Free Movement of Capital: the Saviour or the Nemesis of Democracy?

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The aim of this paper is to find out which of the three strategies of the RECON project is the most suitable to explain how the free movement of capital is conceived in the European Union. In order to be the more detailed as possible, we will also refer to the three models which, bearing in mind how to deal with solidarity, adapt the RECON strategies to the field of the economic politics (models described by Agustín J. Menéndez in the first paper presented at this workshop).[1] In addition, we must take into account that the free movement of capital provisions have been modified during the many years the European integration process has developed. Our research will focus on the European Court of Justice case-law, as it is the main interpreter of the Treaties. We will pay attention to the main changes that case-law has undergone, caused by those new provisions included on the Treaties or by new interpretations of those provisions by the Court. Therefore, our paper will start describing shortly the three models we have made reference to, and then it will proceed analysing the European Court of Justice case-law on a chronological way, comparing each stage of that case-law with the models in order to reconstruct the different views of the free movement of capital in the European Union.

I.- The three models

The RECON project aims at proposing the European Union a strategy for its own democratization. Three are the main strategies proposed and subjected to empirical confirmation: the renationalizing, the federal and the cosmopolitan. As has been said, we will use those models in the way Menéndez has adapted them to the field of the political economy. Thus, in order to apply them to the case law on the free movement of capital, we will briefly summarize them here (perhaps to an extreme degree, which may result on a very schematic view not worthy of Menéndez theoretically subtle construct).

The ***renationalization*** strategy, when applied to the economic field, assumes that the aim of supranational structures is reduced to the establishment of a community of market risks. This means that the market-making measures should be adopted on that supranational sphere, while the market correcting ones correspond to the well-established national regimes. The legitimacy of those market-making norms determines which of the two possible variants applies: (a) unanimous aggregation of national wills or (b) a knowledge-based decision making procedure which should be labelled as *governance*.

[1] A. J. Menéndez, 'The political economy of the European constitution. Some general observations', *Manuscript*.

The second strategy, the *federalist* one, proposes that market-making and market-correcting norms are so interrelated that it should be deduced that there is a common will behind it and, therefore, a sole community of markets risks and of social insurance exists – despite the later may be conceived on (a) a single (supranational) or (b) a composed way (multilevel).

The third is the *cosmopolitan* strategy. Under this conception, the European Union will comprehend a plural set of legal orders coexisting and regulating issues each one on a particular way. It does not exist a community of social insurance, neither (on the degree it is possible) of market risks. This strategy implies that solutions are not to be found on the supranational sphere but on the national one. Nevertheless, a coordination of those national policies is needed not in order to avoid incoherence and incompatibilities (what would be proper of the federal strategy), but in order to set the aims all policies may achieve. The open method of coordination would incarnate the best institutional example of this conception of the European Union.

	Community of market risks	Community of social insurance	Process of collective decision-making
Renationalization	Supranational level	National level	(a) Unanimity of Member States or (b) governance
Federal	Supranational level	(a) Supranational level or (b) multilevel	(Qualified) majority
Cosmopolitan	National level	National level	Open method of coordination

Two remarks should be made when applying this theoretical triad to the case-law of the European Court of Justice – what constitutes the object of this paper. In first term, we should bear in mind that the Court always interprets and refers to community law, that is, to supranational law. Since the cosmopolitan strategy is founded in the premise that national legal regimes coexist and in the idea that a common law is not the solution to the European problems, we must assume that cosmopolitan arguments are not presupposed to be frequent in the Court's case law referred to the free movement of capital (and to the other fields of our research based on the analysis of its jurisprudence: free movement of persons, state liability, and tax law). This can be argued to be understood as a bias in the results of our research, but we should incorporate these findings to those resulted of the analysis of other areas of the economic policy (such as the broad economic policy guidelines, or the labour law) in order to obtain the complete panorama of how the economic policy is conceived in the European Union.

