PRIVATIZATIONS, CONTROL DEVICES AND GOLDEN SHARE.
THE HARMONIZING INTERVENTION OF
THE EUROPEAN COURT OF JUSTICE

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The privatization processes showed up as a general tendency about twenty years ago. They have involved not only Italy, but also many other countries within the EU (mostly France and the UK), with different legal implications. Privatizations also involve a dynamic aspect: they are not successful unless the new by-laws of the firm allow regaining competitiveness. Market globalization has a direct impact on national laws as it increases competition amongst jurisdictions. The impact results in the awareness that investments shall be accomplished where there are lower requirements to comply with. Yet many aspects of such bylaw changes are complex, as it seems an absurdity to immediately and completely align the governance of privatized corporations to the governance of firms that have always been private. Transitory measures are necessary in order to allow the State to control the sale of shares and to maintain a voice within the controlling and managing boards. Hence, they have experienced the introduction of several tools shaped on the needs of the State to protect fundamental interests of the national community: the "action spécifique" in France, the golden share in UK, and in Italy, the "poteri speciali". Before such complex situations arise, the Author points out that it is useful to develop a comparative analysis of the tools of concentration and control that share the same functions. It is clear how different levels of restraint come up and why it is important to establish if such devices of concentration and control comply with the EC law, especially under the several decisions recently (since 2000) issued on these subjects by the ECJ. The author, in particular, shows the path of harmonization along which the Court of Justice has been moving and the effects that its decisions have had on both the Italian and the other European countries legislation. The paper ends up suggesting, in accordance with the most recent ECJ case law, a so-called «virtuous golden share», to be justified in light of the necessity of special powers as essential tools to ensure the so called "public mission". Therefore, it is the EC competition law which has to be subjected to the law of "public services", and not vice versa.

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I. LEGAL-HISTORICAL BACKGROUND

«*I have never known much good done by those who affected to trade for the public interest*». These words were used in 1776 by Adam Smith in his "*The Wealth of Nations*".

It is clear that in this historical phase many transformations have occurred, and are still ongoing, with regard to the economy – and the rules applicable to it – as well as to the evolution of the relationship between private property and public regulations.

The need for protection of certain fundamental interests of general relevance within each individual jurisdiction has always been a matter of great importance not only from a theoretical point of view, but also, and especially, from the perspective of its actual implementation at the regulatory level and enforcement at a judicial level.

Such need, in fact, has characterized the historical evolution of the legal systems of the most advanced jurisdictions: they were indeed conscious of the opportunity of the presence, direct or indirect, of the State in respect of the protection of the most fundamental public interests.

The process towards privatization emerged as general trend around twenty years ago within the EU market, affecting, among the others, Italy, France and the United Kingdom, although with different degrees and extents.

The ways through which such privatization has been accomplished differ among countries but the most important to our purposes is what I term «*substantive privatizatio*n», by which the shareholding – of companies operating in sectors of general interest – shifted from a public owner to a private one (i.e. from the State to the individuals, or other companies).

The «state ownership» could be viewed, therefore, as an indispensable precondition for the State to deploy its power of control.

State participation into the companies' shareholding was a common practice in most of the European economies, at least until the 1980s. «Nationalization» of companies has indeed had a long tradition in Europe. After World War II, important sectors of the economy were nationalized throughout Western Europe[1], in part as a consequence of the so called «*denazification*».[2]

Another wave of nationalizations, begun in Europe during the 1970s, was aimed at rescuing companies and industrial branches financially distressed.

Other nationalizations occurred, however, due to political reasons: for example in Portugal, as a consequence of the 1974 revolution, or in France, where

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1 Think, *ex multis*, to certain legislative measures related to the nationalizations in UK: *Bank of England Act 1946, Coal Industry Nationalisation Act 1946, Civil aviation Act 1946, Transport Act 1946, Electricity Act 1947, Gas Act 1948* e *Iron and Steel Act 1949*. See, for more details, Prosser, T. *Nationalised Industries and Public Control*. Blackwell Publishers, 1986: 22 ff.

2 The expression belongs to Grundmann, S. and F. Moslein. "Golden Shares – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects". *European Banking & Financial Law Journal 4* (EUREDIA). (2001-2): 5. For a more detailed framework, see Parker, D. *Privatisation in the European Union*. Parker (Ed.), 1998: 10, the scholar quotes, *ex multis*, the French example of Renault as well as a great number of Austrian companies.

the Socialist government nationalized 13 out of the 20 biggest French companies between 1981 and 1982.

There are two organizational models that appear to have been predominant: *a*) government-owned entities; *b*) private corporations whose shares were held by the state.

The first model does not necessarily exclude entrepreneurial freedom, as it has been demonstrated by the case of the UK, where the State's influence was restrained to board decision in certain matters considered – according to the Ministry – of national interests; such power though was used sparingly. On the other hand, France, Italy and Germany preferred the second model, which allowed a partial control from the State (mixed firms) and could, if the shares were held in a parent company, ensure a control notwithstanding the little percentage of shareholding. In addition, this model did not require specific legislative measures. The control exercised by the State, however, went often beyond the powers granted to it in its capacity of shareholder: in fact, it usually entailed the right to appoint one or more directors (even though it was a minority shareholder); the power to define the long-term strategy of the company (so called "*piani di programmazione aziendale*" - PPA).

The origins of State control of private companies, therefore, can be traced back to the privatization of those companies that used to belong to the state itself (so called "enti pubblici economici", "aziende autonome statali", "enti di gestione delle partecipazioni statali"). To be sure, even though the ownership rights relative to the assets were transferred, the State nevertheless kept a certain degree of control.

Privatization, in the sense of transferring the control of the firm from a public subject to a private one, represents a peculiar way of allocation of the ownership that affects in turn the extent and purpose of control.

The common starting point of this rethinking is the State involvement in the economy, evidently considered overly broad.

Recent scholarship has been focusing for twenty years on the interaction between private property and State presence in the economy.

This renewed interest has been fueled by the realization in many industrialized countries of major institutional reforms aimed at reducing the area of public sector involvement in the strategic economic system.

The wide program of privatization falls within this framework. In particular, the program was initiated during the 1980s in the UK and followed in many European countries among which, *inter alia*, France and, more recently, Germany, Sweden, Denmark, Spain, Portugal, Belgium and some Eastern European countries (the first of them being Albania).

Since the middle of the 1980s, the privatization process has been extended to public utilities , such as water, gas, telecommunication and electricity. These sectors are traditionally characterized by a strong regulatory approach, which, in Europe, has historically taken the form of State ownership of the firm.

Europe has therefore witnessed a growing decline of public intervention in the economy, following a trend contrary to the one that had led to the nationalization of the majority of the industrial sectors in the past.

