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Article 345 TFEU and the Right to Property: a Possi Free Movement? The Analysis of the Jurisprudence European Union

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Abstract "[T]he right to life is the source of all rights – and the right to property is their only implemen matter of fact, for a long time the right to property has been considered as "[a]n absolute right of the ind parties or public interests" and, therefore, as the most important implementation of any other fundamen not anymore "[t]he paradigm of absoluteness of ownership" , since it can be limited by other rights, as between the right to property and the principle of free movement to assess whether this right, as prov principle of the European Internal Market. In order to do so, the analysis presented will draw mainly o After a preliminary examination of the possible meanings and interpretations of Art. 345 TFEU – in ord the field of the different national "system of property ownership" – the paper will be focused on the freedoms were confronted with Article 345 TFEU in order to demonstrate that, although in theory this A in practice the Court of Justice of the European Union has never accepted the interpretation of Artic freedoms. In this regard, a particular attention will be given to the "golden shares" cases, in order to bette of free movement (i.e. the driving force behind the development of EU Law). Following this, we will a between Article 345 TFEU and free movement of goods. In this context, a brief look will be given to Article 345 TFEU may constitute a legal obstacle against ownership unbundling. "[T]he right to life implementation. Without property rights, no other rights are possible" . Per lungo tempo il diritto di prop which must remain free from interferences by other private parties or public interests" e, pertanto, con diritto di proprietà non è più "[t]he paradigm of absoluteness of ownership" , in quanto può essere lin Questo lavoro è volto ad esaminare – attraverso la giurisprudenza della Corte di Giustizia dell'Unione E della libertà di circolazione, al fine di valutare se la proprietà, come disciplinata dall'art. 345 TFUE, poss europeo. A seguito di una preliminare e necessaria analisi dei possibili significati ed interpretazioni c competenza dell'Unione in materia di "regime di proprietà esistente negli Stati membri" – il presente l eloquente giurisprudenza della CGUE in materia per dimostrare che, anche se in teoria l'art. 345 TFUE di circolazione, in pratica la CGUE ha sempre rigettato l'interpretazione di tale articolo come possibile g proposito, particolare rilievo assumono i c.d. casi "golden shares", la cui analisi permetterà di comprend libera circolazione. In seguito, verranno esaminati i casi in materia di Proprietà Intellettuale, conside circolazione dei beni. In questo contesto, ci si soffermerà brevemente sulle problematiche relative al

costituire un ostacolo giuridico al c.d. "ownership unbundling".

1. Article 345 TFEU: meanings and interpretations.

1.1. From the Treaty of Rome to the TFEU

Article 345 of the Treaty on the Functioning of the European Union is one of the most controversial a stated: "[t]*he exact meaning and scope of Article 345 TFEU is not entirely clear* […] *The phrasing of t becomes difficult to determine* […] *Perhaps these reasons also explain why literature and case-law is ha*

Before becoming Article 345 TFEU, the provision in question was, in the Treaty of Rome, Article 22 official language[2]: "[l]*e present Traité ne préjuge en rien le régime de propriété dans les Etats Mem* Treaty establishing the European Coal and Steel Community (ECSC), which reads: "*L'institution d entreprises soumises aux dispositions du présent Traité*". The same words were already used in the Schu *de la Haute Autorité ne préjuge en rien du régime de propriété des entreprises*".[3] We can easily nc remained unchanged.

It is precisely the expression "*régime de propriété*", or, in English, "*system of property ownership*", th *Préparatoires* of the EEC, we are going to discover that, before reaching its final formulation, there wer production or to undertakings, as characterizing elements of the system of ownership[4]. Apart from th was included in the Treaty with this, already unfortunate, wording.

Indeed, if we analyze the expression of "*system of property ownership*" from the point of view of prop "[r]*efers not only to nationalizations, privatizations and expropriations, but to the entire collection of obligations attached to the right to property and the way in which it can be used*".[5] In other words, w held and not with the right of ownership itself.[6]

Thereby, since we are talking about the "system of property ownership" and not about "the right of establishing the European Atomic Energy Community (EAEC), which corresponds to Article 83 ECSC concerned only with legal persons - namely undertakings - and not natural persons as the subjects of the

Indeed, following from the analysis of the *Travaux*, "[i]*t has sometimes been concluded that Article 3 words, that the European Community will not concern itself with whether undertakings are publicly or neutrality*" of the EU towards the private or public nature of undertakings.[10] This interpretation could b where the Court stated that Article 345 TFEU merely signifies that each Member State may organize as same time respecting the fundamental freedoms enshrined in the Treaty. Also the Commission's interpre *principle*", since it clearly establishes that each Member State is entitled to decide on the most appropriat

Therefore, a plausible conclusion is that, even though the reference to undertakings has been removed meaning of the Article should be the same as the reference was still there: what is concerned is the owne

1.2. A negative competence of the European Union?

A literal interpretation of Article 345 TFEU leads to the conclusion according to which Treaties will r
interpretation of this provision may suggest to understand it "[a]*s a negative competence of the Communi*

On the other hand, there is also a more restrictive interpretation of Art. 345 TFEU according to which it
on whether property is public or private and makes clear that Member States have the right to transform

