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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 implementation. Without property rights, no other rights are possible" . As a matter of fact, for a long time the right to property has been considered as "[a]n absolute right of the individual, which must remain free from interferences by other private parties or public interests" and, therefore, as the most important implementation of any other fundamental rights.

Nowadays, we acknowledge that the right to property is not anymore "[t]he paradigm of absoluteness of ownership" , since it can be limited by other rights, as well as by the public interest. This paper analyses the relationship between the right to property and the principle of free movement to assess whether this right, as provided by Article 345 TFEU, can be a limitation to the cornerstone principle of the European Internal Market. In order to do so, the analysis presented will draw mainly on the jurisprudence of the Court of Justice of the European Union.

After a preliminary examination of the possible meanings and interpretations of Art. 345 TFEU – in order to address the issue of the competence of the European Union in the field of the different national "system of property ownership" – the paper will be focused on the scrutiny of the most telling case-law of the CJEU where the four freedoms were confronted with Article 345 TFEU in order to demonstrate that, although in theory this Article may represent a derogation to the principle of free movement, in practice the Court of Justice of the European Union has never accepted the interpretation of Article 345 as a possible ground to justify any restriction of the four freedoms. In this regard, a particular attention will be given to the "golden shares" cases, in order to better understand the impact of the CJEU jurisprudence on the principle of free movement (i.e. the driving force behind the development of EU Law).

Following this, we will analyze the IPRs cases, considered as a paradigm of the relationship between Article 345 TFEU and free movement of goods. In this context, a brief look will be given to the issues related to the energy sector, in order to assess whether Article 345 TFEU may constitute a legal obstacle against ownership unbundling.

"[T]he right to life is the source of all rights – and the right to property is their only implementation. Without property rights, no other rights are possible" . Per lungo tempo il diritto di proprietà è stato considerato come "[a]n absolute right of the individual, which must remain free from interferences by other private parties or public interests" e, pertanto, come uno dei più importanti diritti fondamentali. Al giorno d'oggi, il diritto di proprietà non è più "[t]he paradigm of absoluteness of ownership" , in quanto può essere limitato da altri diritti individuali, così come dall'interesse pubblico. Questo lavoro è volto ad esaminare – attraverso la giurisprudenza della Corte di Giustizia dell'Unione Europea – il rapporto tra il diritto di proprietà e il principio europeo della libertà di circolazione, al fine di valutare se la proprietà, come disciplinata dall'art. 345 TFUE, possa rappresentare una deroga al principio cardine del mercato interno europeo.

A seguito di una preliminare e necessaria analisi dei possibili significati ed interpretazioni dell'art. 345 TFUE – al fine di affrontare la tematica relativa alla competenza dell'Unione in materia di "regime di proprietà esistente negli Stati membri" – il presente lavoro sarà incentrato su un attento studio della più significativa ed eloquente giurisprudenza della CGUE in materia per dimostrare che, anche se in teoria l'art. 345 TFUE potrebbe essere considerato come una deroga al principio di libertà di circolazione, in pratica la CGUE ha sempre rigettato l'interpretazione di tale articolo come possibile giustificazione ad eventuali restrizioni delle quattro libertà.

A questo proposito, particolare rilievo assumono i c.d. casi "golden shares", la cui analisi permetterà di comprendere meglio l'impatto della giurisprudenza CGUE sul principio della libera circolazione. In seguito, verranno esaminati i casi in materia di Proprietà Intellettuale, considerati come un paradigma del rapporto tra art. 345 TFUE e libera circolazione dei beni. In questo contesto, ci si soffermerà brevemente sulle problematiche relative al settore dell'energia, al fine di valutare se l'art. 345 TFUE possa 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 articles of the Treaty. As Bram Akkermans and Eveline Ramaekers stated: "[t]*he exact meaning and scope of Article 345 TFEU is not entirely clear* […] *The phrasing of the Article is unfortunate, its wording is so broad that the meaning becomes difficult to determine* […] *Perhaps these reasons also explain why literature and case-law is hardly available*".[1]

Before becoming Article 345 TFEU, the provision in question was, in the Treaty of Rome, Article 222 EEC, which was drafted in French, since English was not yet an official language[2]: "[l]*e present Traité ne préjuge en rien le régime de propriété dans les Etats Membres*". Article 222 EEC was actually preceded by Article 83 of the Treaty establishing the European Coal and Steel Community

(ECSC), which reads: "*L'institution de la communauté ne préjuge en rien le régime de propriété des entreprises soumises aux dispositions du présent Traité*". The same words were already used in the Schuman Declaration of 9 May 1950, when he affirmed: "[l']*institution de la Haute Autorité ne préjuge en rien du régime de propriété des entreprises*".[3] We can easily notice that the wording of these four different articles has basically remained unchanged.

