issue in the second case decided by the Court on June 4, 2002.339 At issue in the Commission's case against France was the golden share which reserved certain rights to the Minister of Economic Affairs.340 Post-privatization legislation created a golden share in Société Nationale Elf-Aquitaine ("SNEA"). Specifically, the statute granted the Minister the right to oppose company decisions regarding the disposal of assets and to appoint two members to the board of directors.341 Even more troubling was the obligation imposed upon any investor wishing to purchase more than a certain number of shares to obtain prior approval of the Minister.342 It was this scheme of prior authorization which was the focus of the Commission's case against France.343 The Commission, as required by procedure, notified France that it believed the requirement to be contrary to EC law. The French, fearing foreign control over the petroleum supplies, were not willing to forgo the golden share entirely.344

The Court first assessed whether the golden share that France reserved in SNEA posed a restriction on the movement of capital.345 Like the Portuguese, the French argued that the measure was not

---

336. See supra notes 82-85, 95-96, 108-10 and accompanying text for a discussion of exceptions under which a restriction of the free movement of capital and freedom of establishment may be imposed.
337. See supra notes 139-40 and accompanying text.
338. See generally Case C-367/98, Portugal, 2002 E.C.R. I-4731, ¶ 52, [2002] 2 C.M.L.R. 48, ¶ 52 (asserting that Portugal's motive was purely economic, and thus did not justify restricting capital movements).
339. See id. ¶ 53.
340. See id. ¶ 14.
341. Id. ¶ 9. It should be noted that the two members appointed by the Minister did not have voting rights. Id.
342. Id.
343. Id. ¶¶ 21-24.
344. Id. ¶¶ 14-15 (stating that France would require pre-authorization only where holdings in excess of the maximum share limits might threaten petroleum supplies and that safeguarding such supplies was an important objective).
345. Id. ¶¶ 38-43.
contrary to Article 56 because it was non-discriminatory, but again, the Court found no merit in this argument. Any measure which has the potential to deter investment by nationals of other Member States might make free movement of capital “illusory,” and is thus contrary to Community law. Therefore, for the French golden share to comply with Article 56, it had to be justified either by an explicit Treaty exception or by “overriding requirements of the general interest.” Moreover, even if the objective justified the restriction, the system of prior authorization must be the least restrictive means of achieving that goal.

The French, unlike the Portuguese, satisfied the first condition: In 1984, in Campus Oil, the Court had determined that petroleum products... are of fundamental importance for a country’s existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products... could therefore seriously affect the public security.

Thus the objective of safeguarding the nation’s petroleum supplies is a legitimate national interest, and can justify some restriction of capital movements. The Commission itself conceded that the objective might, under the right circumstances, merit a restriction.

Accepting this, the Court examined the scope of the scheme utilized. Because the use of the public security exception requires that there be a “genuine and sufficiently serious threat,” a Member State may adopt only those measures which are absolutely necessary to secure against the threat. Finding that the French system of prior authorization offered investors no “indication whatever as to the specific, objective circumstances in which prior authorisation will be

346. Id. ¶ 39.
347. Id. ¶ 40.
348. Id. ¶ 41.
349. Id. ¶ 45; see also Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, ¶¶ 17-18.
351. See Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 34, [1984] 3 C.M.L.R. 544 (1984), ¶ 34. In Campus Oil, the Court scrutinized Irish rules which were adopted to ensure that Ireland’s only oil refinery was not closed, which would have had the effect of making the nation entirely dependent upon foreign oil supplies. In the wake of the energy crisis of the 1970s, the Irish government was reluctant to allow that to happen. See id. ¶¶ 5-7.
352. See id. ¶ 35.
353. Id.
355. Id. ¶ 47.
356. See id. ¶ 47.
357. Id. ¶ 48.
358. See id. ¶ 49.
the Court decided that the lack of transparency and legal certainty provided too much discretionary power, and was therefore not proportionate to the stated purpose. As with the system of prior authorization that the Court denied in *Église de Scientologie*, the French golden share system lacked the requisite specificity and failed to adequately indicate to investors when prior authorization would be granted or denied. As such, the restriction violated Article 56 of the EC Treaty.

The most important aspect of *France* was the Court's acknowledgment that some important national interests could necessitate restricting the free movement of capital and the freedom of establishment. Furthermore, the judgment made clear the absolute importance of transparency and proportionality. Though this is a high standard, the final judgment on golden shares handed down on June 4, 2002 proved that it is not an impossible standard to meet.

3. *Commission v. Belgium*

The third, and arguably most important, case was that against Belgium. At issue were two Royal Decrees, each of which vested a golden share in the government. In the Royal Decree of June 10, 1994, a golden share was granted in the *Société Nationale de Transport par Canalisations* ("SNTC"). Another Royal Decree on June 16, 1994 vested in the state a golden share in *Société de Distribution du Gaz SA* ("Distrigaz"). Both enterprises were involved in the gas and energy distribution sector. The golden shares granted were very similar, reserving to the state: (1) the right to be notified of any transfer, sale, or use as collateral of the company's strategic assets, and (2) the right to appoint two members to the board of directors who could in turn suggest to the Minister responsible that he annul a

---

359. *Id.* ¶ 50.
360. *See id.* ¶ 50-51.
363. Because the Belgian case is the only one to date in which the Court permitted the use of golden share measures, it is perhaps the most important because it leaves open the possibility that governments may implement such measures in some instances. Without this decision, the outlook for the future of golden shares would be very dim. Additionally, the Belgian golden share can serve as a model for future golden shares. Provided a government has an acceptable objective, it may avail itself of the protections inherent in golden shares. *See infra Part III.B.2.*
365. *Id.*
366. *Id.*
367. *Id.* ¶ 28.
368. *Id.* ¶ 1.
decision of the board, if he "consider[ed] that the operation in question adversely affect[ed] the national interest in the energy sector."\(^{369}\)

The structure of these rights, and how they were to be asserted, was of particular consequence to the Court's evaluation. The government officials who were appointed to the board of directors could, within four business days, propose to the appropriate Minister that an action of the board be annulled.\(^{370}\) The proposal effected an immediate suspension of the action in question.\(^{371}\) The Minister then had eight business days to take action, and should he fail to annul the decision in that time, the suspension would end, and the action would become effective.\(^{372}\) However, there was a right of appeal to the Belgian Conseil D'Etat to seek annulment of the Minister's decision.\(^{373}\)

The Commission, relying on the 1997 Communication, argued that such measures were a restriction of the free movement of capital and the freedom of establishment, and could not co-exist with Community law unless covered by one of the express exceptions.\(^{374}\) Belgium contended that the measures were justified by reasons of public security and overriding general national interest requirements.\(^{375}\) Moreover, like both France and Portugal, Belgium noted that the schemes were non-discriminatory.\(^{376}\)

Following the framework utilized in France and Portugal, the Court recognized that restrictions on the free movement of capital are clearly contrary to the EC Treaty, and justifiable only in narrowly limited circumstances.\(^{377}\) The Court then commenced its four part assessment of the system. The objective in question—safeguarding energy supplies and protecting the national energy policy—satisfied the first criterion.\(^{378}\) Like protection of petroleum supplies,\(^{379}\) safeguarding energy supplies is a "legitimate public interest."\(^{380}\) Having determined that the objective was legitimate and might permit some restriction of capital movement, the Court considered whether

---

\(^{369}\) Id. ¶¶ 1, 9.