Article 345 TFEU has been used several times by the EU institutions (in particular the Commission) to
neutrality" towards the private or public ownership of undertakings, without any constructive interpretati

Therefore, we can draw the preliminary conclusion that Article 345 TFEU does not confer powers or cor
not prevents, the application of the Treaties to the way in which National law regulate the right of owners

2. Article 345 TFEU and the four freedoms.

2.1. Free movement of persons, free movement of services and freedom of establishment.

Free movement of persons and services are regulated under Title IV of the TFEU. As we all know, whi
and companies.[18]

As the Court clarified in *Factortame II*, the heart of Article 49 is "[t]*he actual pursuit of an economic ac*
indefinite period".[19] A combined reading of Article 49 TFEU and Article 50(2) TFEU shows that the
to set up businesses in the same conditions as nationals.[20] Moreover, in *Commission v. Italy* of 1988
right to purchase, exploit and transfer real and personal property,[21] therefore it includes all the rul
establishment") which are needed to set up business activities.[22]

The leading case – with regard to the relationship between right of establishment and right to prop
Commission case of 1984.

The case arose from a proceeding concerning the decision of the Irish Land Commission to acquire c
company registered under Irish Law.[23] The Supreme Court of Ireland referred to the CJEU for a preli
economic viability of land use, which was, actually, forcing landowners to sell their land by forced sal
holdings of land.[24] The question asked by the Supreme Court of Ireland to the CJEU was whether this

The central issue of this proceeding was the interpretation and the meaning of Article 345 TFEU (at that
stated that "[t]*he system of compulsory acquisition by public bodies is part of the system of property own*
justify a negative answer to the question put by the Irish court".[25] On the contrary, the CJEU took an
not acceptable since the restrictions on the acquisition and use by a national of one Member State are ar
of freedom of establishment. The CJEU also recalled that the Council's "*General Programme for the*
among the restrictions on freedom of establishment to be abolished, provisions or practices which provi
regard to compulsory acquisition.[26]

Therefore, according to the Court, the purpose of Article 345 TFEU "[i]*s not to exclude the application* [it] *is rather to emphasize how according to the Treaty these powers might belong to the Member States,*

This conclusion was also shared by AG Darmon, which, in its opinion, stated – recalling a statement of – that Article 345 TFEU could not be interpreted as excluding the rules in Member States governing th general principles of Community law.[28]

This means that, when regulating at National level, Member States must always take into account t non-discrimination (direct and indirect).[29]

This approach was then upheld by the CJEU with regard to free movement of workers, as enshrined in A to leave the State of origin, the right to enter the territory of another Member State, and the right to reside

In this respect, it is secondary legislation that regulates entry and residence rights, employment access Even if the Directive 2004/38 has replaced almost all the previous directives and regulations on this issue October 1968 that is still the source of some workers' rights and that, therefore, is still applicable in provides that "[a] *worker who is a national of a Member State and who is employed in the territory of an to national workers in matters of housing, including ownership of the housing he needs*".

In *Commission v. Greece*,[32] the Commission brought an action before the CJEU to denounce that Gre Treaty, and in particular with regard to free movement of workers, freedom to provide services an Presidential Decree of 1927 provided that the acquisition by foreign natural or legal persons of owne exception of mortgages, situated in border regions of the country was prohibited on pain of absolute nul from office of any notary who infringes that prohibition. The same penalties were laid down by that pro of assignment to such persons of the right to use urban immovable property situated in the border region the Emergency Law of 1938 prohibited, in respect of both Greek nationals and nationals of other Membe situated in the border regions or on an island or islet forming part of the Hellenic Republic, or in a coas region. In addition, the Commission proved that, by various decrees, almost 55% of Greek territory was the Emergency Law of 1938.[33]

Since Article 9(1) of Regulation No 1612/68 was applicable to the above-mentioned situation, the CJE declare that the Greek legislation was contrary, not to Article 9 of Regulation No 1612/68, but to Article

Following the Opinion of AG Jacobs – which was also recalling the *Commission v. Italy* case of 1988, for workers entails a right of access to housing on the same terms as nationals of the host State[34] – t relates to housing, was adopted pursuant to Article 49 of the Treaty (now Article 46 TFEU), which requi regulations "[s]*etting out the measures required to bring about* […] *freedom of movement for workers, a* (now Art. 45(3) (c)), freedom of movement for workers entails the right to stay in a Member State governing the employment of nationals of that State laid down by law, regulation or administrative actio

Consequently, the Court held that access to housing and ownership of property, provided for in Art movement for workers. Therefore, it is covered by the prohibition of discrimination against a nationa Member State, laid down in Article 48 of the Treaty.[36] Since the Greek restrictions on the ownership right of a worker from another Member State to stay in Greece for the purpose of employment, the C TFEU).

Also with regard to free movement of services, the CJEU in *Commission v. Germany*[37] established a s TFEU, according to which the former must always prevail over the latter.[38]

2.2. Free movement of capital.

Article 63 TFEU provide that all restrictions on the movement of capital and payments between Meml prohibited. Since the Treaties do not define what is the meaning of the expression "*movement of capi* referring to the annex of Directive 88/361.[39]

For the purpose of this work, we are going to limit our analysis to the so-called "golden share" cases *golden share enables it to retain a degree of influence (voting rights) over the activities of the company*".