The second remark is referred to a consequence of this presumed absence of cosmopolitan arguments in the case law of the Court. If this hypothesis proves right, then all jurisdictional decisions restricting the scope of the free movement of capital could be easily equated to the renationalization strategy; and all rulings widening that scope could be related to the federal one. Thus, in order to avoid incurring on that direct identification we should be extremely careful when analyzing the case law. Menéndez proposes a set of indicators which could contribute to assign each judicial decision to a

concrete strategy and which would be our methodological support when doing our task.[2] Those indicators are the purpose of the economic integration, the purpose of each policy or institution, the procedures of decision-making and the mechanisms to stabilize the socio-economic order. These indicators will be our tools when deciding to which strategy a particular argument must be attached.

In what follows we will apply this theoretical framework to the case law of the European Court of Justice by distinguishing between two different legal regimes: before and after the liberalization of the capital movements that took place in the 1990's. Nevertheless, our paper will focus on the three different stages of the ECJ case law we have distinguished according to the main issues it had to deal with: distinction between money transfers as means of payments or capital movements; complete liberalization of movements of capital; and privileges and special rights that Member States retain over privatised companies ('golden shares').

II.- The first stage (the 1980's): the free movement of capital as a complement to the common market

During the first two decades of the European integration process, the free movement of capital was the common market freedom which less attention received. A whole chapter of the Treaty of Rome (the fourth of the third title, first part – articles 67 to 73) was dedicated to it, establishing the obligation to "progressively abolish (…) all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place such capital is invested" (article 67.1 EEC Treaty). Member States also included a 'stand still' clause, committing themselves "to avoid introducing within the Community any new exchange restrictions on the movement of capital and current payments connected with such movements, and shall endeavour not to make existing rules more restrictive" (article 71 EEC Treaty). This legal framework was completed with a Directive implementing article 67 EEC Treaty,[3] which distinguished three kinds of regimes applicable to money transfers: the complete liberalization of the cases included in lists A and B of the Directive, the allowance to keep the *status quo* for cases foreseen in list C, and the prohibition of the liberalization of cases enumerated in list D.

Despite these provisions, the relevance in empirical terms of the free movement of capital by respect to the rest of the whole *aquis communitaire*, and to the other economic freedoms in particular, was scarce. This explains why the European Court of Justice was not asked to solve a sole case on the matter until the end of the 1970's. But since then and for almost a decade the consolidation of the other community freedoms, essentially based on the renewed interest in the completion of the common market and on the active role played by the Court, changed the relevance of the free movement of capital for the European Communities. Being money transfers across national borders inherent to any economic activity foreseen in the EEC Treaty, the free movement of capital

[2] A. J. Menéndez, *op. cit. supra* note 1 (in particular pp. 10-20).

[3] First Council Directive of May 11, 1960 for the implementation of Art. 67 EEC, J.O. 1960, 921 and J.O. 1962, 2435; and Second Council Directive 63/21/EEC of December 18, 1962 adding to and amending the First Directive, J.O. 1963, 62. (For the English texts see O.J., Special Edition, 1959-1962, 49 and 1963-1964, 5). The Directives were amended by Art. 29 of the 1972 Act of Accession (see O.J. 1972 L73/94) and by Directive 85/583/EEC on transactions in shares in unit trusts (O.J. 1985 L372/39).

appeared to be closely related to any other community freedom. In other words, when the case law of the European Court of Justice consolidated the other economic freedoms, movements of capital acquired a new dimension and became by this very reason an important issue. Since this moment the Court had to deal with some cases related to these movements. In the *Casati*[4] ruling it identified one of the first problems the free movement of capital has to face to: as have been said, inasmuch as the money transferred is a mean of payment it is very closely related to the other community freedoms,[5] but money transfers are also intimately connected with the monetary and political economy of the Member States since they have a potential impact on them (mainly over their balance of payments).[6] Should then a money transfer be considered a mean of payment and, therefore, a part of the other well-established community freedoms? Or should it be considered a capital movement by itself, what permits to apply the exceptions the Treaty provides in case of imbalance on the balance of payments of a Member State? Thus, it is vital to decide which dimension prevails: considering money transfers as means of payment, what means that the rules of the pertinent freedom should be applied, or as capital movements, what permits free movement of capital provisions to be applied.