\(^{370}\) Id.

\(^{371}\) Id. ¶ 9.

\(^{372}\) Id.

\(^{373}\) Id. ¶ 29.

\(^{374}\) Id. ¶¶ 16-21.

\(^{375}\) Id. ¶ 26.

\(^{376}\) Id. ¶ 12.

\(^{377}\) Id. ¶ 45.

\(^{378}\) Id. ¶ 46.


\(^{380}\) Case C-503/99, Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50, ¶ 46. The Court explicitly acknowledged that though Campus Oil was a free movement of goods case, the "same reasoning applies to obstacles to the free movement of capital." Id.
the measure was structured to meet the principle of proportionality and legal certainty.\textsuperscript{381}

The Court noted three specific elements of the scheme which ensured that it met the requirement of legal certainty. First, it was a system of opposition, not of prior authorization.\textsuperscript{382} The investor need not apply for permission; rather, the onus was on the government to object to an action which it believed posed a threat to national security.\textsuperscript{383} Second, the government could only object where the action considered by the board related to certain specific assets, such as altering the energy supply networks.\textsuperscript{384} Third, the Minister was only permitted to intercede when the government's energy policy objectives were jeopardized by the proposed action.\textsuperscript{385} These limitations created the legal certainty necessary to permit a restriction on a fundamental freedom.\textsuperscript{386} A final critical element was the availability of judicial review.\textsuperscript{387} The Belgian golden shares, therefore, satisfied the principle of proportionality and were a permissible restriction on the free movement of capital and the freedom of establishment.\textsuperscript{388}

All four conditions were met, and though the Court did not explicitly apply the four-part test to the facts, it is clear that it considered them all: the scheme was not discriminatory,\textsuperscript{389} and it was justified by an overriding need in the general interest,\textsuperscript{390} which had previously been identified by the Court in \textit{Campus Oil};\textsuperscript{391} the scheme could effectively achieve the objective,\textsuperscript{392} and Belgium had demonstrated that the measure was narrowly tailored to achieve the objective without excessive restriction.\textsuperscript{393} The standard, therefore, is not impossible to meet.

\begin{itemize}
\item \textsuperscript{381} \textit{Id.} \textsuperscript{48}.
\item \textsuperscript{382} \textit{See id.} \textsuperscript{49}.
\item \textsuperscript{383} \textit{See id.} \textsuperscript{47-49}.
\item \textsuperscript{384} \textit{See id.} \textsuperscript{50}.
\item \textsuperscript{385} \textit{See id.} \textsuperscript{51}.
\item \textsuperscript{386} \textit{See id.} \textsuperscript{52}.
\item \textsuperscript{387} \textit{See id.} \textsuperscript{51}. The availability of judicial review of the Minister's decision ensured the necessary predictability needed to create legal certainty. \textit{See id.} \textsuperscript{52}.
\item \textsuperscript{388} \textit{See id.} \textsuperscript{57, 60}.
\item \textsuperscript{389} \textit{See id.} \textsuperscript{9-10} (outlining the laws in question, which were applicable to all persons, regardless of nationality).
\item \textsuperscript{390} \textit{See id.} \textsuperscript{46}.
\item \textsuperscript{391} \textit{See Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727,} \textsuperscript{35} [1984] 3 C.M.L.R. 544 (1984), \textsuperscript{35}.
\item \textsuperscript{392} \textit{See Case C-503/99, Belgium, 2002 E.C.R. I-4809,} \textsuperscript{45-52} [2002] 2 C.M.L.R. \textsuperscript{50, 45-52}.
\item \textsuperscript{393} \textit{See id.} \textsuperscript{53}. ("The Commission has not shown that less restrictive measures could have been taken to attain the objective pursued.").
\end{itemize}
C. The 2003 Cases

In May 2003, the Court handed down two more golden share decisions, one against Spain and the other against the U.K. Not surprisingly, the Court analyzed the laws at issue in these cases using the same formulaic approach as it had in the 2002 cases, focusing on the Article 56 violation and only minimally addressing the Article 43 infringements. Advocate General Ruiz-Jarabo Colomer again rendered a prior opinion, arguing that there were some deficiencies in the Court’s analysis of the original golden share cases, particularly that against Belgium as compared to its analysis in the case against France. The Advocate General’s opinion determined that in light of those decisions, the case against Spain should be dismissed, while the Court should find the U.K. scheme unacceptably restrictive. As with the original golden share cases, and contrary to the Court’s frequent practice of adopting the opinion of the A.G., the Court did not follow his opinion.

1. Commission v. Spain

Spanish Law No. 5/1995 provided the structure for privatization and the retention of certain powers by the State. Specifically, the law


[I]t is appropriate to point out that in so far as the rules in question entail restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital... to which they are inextricably linked. Consequently, since an infringement of Article 56 EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment. Id.; Case C-463/00, Spain, 2003 E.C.R. I-4581, ¶ 86, [2003] 2 C.M.L.R. 18, ¶ 86 (repeating almost verbatim its consideration of the issue in the case against the U.K.).
396. The Advocate General’s analysis was again very well-formulated and seemed to deal with the issues in a more logical manner, and will be discussed in greater detail below. See infra Part II.D.
398. Id. ¶ 46.
399. Id. ¶ 58. A.G. Ruiz-Jarabo Colomer noted that with minor changes, the provisions in place in the U.K. could be brought into line with the Treaty and therefore be legal. Specifically, he noted that reasoned opinions by the government for its use of the golden share powers, and the availability of judicial review, were needed to bring these provisions into conformity. Id.
400. See Bermann et al., supra note 36, at 62 (noting that the Court “often... reach[es] the same conclusion, though perhaps on different grounds”).
applied to any undertaking in which the State owned greater than twenty-five percent, and which was involved in "essential services or public services," activities subject to administrative review due to public interest, and those actions which were exempt from EU laws governing competition. The law set up a system of prior authorization for certain company decisions, as well as for any reduction in the State-owned shares of ten percent or greater, or the acquisition of shares by an investor which "results in a holding of at least ten percent of the share capital." The framework was executed by individual Royal Decrees regarding various undertakings. The sectors involved included petroleum, telecommunications, tobacco, commercial banking, and electricity.