In addition to the expression "golden share" there is another concept, the so called "special powers" violation of free movement of capital.[41]

The "golden share", according to the model provided by English law on privatization (and taken by the F share to which are related several special rights (*e.g.* veto power or appointment of directors) that cann the term "special powers" refers to those special rights that the State attributes to itself (as in the case o Therefore, in the latter case the ownership of the special rights by the State is independent from the share

The CJEU, in its judgments on golden shares and special powers, has stated that national measures "[m] *1, EC if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or t capital*".[44]

The general provision of Article 63 TFEU is characterized by three different elements: the "national mea link between the "national measure" and the impediment/deterrent effect.[45]

With regard to the term "measure", its definition within the framework of Article 63 TFEU derives from Articles 34 and 35 TFEU prohibit quantitative restrictions on imports and exports of goods and meas stands for "[a]*ny act or conduct that is attributable to the public authorities and therefore not to privat* four freedoms of the Treaty, it is also applicable to the notion of "national measures" of Article 63 TFEU

With regard to the second element which characterize Article 63 TFEU and to better understand the Europe, it is necessary to recall that the Directive 88/361 on the implementation of Article 67 (now Artic *by natural persons or commercial, industrial or financial undertakings, and which serve to establish or the capital and the entrepreneur to whom or the undertaking to which the capital is made available in or*

From what has been discussed so far, we can draw the preliminary conclusion that the potential investm consequence, it can lead to an infringement not only of Article 63 TFEU, but also of other fundamental fi

2.2.1. The "golden share" cases.

Over the last decade, the CJEU has delivered a number of judgments[48] on golden shares and natic Precisely, there are fifteen cases on golden shares in total and only in one of them the CJEU considered tl

EU Law, as interpreted and applied not only by the CJEU, but also by the Commission, has always be economy.

With regard to the golden shares, this hardcore approach is particularly evident. Indeed, we are going to 295 TEC (now Article 345 TFEU), normally declining to adopt the more wide Advocates General's opin

For example, in all the 2002 cases (except for the discriminatory law in Portugal[50]), the AG Colomer a the form of the "golden shares" were not infringing any Treaty obligations. Therefore, he suggested the C

In its joined opinion of 2001, firstly, he gave a definition of what is a "golden share", affirming that Commission before the CJEU involved the same legal issue, *i.e.* "[t]*he compatibility with* [EU] *law of intervene in the share structure and in the management of privatized undertakings in strategically impor*

According to AG Colomer, the Commission's fundamental mistake was to sidestep the legal consequenc

Indeed, the Commission – only when alluding to the privatization programs undertaken by various Meml to the private sector is an economic policy choice which, in itself, falls within the exclusive competence Treaty *vis-à-vis* the system of property ownership, established in Article 222.[52] Accordingly, for the C proceedings.

On the contrary, AG Colomer underlined the importance of Article 295 in those actions, deducing i conclusion that it must apply to all previous Treaty provisions. Furthermore, he utilized an historical app *authority directly from the Schuman Declaration of 9 May 1950, on which it has been based, which reinf*

In AG Colomer's opinion, the expression "system of property ownership" represented the clearest indi Consequently, Article 295 aimed to declare the neutrality of the Treaty in respect of the ownership of unc

With the exception of the rules on free competition and State aid, the Treaties did not affect other in opinion "property ownership" was to be understood as any measure which, through intervention in the p nation's financial activity – the Commission's interpretation of property law so narrowly limited to apply

The common denominator of the "golden shares" was that they constitute means by which the public au strategic interest for the national economy, with the purpose of imposing economic policy objectives, *i.e.*

Therefore, AG Colomer concluded for the dismissal of the actions by stating that the existence of such *established by the Treaty, although the specific manner in which they are applied may indeed be so*".[57]

The same interpretation of Article 345 TFEU was, then, rendered in all the fifteen cases on golden sha those arguments simply affirming that the "golden shares" were (and still are) incompatible with Article

The CJEU has been harshly criticized for its "golden shares" judgments, especially because it seems tc Treaty.[59] Indeed, some authors not only considered Article 345 TFEU as the legal basis to justify the i that the "golden shares" are functional to the protection of companies' economic interests. Therefore, pre a violation of the principle of equal treatment between the shareholders of public companies and those of

Indeed, Article 345 TFEU should be read in conjunction with Article 106(1) TFUE, which establishes prohibiting any State measure likely to discriminate the latter in favor of the first.

From this combined reading, it seems clear that the purpose of Article 345 TFEU is to grant a margin o relying solely on Article 106(1) TFEU.[62] Therefore, those two provisions should be intended as oper rights.