But before answering this question, it should be noted that this problem will not be relevant at all if the Treaty provisions about the free movement of capital were directly applicable (as were many articles related to the other community freedoms). This legal issue, which has an extraordinary repercussion on the configuration of the freedom as well as on the empirical results of the common market, was dealt with in the above-mentioned *Casati* ruling. In it the Court decided that norms on the free movement of capital (and specifically article 71 EEC Treaty) did not have direct effect because the obligation to liberalize capital movements is limited "to the extent necessary to ensure the proper functioning of the common market", an assessment which is a matter for the Council.[7] In addition the Court stated that the expiration of the transitional period did not mean that restrictions on the exportation of bank notes (article 67.1 EEC Treaty) were abolished – what in fact means that national restrictions to the free movement of capital may be valid for community law if they are justified enough.

Two main ideas inspire these statements and the *Casati* ruling itself. First of all, that *Member States retained the competences over decisions about the material scope of the free movement of capital*. Indeed, during the 1980's the United Kingdom liberalized the movements of capital under Thatcher's mandate.[8] This made crystal clear that the decisions about movements of capital where still under national competence. The view of the free movement of capital the Court expressed in the *Casati* ruling was that the Council had the power to decide to what extent the liberalization of capital movements was needed. Therefore, when looking at it through the lenses of our tripartite scheme, the *Casati* ruling supports the renationalizing strategy. This conception of the free movement of capital has been consistently reaffirmed by the Court in its case law of the 1980's. Indeed, it has also stated that the provisions of the Directive implementing article 67 EEC Treaty did not restrict the right of Member States to prevent infringements of their laws and

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4 Case 203/80 *Criminal proceedings against Guerrino Casati* [1981] ECR 2595.

5 *Casati*, *supra* note 4, paragraph 8.

6 *Casati*, *supra* note 4, paragraph 9.

7 *Casati*, *supra* note 4, paragraph 11.

8 Search literature.

regulations (*Brugnoni & Ruffinengo*).[9] Therefore the Member States were not only allowed to determine the scope of the free movement of capital by deciding to what extent it was necessary for a proper functioning of the common market (as was ruled in *Casati*), but they also could limit that scope if national measures for the surveillance of their balance of payments or their type of currency were needed (article 108 EEC Treaty). This means that not only the market-correcting norms, but also the market-making ones were subject to the will of the States (here 'the will of the States' should not be understood as a common will, but as the will of each Member State, since particular measures reducing the scope of the free movement of capital in each Member State were allowed). In sum, we must conclude that the strategy of renationalization[10] was the one which inspired the free movement of capital during this first stage.

The second main idea which hides behind the reasoning of the Court in *Casati* is that *the free movement of capital had a subsidiary role in respect of the other freedoms* which compound the common market: it shall be granted just to the extent it is needed for their functioning. This conception of the free movement of capital implied the need to open a new jurisdictional trend in order to determine to which field a money transfer was related, since depending on the decision to attribute it to one freedom or another, the legal consequences would be radically different.[11] If a money transfer was considered a movement of capital the legal regime will be mainly subjected to the will of the Member States, as we have seen, while if it was considered a mean of payment of an economic transaction related to any other freedom the legal regime will substantially change (not at least because of the direct effect of the provisions regulating those freedoms). Therefore, we take up again here the important question we did not answer above: to which legal regime a money transfer yields to?

As a matter of fact this issue was dealt with in what should be considered the cornerstone of the case law of the European Court of Justice during this first stage. In the *Luisi & Carbone* case,[12] by means of a preliminary ruling procedure, the Court was asked about the distinction between the notions of 'current payment' (article 106 EEC Treaty) and 'movement of capital' (article 67 EEC Treaty). During this procedure the Court was also inquired about under which circumstances national controls should be allowed in order to identify movements of capital in the form of current payments. The legal problem was, thus, to consider the crossing of a border with some money in cash as part

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9 Case 157/85 *Luigi Brugnoni and Roberto Ruffinengo v. Cassa di risparmio di Genova e Imperia* [1986] ECR 2013.