As with the cases against France, Belgium, and Portugal, the Commission argued that any system of prior authorization was per se restrictive of capital movements. Moreover, the Court had addressed this exact form of restriction in Église de Scientologie holding that a system "which makes a direct foreign investment subject to prior authorization constitutes a restriction on the movement of capital." The Commission conceded that there may be instances where such restrictions could be applied, but based on clear case law, these are narrowly defined exceptions, and in all circumstances, the principles of legal certainty and proportionality must be met. Furthermore, it is absolutely clear that such restrictions can never be applied for purely economic motives.

It is here that the Commission had its strongest argument. While it

---

402. Id.
403. Id.
404. Id.
405. Id. Article 90 governs competition. See EC Treaty art. 86 (previously art. 90).
407. Id.
408. Id. ¶ 11.
409. Id. ¶ 31.
is true that protecting petroleum was an overriding public interest worthy of restricting the free movement of capital and the freedom of establishment, and it is possible that electricity, like energy and petroleum, could also be considered fundamental to the national interest, the Commission would not accept the protection of a tobacco company as such. Nor would the Commission recognize the commercial banking activity as an overriding interest worthy of an exception to the prohibition on restrictions. Although the measures in place for the petroleum, telecommunications, and electricity companies arguably met the first requirement—that the objective must be valid—the Commission absolutely rejected the system of prior authorization because it failed both the legal certainty and proportionality tests.

Spain contended that since one of the laws stated that the system of prior approval established by Royal Decree No. 5/1995 was meant to be applied "consistently with the provisions of the Treaty... concerning the right of establishment and the free movement of capital," it did not violate the Treaty. Spain also adopted A.G. Ruiz-Jarabo Colomer's argument in the original golden share cases: The Treaty expressly states that it "shall in no way prejudice the rules in Member States governing the system of property ownership," and therefore the system did not violate the fundamental freedoms guaranteed by the Treaty.

Notably, Spain argued in the alternative that there was no restriction on the free movement of capital, but conceded that it was possible that the system might affect the freedom of establishment. Nonetheless, Spain contended that "overriding requirements of the general interest" and the necessity of protecting the "continuity in

418. Id.
419. Id. ¶ 36.
420. Id.
421. Id. ¶ 40.
424. Id. ¶ 43.
425. Id. ¶ 44.
public services," 426 justified the system. 427 But the Court did not respond to that argument, and instead analyzed the case in exactly the same manner it had in the three original golden share cases. It based the decision on the Spanish law's restriction of the free movement of capital, and left unexplored the examination of the freedom of establishment violation. 428

The Court agreed with the Commission regarding the golden share rights reserved in the tobacco and banking companies, 429 finding that these industries were not acceptable fields for recognition of an imperative interest justifying a restriction of the free movement of capital. 430 The bank in question was not involved in setting or implementing national policy, nor EU policy, but only in commercial activity. 431 Commercial banking cannot be considered a sector whose protection constitutes an overriding national interest justifying a restriction on capital flows or the right of establishment. 432 At best, it is in the general financial interest of the country, and, as the Court decisively concluded in Portugal, such interests do not permit restricting a fundamental freedom. 433 The Court found that the other three undertakings were active in sectors which could, under some circumstances, validate the need to restrict capital flows. 434 However, the Court again agreed with the Commission's argument and found that the measures failed to meet the requirement of legal certainty, as no precise or objective criteria were provided to indicate to the potential investor when such a request for approval would be granted. 435 The scheme allowed for too much discretion "which

---

426. Id.
427. Id.
428. See id. ¶¶ 85-86:
   In that regard, it is appropriate to point out that in so far as the legislation in issue entails restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital... to which they are inextricably linked. Consequently, since an infringement of Art. 56 EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment.
   Id. ¶ 86.
429. See id. ¶ 70.
430. See id. (noting that, though the Spanish government argued that "the regime at issue is justified by overriding requirements of the general interest linked to strategic imperatives," Spain failed to establish that the bank had a "public service function.").
431. See id.
432. See id.
435. See id. ¶ 74.
represen[t-ed] a serious threat to the free movement of capital and [might] end by negating it completely."436

A comparison of the Spanish system in question and the one implemented by Belgium makes clear that the Spanish scheme was not as narrowly tailored and limited as the Belgian system that the Court upheld.437 A notable difference was the Spanish system's lack of judicial review of a denial of prior authorization.438 Had the Spanish scheme met the precision and proportionality requirement, this decision could have been split: The restrictions would not have been acceptable for two industries (tobacco and commercial banking), but would likely have been acceptable restrictions for the other three, as they related to imperative general interests (electricity, petroleum, and telecommunications).

2. Commission v. United Kingdom439

Another golden share case, this time against the United Kingdom, was also decided on May 13, 2003.440 The U.K. did not argue that the company involved, the British Airport Authority ("BAA"),441 was vital to the general interest, public security or public policy.442 Instead, the U.K. relied on company law.443

---

436. See id. ¶ 76.
437. See id. ¶¶ 77-78.
438. See id. ¶ 78.

Member States are entitled to engage in economic activities on the same basis as private market operators, within the framework of contracts governed by private law. In the absence of harmonisation of the rules of national company law, Community law cannot impose on a company which issues shares the obligation to place the control of that company on the market, or to attach to its shares the whole range of rights which all actual and potential investors might wish to see attached to them.

Id. ¶ 31.