On the contrary, the CJEU "golden shares" case-law seems to go in the opposite direction by emphasizi the CJEU performs the balancing test only with regard to the exceptions/justifications provided in the T principles, such as the principle of neutrality enshrined in Article 345 TFEU, which might constitute Internal Market's principles. However, such a possibility seems to be totally excluded by the CJEU recer application of Article 345 TFEU is subject to the compliance with the fundamental freedoms and cannot

2.3. Free movement of goods: the case of Intellectual Property Rights.

The CJEU defined goods as products which "[c]*an be valued in money and which are capable, as such,* discussed, Articles 34 and 36 TFEU provide the basic rules protecting free movement of goods.

Art. 36 TFEU states: "[t]*he provisions of Articles 34 and 35 shall not preclude prohibitions or restricti public morality, public policy or public security; the protection of health and life of humans, animals historic or archaeological value; or the protection of industrial and commercial property. Such prol arbitrary discrimination or a disguised restriction on trade between Member States*".

Accordingly, the protection of industrial and commercial property represents one of the possible ground Therefore, it is necessary to consider intellectual property rights, which can be defined as intangible goo competition rules), but also under the free movement rules. This is even more true if we think about the has had on the competition law relating to intellectual property.[65]

Whereas Article 345 TFEU provide the so-called "principle of neutrality" towards the Member State Fundamental Rights explicitly states "Intellectual property shall be protected". This provision marks the also in the jurisprudence of the CJEU.

Intellectual property rights are negative rights: they give their "owners" the right to exclude everyone e exclusive rights: therefore, by their nature, they can create barriers to free trade.

Indeed, if we analyze Art. 36 TFEU we are going to notice that it is specified that the prohibitions or res and commercial property, shall not constitute a means of arbitrary discrimination or a disguised restricti impression that it is in contradiction with the Article 345 TFEU: to understand whether it is the case or n

The CJEU case law regarding intellectual property law is centered on a fundamental distinction betwe first drawn in *Consten & Grundig*.[67] Since it has been argued that "[t]*his case law applies to Article 3* other areas than just intellectual property law, which are "touched" by Article 345.

Consten & Grundig concerned an agreement between *Grundig*, a German manufacturer, and *Consten*, the trade mark GINT ("Grundig International"), applied by *Grundig* to all its product to block parallel i 81 (now Article 101 TFEU) and, therefore, asked not to use the trademark GINT anymore. Among oth Commission had exceeded its powers, infringing Article 295 (Art. 345 TFEU).[69] On this point, the CJ the exercise of national industrial property rights, stating that the Commission's injunction to refrain obstacle in the way of parallel imports does not affect the existence of those rights but only limits the under Article 85(1).[70] Therefore, only the exercise of such rights, but not their existence is touched by

Indeed, the CJEU followed the opinion of AG Roemer, which effectively argued that the object of Articl Member States to organize their own systems of property but not to provide a guarantee that the Europe property.[71]

The same reasoning was then confirmed in *Parke, Davis and Co. v. Probel, Reese, Beintema-Interpharm*

In 1970, in *Deutsche Grammophon*, a case related to parallel imports of goods covered by IPRs, the CJ *Treaty does not affect the existence of rights recognized by the legislation of a Member State with regar may nevertheless fall within the prohibitions laid down by the Treaty*"[73] (emphasis added).

This case-law shows that, according to the CJEU, the fact that there is no positive harmonization, *i.e.* sec

authorize the Member States to adopt legislation which infringes the free movement – or competition rul

Finally, in *Spain v. Council*, the CJEU clarified that the distinction between existence and exercise was o

2.4. Article 345 TFEU and competition concerns in the energy sector: the issue of ownership unbur

The relationship between Article 345 TFEU and the issue of ownership unbundling characterized a serie divestiture remedy has been imposed under the provisions of Article 9 of Regulation 1/2003. This capacity[77] and represent the Commission's preferred option to resolve problems in the energy sector w Commission proposed full ownership unbundling meaning "[t]*he complete separation of ownership o separation of all network functions from the other activities of the energy supply undertaking, as the be 'national champions'*".[79] This slightly differs from the Third Energy Package[80] because in the Thi possible solution for transmission and not the obligatory remedy, as in antitrust cases.

Taking into account the abovementioned diversity we are going to assess whether Article 345 TFEU may

As we already saw, Article 345 TFEU does not allow Member States to regulate against EU fundamen intervene on property rights to achieve fundamental EU policies. Obviously, the improvement of compe easily justify legislative measures that affect property rights. What it can be problematic is the way in w to public undertakings. Will it be necessary for them to privatize their assets in order to comply with the that "[i]*t would be enough to apply measures that guarantee effective separation*"[81] between transmiss

Moreover, although in principle there should be no discrimination issue since – according to the Third I ownership unbundling, we cannot exclude that such a problem can actually occur.

In this context, on 24 February 2012 the Dutch Supreme Court has asked the European Court of Justice f Unbundling Act in the energy sector. The case arose in 2007, when the energy companies Eneco, Esser After the dismissal of the Dutch Court of first instance (in 2009), the energy companies appealed to the As a matter of fact, by its decision of 22 June 2010 the Court of Appeal established that the unbundlin therefore it was non-binding. Consequently, the Dutch State instituted cassation proceedings before the D

To better understand the necessity of a preliminary ruling, we shall analyze how the EU Directives kno legislator.