10 Or even more strictly speaking, the *national* strategy: competences were neither devolved to the Member States nor renationalized, because they have not ever been attributed to other fore than the national one. In addition, if both market-making and market-correcting norms were competence of the national level (i.e. just Treaty norms were supranational, and their content referred to national authorities) it seems to us that this nomenclature is accurate.

11 "In the past the Court has opted to regard the movement of capital as subsidiary to the other freedoms. Broadly speaking this meant that the provisions on movement of capital were applicable only where a transfer of money or capital did *not* constitute a payment in connection with the movement of goods or services. In this way the Court prevented the other freedoms being affected by the operation of the rules on movement of capital and thus avoided possible cumulative application. In its case law the Court has as far as possible avoided this cumulative or parallel application by classifying the transaction or act restricted by a given national measure as a movement of capital, movement of goods, movement of persons or provision of services." A. Landsmeer, 'Movement of capital and other freedoms', 28 (2001) *Legal Issues of Economic Integration*, 57-69 (p. 57).

12 Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro* [1984] ECR 377.

of the free movement of capital (regime which allows Member States to retain some powers in order to control their balance of payments) or to consider it as a mean of payment (article 106.3 EEC Treaty). In this particular case the facts which gave rise to the legal conflict were related to the free provision of services, but under some special features: this was the first time a money transfer was attached to a movement from the part of the user instead of form the part of the provider of the service.

The option supported by Italy and France, which were very interested in defending their balance of payments because of the economic difficulties they were suffering then, was that these transfers of money should be considered as part of the free movement of capital, which will allow them to apply national norms in order to protect their fiscal interests. They alleged that in order to consider a transfer of money as part of the free movement of services it was demanded that both the two parts of the economic transaction were identified.[13] From their point of view, a service offered on an indiscriminate way in a Member State to users in general, just at their disposal if they move to the place where the supplier is, should not be considered a service. In order to support this conception of the free provision of services, they quote Advocate General Trabucchi's opinion in *Watson and Belman*,[14] who said that the Treaty just makes explicit reference to the suppliers of the service and not to the users. Therefore, according to his opinion a transfer of money could never be considered as part of the free provision of services.

Advocate General Mancini's opinion in *Luisi & Carbone* radically differed from this view. He argued that in economic sectors like tourism it is inherently assumed that the user must move in order to receive the service. In the fields of teaching and health it is also evident that teachers and doctors should not move throughout the common market, since their economic activity makes sense (i.e. allows them to increase their economic benefits) only if they are placed on a permanent location. To arrive to these conclusions Mancini seems to insert his arguments on an overall analysis of the consequences of the legal problem these money transfers posed, instead of merely resigning himself to elaborate a reductionist reasoning just focused on the particular legal regime to which the free provision of services is subjected. This strategy allowed him to reveal to the Member States supporting the arguments against his case that the economic impact of their view would be noticeable if applied on a broader scale (tourism was than a very important economic sector precisely for France and Italy, of which their balance of payments would be on an even worse situation if incomes related to it were not at their disposal). But, in addition to those general reasons about how the common market should be conceived, legal arguments of Advocate General Mancini were solid too: he particularly invokes that the 1961 program for the liberalization of the movement of services included both dimensions of tourism (service provider's and user's displacements) among the fields to be liberalized, what means that the transfer of bank notes inherent to them should be considered part of the free movement of services instead of attached to the free movement of capital. This categorization was also maintained in the Directives of 1964

[13] The facts of the *Luisi & Carbone* case identified the two Italians which wanted to cross the Italian border with money in cash, but not the service provider. Luisi and Carbone alleged the money transfer was necessary for paying some services (language courses, chirurgic interventions, hotel stays…), but without specifying who the provider was. They labeled those economic activities in abstract: 'tourism', 'health', etc.

[14] Case 118/75 *Criminal proceedings against Lynne Watson and Alessandro Belmann* [1976] ECR 1185.

and 1973.[15] In addition, the Act of Accession of Greece maintained the restrictions over the transfers of foreign money by tourists, a temporal derogation which meant that the general regime was the liberalization of those movements.