It is precisely the expression "*régime de propriété*", or, in English, "*system of property ownership*", that creates some confusion. If we take a close look to the *Travaux Préparatoires* of the EEC, we are going to discover that, before reaching its final formulation, there were some other versions that were giving space either to the means of production or to undertakings, as characterizing elements of the system of ownership[4]. Apart from that, there is no particular explanation of the reason why this Article 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 property law, it has been argued that the addition of the term "*system*" "[r]*efers not only to nationalizations, privatizations and expropriations, but to the entire collection of rules on ownership in the broadest sense, including the rights and obligations attached to the right to property and the way in which it can be used*".[5] In other words, we are dealing with the way in which the right of ownership can be 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 ownership" (difference that is based on Article 91 of the Treaty establishing the European Atomic Energy Community (EAEC), which corresponds to Article 83 ECSC and Article 345 TFEU),[7] we can infer that Article 345 TFEU is concerned only with legal persons - namely undertakings - and not natural persons as the subjects of the property relationship.[8]

Indeed, following from the analysis of the *Travaux*, "[i]*t has sometimes been concluded that Article 345 TFEU deals with the ownership of undertakings only, in other words, that the European Community will not concern itself with whether undertakings are publicly or privately owned*".[9] This is what has been called the "*principle of neutrality*" of the EU towards the private or public nature of undertakings.[10] This interpretation could be reinforced by the CJEU judgment in *Commission v Portugal*,[11] where the Court stated that Article 345 TFEU merely signifies that each Member State may organize as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty. Also the Commission's interpretation of this Article seems to go in the direction of the "*neutrality principle*", since it clearly establishes that each Member State is entitled to decide on the most appropriate form of property ownership. [12]

Therefore, a plausible conclusion is that, even though the reference to undertakings has been removed from the text of Art. 222 EEC and also from Art. 345 TFEU, the meaning of the Article should be the same as the reference was still there: what is concerned is the ownership, private or public, of undertakings only.[13]

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 not apply to the rules mentioned in the Article. Instead, a different interpretation of this provision may suggest to understand it "[a]*s a negative competence of the Community, within which it does not have the power to legislate*".[14]

On the other hand, there is also a more restrictive interpretation of Art. 345 TFEU according to which it establishes "[o]*nly the competence of the Member States to decide on whether property is public or private and makes clear that Member States have the right to transform private property into common*

property and vice versa".[15]

Article 345 TFEU has been used several times by the EU institutions (in particular the Commission) to deny competence of the EU[16] and to reinforce the "*principle of neutrality*" towards the private or public ownership of undertakings, without any constructive interpretation.

Therefore, we can draw the preliminary conclusion that Article 345 TFEU does not confer powers or competences to the EU, nor to the Member States: it simply limits, but not prevents, the application of the Treaties to the way in which National law regulate the right of ownership (private or public) of undertakings.[17]

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, while Article 45 concerns workers, Article 49 concerns self-employed and companies.[18]

As the Court clarified in *Factortame II*, the heart of Article 49 is "[t]*he actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period*".[19] A combined reading of Article 49 TFEU and Article 50(2) TFEU shows that the freedom of establishment includes the right to acquire real property to set up businesses in the same conditions as nationals.[20] Moreover, in *Commission v. Italy* of 1988, the CJEU stated that the right of establishment also includes the right to purchase, exploit and transfer real and personal property,[21] therefore it includes all the rules related to the different general facilities (so-called "*secondary 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 property – is the *Robert Fearon and Company Ltd v The Irish Land Commission* case of 1984.

The case arose from a proceeding concerning the decision of the Irish Land Commission to acquire compulsorily land owned by Robert Fearon & Company Limited, a company registered under Irish Law.[23] The Supreme Court of Ireland referred to the CJEU for a preliminary ruling, challenging an Irish Act, adopted in order to ensure economic viability of land use, which was, actually, forcing landowners to sell their land by forced sale to the Irish authorities for the purposes of increasing the size of holdings of land.[24] The question asked by the Supreme Court of Ireland to the CJEU was whether this act was in conformity with the freedom of establishment.

The central issue of this proceeding was the interpretation and the meaning of Article 345 TFEU (at that time Article 222 EEC). In its written observations, the Commission stated that "[t]*he system of compulsory acquisition by public bodies is part of the system of property ownership in Ireland and that, therefore, Art.222 EEC would on its own justify a negative answer to the question put by the Irish court*".[25] On the contrary, the CJEU took an opposite approach, holding that the Commission's conclusion was not acceptable since the restrictions on the acquisition and use by a national of one Member State are among those which are to be abolished with a view to the realization of freedom of establishment. The CJEU also recalled that the Council's "*General Programme for the Abolition of Restrictions on the Freedom of Establishment*" listed, among the restrictions on freedom of establishment to be abolished, provisions or practices which provide for less favorable rules for nationals of another Member State in regard to compulsory acquisition.[26]

Therefore, according to the Court, the purpose of Article 345 TFEU "[i]*s not to exclude the application of the Treaty to questions of state or private ownership at all, but* [it] *is rather to emphasize how*

according to the Treaty these powers might belong to the Member States, but not as far as the exercise of those powers is concerned".[27]

This conclusion was also shared by AG Darmon, which, in its opinion, stated – recalling a statement of AG Capotorti at the hearing of the appellant in the main proceeding – that Article 345 TFEU could not be interpreted as excluding the rules in Member States governing the system of property ownership from the field of application of the general principles of Community law.[28]

This means that, when regulating at National level, Member States must always take into account the fundamental freedoms and, therefore, respect the principle of non-discrimination (direct and indirect).[29]