The Dutch Unbundling Act requires all integrated Dutch energy companies to unbundle their operation and distribution company on the other ultimately before 1 January 2011. Although it is part of the liberal it goes far beyond the requirements laid down in the aforementioned Directives. First, the Unbundlin network managers to be part of a group of companies that produces, supplies or trades in gas or electricit

In addition, the Unbundling Act requires that groups that include a network company, are prohibited to the network that may conflict with the interest of the management of the networks concerned (the so-call

Finally, the Dutch legislator introduce the necessity of the permission of the minister of economic affairs of privatization"). Pursuant to a Governmental Decision adopted in 2008 it has been established that per being held by the parties outside a well-defined "governmental sphere".[82] This include Essent, Eneco the central government, provinces or municipalities).

As opposed to the Court of Appeal, the Supreme Court considers the prohibition of privatization as abs allow privatization cannot change the absolute nature of the prohibition. Moreover, the fact that leg

managers do not lead to a different conclusion, since we are still in the context of the so-called "governm

Furthermore, the Supreme Court also dismisses the Court of Appeal's position on the analogy to the argument from the fact that "also in this case the situation arises that the government, without being i private parties can be shareholders of a network managers by changing its Governmental Decision".[83]

On the contrary, the Supreme Court rules that this case differs from the golden share constructions government held special rights of control, whereas the present prohibition constitutes a statutory rule to p

Therefore, the Supreme Court asks to the CJEU several questions and, in particular, if the prohibition o property ownership as meant in Article 345 TFEU and if this mean that the Treaty provisions on the free to the prohibition of sidelines.[85]

Pending the preliminary ruling of the CJEU, the Supreme Court seems to be of the opinion the prohi Article 345 TFEU that prevents any privatization.

However, since it may take a long time before the CJEU will render its preliminary ruling, we must wait

3. Article 345 TFEU and the Right to Property: a possible limitation to the principle of free movem

3.1. Article 345 TFEU: a limit to the development of the European Single Market?

The wording of Article 345 TFEU represents one of the most unclear provisions of the Treaties. I performing its role of interpreter of the Treaties. However, from the analysis of the CJEU's jurispr occasionally Article 345 TFEU and, normally, it gave an extremely narrow and prudent interpretation o contains the "principle of neutrality", under which the Treaty is neutral as to "[w]*hether the Member Stat a company*".[86]

It has been inferred that the Treaties' provisions are not applicable to nationalizations of companies in t was already included in the Treaty of Rome because of the great trend of nationalization in France a opposite trend due to the memories of Nazism.[87] However, since *Fearon*, the CJEU had the opport declinations) remain applicable with regard to the exercise, by the Member States, of their competence to

Therefore, it seems that the distinction, drawn by the Court in the intellectual property cases, between e neutral to the existence, *i.e.* the question of nationalization itself, but does interfere in the way i nationalization must be in conformity with the principle of free movement and, obviously, with competiti

In addition, this was confirmed by the so-called "golden shares" case law, in which the CJEU clarifiec exempting the Member States' systems of property ownership from the fundamental rules of the Trea *compatible with this provision only in certain conditions, this must be the case even more so for national*

Since European law does not apply to the decision to nationalize or not an undertaking, the same "princi a limit to the development of the Internal Market within the EU.

Finally, it has been questioned whether Article 345 TFEU can be an obstacle towards the harmonizat property law. From what has been said on the meaning and the interpretation of Article 345 TFEU it is p matter of fact, the CJEU seems to emphasize that 345 TFEU does not prevent internal market law from

345 TFEU merely recognizes the power of Member States to define the rules governing the system of p
EU law on the exercise of national property rights.[92] Therefore, there would be no obstacle for
property.[93]

Since there are some projects of harmonization at EU level of property law (with the European Civil C
developed and what will be the consequence in the CJEU jurisprudence.

3. 2. IPRs and Article 345 TFEU: an issue not yet resolved.

The European Union has developed "[a] *modern system of intellectual property protection of broad c
harmonized national law or on both*".[95] In this field, the CJEU played a crucial role in interpreting ar
respect, the 'existence' and 'exercise' dichotomy, drawn by the Court, has been extremely controversial:

Moreover, it has been argued that the further distinction between positive and negative harmonization, p
the wording of Article 345 TFEU itself and that, therefore, the CJEU should have provided some kind of

At the same time, this distinction has been justified since the Court had to respond to a wrong interpreta
to use it as a possible justification of their national legislation concerning intellectual property rights. T
Article 36 TFEU. On this point, it has been stated that, since "[A]*rticle 36 TFEU safeguards the existen
constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member Sta
intellectual property rights was ensuring consistency with Article 36 TFEU*".[97]

On the other hand, the existence/exercise dichotomy has been fully embraced since it has been argued tha
the Treaty.[98] Indeed, Article 345 TFEU has been interpreted as a shield only for the existence of thos
be exercised, the CJEU had to assess to what extent that exercise can be allowed, "[w]*hile preserving th
the freedom of parallel imports*".[99] Therefore, it has been pointed out that the distinction that came ou
the framework of the Treaty provisions.[100]

Thus, even if the jurisprudence of the CJEU is pretty clear and consistent in excluding Article 345 TFE
free movement of goods in the field of intellectual property, there are still some open questions, espec
perhaps the most crucial for the purpose of this work, is whether the existence *versus* exercise dichotomy
respect, we do not have case law which explicitly addresses this issue, and, since the dichotomy has rem
would in the future expand this doctrine to ensure a broad scope of protection to the principle of free mov

4. Conclusion

Is it possible to consider Article 345 TFEU as a limitation to the principle of free movement? From the
should be negative. As a matter of fact, the Court has always rejected the argument, often provided by th
exemption to the rules on free movement.