The Court finally ruled that those money transfers should be considered part of the free provision of services. Thus, it reduced the scope of the free movement of capital by considering that it starts just where the limits of the free provision of services end. In other words, the Court ruled that the scope of the free movement of capital depended on the extent of the other community freedoms, and that it was hence subjected to the particular variations their limits could undergo. However, Member States were allowed to retain the power to verify that transfers of foreign currency purportedly intended for liberalized payments were not actually used for unauthorized movements of capital. Therefore, if they do not render illusory the freedoms established by the common market, Member States could control those movements in order to protect their balance of payments and their currency type. It seems that the Court had born in mind Mancini's view over the need to asses the consequences for the whole common market system when allowing those controls, which permitted to solve the underlying conflict between the commitment to liberalize the movements of capital and the need to control the economic consequences they may mean for the Member States.

This case law was sustained and expanded by the European Court of Justice in its *Lambert* ruling,[16] in which it allowed national norms to control how transfers of foreign money were exchanged into national currency. In order to protect national balances of payment, it was argued, means of payment related to liberalized economic transactions must comply with the regulated exchange market. If they could resort to the free exchange market, some benefits could then be obtained from the legal regime foreseen exclusively for capital movements. In other words, it would be possible to take advantage at the same time from both the liberalized regime of the money transfers related to community freedoms and of the free exchange market related to capital movements. Hence, in this ruling the Court continued to allow national measures to supervise that movements of capital did not take place in the form of means of payment. Therefore, with it the Court consolidated the clear distinction it had established in *Luisi & Carbone* between the legal regimes related on the one hand to the common market freedoms, and on the other hand to movements of capital. While the Court then stated that national measures were allowed in order to control that a movement of capital did not take place under the appearance of a mean of payment, now it avoids that the exchange regime of the former (free exchange market) could be applied to the latter, what would constitute a *de facto* broadening of the scope of the free movement of capital.

Summarizing what have been the main arguments of the Court when deciding about the free movement of capital during this first stage of its case-law, it should be noted that it has followed the drafting of the Treaties to a tee. While in other economic freedoms it has decided to broaden their scope in the supranational level, this has not been the case in the movements of capital field, in which Member States clearly stated that they should be liberalized just in the extent they were needed to the proper functioning of the common market. In contrast to the other community freedoms, of which Treaty provisions have been declared directly applicable, free movement of capital remained a national issue when they were not part of the common market. In fact, Member States were allowed to control common market transactions in order to avoid

[15] Reference.

[16] Case 308/86 *Criminal proceedings against R. Lambert* [1988] ECR 4369.

illegal movements of capital. Therefore, while decisions about community freedoms were supported by arguments installed on the federal strategy, decisions about movements of capital were based on renationalizing arguments. The case law of the Court adopting this kind of arguments in order to restrict the scope of the free movement of capital was also consolidated, in what refers to the Directive implementing article 67 EEC Treaty, in rulings *Alan East*[17] and *Van Eycke*.[18]

III.- The second stage (the 1990's): completing the internal market

The second stage in the case law of the European Court of Justice about the free movement of capital corresponds with the decade of 1990's. The Court's activity increased during these years because a new legal regime for the movements of capital was foreseen as a consequence of the general aim the European integration process laid down for itself: the completion of the internal market. This new legal regime consisted in the liberalization of movements of capital between the Member States, as was firstly described on the Directive 88/361,[19] which came into force on 1 July 1990, and later by a re-formulation of the content of the Treaties because of the Maastricht agreements. A new constitutional framework was thus settled transferring what was the content of secondary law to the Treaties. It is really important to note that the Maastricht Treaty was the definite moment in order to establish the final conditions under which a complete free movement of capital has been achieved in the European Union, and also that that was done by simply confirming what have been prior stated by Member States in the Directive. We should also notice that this legal regime has not been modified since then –apart from the minor fact that the Amsterdam Treaty changed article numbers. From then on, the main provision regulating movements of capital is article 56 EC (ex article 73B EC), of which its two sections literally state:

> "1. 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.
> 2. 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."