Regardless of the ideological affiliation, in fact, it is increasingly felt by the nations the need to reshape the role of the state in the economy, not only for a redefinition of the boundary between public and private, but also for the identification of an innovative architecture of the market through the transformation of the objectives assigned to companies.

Privatizations are thus a key element of this new policy, which basically identify a private approach of the State to the economy.

The legal consequences of the privatizations, however, are not easy to determine.

Privatizations also involve a dynamic aspect: they fail unless the new by-laws do not allow the company to regain its competitiveness.

Market globalization has a direct impact on national regulation as it increases competition amongst jurisdictions, because investments shall be made where there are lower legal requirements to comply with. In addition, the tendency to homogenization is, of course, accentuated due to the direct influence of belonging to the European Union.

Increased competition and compliance with EC laws have opened the way to a massive privatization that implies a shift from a mixed economy system (where the State owns wide sectors of firms, including those pursuing general interests) to a privatized economy (where the State only regulates privately owned firms).

In some respects, a shift from the public to private sector may seem trivial the privatized corporation, indeed, maintains its legal personality.

Many aspects of this change of status, however, are complex since it appears to be hard to immediately and fully align the governance system of privatized companies with that of firms which have always had a private character. Transitional measures are thus required in order to allow the State to control the transfer of shares or maintain its representation on boards of directors as well as to protect fundamental interests of the national community.

Among these measures one can list: the "*action spécifique*" in France, the "*golden share*" in UK, and the "*poteri speciali*" in Italy.

A comparative analysis of the various instruments of control that have similar functions is very useful in order to show the different degrees of restriction that have been held compatible with the EU law, in light of various recent judgments of the European Court of Justice.

In this framework, it has been noted how the pressure exerted by the EC Commission has influenced the evolution of the Italian legislation on the "*poteri speciali*".

In particular, the evaluations expressed by the ECJ allowed the Italian legislature to identify an ideal *model* to be referred to for the adoption of a new law on the matter.

Hence, the new Italian regulation of the "*poteri speciali*" was introduced by art. 4, paragraph 227-231, Law no. 350 of 24 December 2003. The article justifies the exertion of the "*poteri speciali*" exclusively for «vital interests» of the State and for «urgent exigencies of public interests».

Such justification, however, is currently under strict scrutiny especially after the ECJ has negatively judged art. 2449 of the Italian Civil Code (Decision of 6 December 2007) and has again rejected the «criteria of the exertion of certain "*poteri speciali*"» held by the State in privatized corporations (Decision of 26 March 2009).

II. CONTROL AND CONCENTRATION DEVICES IN EC LAW

According to Italian law, the "*poteri speciali*" conferred to the Minister of Finance after the privatization of public firms, allowing him to play an important role in the board of certain companies which operate in the sector of public utilities.

The "*poteri speciali*", the "*golden share*" and the "*action spécifique*", have all been questioned not only in relation to their compatibility with corporate law but also with the EC law principles, especially those concerning the free movement of capitals and right of establishment (rather than those concerning free competition).[3]

The privatizations may increase the firms' efficiency to the extent of which their exposure to takeovers allows the market forces to exert an external control on the firm's performance and on management. Sometimes, when the minority shareholder (i.e. the State) is given too much power, the market mechanisms are not able to fully operate. This is the case of "golden shares", which «*shake the watersof corporate legal literature*».[4]

In a series of recent decisions, the ECJ has dealt with the problem of compatibility with the EC law of national legislations that grant the Government certain powers of intervention in the management of privatized firms in strategic sectors of the economy.[5]

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[3] Rossi , G. "Privatizzazioni e diritto societario". *Rivista delle Società* (1994): 391, defines the *poteri speciali* as "*a wild and an unusual application of the golden share*"; Libonati, B. "La faticosa «accelerazione» delle privatizzazioni". *Giurisprudenza commerciale I* (1995): 70, discussing the relationship with the market, given the important number of obstacles that characterize the competition, the natural financial and company dynamic, underscores how "*it seems that the market works even if it is not accepted*"; Carreau, D. and R. Treuhold. "Privatisations, droit boursier et pratiques des marchés". *Revue des societies* (1994): 5, believe to assist at a "*premature announce of Colbert death*" for "*the Colbertist inspiration is very visible*".

[4] The expression, although employed in another discussion, has been drawn from Asquini, A. "I battelli del Reno". *Rivista delle Società* (1959): 617.

[5] Although the topic is relatively recent, it has attracted the interest of many scholars. As concerns the Italian legal literature see, *ex multis*, Ballarino, T. and L. Bellodi. "La golden share nel diritto

Prior to analyzing such decisions, it is fundamental to start from the Communication issued by the Commission dealing with some legal aspects related to the intra-EU investments (97/C 220/06).[6]

In this Communication, the Commission, after tracing the regulatory framework relating to the key provisions of the Community Treaty on freedom of movement of capital and the right of establishment, noted that the examination of various laws and regulations in some Member States leads to the following distinction:

a. discriminatory provisions, that is, applicable exclusively to the investors who are citizens of another Member State; and
b. non-discriminatory provisions which apply to all citizens of Members States.

Cases *sub* a), have been deemed as apt to to restrict the freedom of make investments within the EU and, therefore, contrary to article 73B and 52 of the EC treaty, unless they fall within specific exemptions provided for (public policy, public security, public health and national defense). Such exemptions, however, must be narrowly interpreted and not based on economic evaluations, in accordance with a consolidated view of the Court of Justice.[7]

comunitario". *Rivista delle Società I* (2004): 2 ff; Salerno. L. "Golden shares, interessi pubblici e modelli societari tra diritto interno e disciplina comunitaria". *Diritto del commercio internazionale* (2002): 674 ff; Bonelli, F. *Il codice delle privatizzazioni nazionali e locali.* Milano: Giuffrè, 2001; Merusi, F. "La Corte di Giustizia condanna la golden share all'italiana e il ritardo del legislatore". *Diritto pubblico comparato europeo III* (2000): 1236 ff; Garofoli, R. "Golden shares e authorities nella transizione dalla gestione pubblica alla regolazione dei servizi pubblici". *Rivista italiana di diritto pubblico e comparato* (1998): 186 ff; Cirenei, M.T. "Le società di diritto « speciale » tra diritto comunitario delle società e diritto comunitario della concorrenza: società a partecipazione pubblica, privatizzazioni e « poteri speciali »". *Diritto del commercio internazionale* (1996): 771. As concerns foreign legal literature: Gippini Fournier, E. and J.A. Rodriguez Miguez, "Actions spécifiques dans le sociétés privatisées: le beurre ou l'argent du beurre". *Revue du droit de l'Union européenne I* (2003): 39 ff; Thirion, N."Golden shares, droit de sociétés et marché intérieur". *Cahiers de droit européen* (2003): 225 ff; Carreau, D. "Privatisations et droit communautaire: la validation conditionelle des actions spécifiques (ou golden shares)". Contratto e Impresa/Europa (2002): 1191 ff; Ruge, R."Goldene aktien und EG-Recht". *Europäische Zeitschrift für Witschaftrecht* (2002): 421 ff.