There are two interrelated questions arising from Article 345 TFEU: (i) how far the competence of the
and (ii) how far the competence of the European Union goes, before it encroaches upon the competence

This is clearly shown in the “golden shares” cases, where the theme of the *ex-ante* illegitimacy of spec *post* compatibility with EU law is deeply related to the relationship between the public and private acti divide”).

Indeed, this issue is nowadays particularly relevant since in 2012 the Italian government issued the so-c original provisions laid down in Law-Decree No 332/1994. After more than a decade since the first CJEU to finally address the golden shares issue by establishing a notion of “strategic assets” which are subjec for potential investors who seek participation in control of strategic companies.[103] It applies to Italian security, or (ii)energy, transport and communications.

Since the Commission is currently analyzing these new provisions and the Italian Government has agai Decrees which would further establish the conditions for the applications of golden shares, we have to shares or consider them incompatible with EU Law, once again.

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[1] Bram Akkermans and Eveline Ramaekers, *Article 345 TFEU (ex-Article 295 EC), Its Mea* Blackwell Publishing, May 2010, p. 293.

[2] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 299.

[3] Bram Akkermans and Eveline Ramaekers, *ibid.*, p. 297.

[4] Bram Akkermans and Eveline Ramaekers, *ibid.*, p. 300.

[5] Directorate General for Internal Policies, Policy Department: Citizens Rights and Constitu *Eigentumsordnungen in den Mitgliedstaaten und der EWG-Vertrag*, pp. 18.

[6] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 303, which refers to Advocate Gener [2002] ECR I-4731, at para 54.

[7] Bram Akkermans and Eveline Ramaekers, *ibidem*. Art. 91 EAEC states: "*Le régime de pr l'objet d'un droit de propriété de la Communauté en vertu du présent chapitre est déterminé par la législ*

[8] Bram Akkermans and Eveline Ramaekers, *ibidem*.

[9] Bram Akkermans and Eveline Ramaekers, *ibid.*, p. 301.

[10] Gaetano Azzariti, *Invertire la rotta Per un governo pubblico dell'acqua. Rela* http://www.acquabenecomunetoscana.it/referendum/wp-content/uploads/2010/04/Relazione-introduttiva· (consulted on 25.03.2012).

[11] CJEU, *Commission v Portugal*, C-367/98, 2002, § 28.

[12] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 302, which refers to EC Bulletin 7/ Commission White Paper on Services of General Interest: "*The term 'public undertaking' is normally a provides for strict neutrality. It is irrelevant under Community law whether providers of services of g rights and obligations*", COM(2004) 374 final.

[13] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 302.

[14] Directorate General for Internal Policies, Policy Department: Citizens Rights and Const *conflict in Bosnia and Herzegovina, Croatia and Kosovo*, Study requested by the European P http://www.europarl.europa.eu/studies (consulted on 23.03.2012).

[15] Directorate General for Internal Policies, Policy Department: Citizens Rights and Constitutio

[16] See on this point, Bram Akkermans and Eveline Ramaekers, *op. cit.*, pp. 307-308.

[17] Bram Akkermans and Eveline Ramaekers, *ibid.*, pp. 304-305.

[18] Catherine Barnard, , *The Substantive Law of the EU. The Four Freedoms*, Oxford University

[19] CJEU, *R. v. Secretary of State for Transport, (Factortame II)*, C-221/89, 1991, § 20.

[20] Directorate General for Internal Policies, Policy Department: Citizens Rights and Constitutio

[21] CJEU, *Commission v. Italy*, C-63/86, 1988, § 14.

[22] Directorate General for Internal Policies, Policy Department: Citizens Rights and Constitutio

[23] CJEU, *Robert Fearon & Company Limited v Irish Land Commission*, C-182/83, 1984, §§ 1 a

[24] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 309.

[25] CJEU, *Robert Fearon*, C-182/83, 1984, § 5.

[26] CJEU, *Robert Fearon*, *ibid.*, § 6.

[27] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 309.

[28] Opinion of AG Darmon, *Robert Fearon*, *ibid.*, p. 3689.

[29] Indeed, the CJEU in this case affirmed that Article 49 TFEU "[d]*oes not prohibit a Member S adopted under legislation governing the ownership of rural land subject to a requirement that nationals land-owning company reside on or near the land, if that residence requirement also applies to nationals are not exercised in discriminatory manner*" (emphasis added). See, CJEU, *Robert Fearon*, C-182/83, 19

[30] See, CJEU, *Union Royale Belge des Societes de Footbal Association (ASBL) v. Bosman*, C-190/98, 2000, § 22; *Roux v. Belgium*, C-363/89, 1991, § 9.