This approach was then upheld by the CJEU with regard to free movement of workers, as enshrined in Article 45 TFEU. This freedom includes, among others,[30] the right to leave the State of origin, the right to enter the territory of another Member State, and the right to reside freely and to pursue an economic activity there.[31]

In this respect, it is secondary legislation that regulates entry and residence rights, employment access and conditions and the right to remain in the State of employment. Even if the Directive 2004/38 has replaced almost all the previous directives and regulations on this issue, there is a part of the Council Regulation (EEC) No. 1612/68 of 15 October 1968 that is still the source of some workers' rights and that, therefore, is still applicable in the field of free movement of workers. In particular, Article 9(1) provides that "[a] *worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded 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 Greece had failed to fulfill its obligations under several Articles of the Treaty, and in particular with regard to free movement of workers, freedom to provide services and freedom of establishment. Indeed, in the Hellenic Republic, a Presidential Decree of 1927 provided that the acquisition by foreign natural or legal persons of ownership of immovable property, or other real rights therein, with the exception of mortgages, situated in border regions of the country was prohibited on pain of absolute nullity of the legal act in question, criminal sanctions and the removal from office of any notary who infringes that prohibition. The same penalties were laid down by that provision in respect of the prohibition against letting or any other form of assignment to such persons of the right to use urban immovable property situated in the border regions of the country for a period of more than three years. Furthermore, the Emergency Law of 1938 prohibited, in respect of both Greek nationals and nationals of other Member States, the conclusion of legal acts relating to immovable property situated in the border regions or on an island or islet forming part of the Hellenic Republic, or in a coastal area or an area in the interior of the country designated a border region. In addition, the Commission proved that, by various decrees, almost 55% of Greek territory was designated border region under the Presidential Decree of 1927 and the Emergency Law of 1938.[33]

Since Article 9(1) of Regulation No 1612/68 was applicable to the above-mentioned situation, the CJEU held that, in its application, the Commission asked the Court to declare that the Greek legislation was contrary, not to Article 9 of Regulation No 1612/68, but to Article 48 of the Treaty (now Art. 45 TFEU).

Following the Opinion of AG Jacobs – which was also recalling the *Commission v. Italy* case of 1988, were the CJEU confirmed the view that the right of free movement for workers entails a right of access to housing on the same terms as nationals of the host State[34] – the Court stated that Regulation No 1612/68, Article 9(1) of which relates to housing, was adopted pursuant to Article 49 of the Treaty

(now Article 46 TFEU), which required the Council (and now also the Parliament) to adopt directives or regulations "[s]*etting out the measures required to bring about* […] *freedom of movement for workers, as defined in Article 48*". Moreover, according to Article 48(3) itself (now Art. 45(3) (c)), freedom of movement for workers entails the right to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action.[35]

Consequently, the Court held that access to housing and ownership of property, provided for in Article 9 of Regulation No 1612/68, is the corollary of freedom of movement for workers. Therefore, it is covered by the prohibition of discrimination against a national of a Member State who wishes to take employment in another Member State, laid down in Article 48 of the Treaty.[36] Since the Greek restrictions on the ownership and renting of immovable property by foreigners was impeding the right of a worker from another Member State to stay in Greece for the purpose of employment, the Court found that they were in breach of Article 48 (now Article 45 TFEU).

Also with regard to free movement of services, the CJEU in *Commission v. Germany*[37] established a sort of hierarchical principle between Articles 56-57 and Article 345 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 Member States and between Member States and third countries shall be prohibited. Since the Treaties do not define what is the meaning of the expression "*movement of capital*", the CJEU plays a crucial law in identifying this notion often 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, which involves "[n]*ewly privatized companies where the State's golden share enables it to retain a degree of influence (voting rights) over the activities of the company*".[40]

In addition to the expression "golden share" there is another concept, the so called "special powers", which will be relevant to analyze in the context of the possible violation of free movement of capital.[41]

The "golden share", according to the model provided by English law on privatization (and taken by the French legislature in the form of "*action spécifique*"), is a privileged share to which are related several special rights (*e.g.* veto power or appointment of directors) that cannot be modified without the consent of the shareholder.[42] Instead, the term "special powers" refers to those special rights that the State attributes to itself (as in the case of the Italian law on privatization) without any privileged share.[43] Therefore, in the latter case the ownership of the special rights by the State is independent from the shareholding.

The CJEU, in its judgments on golden shares and special powers, has stated that national measures "[m]*ust be regarded as restrictions within the meaning of Article. 56, n. 1, EC if they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors from other Member States from investing in their capital*".[44]

The general provision of Article 63 TFEU is characterized by three different elements: the "national measure", the impediment or deterrent effect on investment, the causal 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 the jurisprudence on the free movement of goods. As we all know, Articles 34 and 35 TFEU prohibit quantitative restrictions on imports and exports of goods and measures having equivalent effect. In this context, the term "measure" stands for "[a]*ny act or conduct that is attributable to the public authorities and therefore not to private individuals*".[46] Since this definition has been applied to all the 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 problems related to the widespread use of "golden shares" across Europe, it is necessary to recall that the Directive 88/361 on the implementation of Article 67 (now Article 63 TFEU) defines direct investment as "[i]*nvestments 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*".

