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Can the Tests Applicable to One Fundamental Freedom Be Extended to Other Freedoms of Movement?

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Abstract: *Enshrined in the field of the free movement of goods by the landmark Cassis de Dijon ruling, the principle of mutual recognition has enjoyed a successful trajectory in the realm of the other fundamental economic freedoms as well. More unusually, the debates sparked by the case law on golden shares have advanced the idea that the approach to selling arrangements (or so-called "marketing arrangements") established in the Keck and Mithouard judgment could also be extended to the area of free movement of capital, in the form of investment arrangements that would fall outside the scope of Article 63 TFEU. These examples of synergy between the freedoms of movement, which "intermingle in a single legal matrix" (as noted by Prof. Ch. Gavalda), are closely linked to the interpretative competence conferred on the Court of Justice in Luxembourg under Article 267 TFEU within the framework of the preliminary ruling procedure.*

Keywords: *freedoms of movement, movement of capital, selling arrangements, golden-shares, investment arrangements.*

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Introduction

Nearly three decades have passed since the ruling in which the Court of Justice in Luxembourg, exasperated by the artificial invocation of the provisions prohibiting measures having equivalent effect to quantitative restrictions, sought to temper this trend through the refined reasoning popularized by the judgment in *Keck and Mithouard* (CJEC, 1993, November 24). Called upon to rule on French legislation prohibiting retailers (but not producers) from selling at a loss, the Court introduced a distinction between: measures relating to the content or characteristics of products, which impose various requirements concerning the name, form, size, weight, composition, presentation, labelling or packaging of products or, in other words, *regulations that directly affect the goods themselves* (para. 15 of the judgment); and *measures imposing certain selling arrangements*, which establish specific conditions for the actual marketing of goods. These include regulations on the terms and methods of sale, the time or place of sale, or rules concerning the persons allowed to sell particular goods.

The formula laid down by the Court was grounded in the conceptual distinction between dual burden rules and equal burden rules, as explained in the judgment. *Cassis*-type rules concerning the intrinsic or extrinsic characteristics of goods fall within the scope of Article 34 TFEU, since their requirements must be complied with by the importer in addition to those already applicable in the country of origin (Bercea & Doroga, 2019). By contrast, rules relating to selling arrangements impose an equal burden on all traders operating within a particular territory. Since the aim of such regulations is to subject the marketing of goods - regardless of their origin - to conditions concerning how they are sold, rather than to hinder or make more difficult the market access of imported goods compared to domestic ones, they cannot be classified as measures having equivalent effect to quantitative restrictions (MEEQRs) and do not fall within the scope of Article 34 TFEU (formerly Article 30 EEC at the time of the decision). These rules, provided that:

i) they apply to all economic operators concerned who carry out their activity within the national territory, and

ii) they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States (para. 16 of the judgment),

are not liable, directly or indirectly, actually or potentially, to hinder trade between Member States within the meaning of the *Dassonville* formula (Dobrilă, 2019).

The rule established by the Court - one which, incidentally, sparked intense legal debate (in the first year after the publication of the judgment alone, i.e., 1993–1994, nearly 100 articles and studies were published) - was subsequently applied in the *Hünermund* case (CJEC, 1993, December 15) which concerned rules adopted by a professional body (the pharmacists' professional chamber) that imposed restrictions on how advertising could be conducted. The Court considered that such rules did not fall within the scope of the provisions prohibiting MEEQRs but instead constituted selling arrangements (Groza, 2004). A similar conclusion was reached in relation to the Dutch provisions mandating the compulsory closure of petrol stations during certain time intervals, which were likewise regarded as selling arrangements rather than measures having equivalent effect (*Tankstation't Heukske and Boermans,* 1994, June 2). Other examples include the Italian provisions mandating the closure of outlet stores on Sundays and public holidays (*Punto Casa and PPV*, 1994, June 2) or the Greek rules reserving the sale of milk specially manufactured for infants exclusively to pharmacies (*Commission v Greece,* 1995). Legal scholarship has gone even further, drawing a distinction between static selling arrangements - such as rules on shop opening hours or the types of premises in which certain goods may be sold - and dynamic selling arrangements (Deleanu, 2021; Gavalda et. al. 2019), which concern the ways in which a producer chooses to market a product, including specific forms of advertising, free offers, and similar promotional strategies (Craig & de Búrca, 2017).