This provision thus liberalized all movements of capital between Member States and even between Member States and third countries. However, restrictions to the latter movements which existed by national or community law prior to 1994 and referred to direct investments were allowed to be maintained (article 57.1 EC). The second paragraph of the same article describes the procedure the European institutions must respect when regulating movements of capital between Member States and third countries related to direct investments: qualified majority is the standard procedure, but unanimity is required if any restriction to the liberalization is to be established (article 57.2 EC). Nevertheless, Member States still retain some competences which, once exercised, may restrict the free movement of capital. These limited cases just constitute

[17] Case 143/86 *John Richard Alan East and others (Margetts and Addenbrooke) v. Thomas Cuddy and Winifred Cuddy* [1988] ECR 625.

[18] Case 267/86 *Pascal Van Eycke v. ASPA NV* [1988] ECR 4769.

[19] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Art. 67 of the Treaty, O.J. 1988, L 178/5.

exceptions to the freedom (article 58 EC) that for the first time seemed to put the legal regime of movement of capital on a level with all the other European Union's economic freedoms. For instance, Member States are now allowed to apply provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. They are also allowed to adopt measures in order to avoid infringements to their legal order. All these provisions substantially changed the legal regime to which movements of capital were subjected. Therefore, the case law interpreting those provisions and the scope of the freedom they foresee also changed. The analysis of the new case law of the European Court of Justice on the matter is thus vital to understand which conception of the European Union hides behind this new regime.

As a consequence of this new liberalizing regime, in this period the main trend in the case-law of the European Court of Justice was to broaden the scope of the free movement of capital. What must be noted is that behind these rulings of the Court there were lying three different legal techniques. First of all, since nor the Directive neither the Treaties gave any definition of what constitutes a movement of capital, the scope of the freedom was widened by considering some fields included on its material content. In this sense, bank loans (*Svensson*)[20] and mortgages over real estate investments (*Trummer & Mayer*)[21] were declared part of the content of the free movement of capital. In relation to this first legal technique, we must pay attention to the reasoning the Court argued in order to consider the latter field as part of the money transfers which were liberalized. As matter of fact, when determining the material scope of the Treaty provisions, in the *Trummer & Mayer* case it resorted to the Annex I of the Directive 88/361, which enumerated on an open list different categories of capital movement to which the Directive was applicable. Mortgages were not included on that list, but the Court stated that because of their inextricably linkage with capital movements they should be considered under the legal regime of the free movement of capital. In addition, it stated that the prohibition to express the mortgage on a foreign currency, as was foreseen in the Austrian law under review, should be interpreted as a restriction to the freedom, since it could make less attractive an investment. Therefore, we may summarize the *Trummer and Mayer* ruling by highlighting the three main points of its reasoning. In this case the Court decided (a) to use the Annex of a secondary law which was not in force in order to interpret the content of a Treaty provision;[22] (b) to broaden the scope of the concept 'movement of capital' on a case by case basis (since the 'close connection' criterion has not been precisely defined);[23] and (c) to consider against the free movement of capital any restriction which could make less attractive an investment.[24]

To what refers to the resort to the Annex I of the Directive not in force any more in order to interpret the concept of capital movement in the Treaty, as legal scholars we may consider this is at least a strange reasoning.[25] If the content of that Directive have

[20] Case C-484/93 *Peter Svensson et Lena Gustavsson v. Ministre du Logement et de l'Urbanisme* [1995] ECR I-03955.

[21] Case C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-01661.

[22] *Trumer & Mayer*, *supra* note 21 (paragraph 21).

[23] *Trumer & Mayer*, *supra* note 21 (paragraph 24).

[24] *Trumer & Mayer*, *supra* note 21 (paragraph 26).