[6] Published in *GUCE*, N.C. 220/15, 19 July 1997.

[7] See, for example, *Decision* 4 May 1993, *Federacion de distribudores cinematograficos*, case C-17/92. *Raccolta* (1993): I/2239, point 16.

However, the restrictive measures which are adopted under such statutory exemptions have to comply with the principle of proportionality, also established by the ECJ case law.

This means that the restriction in question must constitute a necessary measure to ensure the protection of the objectives explicitly covered by these exceptions and that there should be no other possible measures that would achieve the same objectives less restrictive of the fundamental freedom in question.[8]

In relation to the cases of non-discriminatory measures - including 1) general authorization procedures that apply to all EU investors for the acquisition of control in a domestic company, or 2) rights granted to national authorities to veto certain decisions of the company or to appoint board members - the Communication in question, especially with regard to cases *sub b),* refers to what has been established by the ECJ.

These measures must fulfill four conditions:

- they must be applied in a non-discriminatory way;
- they have to be justified by urgent motivations of general interest;
- they have to be suitable in ensuring the accomplishment of the objective pursued;
- they do not have to go beyond what is necessary for the accomplishment of the objective.

On the basis of these fundamental principles, through peer reviews (initiatives which involve multilateral monitoring activities aimed at identifying the best national practices in the field of regulations) the Commission has analyzed different aspects of the "*poteri speciali*" or golden shares used in the Member States. It has therefore commenced – after having realized that some national regulations did not meet the EC law requirements – several infringement procedures against various Member States, including Italy.

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[8] Cfr., amongst the others, *Decision* 14 december 1995, *Sain de Lera*, cases gathered C-163/94, C-165/94 e C-250/94. *Raccolta* (1995): I-1821, point 23.

If the activities of the Commission on the subject of "poteri speciali" was undoubtedly significant especially in the last decade[9], it is equally true that the body appointed to enforce EC law - the Court of Justice - has not kept a constant approach and has allowed the adoption of provisions regarding "poteri speciali" aimed at protecting vital national interests, deeming them compatible with the fundamental freedoms guaranteed by Community Treat under certain circumstances.

According to the Communication of 1997, the EC Treaty provisions "harmed " by the golden share practice are art. 73B (now art. 56: «all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited») and art. 52 (now art. 43: «restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited»).

As of Art. 56 (free movement of capital), the Communication expressly mentions the Council Directive 88/361/EEC of 24 June 1988 (issued on the eve of liberalization of monetary exchanges)[10] in the part that contains a list of transactions that constitute movement of capital. Thus the Communication refers first to purchases of shares and bonds «made for the sole purpose of making a financial investment» (investment portfolio). Moreover, according to the Communication, «the purchase of shares in domestic companies by investors from another Member State, as well as the full exercise of the voting rights attached to those shares are considered a form of movement of capital» and therefore must be liberalized completely.

According to the classification of the Communication the «indirect investments» fall within the category of art. 43 (right of establishment). These investments are the ones aimed at obtaining the participation or the control of target corporations.

The pursuit of activities as self-employed persons as well as the incorporation and management of firms require that «the citizens of other EU Member States should have the right to acquire controlling stakes, to fully exercise the voting rights

9 See, *ex multis*, the Green Paper on Services of General Interests, 21 May 2003.
10 Published in *GUCE* no. L 178, 18 July 1988.

attached to them, and to manage domestic companies under the same conditions provided by a given member State for its own citizens».

In the first part of the Communication, the prescriptions are concerned with the cross-border aspect of the phenomena; yet in the last part («Examination of the compatibility of certain Existing Restrictions»), with reference to «provisions applicable without distinction to all the investors», the Communication provides that the following domestic measures are incompatible the EC law:

- general authorization procedures which, for example, any investor (whether citizens of the same State or of another EU Member State) who wishes to acquire a stake in a domestic company above a certain threshold has to comply with;

- the rights granted to national authorities, despite contrary provisions of company law, to veto certain major decisions to be taken by the company, as well as to impose the election of some directors as a means of exercising the right of veto, etc.

In the first situation we should distinguish two different scenarios, depending on whether the authorization impinges on the position of a domestic or European investor. Although the Communication does not seem entirely clear on the point, it should be said that the right of establishment (which protects citizens of a Member State in their moving to the territory of another Member State) does not apply to domestic investors. Indeed, the opening words of the provision refers to "measures applicable without distinction to all traders and investors." Therefore, the above-mentioned procedures are illegal under EC law, regardless of who is the subject affected and where he is (provided that, in accordance with the general limit of art. 43, this place is located in a member State). As to the content of the provision, however, it must be conceded that a citizen of another Member State has the right to acquire a controlling stake and, in turn, to fully exercise the right to vote the purchased shares entail, and manage the undertaking established in the first Member State. These rights, in fact, are nothing but a mere form of exercise of the right of establishment.

The second situation (right to veto, appointment of the directors) is easier to explain, as it is not concerned with commercial transactions, but rather with the so called "*interna corporis*" of the company. These have nothing to do with the personal qualities of the person who acquires control: the European freedoms apply without distinction to all the investors.

In any case, the restrictions created under the laws of the Member States can survive, under article 45, if the activities expected to be benefited by the right of establishment are involved in "even occasionally" in the exercise of public powers. In addition, the general procedures for authorization can be compatible with EC law if they are justified by imperative requirements in the general interest and meet objective criteria, so as to minimize the discretion of the national authorities.[11]

Other EC rules which may be harmed by the golden share may be found in company law directives.

The second directive (77/91/CEE approved by the Council of Ministers 13 December 1976) at art. 29, paragraph 1, establishes that national laws may permit «where the subscribed capital of a company having several classes of shares carrying different rights with regard to voting, or participation in distributions within the meaning of Article 15 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the right of pre-emption of shareholders of the other classes to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued».

The third directive (78/855/CEE approved by the Council of Ministers the 9 October 1978) and the sixth directive (82/891/CEE approved by the Council of Ministers the 17 December 1982) provide that the decision concerning the merger or split-up of the company requires the approval of a majority of two-thirds of voting shares represented in the general meeting.

[11] The applicability of such requirements and, therefore, of the unlawfulness of the measures of authorization that could restrain the right of establishment, has been evoked by the European Court of Justice in the recent Decision 15, January, 2002, Commission v. Italy, case C-439/99. *Raccolta* (2002): I-305, concerning the trade show activity. The Commission claimed the violation of the right of establishment and of free provision of services from a number of national and regional provisions on trade shows, expositions, shows and markets. In particular, the norms that subordinate the activity of organizing trade shows to the "intervention of public authorities or of local administrations of different nature, into the, total or partial, designation of the organs of show trade entities such the board of directors, the executive committee, the auditors" and to the "intervention, even only consultative, of organs that are already present in the concerned territory for the acknowledgment or the authorization to the organizer", were considered as breaking of both the free provision of services and of the right of establishment. The Court has accepted the Commission point of view.