441. Id. ¶ 8.
442. It is possible that they may have succeeded had they pursued such a line of argument. Since the specific company in question was the BAA, even disregarding the events of September 11, 2001, a solid argument can be made for the importance of safeguarding a nation's airports as an overriding national interest. In light of the terrorist attacks which were launched from airports, a strong argument for a public security exception also exists. The Court might find that a less restrictive means exists to guard the nation's airports. But, since the Court recognized that restricting foreign property ownership on certain parts of the Italian coast might be a valid objective for a restriction based on national security (if the protective measure was proportionate and not overly burdensome), it is likely that the Court would at least consider a public security argument for airports. However, whether or not protection of the airports would be considered fundamental to the interests of the nation is left open for the future, since the U.K. did not argue that it was. See id. ¶ 49.
443. See id. ¶ 24.
The Airports Act of 1986 privatized the British airport industry. The Act created a one pound golden share in the BAA, which was established to manage the United Kingdom’s airports. The Secretary of Transportation held the share which conferred the right to give written consent regarding the disposal or change in control of certain BAA assets. These rights were included in Article 10 of the BAA’s Articles of Association. Article 40 of the Articles of Association limited the percentage of shares that could be owned by any one person. Only “[p]ermitted” persons were allowed to individually hold more than fifteen percent of the voting stock. The U.K. defended the golden share, claiming that share structures are governed by company law, which is a national concern. Moreover, the U.K. argued that since the golden share did not prevent access to the market for the BAA shares, it was not contrary to Community law.

The Commission attacked the golden share on two grounds: first, it limited the potential to acquire voting shares; second, the Commission objected to the system of pre-approval in place for decisions relating to the disposal of assets, loss of control over subsidiaries, and the winding up of the company. Such measures might hinder freedom of establishment and also hamper the free movement of capital. Because the U.K. did not argue that the objective was justifiable for reasons of public security, public policy or an overriding reason of the general interest, and because the golden share seriously limited the right of investors to manage the company without first obtaining approval from the Secretary of Transportation, the Commission argued that the measure was a restriction on the two freedoms. The Commission discounted the company law argument because the rights under discussion did “not arise from the normal operation of that law” and were created only through an act of state.

---

444. See id. ¶ 8.
445. See id.
446. See id. ¶ 10. Specifically, the Secretary of Transportation had to be conferred with prior to (1) the BAA ceasing to hold controlling shares in any of the designated airports; (2) the dissolution of the BAA or of any of its subsidiaries which own a designated airport, unless in so doing the designated airport is still owned by the BAA or another subsidiary; and (3) the disposal of any designated airport. See id.
447. See id.
448. See id. ¶ 11.
449. See id.
450. See id. ¶ 16.
451. See id.
452. See id. ¶ 19.
453. See id. ¶ 20.
454. See id. ¶ 22.
455. See id. ¶ 23.
456. See id. ¶ 24.
Again refusing to investigate the possible Article 43 infringements, the Court built upon previous free movement of capital case law and evaluated the compatibility of the U.K. golden share with Treaty rights. Finding that measures which limit the “scope for participating effectively in management” restrict the free movement of capital, the Court established that the cap on the amount of voting stock an investor may own was a violation of Article 56. Deterring investment is an indirect restriction to market access. Therefore it could not be tolerated, unless justified by a Treaty exception or an imperative reason of national interest. None being offered, the Court confined itself to the questions presented, and agreed with the Commission that the U.K. rule did not fall within the normal operation of company law, and therefore was not excluded from compliance with Article 56.

D. Advocate General Ruiz-Jarabo Colomer’s Opinion

Advocate General Ruiz-Jarabo Colomer rendered opinions in both the 2002 golden share cases and the 2003 golden share cases. In}

457. See id. Since Parliament had to act to insert this special share in the Articles of Association, the Commission refused to recognize this as a normal operation of the U.K. Company law. Id.

458. See id. ¶¶ 51-52. Again the Court held that any infringement of Article 43 is a “direct consequence” of the restriction of the free movement of capital, and need not be examined independently. Id.

459. See id. ¶ 44; see also Case C-221/89, The Queen v. Sec’y of State for Transp., ex parte Factortame Ltd., 1991 E.C.R. I-3905, ¶¶ 20-23 (coming to the same conclusion vis-à-vis the right of establishment by finding that a British condition that the owner of a ship be British in order to register it infringes upon the right of establishment since “where the vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment.”).


461. See id. ¶ 47. The Court has found such deterrence effectively deprives persons of their Treaty rights. See Case C-55/94, Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37, [1996] 1 C.M.L.R. 603 (1995), ¶ 37 (“[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions.”) (emphasis added); cf. Case C-222/97, Trummer & Mayer, 1999 E.C.R. I-1661, ¶ 26, [2000] 3 C.M.L.R. 1143 (1999), ¶ 26 (holding that a rule which might dissuade a homebuyer from denominating his mortgage in another Member State’s currency deprives them of the right to free movement of capital).


both instances, the Court declined to adopt his opinion. In the 2002 cases, the Advocate General opined that, with one exception, the various powers reserved by the states in the form of the golden shares were completely consistent with Treaty obligations. Article 295 states, simply and unequivocally: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." Determining that the Treaty intended that property ownership must "extend to any measure which, through intervention in the public sector, understood in the economic sense, allows the State to contribute to the organisation of the nation's financial activity," A.G. Ruiz-Jarabo Colomer argued that any interpretation of property law so narrowly limited to apply to purely private or civil law was "absurd." Furthermore, Article 295 is placed in part six of the Treaty—General and Final Provisions—thus he reasoned that Article 295 must apply to all preceding Treaty provisions. Furthermore, he utilized an historical approach to interpreting the import of the article, and noted that Article 295 traces its authority to the initial agreements. Based on the wording of the first version of this Article, "[t]his Treaty shall in no way prejudice the system of ownership of means of production which exists within the Community," it would be logical to conclude that a state may have a property right in "exercis[ing] decisive influence on the definition and implementation of all or some of its economic objectives."


465. See supra notes 289-92, 396-400 and accompanying text.


470. See id. ¶ 63.
471. Id. ¶ 43.
472. Id. ¶ 45 ("Article 295 EC is in the unique position of deriving its authority directly from the Schuman Declaration of 9 May 1950, on which it has been based, which reinforces its specific nature and symbolic importance.").
473. Id. ¶ 51 (referring to the wording of the original draft of 5 December 1956).
474. Id. ¶ 54. However, the reasoning utilized by A.G. Ruiz-Jarabo Colomer fails to fully explain why a state would not simply retain a majority holding in those companies which it believes to be critical to the interests of the nation, and thereby retain the ability to direct the company. For a discussion of some perceived
A.G. Ruiz-Jarabo Colomer's reasoning in the 2003 cases is arguably the most persuasive of all the analysis available on the compatibility of golden shares with Community law. Additionally, A.G. Ruiz-Jarabo Colomer exposed some deficiencies in the Court's analysis of the 2002 golden share cases. First, the A.G. asserted that the freedom of establishment represents a more suitable framework than that of the free movement of capital for an analysis of restrictions arising from state-held golden shares. The states were attempting to influence control of privatized companies, not the movement of capital into the nation. As such, the measures only affect capital movements indirectly. Like Luisi & Carbone, where capital movements were only a necessary by-product of the free movement of services, here, the movement of capital was incidental to the exercise of the right of establishment. Because the freedom of establishment is directly infringed, and the free movement of capital only incidentally, the appropriate inquiry was how the various golden share mechanisms infringed freedom of establishment.