[31] Catherine Barnard, *op. cit.*, p. 269.

[32] CJEU, *Commission of the European Communities v. Hellenic Republic*, C-305/87, 1989.

[33] CJEU, *Hellenic Republic*, C-305/87, 1989, §§ 2-3.

[34] Opinion of AG Jacobs, CJEU, *Hellenic Republic*, C-305/87, 1989, 13 April 1989, § 13.

[35] CJEU, *Hellenic Republic*, C-305/87, 1989, § 18.

[36] CJEU, *Hellenic Republic*, *ibidem*.

[37] CJEU, *Commission of the European Communities v. Federal Republic of Germany*, C-503/0

[38] CJEU, *Commission v. Federal Republic of Germany*, C-503/04, 2007, § 37.

[39] For instance, it includes mortgages, inheritances, banknotes and coin, different guarantees a
p. 563-564.

[40] Catherine Barnard, *ibid.*, p. 569.

[41] Actually, the "golden shares" could lead to an infringement of both art. 49 TFEU (freedom
the CJEU has interpreted the "golden shares" as a possible violation of art. 63 TFEU, therefore the infri
consequence of the first violation. Cfr., with regard to this issue, Sara De Vido, *La recente giurispruden
sulla libera circolazione dei capitali o sul diritto di stabilimento?*, in *Dir. comm. internaz.*, 2007, 04, p. 8

[42] Cfr. Giovanni Patti, *I diritti dello Stato tra libera circolazione dei capitali, golden shares e r*

[43] Cfr. J. Sodi, *Poteri speciali, golden shares e false privatizzazioni*, in *Riv. soc.*, 1996, p. 374 s

[44] CJEU, *Commission v. Portugal*, C-171/08, 2010, § 50; *Federconsumatori c. Comune di M* C-112/05, 2007, § 19; *Commission v. Netherlands*, C-282/04 e C-283/04, 2006, § 20.

[45] Cfr. Giovanni Patti, *I diritti dello Stato tra libera circolazione dei capitali, golden shares e r*

[46] L. Daniele, *Circolazione delle merci*, (Dir. com.), Dizionario di diritto pubblico, a cura di S.

[47] Christine O'Grady Putek, *Limited But Not Lost: A Comment on the ECJ's Golde* http://ir.lawnet.fordham.edu/flr/vol72/iss5/35 (consulted on 31.03.2012).

[48] CJEU, *Commission v. Italy,* C-58/99, 2000; *Commission v. France*, C-483/99, 2002; *Co* C-367/98, 2002; *Commission v. United Kingdom*, C-98/01, 2003; *Commission v. Spain,* C-463/00, 2003; Joined cases C-282/04 and C-283/04, 2006; *Federconsumatori v. Commune di Milano*, C-463/04 *Commission v. Spain,* C-274/06, 2008; *Commission v. Spain*, C-207/07, 2008; *Commission v. Italy*, C-32 *v. Portugal*, C-543/08, 2010.

[49] See CJEU, *Commission v. Belgium,* C-503/99, 2002.

[50] Joined opinion of AG Colomer, CJEU, *Portuguese Republic*, C-367/98, 2002; *French R* delivered on 3 July 2001, §§ 29-30.

[51] Joined opinion of AG Colomer, CJEU, *Commission of the European Communities v. Po Communities v. French Republic*, C-483/99, 2002; *Commission of the European Communities v. Kingdo*

[52] Joined opinion of AG Colomer, *op. cit.*, § 41.

[53] Joined opinion of AG Colomer, *ibid.*, § 45.

[54] Joined opinion of AG Colomer, *op. cit.*, § 53.

[55] Christine O'Grady Putek, *op. cit.*, p. 2272.

[56] "[I]*t makes no sense for the EC Treaty to contain a provision whose sole aim is to state t property legislation in the Member States*". See, Joined opinion of AG Colomer, *op. cit.*, §§ 62-63.

[57] Joined opinion of AG Colomer, *op. cit.*, § 91.

[58] "[H]*owever, those concerns cannot entitle Member States to plead their own systems of pro justification for obstacles, resulting from privileges attaching to their position as shareholder in a priv the Treaty. As is apparent from the Court's case law, that article does not have the effect of exemp fundamental rules of the Treaty*". See, CJEU, *Portuguese Republic*, C-367/98, 2002, § 48; *French Repub* 44.

[59] On this point, see, *inter alia*, S.M. Carbone, *Golden share e fondi sorani: lo Stato nelle impr* 2009, p. 2; P. Manzini, *Note sulle "relazioni pericolose" tra Stato e imprese nel quadro del diritto comu*

[60] See S.M. Carbone, *op. cit.*, p. 1; G.C. Spattini, *"Vere" e "false" "Goldenshare" nella giu Giustizia, ovvero il "formalismo" del principio della "natura della cosa": il caso Volkswagen, e altro...*,

[61] G. Patti, *I diritti speciali dello Stato tra lbera circolazione dei capitali, golden shares e rego*

[62] D. Gallo, *Le* golden shares *e la trasformazione del* public/private divide*: criticità, sviluppi e investimenti extra-UE*, in S. M. CARBONE (a cura di), *L'Europa a vent'anni da Maastricht: verso nuo Diritto Internazionale, Genova, 31 maggio-1 giugno 2012*, 2013.