It is clear that the authorization and the veto power granted to the State do not reflect the spirit of the abovementioned provisions and, in more general terms, negatively affect the principle according to which the power of control belongs to the shareholders. At the same time, these provisions do not comply with the principle of proportionality and correlation between investment and control.

In the proceeding initiated against the Member States, the Commission did not claim the violation of such provisions. Indeed, in that period, the directives had been correctly implemented: the behavior that has been deemed as unlawful from a European point of view, occurred later and it has not led to the abrogation of the rules of implementation.

III. EUROPEAN COURT OF JUSTICE'S HARMONIZATION

As already mentioned, the most significant evolution in the field of the golden share is represented by the decisions that the ECJ had adopted since May 2000. In a series of seven cases of infringement the Court has, indeed, dealt with – through an accurate *uniforming* intervention – the relationship between the European legislation and the "*poteri speciali*".

In reference to the "Italian case", the regulation of the "*poteri speciali*", which was adopted by the Italian legislature with the Decree no. 332 of 31 May 1994, converted into Law no. 474 of 30 July 1994, did not initially met the consent of the European authorities.

In fact, a specific proceeding was initiated by the Commission (19 February 2009). The proceeding aimed at emphasizing that the Republic of Italy, by adopting articles 1 n. 5 and article 2 of the above mentioned decree, as well as the decrees which implemented the "*poteri speciali*" in case of the privatizations of Eni and Telecom S.p.A., did not comply with the European requirements envisaged by art. 43, 49 and 56 of the Treaty.[12] For this reason, Italy was first sentenced by the ECJ

[12] Art. 43 (ex article 52): "*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take*

for breach of the mentioned obligations on the 23rd of May 2000, case C-58/99, Commission v. Italy.[13]

In particular, it has been pointed out that: «*With regard to the special powers conferred on the Treasury Ministry under article 2 of the consolidated legislation, the Commission essentially argues that powers of that kind, which are liable to hinder or render less attractive the exercise of the fundamental freedoms guaranteed by the Treaty, must satisfy four conditions: they must apply in a non-discriminatory manner, be justified by overriding considerations in the general interest, be appropriate for ensuring that the objective which they pursue is achieved and not go beyond what is necessary in order to achieve that objective. Since there is no indication whatever that those conditions are satisfied in the present case and the special powers thus confer on the Italian authorities a potential to discriminate which may be used in an arbitrary manner, the Commission considers that those special powers are incompatible with Articles 52 and 73b of the Treaty*».[14]

The Court has fully shared such approach of the Commission and, as already mentioned, it has deemed Italy as violating the mentioned articles of the Treaty.

This decision is certainly an important point in the analysis of Italian legislation on privatization and especially of the "*poteri speciali*". As a result, the national legislature is expressly barred from producing new rules with the same content and domestic judges shall be allowed to consider these rules as inapplicable to concrete cases.[15]

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up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital"; Art. 49 (ex article 59): "*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community*"; Art. 56 (ex article 73B): "*Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited*".

[13] For this decision, see *Raccolta* (2000): I-3811.

[14] Decision 23 May 2000, point 13.

[15] In relation to such Court decision, it is necessary to underscore that, within a context where the competition and the equal treatment of the economic operators represent the rule and where their restrictions represent the exception to be justified case by case, the privatizations, instead of facilitating a new closedown of the market and discriminations based on the nationality of the

With this decision, the Court has not held that the "golden share" is per se illegal. Though it has expressed its own concerns only with regard to the ways in which this device is used, suggesting that the adoption of the golden share must be based on transparent and objective criteria. Moreover, he reference to the concept of «national interests», seen as a limit to foreign investments, is not outright lawful. Therefore, in the relevant cases, the concept of «national interests» must not be employed as a discretionary, non-transparent criterion, capable of unjustifiable discrimination against foreign investors.[16]

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investors, should represent the device through which they would favor the investments on an European dimension and to move definitely the States away from the direct or indirect intromission into the national economies.

[16] Yet, it is necessary to underscore that the Court, whilst completely sharing the Commission view, has not probably considered (out of consideration of the peculiar incisiveness of the Italian "*poteri speciali*" as originally established by the law no. 474/94) certain elements that could lead to conclusions in part different from those effectively taken. In particular, it does not seem that the Court considered those powers also from a "inward" point of view, not only in comparison with the EC law: in other words, assumed that the principle of non-discrimination quoted in the decision has to be considered as fundamental, maybe it would have been more profitable to face it by taking into account that the protection of the vital interests referred by the norms, had to be considered also as protection of the essential national interest tout court, without any reference to the profiles of nationality belonging to the possible subjects hypothetically damaged by said measures. In practice, the Court could extend – as it did in 2002 concerning the Belgian "*poteri speciali*" – its own evaluation on the point also taking into account another provision of the Treaty, such as the norm established by art. 86 (ex art. 90), paragraph 2 («*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community*»). On one side, this hypothesis represents in fact and undoubtedly a factual situation which involves companies charged with providing services of general economic interests and which, however, is related to a possible derogation of the EC norms that apply to not hinder – even on a factual dimension – the mission conferred to such legal entities. On the other side, as concerns the profiles which involve the absence of references to the concept of "imperative reasons of general interests" within the legislation, the Court has simply analyzed the black letter of the norm. Such an approach could effectively give rooms to substantial unlimited interpretations in relation to the margins of applicability of the "*poteri speciali*" – this interpretation was possible before the Decree of the President of the Council of Ministers (D.P.C.M.) 11 February 2000 came into force – for it was not envisaged any form of restrain (except for implicit ways) of said application before situations that were not so important or relevant for the vital interests of the State. It is true, the clarifying intervention of the Italian legislator through the D.P.C.M of 2000 (which has correctly précised that the "*poteri speciali*" must be exerted within the respect of the principle of proportionality and non-discrimination and which has also added the possibility to deny the approval for the acquisitions that are not in compliance with the choice of privatization of the company, as long as that is imposed by the exigency to protect the vital interests of the State) has not been taken into account by the Court. The Court has in fact condemned Italy considering that, according to an established case law, the existence of the fulfillment of Member States obligations has to be evaluated in relation to the Member State situation that occurred at the deadline established in the reasoned Opinion (in this case

The judgment of May 2000 represented the first ring of a chain of similar decisions adopted by the ECJ.