Furthermore, A.G. Ruiz-Jarabo Colomer contended that there were some deficiencies in the Court's 2002 golden share decisions. Leaving aside the judgment against Portugal, which was clear, he then compared the French regime with that of Belgium. In Belgium, the Court made much of the legal certainty of the system in place: the governmental representative on the board had only four days in which

476. See id. ¶ 36; see also United Kingdom, 2003 E.C.R. I-1803, [2003] 2 C.M.L.R. 18, ¶ 39 (noting that government approval allows the government to ensure that "the specific responsibilities" of the privatized undertakings are met); Case C-483/99, France, 2002 E.C.R. I-4781, ¶ 28, [2002] 2 C.M.L.R. 49, ¶ 28 (noting that ensuring that the decision-making body remain in France is essential to the protection of the energy supplies); Case C-367/98, Portugal, 2002 E.C.R. I-4731, ¶ 31-32, [2002] 2 C.M.L.R. 48, ¶ 31-32 (arguing that the Portuguese government must have the requisite level of control to ensure that the re-privatization goals are not frustrated); Case C-503/99, Belgium, 2002 E.C.R. I-4809, ¶ 28, [2002] 2 C.M.L.R. 50, ¶ 28 (noting that the government needs the means to protect the energy policy from being negatively affected by company decisions).
to object, and the Minister then had twenty-one days to overturn the board's decision.\textsuperscript{483} A.G. Ruiz-Jarabo Colomer noted, however, that the French measure was also subject to strict time limits—the French minister had one month in which to deny authorization.\textsuperscript{484} That was only minimally longer than the time period which the Court allowed in \textit{Belgium}.\textsuperscript{485} Moreover, the A.G. noted the lack of specificity in the Belgian system; the government representative could object to any proposed action which he deemed contrary to national energy policy.\textsuperscript{486} The Court found this to be an "objective criteria"\textsuperscript{487} sufficiently clear to guarantee legal certainty. However, the A.G. did not believe this to be so much more clear or precise than the French system of opposition to any transfer or disposal of an asset identified in an annex to the decree in question.\textsuperscript{488} The French law also indicated that authorization would be denied in order to protect the national interest,\textsuperscript{489} but the Court was not satisfied that this offered the same level of protection as the Belgian law, which specifically stated that the Minister was concerned with the national energy policy.\textsuperscript{490} Apparently, this incremental amount of added specificity was enough. Though the Court methodically evaluated each of the golden share cases in the same manner, it remains unclear what is actually required to meet the principle of legal certainty; indeed, it is much easier to determine what fails to meet the test.


\textsuperscript{484} See \textit{id.} \textsuperscript{39}. However, the French Minister was able to extend this time limit by a further fifteen days. See \textit{id.}

\textsuperscript{485} See Case C-503/99, \textit{Belgium}, 2002 E.C.R. I-4809, \textsuperscript{22}, [2002] 2 C.M.L.R. 50, \textsuperscript{29}. In \textit{Belgium}, the Court found twenty-one days to be an acceptable time frame for the Minister to act, whereas in the French regulation, the government had one month. \textit{Id.} \textsuperscript{29}.


\textsuperscript{490} See Case C-503/99, \textit{Belgium}, 2002 E.C.R. I-4809, \textsuperscript{9}, [2003] 2 C.M.L.R. 50, \textsuperscript{9}. However, Fleisher finds that the two modes of control are in fact different in a very important manner. According to Fleisher, the Belgian system restricted the management of the company, whereas the French system restricted the access to the company. See Fleisher, \textit{supra} note 19, at 495. Such a distinction would seem to reconcile the two decisions, but this distinction is not readily apparent in the decisions, and the wording of the two systems is not so very different.
III. WHAT LIES AHEAD

This part considers the future import of the golden share rulings. Part III.A. identifies some recently commenced actions. Part III.B. discusses the reaction by Member States, as well as both acceding and applicant states, to the judgments. Finally, Part III.C. looks at the broader role of the rulings within the context of the EU as an institution.

The first golden share cases provide the framework for scrutinizing future use and structure of golden share devices, but the fact-intensive inquiry necessary to determine which derogations are compatible with the Treaty ensures that these six cases are just a starting point. Specifically, Portugal mandates that something more than an economic or commercial objective is needed to justify restricting capital flows, and France and Belgium are pivotal for defining the scope of the proportionality requirement. The Belgian case ensures that some golden shares comply with Community law, which is precisely why the ECJ will hear more golden share cases. Spain and United Kingdom illustrate the Court's application of the framework.

Based on the Court's decisions and the arguments of the Commission, one would expect that the existence of these golden shares has had a great impact on investment in the EU. But the Organization for Economic Co-operation and Development (the "OECD") concluded that barriers to inward foreign investment are lower in EU Member States than in any other industrialized nation. The purpose of Article 56 and the free movement of capital is to ensure that cross-border investment and capital flows are not inhibited, and it would seem that the existence of golden shares has

491. See supra Part II.
493. The French law was not as detailed as the Belgian Decrees, and failed to provide the "objective and stable criteria" ultimately required for a golden share right to be compatible with Community law. See Communication, supra note 20, ¶ 9. Belgium threw a lifeline to the battered golden share, though, and ensured that these special rights did not yet face extinction. See Case C-503/99, Belgium, 2002 E.C.R. I-4809, ¶ 55, [2002] 2 C.M.L.R. 50, ¶ 55 (permitting the use of the Belgian golden share because it met the four-prong test).
494. See supra notes 377-93 and accompanying text.
495. See supra Part II.C.
496. See supra Part II.
497. In a worldwide review of investment movement, the OECD concluded that the EU Member States have "the lowest barriers in the industrialised world to inward foreign direct investment." Guy de Jonquieres, Europe Leads Way in Lack of Barriers to Foreign Investment, Fin. Times, May 23, 2003, at 9. Of course, the results of the OECD review are not adjusted to reflect the existence of restrictive measures, and it is very likely that the results tell more about the existence and effectiveness of restrictions elsewhere.
498. See supra note 108 and accompanying text (discussing the exceptions to the
not completely dissuaded investment movement. But Article 56 is unequivocal,\textsuperscript{499} and the Commission will certainly not give up the fight to free the EU from all unnecessary restrictions.