From what has been discussed so far, we can draw the preliminary conclusion that the potential investments' restrictions is in the nature of the golden shares[47] and, as a consequence, it can lead to an infringement not only of Article 63 TFEU, but also of other fundamental freedoms guaranteed by the Treaties.

2.2.1. The "golden share" cases.

Over the last decade, the CJEU has delivered a number of judgments[48] on golden shares and national special powers held by the Member in privatized companies. Precisely, there are fifteen cases on golden shares in total and only in one of them the CJEU considered them justifiable.[49]

EU Law, as interpreted and applied not only by the CJEU, but also by the Commission, has always been extremely hardcore in punishing any State interventions in the economy.

With regard to the golden shares, this hardcore approach is particularly evident. Indeed, we are going to see how the CJEU has rendered a narrow interpretation of Article 295 TEC (now Article 345 TFEU), normally declining to adopt the more wide Advocates General's opinions.

For example, in all the 2002 cases (except for the discriminatory law in Portugal[50]), the AG Colomer affirmed that the different powers reserved by the Member States in the form of the "golden shares" were not infringing any Treaty obligations. Therefore, he suggested the CJEU to dismiss the Commission's actions.

In its joined opinion of 2001, firstly, he gave a definition of what is a "golden share", affirming that the three actions for infringement of the Treaties brought by the Commission before the CJEU involved the same legal issue, *i.e.* "[t]*he compatibility with* [EU] *law of national systems which grant the Executive certain prerogatives to intervene in the share structure and in the management of privatized undertakings in strategically important areas of the economy*".[51]

According to AG Colomer, the Commission's fundamental mistake was to sidestep the legal consequences that follow from Article 295 EC (Article 345 TFEU).

Indeed, the Commission – only when alluding to the privatization programs undertaken by various Member States – pointed out that the movement of a firm from the public to the private sector is an economic policy choice which, in itself, falls within the exclusive competence of Member States, stemming from the principle of neutrality in the Treaty *vis-à-vis* the system of property ownership, established in Article 222.[52] Accordingly, for the Commission, Article 295 EC was not relevant for

the purposes of the proceedings.

On the contrary, AG Colomer underlined the importance of Article 295 in those actions, deducing it already from its position in the Treaty, which leads him to the conclusion that it must apply to all previous Treaty provisions. Furthermore, he utilized an historical approach in the interpretation of the article, noting that it derived "[i]*ts authority directly from the Schuman Declaration of 9 May 1950, on which it has been based, which reinforces its specific nature and symbolic importance*".[53]

In AG Colomer's opinion, the expression "system of property ownership" represented the clearest indication that this it was not a legal, but rather an economic concept. Consequently, Article 295 aimed to declare the neutrality of the Treaty in respect of the ownership of undertakings, in the economic sense: the means of production.

With the exception of the rules on free competition and State aid, the Treaties did not affect other instruments of State's intervention[54] and, therefore – since in its opinion "property ownership" was to be understood as any measure which, through intervention in the public sector allows the State to contribute to the organization of the nation's financial activity – the Commission's interpretation of property law so narrowly limited to apply to purely private or civil law was absurd.[55]

The common denominator of the "golden shares" was that they constitute means by which the public authorities may participate in the activities of certain undertakings of strategic interest for the national economy, with the purpose of imposing economic policy objectives, *i.e.* matter reserved for the sovereignty of the Member States.[56]

Therefore, AG Colomer concluded for the dismissal of the actions by stating that the existence of such measures "[w]*as not in itself contrary to the fundamental freedoms 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 shares. Unfortunately – as we already mentioned – the CJEU rejected those arguments simply affirming that the "golden shares" were (and still are) incompatible with Article 345 TFEU.[58]

The CJEU has been harshly criticized for its "golden shares" judgments, especially because it seems to erode the margin of sovereignty left to the Member States by the Treaty.[59] Indeed, some authors not only considered Article 345 TFEU as the legal basis to justify the introduction of the "golden shares" by the State,[60] but also argued that the "golden shares" are functional to the protection of companies' economic interests. Therefore, preventing the exercise of such special rights to the State could lead to a violation of the principle of equal treatment between the shareholders of public companies and those of private companies.[61]

Indeed, Article 345 TFEU should be read in conjunction with Article 106(1) TFUE, which establishes the principle of equality between private and public undertakings, 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 of maneuver that, otherwise, Member States would not have had by relying solely on Article 106(1) TFEU.[62] Therefore, those two provisions should be intended as operating a balancing of values between the Internal Market and social rights.

On the contrary, the CJEU "golden shares" case-law seems to go in the opposite direction by emphasizing a sort of absolute nature of the principle free movement. Indeed, the CJEU performs the balancing test only with regard to the exceptions/justifications provided in the Treaty, without taking

into account that there are other constitutional principles, such as the principle of neutrality enshrined in Article 345 TFEU, which might constitute a counter value compared to the necessary predominance of the Internal Market's principles. However, such a possibility seems to be totally excluded by the CJEU recent judgment in *Commission v. Greece*, where the CJEU held that the application of Article 345 TFEU is subject to the compliance with the fundamental freedoms and cannot conflict with them.[63]

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, of forming the subject of commercial transactions*".[64] As already 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 restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*".