In particular:

- *Decision 4 June 2002, case C-367/98, Commission v. Portugal*;
- *Decision 4 June 2002, case C-483/99, Commission v. France*;
- *Decision 4 June 2002, case C-503/99, Commission v. Belgium*;
- *Decision 23 May 2003, case C-463/00, Commission v. Spain*;
- *Decision 23 May 2003, case C-98/01, Commission v. UK*;
- *Decision 2 June 2005, case C-174/04, Commission v. Italy*;
- *Decision 23 October 2007, case C-112/05, Commission v. Germany*;
- *Decision 6 December 2007, cases C-463/04 e C-464/04, Federconsumatori and AEM S.p.A. v. Comune di Milano*;
- *Decision 26 March 2009, causa C-326/07, Commission v. Italy.*

Very briefly, in the quoted cases, the implemented methods of protectionism are similar in the following aspects:

a) limitation of foreign shareholding in privatized firms (Portugal, Germany);
b) procedure of prior authorization for investments exceeding certain thresholds regarding voting rights (France, Portugal, Spain, Italy, UK and Germany) ;power to prohibit liquidation, merger and split-up of firms (Spain, Italy and UK);
c) power to prohibit strategic decisions, such as, for example, the sale of blocks of shares or use them as collateral (France, Spain, UK);
d) power to prohibit decisions concerning the transfer of technical equipment and installations for the transport of energetic products as well as other decisions related to the former if they were deemed

the provided deadline was the 10th August 1998) and that, therefore, it is not possible to take into account the successive modifications. Hence, it could be believed that before the more relaxed approach of the Court, the decision of 2000 issued against Italy could well be characterized by other elements, thus anticipating in substance – at least in part – the new approach of such authority, that is the approach introduced in 2002 in relation to the Belgian legal order.

necessary by the Government to achieve public objectives concerning the supply of energy in the country (Belgium)

e) the power to appoint directors in the board (Belgium, France, Italy and Germany);

f) power to prohibit the by-laws amendment which may be aimed at canceling the "*poteri speciali*" (Italy, UK);

g) the suspension of voting rights, above a certain threshold, in case of shares purchased in State companies (Italy).

The Court of Justice has always ruled in favor of the Commission, except in the case against Belgium. The Court held that the national measures discussed above – either limiting the purchase of shares or prohibiting the major strategic decisions on the future of business – constitute an unlawful restriction of the free movement of capitals because they deter investors from investing in the capital of privatized enterprises. Instead, in the case against Belgium, the Court accepted the compatibility of a right of veto with Community law.

The decisions of the ECJ have confirmed the Commission's interpretation of the previous decisions of the ECJ itself. This interpretation provides that all the internal measures that are concerned with the exercise of the fundamental freedoms of the Treaty have to comply with the four conditions that have been mentioned earlier.

Hence, the Court has not prohibited the "golden share", rather it has established strict criteria for its adoption:

a. the "*poteri speciali*" can not subsidize economic *performances*;

b. the "*poteri speciali*" may be introduced only in relation to the pursuit t of general public interests; they must not be unduly restrictive; and they must comply with the rule of law and the principle of legal certainty.

A note should be made with reference to the *British Airports Authority* case, in which the Court struck down the provisions of English law which prohibited to hold more than 15% of the voting shares (similarly to the opinion of the Commission 09/07/2003 that challenges the compatibility with the EC law of the Italian provision that prevents foreign State firms to hold more than the 2% of the shares of corporations operating within the Italian market in the sector of gas and electricity – Decree no. 192 of 25 May 2001, converted into Law no. 301 of 20 July 2001).

These cases have a common feature: they are, in fact, characterized by a state intervention, usually in the form of legislation. In other words, are introduced in different ways but always by means of state initiative.

You have to wonder, at this point, if the attitude of the Court and the Commission would be different if it were eliminated this momentum state and if the limiting clause of the shareholding was not already inserted by law, but by the shareholders.

Hence, one may wonder if the Court's and Commission's approach would be different if such state initiative were eliminated and the clause establishing a threshold for the shareholding were introduced not by a statute, but by a general meeting resolution.

The answer to this question can only be positive: when the introduction of this type of clauses is not the result of the exercise of state power, but is the result of a free agreement between the members common rules on corporate governance do apply. Obviously, it is not sufficient to demonstrate that the clause capping the shareholding has not been produced by a statutory intervention: it is also necessary to show that no pressure from the public authority is involved.[17]

This conclusion may be different, however, if art. 56 of the EC Treaty would have also «horizontal» effects – i.e. between individuals - and not only «vertical» – i.e. among States.

In order to overcome the principle «one share-one vote», the State should demonstrate that the exceptions authorized by their company laws respond to «overriding public interest» and comply with the principle of proportionality.

This would lead to a greater difference between public firms under State control, such as the *Electricité de France*, which would continue to be protected by art.

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[17] On this respect see ECJ, Decision 30 January 1985, case C-290/83, *Commission v. France. Raccolta* (1985): 439.

295 of the Treaty[18], and the privatized firms which would be subject to the free movement of capitals provisions.[19][20]

Notwithstanding the repeated condemnations of the Court, the behavior of a Member State that takes advantage of the "*actions spécifiques*" cannot, in general terms, be deemed as contrary to the EC law.

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[18] Art. 295 EC Treaty: "*This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*". From this provision, the General Attorney reckons that the EC Treaty is neutral in relation to the companies' ownerships and to the production devices.

[19] The shareholders freedom to restrain the shareholding would be anyway subjected to the limitations envisaged by the proposed Takeover Directive. This is the XIII directive that has been rejected for the first time (4 July 2001) by the European Parliament, above all because of the German strong opposition. This conclusion has been also facilitated by the determined approach demonstrated by the General Attorney Colomer; in fact, if the Court had shared such an approach, there would have been a threat to the principle of equality of the devices. A successive proposal drafted by a group of company law expert has led to a common position of the European Parliament, in November 2003 the 27th. This provides that when the offeror succeeds to buy the 75% of the voting shares, the multi-vote shares shall be reduced to one vote (one share one vote) during the first general meeting after the offer. In May 2004, the European Council of Ministers has finally adopted the 2004/25/EC Directive, conventionally known as the Takeover-Bid Directive. That was the result of a compromise reached after just over 30 years of negotiations.