\textbf{A. Pending Action}

The Commission is seriously contemplating taking action against Germany for what it views as excessive state control over Volkswagen.\textsuperscript{500} The German state of Lower Saxony retains an unusually high degree of control over Volkswagen.\textsuperscript{501} Germany has argued that the Volkswagen law (the "VW law") is simply the German version of a golden share, and thus should not be attacked as incompatible with Treaty obligations.\textsuperscript{502} Now that the Court has spoken so decisively on golden shares,\textsuperscript{503} this argument is less likely to prevail.

On March 19, 2003, the Commission sent Germany notice that, in its view, this law was contrary to the free movement of capital and the

---

\textsuperscript{499} See supra note 64 and accompanying text.


\textsuperscript{503} See supra Part II.
freedom of establishment. 504 Germany continues to aggressively defend the VW law. 505 If the case goes to the ECJ, it is likely that the German law will be put to the same four-part test used in the golden share cases, 506 even though the VW law is not structured as a traditional golden share. 507 Like the Spanish protection of the banking and tobacco industries, it is unlikely that protecting a car manufacturer would be considered an imperative interest in the national interest, or acceptable for public policy or public security reasons. 508 Like Portugal and Spain, Germany's objective does not satisfy the Treaty requirements and does not merit derogation. 509 In the unlikely event that Germany is able to convince the Court that there is an acceptable imperative need in the general interest for the protection of Volkswagen, the measure would still be required to fulfill the principles of legal certainty and proportionality. 510

The Commission has taken the first steps to bring proceedings against the Netherlands, Italy, Luxemburg, and Denmark for use of golden shares. 511 The Netherlands holds a golden share in KPN, a formerly state-owned telecommunications giant. 512 Despite the Commission's stance, the Netherlands has indicated that it has no

---

504. Id. Germany was given eight weeks in which to justify these provisions, and if it failed to do so, the Commission could issue a "reasoned opinion" and move on toward litigation. See James Durance, Germany—East German Strike Pain Increases, Forcing Automakers to Revise Production Schedules, WMRC Daily Analysis, June 23, 2003, available at 2003 WL 56932252. It appears likely that such an opinion will be sent, since Germany staunchly defended this law as consistent with EU law throughout the two month period granted to it to justify the law. See id.; Haig Simonian & Francesca Guerrera, Germany Resists EU Attempt to Outlaw VW Takeover Protection, Fin. Times, June 21, 2003, at 9. Since the law effectively does the same thing as a golden share, it clearly restricts the movement of capital.

505. Germany contends that the law is justified. See Renee Cordes, VW Back in EU Headlights, Daily Deal, Jan. 16, 2004, available at 2004 WL 64605306. Furthermore, the company is currently not doing very well financially, and there is some fear of a takeover which could result in many job cuts. See id.

506. See supra Part I.B.

507. See Cordes, supra note 505.

508. See supra notes 429-32 and accompanying text.


plans to relinquish its golden share in KPN. Italy is resisting pressure by the Commission to relinquish a golden share in Telecom Italia. In both cases, the ECJ could find that at least the first prong of the test has been met.

The Commission has also issued warnings to Italy and Spain regarding laws in both nations which are designed to protect their energy companies. Both regimes were put in place to protect against acquisition by Électricité de France.

All of this activity ensures that there will be more golden share cases in the future. The Court in Spain stated that protection of the telecom industry might, under the right circumstances, fall under the public security exception. The Court also held in Belgium that the energy sector can justify a restriction of the free movement of capital and the freedom of establishment. Therefore, any future inquiry by the Court will focus on whether the laws imposed satisfy the principles of proportionality and legal certainty—at least in regard to Telecom Italia, Eni SPA, Enel, KPN and Endesa.

B. Reaction to the Decisions

1. Member States

Reaction by the Member States to the rulings in the golden share cases has been mixed. Popular opinion does not completely support

---

513. See Meller, supra note 511.
514. Fred Kapner, Italia Chief Still in Control, Fin. Times (London), July 20, 2003, available at 2003 WL 57801986. The golden share permits the state to veto the acquisition of more than three percent of the company by an individual investor. Id.
As regards the three other undertakings concerned, which are active in the petroleum, telecommunications and electricity sectors, it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reason and therefore may justify an obstacle to the free movement of capital.

Id. (emphasis added).
516. See Orange, supra note 26; see also supra note 26 and accompanying text.
517. See Orange, supra note 26.
518. See supra note 515.
the decisions, and both Portugal and Spain have expressed reluctance to comply with the rulings. But the Commission is not

Commission declared France compliant. See id. In May 2003, the Commission stated that Portugal had failed to provide evidence that they have eliminated the restrictions. Id. The U.K. quickly indicated that it would comply with the Court’s ruling. See Kevin Done, Government Loses BAA Golden Share, Fin. Times, Sept. 17, 2003, at 26. Done also noted that the BAA is going beyond this and also plans to remove the condition in its articles of association which limits voting rights of individual investors to fifteen percent. Id.; see also Sean O’Grady, So Called Golden Shares Are the Base Metal of Nationalism, The Independent, May 17, 2003, at 7, available at 2003 WL 20379256. However, the U.K. still holds golden shares in a number of companies, including BAE Systems, British Energy and Rolls-Royce, among others. BAA ‘Golden Share’ Ruled Illegal, BBC News, May 13, 2003, at http://news.bbc.co.uk/1/hi/business/3022809.stm; see also Ellison & Reed, supra note 511 (noting that the government in the U.K. still has golden shares in more than twenty companies, and it is unlikely the Commission will stop with the BAA golden share). Spain, on the other hand, has stated that it will not give up its golden shares in Indra (defense and electronics), Telefonica (telecommunications), Repsol (oil), or Endesa (power). Spain fears that “shortcomings of EU legislation in this area [will] return the Spanish economy to a situation in which companies controlled by the state have stakes in deregulated industries.” Spain Remains Defiant over ‘Golden Share’ (La Accion De Oro Solo Vetara A Empresas De Capital Publico), Expansion, July 8, 2003, available at LEXIS, News Library, Expansion File. However, there is some likelihood that Spain will try to revise its golden share to fit into the Belgian model. See Commission Sends Assent Against “Anti-EDF” Laws in Spain and Italy, Agence Europe, July 10, 2003, available at 2003 WL 58351621.