Accordingly, the protection of industrial and commercial property represents one of the possible grounds to justify prohibitions or restrictions on free movement of goods. Therefore, it is necessary to consider intellectual property rights, which can be defined as intangible goods, not only from the perspective of Article 101 and 102 TFEU (the competition rules), but also under the free movement rules. This is even more true if we think about the great influence that judgments like *Dassonville* and *Cassis de Dijon* 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 States' system of property ownership, Article 17(2) of the Charter of Fundamental Rights explicitly states "Intellectual property shall be protected". This provision marks the growing importance of intellectual property not only in EU law, but also in the jurisprudence of the CJEU.

Intellectual property rights are negative rights: they give their "owners" the right to exclude everyone else from using their creations. This is why IPRs are also known as 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 restrictions, which are justified by virtue of the protection of industrial and commercial property, shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. This provision may create the impression that it is in contradiction with the Article 345 TFEU: to understand whether it is the case or not we must analyze CJEU's case law.[66]

The CJEU case law regarding intellectual property law is centered on a fundamental distinction between existence and exercise of property rights, distinction which was first drawn in *Consten & Grundig*.[67] Since it has been argued that "[t]*his case law applies to Article 345 TFEU in full*",[68] we are going to see whether it applies also to 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*, its French distributor, which allowed *Consten* to register in France the trade mark GINT ("Grundig International"), applied by *Grundig* to all its product to block parallel imports. The Commission argued

that this agreement infringed Art. 81 (now Article 101 TFEU) and, therefore, asked not to use the trademark GINT anymore. Among other things, the appeal to the CJEU was based on the claim that the Commission had exceeded its powers, infringing Article 295 (Art. 345 TFEU).[69] On this point, the CJEU held that Article 295 do not exclude any influence of EU law on the exercise of national industrial property rights, stating that the Commission's injunction to refrain from using rights under national trademark law in order to set an obstacle in the way of parallel imports does not affect the existence of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1).[70] Therefore, only the exercise of such rights, but not their existence is touched by Art. 345 TFEU.

Indeed, the CJEU followed the opinion of AG Roemer, which effectively argued that the object of Article 345 TFEU is to guarantee in a general manner the freedom of the Member States to organize their own systems of property but not to provide a guarantee that the European institutions may not in any way intervene in subjective rights of property.[71]

The same reasoning was then confirmed in *Parke, Davis and Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm*,[72] with regard to patents.

In 1970, in *Deutsche Grammophon*, a case related to parallel imports of goods covered by IPRs, the CJEU confirmed its previous decisions underling that "[a]*lthough the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights 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.* secondary legislation, in the area of intellectual property law, does not authorize the Member States to adopt legislation which infringes the free movement – or competition rules.[74]

Finally, in *Spain v. Council*, the CJEU clarified that the distinction between existence and exercise was only applicable in cases of negative harmonization.[75]

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

The relationship between Article 345 TFEU and the issue of ownership unbundling characterized a series of Commission's decisions in the energy market where structural divestiture remedy has been imposed under the provisions of Article 9 of Regulation 1/2003. This divestiture refers to transmission networks[76] and to generation capacity[77] and represent the Commission's preferred option to resolve problems in the energy sector with regard to vertically integrated firms.[78] As a matter of fact, the Commission proposed full ownership unbundling meaning "[t]*he complete separation of ownership of generation assets from ownership of transmission assets and the separation of all network functions from the other activities of the energy supply undertaking, as the best possible solution, which would also lead to the dissolution of big 'national champions'*".[79] This slightly differs from the Third Energy Package[80] because in the Third Energy Package, ownership unbundling is considered one of the 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 constitute a legal obstacle against ownership unbundling.

As we already saw, Article 345 TFEU does not allow Member States to regulate against EU fundamental principles. On the other hand, this provision means that EU can intervene on property

rights to achieve fundamental EU policies. Obviously, the improvement of competition in the energy market falls within EU goals. Therefore, it can easily justify legislative measures that affect property rights. What it can be problematic is the way in which ownership unbundling can be enforced, especially with regard to public undertakings. Will it be necessary for them to privatize their assets in order to comply with the ownership unbundling provision? There is literature which affirms that "[i]*t would be enough to apply measures that guarantee effective separation*"[81] between transmission/distribution networks and production/supply of energy.

Moreover, although in principle there should be no discrimination issue since – according to the Third Energy Package – both public and private undertakings can enforce 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 for a preliminary ruling on the conformity with EU law of the Dutch Unbundling Act in the energy sector. The case arose in 2007, when the energy companies Eneco, Essent and DELTA initiated a legal proceeding against the Dutch State. After the dismissal of the Dutch Court of first instance (in 2009), the energy companies appealed to the Dutch Court of Appeal, which set aside the ruling in first instance. As a matter of fact, by its decision of 22 June 2010 the Court of Appeal established that the unbundling regulation violated the principle of free movement of capital and therefore it was non-binding. Consequently, the Dutch State instituted cassation proceedings before the Dutch Supreme Court.

To better understand the necessity of a preliminary ruling, we shall analyze how the EU Directives known as Third Energy Package have been implemented by the Dutch legislator.