[20] On this respect, through the recent Volkswagen decision (Commission. V. Germany), the Court has considered the national German legislation as incompatible with the EC law (the legislation transformed the private company Volkswagenwerk into a public company, for this reason the legislation is known as VW). In fact the legislation, through the envisagement of measures capable to hinder or restrain the acquisition of the shares of the target companies and such as to dissuade the European investors to invest in these companies, brought a restrain of the free movement of capitals among the Member States. More specifically, according to the Court's opinion, art. 4, n. 3, of the VW law creates, "*an instrument enabling the Federal and State authorities to procure for themselves a blocking minority allowing them to oppose important resolutions, on the basis of a lower level of investment than would be required under general company law*". In fact, the right to vote was limited to the 20% of the social capital hold in the Volkswagen company. Moreover, the VW law modified the earlier company law by introducing a majority of the 80% of the capital for the general meeting decisions that according to the common law required only the 75%. According to the Court, in such a way, art. 4, n. 3, of the VW law introduces: "*enabling the public authorities to procure for themselves a blocking minority allowing them to oppose important resolutions, on the basis of a lower level of investment than would be required under general company law. By capping voting rights at the same level of 20%, the specific legislation supplements a legal framework which enables the said public authorities to exercise considerable influence on the basis of such a reduced investment. By limiting the possibility for other shareholders to participate in the company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, such a situation is liable to deter direct investors from other Member States, thereby diminishing the interest in acquiring a stake in the capital of that company and thus constituting a restriction on the movement of capital* ". As a consequence, the Court reminds that it is necessary to remind that "*those provisions form part of a legal framework giving the Federal State and the Land of Lower Saxony the ability to exercise a greater level of influence than would normally be linked to their investment. However, the Federal Republic of Germany has not shown why, in order to protect the general interests of minority shareholders, it is appropriate or necessary to maintain such a position for the benefit of the Federal and State authorities* ", not complying with the obligations envisaged in art. 56, n. 1, EC Treaty.

Although the approach of the Court might change , this would not hinder the acceptation of a «*virtuous*» golden share.[21]

Directly from the Belgium case, and indirectly from the others, in fact, it seems that the general prohibition of the *actions spécifiques* could be derogated.

In the decision dealing with Belgium (C-503/99), the Court declared that «*depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatized, where those undertakings are active in fields involving the provision of services in the public interest or strategic services*» and, underscoring the «*the objective of guaranteeing energy supplies in the event of a crisis»,* Belgian legislation was thus considered lawful.

In the subsequent Spanish case (C-463/00), a corporation that produced tobacco and a group of commercial banks operating in the traditional banking sector were not considered firms «committed to produce public services». Moreover, in relation to firms operating in more sensitive sectors (petrol, telecommunication and electricity), the Court maintained that the «public security» justification under art. 58 of the Treaty «can be invoked only in case of real and serious threat to one of the fundamental interests of the community». Yet, a discipline envisaging a preventive administrative authorization, whose criteria are not known in advance, jeopardizes not only the principle of certainty of law, but also the interests of prospective investors given that the Government may exercise a discretionary power that can erode the merits of the free movement of the capitals.

According to the Court, there would be a different situation if the States, adopted less strict measures, «*in particular through a system of ex post declarations»* based on «*objective, non-discriminatory and known in advance (to the concerned firms) criteria*».[22]

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[21] The expression has been drawn from Ballarino, T. and L. Bellodi. "La golden share nel diritto comunitario", *Rivista delle Società I* (2004): 37.

[22] The topic has been considered as relevant in the Belgium case (C-503/99). According to the Commission, the Belgian legislation that conferred to the Government the golden share of the *Société nationale* and of the *Distrigaz*, consisting in the right to oppose any sale, violated art. 73B (now 56) of the treaty. The Court shows a different tendency. It deems that "*it is necessary to note that this discipline is an opposition discipline. Such discipline stems from the principle of respecting the autonomy of organizational decision, provided that the control that can be exerted by the Minister in charge shall depend in every single case on the initiative of the governmental authorities. Within such a context, it is not required any authorization. Moreover, strict terms are*

The Court adds that «*every subject concerned by a restraining measure of this kind must be acknowledged with a judicial remedy*».

However, this approach has not prevented most scholars[23] from listing five requirements that are indispensable for a «virtuous» and «EC law-friendly» golden share:

1) statutory precision;
2) opposition *ex post facto* and not preventive authorization ;
3) precise terms foropposition;
4) obligation to justify the interference of the State;
5) an effective judicial control.

No one, vice versa, could argue that the golden share can be *de plano* included within the exceptions envisaged by art. 58, 1, b), EC Treaty (measures justified by public order and security which the Member States can adopt while derogating to the free movement of capitals).[24]

IV. EFFECTS ON ITALIAN LAW

The "pressure" exercised by the European Commission - as already mentioned in the introduction - has inevitably boosted the wave of reform with regard to the Italian "*poteri speciali*".

The conclusions of the ECJ allowed the Italian legislature to pass a new regulation of the "*poteri speciali*", introduced, pursuant to the infringement procedure, by art. 4, paragraphs 227-231 of the Law n. 350 of 2003, which justifies the exercise of the "*poteri speciali*" only in case of «vital interests» of the state and of «overriding public interest requirements».

imposed to the public authorities for the exertion of such opposition". The Belgian discipline is hence based on objective criteria and can be approved. The envisagement of an opposition discipline alone is not anyway sufficient: it is also necessary to demonstrate the respect of the principle of proportionality. According to Court, "*the Commission has not demonstrated that it could be possible to adopt less strict provisions to accomplish the followed purpose*".

23 Fleischer, H. "Judgments of the full Court of 4 June 2002". *Common Law Market Review 40* (2003): 497.

24 On this regard, the ECJ in the decision 463/00 has provided that «*the requirements of public security, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society*».

It should be noted, however, that two very recent decisions of the ECJ have cast some doubts on the stability of the Italian system.

A. First, in close connection with what has been said so far, in Italian law, the question arises about the limits that special legislation meets in determining rights and duties of directors appointed in privatized companies, with specific regard to potential violations of the right of establishment and free movement of capital (as referred to in articles 43 and 56 of the EC Treaty).

In this regard, the first case recently heard before the ECJ was AEM S.p.A. Milano, cause riunite C-463/04 e C-464/04, (6 December 2007[25]). Such case imposes a deep reflection on the governance of State-owned companies: the «*jus imperii*» of the State influences the natural course of «*jus gestionis*» of the company.

With specific regard to the compatibility of the system of appointment and removal of directors by the Government pursuant to art. 2449 of the Civil Code with the freedom of movement of capital pursuant to art. 56 EC Treaty, the ECJ has said:

«*Article 56 EC must be interpreted as precluding a national provision, such as Article 2449 of the Civil Code, under which the articles of association of a company limited by shares may confer on the State or a public body with a shareholding in that company the power to appoint directly one or more directors which, on its own or, as in the main proceedings, in conjunction with a provision such as Article 4 of Law No 474/1994, which grants that State or public body the right to participate in the election on the basis of lists of the directors it has not appointed directly, is such as to enable that State or public body to obtain a power of control which is disproportionate to its shareholding in that company*».

The ECJ believes that the legislation grants "*poteri speciali*" to the State – as a clause of the by-laws – should be treated, with regard to the effects produced, in the same way as the provision envisaged in art. . 2449 of the Civil Code.