521. Some fear that the European Union is not really working to the best interests of all the member states. See Graham Booth, Letter to the Editor, EU Meddling Threatens Our Airports, W. Morning News, Sept. 30, 2003, at 4, available at 2003 WL 64568724. Mr. Booth expressed frustration with the appearance that the EU manipulates the rules to the benefit of certain key cities, specifically Paris and Frankfurt. Id. Mr. Booth’s anger has some basis, at least on a superficial level, given the recent concern over France and Germany’s blatant disregard for the requirements of the Stability and Growth Pact, and their subsequent ability to persuade the EU Finance Ministers not to recommend they be forced to pay fines that would likely be imposed on smaller EU nations which do not constitute such a large percentage of the overall EU economy. See Ernst Welteke, The Pact’s Principles Must Always Be Protected, Fin. Times, Dec. 4, 2003, at 15 (discussing the damage to the “European idea” caused by not penalizing Germany and France). Interestingly, the Commission is considering taking legal action against the European Council for deciding not to impose sanctions. See Enda O’Doherty, View from the European Press, Irish Times, Jan. 19, 2004, at 8, available at 2004 WL 61029250; Chris Flood, Preview: UK Interest Rate Rise May Be Delayed, Fin. Times (FT.Com), Jan. 18, 2004, available at 2004 WL 56787003 (noting that the agenda for the EU finance ministers’ meeting on January 18, 2003 included the Commission’s threat to bring action against the Council). The decision not to impose sanctions effectively seriously undermined the Stability and Growth Pact. See Wolfgang Munchau, Flexible Rules for Europe Strictly Enforced, Fin. Times, Jan. 19, 2004, at 13. The debate over this will undoubtedly reverberate through EU politics. See George Parker & Bertrand Benoit, Brussels Insists on Mounting Stability Pact Legal Challenge, Fin. Times, Jan. 14, 2004, at 2 (“The spectacle of the Commission and the EU member states fighting in court over a central plank of economic policy is a symptom of growing mistrust and ill feeling at the heart of Europe.”). There is some concern that golden share rulings demonstrate only that the EU interferes in areas of national interest, where the EU does not belong, and fear that “[t]he EU shifts power from democratic governments to elites controlled by big corporations, seeking to create monopolies.” Bob Glanville, Activists Condemn EU Airport Ruling: Decision Prepares Ground For Hostile
likely to stand idly by and permit individual states to disregard the decision of the Court. Should Portugal and Spain continue to ignore the decisions, the Commission can take further action and has already indicated that it plans to initiate a proceeding against Portugal for its failure to comply. Pursuant to Article 228, the Commission may return to the Court and request that a penalty (lump sum or fine) be imposed upon the delinquent Member State. Of course, the suggestions of the Commission cannot bind the Court, but the Court has already demonstrated sympathy with the Commission’s arguments regarding the restriction of capital movements imposed by golden shares.

2. Applicant and Acceding States

Privatization is not an historical artifact. It is still ongoing in much of Central and Eastern Europe, and in other parts of the world, such as Africa. Since many of the Central and Eastern European

Takeover, Morning Star, May 14, 2003, at 5, available at LEXIS, News Library, Morning Star File (stating that the BAA ruling is “just another example of the European Union meddling in politics and economics in Britain” (quoting Ian Davidson, MP, chairman of Labour Against the Euro)). Such sentiments may have no influence at all, as shown by the immediate compliance with the ECJ’s ruling by the U.K., even though voices of dissent have been heard. However, such sentiments may strengthen the resolve of governments still battling to maintain their influence over certain companies. And, since at least two nations have yet to comply, it is apparent that there remains some dissatisfaction with the decisions at higher levels of government. The fear that the EU is overshadowing national identity may fuel support for the use of golden shares. On the other hand, some see their use as “economic nationalism,” which is contrary to the spirit of the EU, and not necessarily the best business decision for some of these companies. See O’Grady, supra note 520.


The government has been stung into action by France and Germany’s methods of dealing with troublesome European Union rules by ignoring them. After Paris and Berlin reacted to breaches of the stability and growth pact by suspending the rules that would have imposed fines on them, Madrid has decided to ignore the rules as they relate to golden shares.

Id.

523. See May Press Release, supra note 520 (publicizing the Commission’s decision to instigate action against Portugal for failure to comply).

524. See id.

525. EC Treaty art. 228(2).

526. Id.; see also Case C-387/97, Commission v. Greece, 2000 E.C.R. I-5047, ¶ 89 ("It should be stressed that these suggestions of the Commission cannot bind the Court[, ... [however, the suggestions are a useful point of reference.").

527. With only one exception, the Court has been persuaded by the Commission’s arguments in the golden share cases. Only in the case of Belgium did the Court find for the Member State rather than the Commission. See Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, [2002] 2 C.M.L.R. 50 (2002).

528. Privatization is still ongoing in much of Central and Eastern Europe, as well as in other parts of the world. See infra notes 529-30 and accompanying text.

529. For example, Ghana holds a golden share in Ashanti, a gold company. The
nations are hoping to join the EU—some as early as May 2004—these rulings have significant consequences for these nations and have not gone unnoticed.\(^\text{530}\) Many are heeding the warning.

For example, Hungary is among the ten nations joining the EU in 2004.\(^\text{531}\) Hungary owns a golden share in MOL, an oil and gas company.\(^\text{532}\) The privatization agency, APV, has indicated that the government’s shares will be sold off over the next few years,\(^\text{533}\) but it would like to hold on to its golden share as long as possible.\(^\text{534}\) Hungary could still create a golden share in MOL, emulating the scheme implemented by Belgium, which could withstand the Court’s scrutiny. Since the protection of the specific industries involved has already been deemed an acceptable objective,\(^\text{535}\) the government need only ensure that whatever law it fashions comports with the strict requirements outlined in Belgium.\(^\text{536}\)

Romania, which is not acceding to the Union in 2004, but has applicant state status,\(^\text{537}\) has initiated proceedings to privatize SNP golden share allows the Ghanian government to veto any company decision which would alter the gold operation. See, e.g., Julie Bain, AngloGold Seeks Ashanti Shield, Bus. Day (South Africa), Oct. 31, 2003, at 16, available at 2003 WL 66919947.

530. Both the Czech Republic and Poland are busy privatizing steel holdings in order to comply with EU mandates on the limitation of state aid and new production quotas, so it is obvious that the acceding states are paying close attention to the mandates of EU law. See Polish and Czech Heavy Industries Undergo Painful Transition, EU Bus., Oct. 26, 2003, at http://www.eubusiness.com/afp/031026025158.f65gm6ej. There is no indication that either state is attempting to maintain golden shares in these companies, which is just as well, since it is highly unlikely that such restrictions could pass the justification prong of the test.