The *Keck* doctrine on selling arrangements and its relevance to the case law on golden shares

Although there has been pushback against the *Keck* reasoning - on the grounds that it placed too much emphasis on formal and factual equality to the detriment of market access (Reich, 1994), the theoretical framework applied by the Court in the field of the free movement of goods has proven to be both enduring and appealing over time. The debates triggered by the case law on golden shares have advanced the idea that the approach to selling arrangements (or marketing arrangements) established in the *Keck* judgment could be extended to the field of capital movement, in the form of investment arrangements that would fall outside the scope of Article 63 TFEU. In other words, extending the *Keck* test to capital movements would in practice mean recognizing a distinction between restrictions on the free movement of capital and investment arrangements - a distinction the Court could potentially rely on when assessing national rules through which Member States have retained special rights in companies that were formerly

state-owned and subsequently privatized. Before exploring the contours of this possible extension of the *Keck* test, some preliminary clarifications regarding the notion of golden shares are in order.

Public ownership flourished in post-war Europe as part of efforts to revive war-torn economies, stimulate economic growth, and create national champions in strategic sectors considered vital to national interests. The two subsequent waves of privatization - the first in the late 1970s and 1980s, driven by the policies of Margaret Thatcher in the United Kingdom, and the second in the 1990s, spurred by the budgetary constraints introduced by the Maastricht Treaty and the broader efforts of Member States to reduce public debt - did not prevent continued state intervention in the market (Antonaki, 2016). Through the use of golden shares, the state sought to retain privileged powers in companies operating in strategic economic sectors (such as public security, defense, energy, and telecommunications). Typically, *golden shares* may confer either a veto right over decisions involving amendments to the company's statutes, or special voting rights that enable the holder to block another shareholder from acquiring more than a specified number of shares.

By granting the state (despite being only a minority shareholder) privileged powers allowing it to retain control over the decision-making process, *golden shares* have been classified by the Court of Justice in Luxembourg as obstacles to the free movement of capital (Orga-Dumitriu, 2023). They are seen as disincentives to share acquisitions and, by extension, to foreign investment, having been identified as one of the factors contributing to the "economic gap between the United States and the overly rigid European economies." (Capital, 2003, March 13). Traditionally, the Court has maintained a firm stance against these "hybrid forms of economic protectionism" (Gallo, 2016) and the broader trend toward what has been termed "economic patriotism." (Antonaki, 2016) It has upheld the majority of infringement actions brought against Member States (including Portugal, France, Spain, Greece, Germany, Italy, and the Netherlands) for failure to fulfill their obligations (Şandru, 2014; Papadopoulos, 2025).

Can the *Keck* test be applied to the free movement of capital? Are there also investment arrangements ?

One of the most well-known judgments in the CJEU's case law on golden shares is the ruling in *Commission v. Germany (Volkaswagen I*, Grand Chamber, October 23, 2007*)*, which concerned the regime established under the provisions of the Volkswagen Law - more specifically, the special powers granted to the Federal State and the Land of Lower Saxony in the Volkswagen company.

A brief outline of the factual and legal background that gave rise to the dispute is essential for a proper understanding of the case. More commonly associated with the German economic miracle than with its grim National Socialist origins (Colomer, 2007), the manufacturing of the "people's car" (*Volks-Wagen*) was initially entrusted to the German automobile industry association and, later, to the National Socialist organization *Arbeitsfront* (Labor Front). The project was financed through both public subsidies and contributions from German citizens.

Following the expropriation of the Wolfsburg estate (a centuries-old aristocratic property), the foundation stone for the Volkswagen factory was laid in May 1938, alongside plans to build a new city to house the future workers—the present-day city of Wolfsburg. However, the outbreak of the Second World War shattered the dream of the 336,000 small investors, their hopes "drowned in the roar of guns and cannons." (Pârvulesco, 2006). Having withstood Allied bombings, the factory resumed operations in May 1945. Since the military government of the British occupation zone failed to sell the company to a foreign competitor (such as Ford or Chrysler), Volkswagen became, in 1949, an available public asset. Even in the face of uncertainty regarding its ownership, the operation of the plant quickly became an economic success, largely due to employee involvement in its management. The employees claimed ownership rights, alongside legitimate claims also asserted by the Federal State, the Land of Lower Saxony, trade unions, and, of course, the small individual investors from the company's early days.

The reconciliation of these competing interests was achieved through a compromise formalized by the conclusion of an agreement on the legal status of Volkswagen GmbH, signed on 12 November 1959 between the Federal Republic and the Land of Lower Saxony. According to the terms of the agreement, in a first phase, all of the company's shares were transferred to the Federal State. In a second phase, following the transformation of the company from a limited liability company into a public limited company (*Aktiengesellschaft*), 60% of the shares were distributed to private individuals, while the remaining 40% - divided equally into two 20% blocks -were allocated to the Federal State and the Land of Lower Saxony.

The articles of association of Volkswagen AG were adopted on 6 July 1960 and, together with the rest of the agreement, were incorporated into the Volkswagen Law.