[63] CJEU, *Commission v. Greece,* C-244/11, 2012 §§17-18.

[64] CJEU, *Commission v. Italy*, C-7/68, 1968, p. 429.

[65] Daniel G. Goyder, *Intellectual Property Rights: The Purposes and Effects of Articles 28 to 3* 1, available at http://www.oup.com/uk/orc/bin/9780199232307/resources/additional/goyder5e_ip_rights.

[66] Irena Tusek, *Finding the Balance between Market Freedoms and Fundamental Rights: E*

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[67] CJEU, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the*

[68] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 310.

[69] Christopher Stothers, *Parallel trade in Europe: intellectual property, competition and regula*

[70] CJEU, *Consten & Grundig*, Joined cases 56 and 58/64, 1966, p. 345-6.

[71] Opinion of AG Roemer, CJEU *Consten & Grundig*, Joined cases 56 and 58/64, 1966, 27 Ap

[72] CJEU, *Parke, Davis and Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm*, C-24/

[73] CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. K* chance to better specify that "[i]*n particular Article 222 according to which the Treaty in no way preju ownership, cannot be interpreted as reserving to the national legislature, in relation to industrial ana adversely affect the principle of free movement of goods within the common market as provided for and Communities v Italian Republic*, C-235/89, 1992, § 14. This was, then, confirmed in *Commission v. U Kingdom of Great Britain and Northern Ireland*, C-30/90, 1992, § 18.

[74] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 310.

[75] CJEU, *Kingdom of Spain v. Council of the European Union*, C-350/92, 1995, §§ 19-23: ' *existence of industrial property rights fall within the sole jurisdiction of the national legislature, th harmonization of the relevant national legislation* […] *Neither Article 222 nor Article 36 of the Treaty legislature, to the exclusion of any Community action in the matter* […] *Moreover, the Court confir Community is competent, in the field of intellectual property, to harmonize national laws pursuant to creating new rights superimposed on national rights*".

[76] See, *inter alia*, European Commission, Case COMP/39.315 – *Eni*, 2010.

[77] See, *inter alia*, European Commission, Case COMP/39.388 – German electricity Wholesale

[78] See, M. Diathesopoulos, *Ownership Unbundling in European Energy Marke* http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=michael_diathesopoulos (as consul

[79] See, M. Diathesopoulos, *op. cit.*, p. 2.

[80] See, European Parliament, Directive 2009/72/EC, July 13, 2009, OJ L211/55 and Directive 2

[81] See, M. Diathesopoulos, *op. cit.*, p. 18.

[82] See W. Loof, *On the consequences of art. 345 TFEU for ownership unbund* http://www.degruyter.com/view/j/eplj-2012-1-issue-2/eplj-2012-0014/eplj-2012-0014.xml (as consulted

[83] See W. Loof, *op. cit.*, p. 333.

[84] See W. Loof, *op. cit.*, p. 334.

[85] See W. Loof, *op. cit.*, p. 334 onwards.

[86] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 314.

[87] Christian Von Bar, *Towards a European Civil Code*, Kluwer Law International, 2011, p. 323

[88] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 314.

[89] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 314.

[90] Directorate General for Internal Policies, Policy Department: Citizens Rights and Constitutio

[91] Bram Akkermans, *The Principle of* Numerus Clausus, *op. cit.*, p. 524.

[92] CJEU, *R v. Secretary of State ex part BAT & Imperial Tobacco*, C-491/01, 2002, § 147.

[93] Hector S. Moreno, *Towards a European System of Property Law*, European Review of Priva

[94] Hugh Collins, *THE EUROPEAN CIVIL CODE: THE WAY FORWARD*, Cambridge Universi

[95] Paul Demaret, Inge Govaere, Domink Hanf, *European Legal Dynamics*, Peter Lang, 2007, p.

[96] Bram Akkermans and Eveline Ramaekers, op. cit., p. 311.

[97] Bram Akkermans and Eveline Ramaekers, ibid.

[98] Daniel G. Goyder, *op. cit.*, p. 4.

[99] Daniel G. Goyder, *ibidem*.

[100] Daniel G. Goyder, *op. cit.*, p. 4.

[101] Directorate General for Internal Policies, Policy Department: Citizens Rights and Constitutio

[102] See Law-Decree No. 21 of March 15, 2012, as amended and ratified by Law No. 56 of May

[103] J. Ganza, *Italian Golden Shares – a Never-E* http://kslr.org.uk/blogs/europeanlaw/2013/01/15/italian-golden-shares-a-never-ending-story/ (as consulte

[104] E. Marro, *Golden share, la storia infinita*, in *Corriere* http://archiviostorico.corriere.it/2013/marzo/28/Golden_share_storia_infinita_co_0_20130328_7b8bb96(01.04.2013).