The Dutch Unbundling Act requires all integrated Dutch energy companies to unbundle their operations into a network company on the one hand and a production, trade and distribution company on the other ultimately before 1 January 2011. Although it is part of the liberalization of the energy market initiated by the European Commission, it goes far beyond the requirements laid down in the aforementioned Directives. First, the Unbundling Act introduce the so-called "group prohibition", which prohibits network managers to be part of a group of companies that produces, supplies or trades in gas or electricity.

In addition, the Unbundling Act requires that groups that include a network company, are prohibited to engage in any additional activity not related to the infrastructure of the network that may conflict with the interest of the management of the networks concerned (the so-called "prohibition of sidelines").

Finally, the Dutch legislator introduce the necessity of the permission of the minister of economic affairs to transfer shares in a network manager (the so-called "prohibition of privatization"). Pursuant to a Governmental Decision adopted in 2008 it has been established that permission will always be refused when a transfer will result in shares being held by the parties outside a well-defined "governmental sphere".[82] This include Essent, Eneco and DELTA (the shares of which are held, directly or indirectly, by the central government, provinces or municipalities).

As opposed to the Court of Appeal, the Supreme Court considers the prohibition of privatization as absolute. Indeed, the permission of the minister of economic affairs to allow privatization cannot change the absolute nature of the prohibition. Moreover, the fact that legal persons such as Essent and Eneco can hold shares in network managers do not lead to a different conclusion, since we are still in the context of the so-called "governmental sphere".

Furthermore, the Supreme Court also dismisses the Court of Appeal's position on the analogy to the golden share constructions. Indeed, the Court of Appeal draw its argument from the fact that "also in

this case the situation arises that the government, without being impeded by the law to do so in any way, can decide if, and which, 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 because in the latter companies had been privatized whereby the government held special rights of control, whereas the present prohibition constitutes a statutory rule to prevent privatization.[84]

Therefore, the Supreme Court asks to the CJEU several questions and, in particular, if the prohibition of privatization can be considered as a rule governing the system of property ownership as meant in Article 345 TFEU and if this mean that the Treaty provisions on the freedom of capital are not applicable to the group prohibition as well as to the prohibition of sidelines.[85]

Pending the preliminary ruling of the CJEU, the Supreme Court seems to be of the opinion the prohibition of privatization constitutes a regulation of ownership under 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 to see how the Court of Justice will solve this intricate case.

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

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. Its ambiguity could have been positively exploited by the CJEU, performing its role of interpreter of the Treaties. However, from the analysis of the CJEU's jurisprudence carried out so far, it is evident that the CJEU used only occasionally Article 345 TFEU and, normally, it gave an extremely narrow and prudent interpretation of it. In different cases, the CJEU underlines that Article 345 TFEU contains the "principle of neutrality", under which the Treaty is neutral as to "[w]*hether the Member State or one of its organs, or private individuals own the shares in such a company*".[86]

It has been inferred that the Treaties' provisions are not applicable to nationalizations of companies in the Member States. From an historical point of view, this provision was already included in the Treaty of Rome because of the great trend of nationalization in France and in Italy in the latest fifties, whereas in Germany there was the opposite trend due to the memories of Nazism.[87] However, since *Fearon*, the CJEU had the opportunity to affirm that the principle of movement (in all its different declinations) remain applicable with regard to the exercise, by the Member States, of their competence to nationalize.[88]

Therefore, it seems that the distinction, drawn by the Court in the intellectual property cases, between existence and exercise, is applicable also in this field: the Treaty is neutral to the existence, *i.e.* the question of nationalization itself, but does interfere in the way in which the nationalization takes place, especially because the nationalization must be in conformity with the principle of free movement and, obviously, with competition rules.[89]

In addition, this was confirmed by the so-called "golden shares" case law, in which the CJEU clarified, once and for all, that Art. 345 TFEU does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty. On this point, it has been argued that, "[i]*f golden shares are compatible with this provision only in certain conditions, this must be the case even more so for nationalizations*".[90]

Since European law does not apply to the decision to nationalize or not an undertaking, the same "principle of neutrality" contained in Article 345 TFEU seems to be setting 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 harmonization of private law and, therefore, the development of a European property law. From what has been said on the meaning and the interpretation of Article 345 TFEU it is pretty clear that there is no reason to support such a statement. As a matter of fact, the CJEU seems to emphasize that 345 TFEU does not prevent internal market law from having an influence on the right of ownership.[91] Indeed, Article 345 TFEU merely recognizes the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of EU law on the exercise of national property rights.[92] Therefore, there would be no obstacle for the EU institutions to adopt secondary legislation in the field of property.[93]

Since there are some projects of harmonization at EU level of property law (with the European Civil Code)[94] it is going to be interesting to see how and if they will be 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 coverage which either rests directly on EU authority or on largely harmonized national law or on both*".[95] In this field, the CJEU played a crucial role in interpreting and balancing the "competition rules" and the "market rules". In this respect, the 'existence' and 'exercise' dichotomy, drawn by the Court, has been extremely controversial: indeed, it has been either harshly criticized either fully supported.