533. See id.

534. See id. Despite the Court’s determination that protectionist measures in the energy and petroleum sectors can indeed be accepted under the right circumstances, some still have the impression that such measures might not be permitted. See Andrew Neff, Hungary Picks Citigroup to Steer State Sale of MOL Stake, WMRC Daily, Sept. 1, 2003, available at 2003 WL 60324264 (“[R]ecent rulings by the European Court of Justice indicate that EU member state governments will not be allowed to keep golden shares in ‘strategic’ formerly state-owned companies that have largely passed into private hands.”).


Petrom, which also operates in the oil and gas sectors, and has indicated that the state would like to reserve a golden share in the privatized company. Given the framing of the Court's decisions in the golden share cases, Romania would also likely be able to craft a golden share which would be acceptable to the ECJ. Because the industries in question, oil and gas, meet the threshold requirement of an acceptable objective, Romania need only ensure that the law is crafted in such a way as to be minimally restrictive and that it meet the principles of legal certainty and proportionality.

Another applicant state which is proceeding with privatization is Bulgaria. Bulgaria is privatizing the telecom company BTC. Bulgaria has reached an agreement with the British based, American-owned, Advent for the sale of the company, but Bulgaria will retain a golden share in the company. As with Hungary and Romania, the company operates in an industry which might justify some state control, and therefore, so long as Bulgaria formulates the golden share in a narrowly tailored, proportionate and precise way, it need not conflict with EU law.

It is likely that nations undergoing privatization are now in a better position to reserve golden shares and implement schemes to protect industries of vital public interest or public security interest which will hold up to the ECJ's scrutiny. Using the Court's decisions and tests as guidance, nations can evaluate which industries might meet the threshold acceptable objective test—such as MOL in Hungary and


539. See Neff, supra note 538.


545. See Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 71, [2003] 2 C.M.L.R. 18 (2003), ¶ 71 (stating that the objective of ensuring the provision of telecommunications service may "constitute a public security reason").
Using the Belgian system as a framework, some governmental control and influence can be maintained provided that adequate safeguards are established to protect the affected investors. There will likewise be some industries that cannot be protected. The Spanish ruling illustrates some such industries: tobacco and commercial banking. It is also likely that, should the German case get to the ECJ, car manufacturing will also be excluded. Nonetheless, there is a future for the use of a golden share in the EU.

C. Effect of the Rulings

The Court's rulings in the golden share cases removed a large obstacle to the ratification of a unified EU takeover law directive. Creating a common law regarding cross-border takeovers has been a goal of the EU since the Commission first expressed its intent to prepare a directive on takeovers in 1985. The penultimate attempt to adopt a takeover directive failed, in part because of vehement German opposition which was motivated by fear that its large companies, such as Volkswagen, would become a target for takeover activity. Unexpectedly, the Council finally succeeded in adopting a takeover directive on December 16, 2003. Though the adopted version falls short of the ideal directive envisioned by internal market commissioner Fritz Blokestein, it is at least a step forward after fourteen years of disagreement. Though these six rulings will not

546. See supra notes 352-54 and accompanying text.
547. See supra notes 378-88 and accompanying text.
548. See supra Part II.B.3.
549. See supra notes 429-33 and accompanying text.
550. See supra notes 499-510 and accompanying text.
553. See Equalising Shares; Governments Must Let Go of Privatised Companies, Fin. Times, May 14, 2003, at 22.
bridge all of the differences between the Member States and their approach to takeover law, they do alter the landscape of European takeover law. The underlying reasoning behind disallowing most uses of golden shares\(^{556}\) may well be applied to other protectionist or defensive measures in the future, including the Volkswagen law.\(^{557}\) Because it is clear that the Court draws from previous case law when facing new challenges, it is safe to say that the golden share rulings will have a role in future EU legal developments.

The Court, perhaps more than any other body, has promoted the realization of the Treaty's goal of a single European integrated market. Ultimately, this goal cannot be realized absent free movement of capital. In limiting the use of golden shares, the Court has taken an important step.

It is clear that the rulings limit the ability of Member States to use the powerful golden share tool as an effective defense to takeovers. For example, Portugal Decree law No. 380/93, which was declared incompatible with the Treaty in *Commission v. Portugal*,\(^{558}\) was activated and used in 1998 to prevent a shareholder from acquiring more than ten percent of Portucel.\(^{559}\) In 2000, the same law blocked a hostile takeover attempt of Cimpor.\(^{560}\) It is unlikely that these companies would have been able to fend off takeover attempts in the absence of the golden share. The golden share rulings level the playing field to some extent, while still allowing Member States to protect essential national interests.

**CONCLUSION**

While the Treaty gives expression to the underlying spirit and purpose of the Community, it is the Court that breathes life into its express and implied rights and obligations. The ability of the Court to apply important principles to all of the freedoms has allowed Community law to develop quickly and more comprehensively than it otherwise might.

Drawing upon previous case law, the Court has formulated a framework for analyzing golden shares. Because of the fact-intensive nature of the inquiry into whether a specific golden share system is acceptable, this framework will certainly continue to be invaluable both to the nations hoping to maintain their golden shares, and to the Commission in evaluating which systems infringe upon the free movement of capital.

---

556. See supra Part II.
557. See supra notes 500-02 and accompanying text.
559. See Câmara, *supra* note 12, at 511.
560. See id.
The rulings are very important for several reasons. First, on a practical level, they provide a framework for future analysis of golden shares. Second, from a broader perspective, the decisions embraced some of the key principles, such as proportionality and legal certainty, established regarding other fundamental freedoms, importing elements which can now safely be called fundamental principles, into the law of capital movements. Third, the judgments are a big step toward accomplishing an integrated market. Finally, on a practical level, the judgments provide guidance for future golden shares—they may still be used to protect vital public interests, thus the Court did not eviscerate Member States’ ability to protect truly important national interests.

The decisions are not completely satisfying, however. The Court’s refusal to face the Article 43 issue squarely is frustrating, particularly in light of A.G. Ruiz-Jarabo Colomer’s persuasive argument in favor of an establishment analysis. The Court has also failed to define adequately what is required to meet the legal certainty requirement. Thus, future golden share cases will play a role in clarifying these issues.

561. Many such systems still exist, and the Commission, perhaps emboldened by these decisions, has instigated action against other Member States. Undoubtedly, any of these infractions which end up before the ECJ will be subjected to the same scrutiny as the previous six were.

562. See supra notes 191, 216 and accompanying text.

563. See supra note 428 and accompanying text.