This law introduced not only:

i) a qualified majority requirement of over 80% for decisions of the general shareholders' meeting—despite the fact that, under general company law, a majority of at least 75% of the represented share capital would have sufficed, but also
ii) a limitation on voting rights, whereby no shareholder holding more than one-fifth of the capital could exercise voting rights exceeding 20%. In addition,
iii) both the Federal State and the Land of Lower Saxony were each granted the right to appoint two members to the Supervisory Board, although under general corporate law they would have been entitled to nominate only three members in total.

By imposing a requirement of more than 80% of represented capital for shareholder resolutions which would otherwise require only a 75% majority under general company law, Article 4(3) of the VW Law effectively allowed the Land of Lower Saxony (which held a 20% stake) to block such decisions. Despite its seemingly neutral formulation, the supermajority requirement was designed to benefit the public authority exclusively. Through the combined effect of these provisions, the public shareholder effectively held a blocking minority and exercised decisive influence over the company's corporate governance framework.

It is precisely this *criterion of an unusual derogation from general company law* that has been identified in the case law on golden shares as the first indicator for a possible application of the *Keck* test to distinguish investment arrangements from restrictions on capital movements—just as marketing arrangements were distinguished from product-related measures in the context of goods. The second element concerns the *effect that the State's special shareholding has on cross-border capital movements*, following the model of the "obstacle to trade" criterion from the *Keck and Mithouard* judgment.

The first criterion has been approached differently by the Commission and the Member States. When the State, by exercising its legislative powers, granted itself preferential prerogatives in a company subject to privatization, it was deemed to have infringed the free movement of capital. Following this reasoning, the provisions of the VW Law, in the Commission's view, represent a state measure and a restriction on capital movements. Conversely, according to the defendant State's argument, the VW Law merely incorporated into its text the company's articles of association, thereby expressing the will of the shareholders and, in effect, replicating a shareholders' agreement which, in light of the principle *pacta sunt servanda*, must be respected as such. The special rights granted to the

public shareholder would therefore constitute an "investment arrangement" falling outside the scope of the prohibition laid down in Article 63 TFEU.

In the *Volkswagen* case, as well as in other similar disputes, the defendant States argued that the measures by which they granted themselves special powers in companies operating in strategic sectors applied equally to public and private investors and did not restrict market access for investors from other Member States. In principle, the Court has not objected to the use of a concept akin to "selling arrangements" in the area of capital movement. It acknowledges that, indeed, certain restrictions may concern investment operations and that the rules introducing such measures are applied in a non-discriminatory manner to both residents and non-residents (*Commission v United Kingdom*, 2003; *Commission v Spain*, 2003).

By consistently applying this line of reasoning, the Court effectively refuses to classify the State's special shareholdings as rules comparable to those governing selling arrangements in the context of the free movement of goods (CJEC, *Commission v United Kingdom,* 2003, May 13). One might ask whether this *a priori* classification of golden shares as restrictions on the cross-border movement of capital (Aniței & Lazăr, 2014) reflects an overly rigid attitude on the part of the Court - one that is reluctant to acknowledge that, on the contrary, the presence of public ownership in the shareholding structure of strategic companies may serve as a positive signal of their solvency and may even encourage investors to purchase shares in such companies.

In the *infringement* procedure (Dimitriu, 2023) brought against the Portuguese Republic concerning the special rights held by the Portuguese State in the electricity and gas distribution company Energias de Portugal (EDP), the defendant State's argument included the claim that the contested special rights had no actual impact on either direct investment or portfolio investment in EDP. This was supported by the fact that EDP's shares are among the most actively traded on the Lisbon Stock Exchange, with a significant proportion of them being held by foreign investors (*Commission v Portugal*, 2010). Of course, it could be argued that the so-called "substantial obstacle" criterion raises evidentiary difficulties in practice and is difficult to reconcile with the principle of legal certainty. Nevertheless, if used carefully and on a case-by-case basis, it could help to remedy shortcomings arising from the erroneous assumption that all golden shares inherently restrict capital movements (Antonaki, 2016).

Conclusions

The application of tests established by the CJEU within the scope of one freedom and their transposition to other fundamental freedoms of movement does not receive uniform treatment in the Court's case law. Although some theoretical constructs (such as the principle of mutual recognition) established by the Court in the context of one fundamental freedom have been applied to other economic freedoms, the conceptual transplant is not always appropriate, most likely due to the specific nature of each freedom. This subject calls for a methodological approach aimed at identifying the criteria that enable the cautious adaptation of such a process. These developments, however, speak volumes about the dynamism of European Union law (Spătaru-Negură, 2016; Ilucă, 2024), whose rules are often shaped through case law. Through the exercise of its interpretative function, the Court contributes to the alchemy of fundamental economic freedoms - an alchemy that reveals the extraordinary power or the 'magic of law, which lies in interpretation and in the interpreter,' as Professor Raluca Bercea observed when she noted that 'no other legal subject has seemed to me as dependent on this magic as European Union law.' (Interview with Professor Raluca Bercea, 2017).

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