Moreover, it has been argued that the further distinction between positive and negative harmonization, provided by the Court in *Spain v. Council*, cannot be deduced from the wording of Article 345 TFEU itself and that, therefore, the CJEU should have provided some kind of argumentation to support it.[96]

At the same time, this distinction has been justified since the Court had to respond to a wrong interpretation of Article 345 TFEU by the Member States, which were trying to use it as a possible justification of their national legislation concerning intellectual property rights. To do so, it had to create a doctrine, which seems to be inspired to Article 36 TFEU. On this point, it has been stated that, since "[A]*rticle 36 TFEU safeguards the existence of intellectual property rights unless the exercise of those rights constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States, interpreting Article 345 TFEU to only apply to the exercise of 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 that it seems to representthe necessary application of the provisions of the Treaty.[98] Indeed, Article 345 TFEU has been interpreted as a shield only for the existence of those rights. Since any existing rights is completely useless if it cannot be exercised, the CJEU had to assess to what extent that exercise can be allowed, "[w]*hile preserving the freedom of movement of goods between Member States, including the freedom of parallel imports*".[99] Therefore, it has been pointed out that the distinction that came out from its case law it is not a creation of the CJEU, but it is part of the framework of the Treaty provisions.[100]

Thus, even if the jurisprudence of the CJEU is pretty clear and consistent in excluding Article 345 TFEU as a possible justification for an infringement of the principle of free movement of goods in the field of intellectual property, there are still some open questions, especially on the aforementioned

dichotomy. One of this question, and perhaps the most crucial for the purpose of this work, is whether the existence *versus* exercise dichotomy can be applied outside the field of intellectual property law. In this respect, we do not have case law which explicitly addresses this issue, and, since the dichotomy has remained unmentioned by the Court, we still do not know if the CJEU would in the future expand this doctrine to ensure a broad scope of protection to the principle of free movement.

4. Conclusion

Is it possible to consider Article 345 TFEU as a limitation to the principle of free movement? From the analysis of the CJEU jurisprudence carried out so far, the answer should be negative. As a matter of fact, the Court has always rejected the argument, often provided by the Member States, that Article 345 TFEU could be interpreted as an exemption to the rules on free movement.

There are two interrelated questions arising from Article 345 TFEU: (i) how far the competence of the Member States goes, before national legislation infringes EU law; and (ii) how far the competence of the European Union goes, before it encroaches upon the competence of the Member States[101].

This is clearly shown in the "golden shares" cases, where the theme of the *ex-ante* illegitimacy of special powers held by the State in privatized companies or of their *ex post* compatibility with EU law is deeply related to the relationship between the public and private action in the economy (*i.e.* the erosion of the so-called "public/private divide").

Indeed, this issue is nowadays particularly relevant since in 2012 the Italian government issued the so-called "new golden share rules",[102] which significantly amend the original provisions laid down in Law-Decree No 332/1994. After more than a decade since the first CJEU's judgment against Italy, this new Law-Decree No 21/2012 seems to finally address the golden shares issue by establishing a notion of "strategic assets" which are subject to golden shares as well as by introducing a "fit and proper'" test for potential investors who seek participation in control of strategic companies.[103] It applies to Italian companies which are active in the fields of (i) defense and national security, or (ii)energy, transport and communications.

Since the Commission is currently analyzing these new provisions and the Italian Government has again postponed[104] the examination and the adoption of the National Decrees which would further establish the conditions for the applications of golden shares, we have to wait to see whether the EU institutions will green-light the golden shares or consider them incompatible with EU Law, once again.

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[6] Bram Akkermans and Eveline Ramaekers, *op. cit.*, p. 303, which refers to Advocate General Colomer's opinion to Cases C-367/98, C-483/99 and C-503/99, [2002] ECR I-4731, at para 54.

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[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.

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[29] Indeed, the CJEU in this case affirmed that Article 49 TFEU "[d]*oes not prohibit a Member State from* making *exemption from compulsory acquisition measures adopted under legislation governing the ownership of rural land subject to a requirement that nationals of other Member States who have taken part in the formation of a land-owning company reside on or near the land, if that residence requirement also applies to nationals of that Member State and if the powers of compulsory acquisition are not exercised in discriminatory manner*" (emphasis added). See, CJEU, *Robert Fearon*, C-182/83, 1984, § 11.

[30] See, CJEU, *Union Royale Belge des Societes de Footbal Association (ASBL) v. Bosman*, C-415/93, 1995, § 104; *Graf v. Filzmoser Maschinenbau GmbH*, 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-503/04, 2007.

[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 and direct investments. See on this point, Catherine Barnard, *op. cit.*, 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 of establishment) and art. 63 (free movement of capital). Normally, the CJEU has interpreted the "golden shares" as a possible violation of art. 63 TFEU, therefore the infringement of art. 49 TFEU could be invoked only indirectly and as a consequence of the first violation. Cfr., with regard to this issue, Sara De Vido, *La recente giurisprudenza comunitaria in materia di golden shares: violazione delle norme sulla libera circolazione dei capitali o sul diritto di stabilimento?*, in *Dir. comm. internaz.*, 2007, 04, p. 861.

[42] Cfr. Giovanni Patti, *I diritti dello Stato tra libera circolazione dei capitali, golden shares e regole di diritto societario*, in *Europa e dir. priv.*, 2011, 02, p. 525.

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[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 the obvious, namely that the Treaty does not affect the structure of 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 property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatized undertaking, to the*

exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case law, that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty". See, CJEU, *Portuguese Republic*, C-367/98, 2002, § 48; *French Republic*, C-483/99, 2002, § 44;. *Kingdom of Belgium*, C-503/99, 2002, § 44.