In fact, as well as provisions concerning "*poteri speciali*" or "golden shares" represent an unjustified unequal treatment of State and private shareholders, art. 2449 of the Civil Code, granting the power of appointment and removal of directors exclusively to the State, puts the State in a better position than a comparable private

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[25] Published in *Foro Italiano* IV (2008): 67.

shareholder, thereby discouraging foreign investment in the share capital of the company.

Therefore, art. 2449 of the Civil Code can be held incompatible with the freedom of movement of capitals, even though it does not fall *stricto sensu* in the category of "*poteri speciali*" unlike "golden shares" (given that also the sources is different: the law in the case of "*poteri speciali*", the by-laws in the case of the power of appointing directors).

In other words, the mere fact that the national legislature provide for a direct measure specifically aimed at giving special powers to the State can not prevent the applicability of Art. 56 of the EC Treaty. For the same reason, art. 2450 of the Civil Code, which provided for the possibility of appointment of directors even in the absence of an investment by the State in the share capital of the company, was repealed in 2007, because it was found incompatible with EU principles.[26]

For the Court, a provision (also of company law) that grants a privilege to certain shareholders can be justified only if such privilege is appropriate for ensuring that the objective which is intended to be pursued is achieved. The Court, however, aware that such instruments usually are meant to grant the Governments more (often undue) influence on private companies, requires that these measures not go beyond what is necessary in order to achieve that objective.

However, it should be noted - the Court said - that Art. 2449 of the Civil Code (unlike the rules on golden shares) does not provide for any specific requirement to which the inclusion in the by-laws of the abovementioned clauses is subject. As such, this provision does not appear to be justified.

The Court has thus been very critical with the possibility for the State to influence the governance of a company through the power of appointing directors pursuant to art. 2449 of the Civil Code, thereby raising the question about the possibility of a future amendment of such provision (in accordance with the new art.

[26] Although art. 2449, paragraph 3, of the Civil Code states that the directors appointed by the Government «*shall have the same rights and duties of members elected by private shareholders*», the fact that the Government alone has the rights to dismiss them, allow them to easily escape the control that, pursuant to art. 2383 of the Civil Code, is attributed to general meeting.

2380-bis of the Civil Code, whereby the company shall be managed by the directors alone).

It must be noted, however, that the majority of Member States are gradually abandoning this practice, therefore reducing the role of the "*poteri speciali*" in the EU context.[27]

In this scenario, many Member States have increasingly addressed aspects of general interest more with regulations than with "*poteri speciali*". In many cases, Member States have set time limits for the abolition of "*poteri speciali*" in the relevant companies. In other cases, the "*poteri speciali*" can be justified as exceptions mentioned in the Treaty or structured in such a way as not to be in conflict with other European regulations.

In the remaining cases, the Commission has, however, the right to request further information and to scrutinize their compatibility with EC law.[28]

Pursuant to this decision of the ECJ, Italy decide to rewrite art. 2449 of the Civil Code – as amended by art. 13 of Law no. 34 of 25 February 2008 – in order to make it consistent with the EC law.[29]

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[27] In Spain, for example, golden shares in companies such as Endesa, Repsol, Telefonica and Iberia have been eliminated. Ireland gave up its special powers in Irish Life Assurance Company and T. Eireann. In Denmark, the shareholding thresholds in the company Copenhagen Airport A / S have been eliminated. In May 2004, the British government, after the elimination of its golden share in BAA, has removed its golden share also in National Grid., Viridian group plc, Scottish Power and Scottish Hydroelectric (now a subsidiary of Scottish and Southern Energy) and Phoenix Natural Gas. Similarly, the United Kingdom has reduced the scope of the special share in British Energy, which is now limited only to considerations of national security. Special shares in Cable & Wireless, British Gas, National Power (now International Power) and AEA Tech. plc have already been removed at an earlier stage (between 1999 and 2002). United Kingdom still retains a special power in S. BAE, Rolls-Royce and Devenport. However, the powers relating to the special share in BAE S. and Rolls-Royce were reduced in 2002. In addition, NIREX, a company operating in the nuclear field, was acquired by the UK Government in 2005 and is now wholly owned by the State.

[28] In Italy, in particular, special powers are retained by the Government in strategic companies such as Enel, Telecom, Finmeccanica, Terna, Eni.

[29] «Art. 2449 – Companies in which the State or public entities participate [1] *If State or public entities detain equity holdings in a company limited by shares that do not resort to the risk capital market, the deed of incorporation may grant them the authority to appoint one or more directors or statutory auditors or members of the supervisory board, proportionally to the portion of the capital subscribed.* [2] *The directors and statutory auditors or the members of the supervisory board appointed pursuant to the preceding paragraph can be revoked only by the entities which appointed them. They have the rights and duties of the officers appointed by the shareholders' meeting. The directors cannot be appointed for more than three financial years and their appointments are valid until the date of the shareholders' meeting called to approve the balance sheet relating to the last financial years of their appointment.* [3] *The appointments of the members of the supervisory board are valid for three financial years and their appointments are valid*

The most important features of the amended version of art. 2449 are the following:

1. different rules are applicable depending on whether the State holds shareholding in listed or non-listed companies:
2. in the non-listed companies context, by-laws may give the State the power to appoint directors, but in proportion to the share capital;
3. three years is the maximum period for which the directors may be appointed, and their term expires at the date of the shareholders' meeting called upon to approve the financial statements of the last year of their appointment. The members of the supervisory board are appointed for three years and their term expires at the date of the shareholders' meeting called upon to approve the financial statements of the third year of their appointment;
4. in the listed companies context, the applicable rules are borrowed from the regulation of financial instruments entailing voting rights or rights to receive a dividend;
5. the State may be given a particular class of shares entailing voting rights, upon proposal of the Board of Directors to the shareholders' meeting which has to approve the resolution by majority vote (with the concurring vote of the State).

It should be added, for sake of completeness, that a transitional period of eight months has been introduced. During such period the boards of directors of listed companies, in which the State is entitled to appoint directors pursuant to art. 2449, have to amend the by-laws in order to provide that, pursuant to art. 2346, last paragraph, of the Civil Code, voting rights are incorporated into financial, non-transferable, instruments (conditioned on the persistence of the involvement of the State).

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until the date of the shareholders' meeting called to approve the balance sheet relating to the third financial year of their appointment. [4] *In case of company that resorts to the risk capital market, the provision of art. 2346, sixth paragraph, apply. The board of directors may propose to the shareholders' meeting, with the majorities provided for the ordinary shareholders' meeting, to approve the representation of the administrative rights of the State or public entities, indicated in the by-laws, by a particular category of shareholders. The consent of the State or public entities in favour of these administrative rights is necessary».*

Finally, once these eight months elapse, all the by-laws that do not comply with the provisions of art. 2449 (new version) are automatically abrogated.