[59] On this point, see, *inter alia*, S.M. Carbone, *Golden share e fondi sorani: lo Stato nelle imprese tra liberà comunitarie e diritto statale*, in *Dir. comm. Internaz*, 2009, p. 2; P. Manzini, *Note sulle "relazioni pericolose" tra Stato e imprese nel quadro del diritto comunitario*, in *Il Diritto dell'Unione europea*, 2002, n. 3.

[60] See S.M. Carbone, *op. cit.*, p. 1; G.C. Spattini, *"Vere" e "false" "Goldenshare" nella giurisprudenza comunitaria. La "deriva sostanzialista" della Corte di Giustizia, ovvero il "formalismo" del principio della "natura della cosa": il caso Volkswagen, e altro...*, in *Riv. it. dir. pubbl. com.*, 2008, p. 303 onwards.

[61] G. Patti, *I diritti speciali dello Stato tra lbera circolazione dei capitali, golden shares e regole di diritto societario*, *op. cit.*, p. 3.

[62] D. Gallo, *Le* golden shares *e la trasformazione del* public/private divide*: criticità, sviluppi e prospettive del diritto dell'Unione europea tra mercato interno e investimenti extra-UE*, in S. M. CARBONE (a cura di), *L'Europa a vent'anni da Maastricht: verso nuove regole. Atti del XVII Convegno annuale della Società Italiana di 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 30*, in *EC Competition Law*, 5th edition, Oxford EC Law Library, p. 1, available at http://www.oup.com/uk/orc/bin/9780199232307/resources/additional/goyder5e_ip_rights.pdf (consulted on 01.04.2012).

[66] Irena Tusek, *Finding the Balance between Market Freedoms and Fundamental Rights: EU Competition Law Policy v Intellectual Property Rights – Pas Si Simple!*, p. 2, available at http://www.pravo.unizg.hr/_download/repository/Irena_Tusek.pdf (consulted on 01.04.2012).

[67] CJEU, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*, Joined cases 56 and 58/64, 1966.

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

[69] Christopher Stothers, *Parallel trade in Europe: intellectual property, competition and regulatory law*, Hart Publishing, 2007, p. 28.

[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 April 1966, p. 366.

[72] CJEU, *Parke, Davis and Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm*, C-24/67, 1968.

[73] CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, C-78/70, 1971, § 11. In *Commission v. Italy* the Court had the chance to better specify that "[i]*n particular Article 222 according to which the Treaty in no way prejudices the rules in Member States governing the system of property ownership, cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the common market as provided for and regulated by the Treaty*". See CJEU, *Commission of the European Communities v Italian Republic*, C-235/89, 1992, § 14. This was, then, confirmed in *Commission v. UK*: see CJEU, *Commission of the European Communities v United 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: "[f]*ar from endorsing the argument that rules concerning the very existence of industrial property rights fall within the sole jurisdiction of the national legislature, the Court was anticipating the unification of patent provisions or harmonization of the relevant national legislation* […] *Neither Article 222 nor Article 36 of the Treaty reserves a power to regulate substantive patent law to the national legislature, to the exclusion of any Community action in the matter* […] *Moreover, the Court confirmed in Opinion 1/94 that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for 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 Market, 2009.

[78] See, M. Diathesopoulos, *Ownership Unbundling in European Energy Market & Legal Problems under EU Law*, 2011, availbale at

http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=michael_diathesopoulos (as consulted on 31.03.2013).

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

[80] See, European Parliament, Directive 2009/72/EC, July 13, 2009, OJ L211/55 and Directive 2009/73/EC, July 13, 2009, OJ L211/94.

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

[82] See W. Loof, *On the consequences of art. 345 TFEU for ownership unbundling of Dutch Energy networks*, 2012, p. 331, available at http://www.degruyter.com/view/j/eplj-2012-1-issue-2/eplj-2012-0014/eplj-2012-0014.xml (as consulted on 31.03.2013).

[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 Constitutional Affairs, *op. cit.*, p. 45.

[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 Private Law, n. 5, 2011, Kluwer Law International, p. 592.

[94] Hugh Collins, *THE EUROPEAN CIVIL CODE: THE WAY FORWARD*, Cambridge University Press, Cambridge, 2008.

[95] Paul Demaret, Inge Govaere, Domink Hanf, *European Legal Dynamics*, Peter Lang, 2007, p. 206.

[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 Constitutional Affairs, *op. cit.*, p. 44.

[102] See Law-Decree No. 21 of March 15, 2012, as amended and ratified by Law No. 56 of May 11, 2012.

[103] J. Ganza, *Italian Golden Shares – a Never-Ending Story?*, 2013, p. 3 available at http://kslr.org.uk/blogs/europeanlaw/2013/01/15/italian-golden-shares-a-never-ending-story/ (as consulted on 01.04.2013).

[104] E. Marro, *Golden share, la storia infinita*, in *Corriere della Sera*, March 28, 2013, available at http://archiviostorico.corriere.it/2013/marzo/28/Golden_share_storia_infinita_co_0_20130328_7b8bb960-97b3-11e2-87a8-8ca181533455.shtml (as consulted on 01.04.2013).