To be sure, neither the Court of Justice nor the Italian legislature have given much attention to the category of holders of financial instruments who, while not having the qualification of shareholder, pursuant to art. 2351, paragraph 5, of the Civil Code, in an appropriate meeting may appoint independent directors, replicating to a certain extent the issue of granting appointment rights without adequate participation in the share capital.

It is to be expected, then, that listed companies, which after 2008, can no longer grant appointment rights to the State, will likely amend their by-laws in order to achieve the same result, though with different, lawful, means.[30] This does not exclude, however, that ECJ may rule against those new instruments.

B. Secondly, the ECJ has recently (Case-326/07, 26 March 2009) censored the «criteria for the exercise of the "*poteri speciali*"» held by the State pursuant to Law no. 350 of 31 december 2003 as implemented by the Presidential Decree of 10 June 2004.

It should be emphasized that the Italian system, with the latest legislation just referred to, had established new criteria for the exercise of the "*poteri speciali*", trying to replicate those which had made the corresponding Belgian regulations unaffected by the ECJ.

Such regulations provide for:

a) an opposition system that, unlike the previous one shaped as a mere prior authorization, represents an intervention *ex post*, more respectful of the decision-making of investors;

b) a limited time frame in which to exercise the power of opposition;

c) a justification of the intervention of the Minister of Finance, which can only take place in case of actual harm to the vital interests of the State, with consequent subordination to judicial review.

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[30] Consider, for example, the *poison pill* that allows capital increases reserved only to the State shareholder - in order to avoid hostile takeovers - when its ownership falls below a certain threshold (30%). This technique, however, seems to evoke a form of «disguised golden share».

With the introduction of these three characteristics, the Italian legislature intended to make «objective and proportionate» the restrictions contained in the new version of the special powers, whose use is also limited to cases of «genuine and serious threat» and «prejudice to the vital interests of the State».

In its judgment of 26 March 2009, the ECJ has not considered sufficiently clear and in line with EU law the Italian regulation because

«*the mere statement in Article 1(1) of the Decree of 2004 that the special powers must be used only in accordance with Community law cannot make the use of those criteria consistent with Community law. The general and abstract nature of those criteria is incapable of ensuring that the special powers will be exercised in accordance with the requirements of Community law*» and because «*the situations allowing the exercise of the power of veto are potentially numerous, undetermined and undeterminable, and that they leave the Italian authorities broad discretion*».

Also in this case, ECJ meant to strengthen its harmonizing mission.[31]

V. CONCLUDING REMARKS

In order to draw some conclusions, one can certainly believe that the ECJ case law on "golden share" has had and will have a huge impact.[32]

This is due not only to the role that privatizations have played in many Member States, but in a certain sense also to the potential effect of such decisions on company law in general. It has already been emphasized that in those decisions the prohibition of restraints has been so wide that it to encompasses all the relevant company law provisions that may render the investment less attractive.

In principle, all of the provisions applicable to the listed companies can be examined in the light of the EC law. Moreover, ECJ decisions shall be taken in high

[31] It should be noted, in particular, that in this "battle" for the abolition of restrictions to free movement of capital, the European Union tends to interfere more with formal aspects rather than with structural situations, focusing more on the consequences than on the causes. A more effective method would be, instead of deeming the golden share as incompatible per se, to investigate - case by case – its harmful effect, just as the ECJ is doing with his constant work.

[32] As concerns the free movement of capitals, for example concerning the investors (entrepreneurial investors or investors looking for a dominant position included), not necessarily the importance of EC decisions shall be similar to the Centros (1999) decision, adopted in relation to the companies' right of establishment.

consideration for every discussion related to the European company law, much beyond the privatizations. This is true also for the voting and economic rights of the shareholders, as they represent a meaningful factor for the convenience of the investment.

The decisions on golden share matters will probably affect company law. For example, the voting rights restrictions in the listed companies, the discretion of the management in the adoption of defensive measures and the immediate and binding character of specific provisions may be assessed through a constant consideration of fundamental freedoms.

However, in light of the acknowledged *uniforming* intervention of the ECJ, another conclusive and prospective observation has to be made.

The economic-financial crisis, whose consequences are currently experienced , has led the political as well as academic environments to reconsider the importance of the State intervention in the economy, not only as a regulator but also as an entrepreneur.

Expressions such as «nationalizations» and «public direction» have been employed again, expressing an ideology that prefers regulation over deregulation of the markets.

A solution could be identified in the strengthening the importance of the special shares held by the Government. The increase of the State control could help firms strategically important for the State, as well as banks and other financial institutions, to avoid in the future risk of failures and all the negative effects stemming from market mechanisms alone.[33]

Such considerations are inevitably reflected on the matters concerning the "*poteri speciali*" and the "protectionist" necessity to secure the «*urgent vital interests of the State*».

In other words, granting certain "*poteri speciali*" to the Government is justified even on the idea of the accomplishment of a public mission (accordingly, the recent

[33] Vice versa, if the scenario compatible with the development of a free European market is the one of the regulated competition, which is the lawful dimension of the State's extension – out of the clear market failures – into fields that no longer belong to it?

ECJ decisions seem to show consent when they express favor for the «*virtuous golden share*»). This means, therefore, that the "*poteri speciali*" should work as an essential device to ensure that "*mission*".[34]

This observation seems to be confirmed even by the EC Commission which has expressly noted that «*EU citizens expect to receive high quality services and good prices*» and that «*the consumers and their necessities are to be considered the focus of the public action in this sector. The EC law protects the general interest targets and the mission of the public service*».[35]

It is compulsory to assume that certain economic activities – public utilities (defense, transport, telecommunication, energy and other public services) – indirectly supported by the State have a social significance that is absolutely crucial and as such they need an effective and fair protection.

In my opinion, in such way, the function of the golden share, to be meant as a device of industrial policy (regardless of the several meanings often attributed to it), would be strengthened.

Hence, in this respect, it is necessary to remark that the European Parliament itself has several times confirmed the value of the essential public interest services and the duty of the EC legislator to ensure their exertion within the internal market and to ensure that the competition law complies with the obligations of the public mission.[36]

It is easy to guess that the EC laws on competition are to be considered subject to public service obligations and not the other way around.

This in turn implies and imposes to re-think this subject and as a consequence, the elimination of every hurdle, especially regulatory , to the correct and positive development of the public mission.

[34] Such possibility would result in compliance with the EC law under art. 86.2 of the EC treaty, according to which: «*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*».

[35] Commission Communication, General interest services in Europe, 2001/C 17/04, section 2, point 8.

[36] Resolution of the European Parliament on the Green Paper on services of general interest (COM (2003) 270 – 2003/2152 (INI), point 19.

Today, therefore, it appears to be effective and provocative the question posed by Professor Sabino Cassese when he was Minister of the Funzione Pubblica of the Italian Republic: «*Is the private sector that advances or the public one that reorganizes itself?*».