[25] "An indicative nomenclature of capital movements is annexed to the Directive and is divided under thirteen headings (direct investments, property investments, etc.). The Nomenclature remains relevant today even though the Treaty provision on which the Directive itself was based is no longer in force. The Court accepted in *Trummer and Mayer* that insofar as Article 73b EC carried over in substance the

been transferred to the Treaties without any reference to its Annex, the straight interpretation should be that it was not in the Member States' mind to include its content in the Treaty. However, the Court decided that the correct way to give content to the concept of movement of capital was not by delimiting it on its own decisions, but by interpreting Member States' will precisely as they had previously defined it in that annex. Hence, the existence of a supranational law liberalizing the movements of capital shows that a federal strategy has been adopted when redesigning the policy, but the argument the Court uses when defining the content of that supranational law is a renationalizing one, since it takes into account what was the common denominator of Member States opinions on the issue. Surprisingly, the combination of both strategies seems not to be an isolated case but a constant in the new free movement of capital regime, as we will see later.[26]

The decision of the Court to refer to the annex of the Directive instead of stating a concrete judicial definition of movement of capital may be founded on very different grounds,[27] but it is beyond any doubt that it confers on the Court a broad margin of appraisal, since as long as the legislator does not define the content of 'capital movement' the Court will retain the competence over the interpretation of the concept. But this margin is also broadened by virtue of the Court's decision to determine the relevance of a case for the free movement of capital depending on its link to it. This case by case approach allows the Court to gradually determine the limits of the scope of what is under the regime of the freedom of capital movements.

Finally, to what refers to the decision of considering any reduction of an investment's attractiveness a restriction to the free movement of capital, we must note that this reasoning broadens the scope of the freedom. The supranational provision allowing capital movements will thus be reinforced, since Member States will unlikely achieve to pass a norm which does not affect the freedom. This interpretation of what a restriction to the free movement of capital is, linking it to the attractiveness of a transaction, is a stricter one in comparison with how restrictions to any other community freedom have been interpreted until then.[28] This allows us to consider the free

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contents of Article 1 of the Third Directive, that nomenclature retained the indicative value it had for the Directive". L. Flynn, 'Coming of age: the free movement of capital case law 1993-2002', 39 (2002) *Common Market Law Review*, 773-805 (p. 776).

26 Indeed, this strategy matches up with the one adopted in article 57.2 EC referred to the material scope of the movement of capital with third countries, since the procedure to regulate that movements differs depending on the content of the regulation: if it respects liberalization then qualified majority is enough to pass the norm, but if it implies a restriction to the liberalization unanimity is required. The adoption of the federal or the renationalizing strategy depends thus on the content of the norm to be passed.

27 Perhaps the most acceptable explanation is Landsmeer's one: "The reason why the Court does not formulate a definition and uses a relatively old directive that dates from before the second phase (EMU, 1 January 1994, and therefore before the new Treaty provisions of Articles 56–60 EC), could be explained by the difficulties which a general definition could create. A generally formulated definition would easily affect the other freedoms. For instance, the buying of real estate in one of the member states could affect the freedom of establishment or the freedom of services. These kinds of transactions will however also affect the movement of capital. By using the Directive, the influence of capital movements on the other freedoms will be restricted to the transactions 'enumerated' in the Directive. Besides, by using the Annex of the Directive, the Court can decide on a case by case basis whether the capital provisions apply". A. Landsmeer, 'Capital movements: On the Interpretation of article 73B of the EC Treaty', 27 (2000) *Legal Issues of Economic Integration*, 195-200 (p. 198-199).

28 "The above-mentioned conclusion is however less spectacular then it appears at first impression. Compared to other kinds of transactions, Capital is much more sensitive to barriers and certain kinds

movement of capital the widest community freedom –at least to what refers to the margin of the Member States not only in order to limit it, but also to not interfere in it.

The second legal technique by which the Court broadened the scope of the free movement of capital was by narrowing the margin of the allowed restrictions related to national tax laws. Despite article 58 EC permitted, as we have already seen, national norms referred to tax law to restrict the movement of capital, in some cases national provisions were considered against the community freedom since they created a discrimination depending on the place a company which pay dividends to natural persons is placed (*Verkooijen*)[29] or since they were not justified enough in order to allow a violation of the Treaty norms (*Sandoz*).[30] This second legal technique, thus, limits the Member State's margin of manoeuvre and as a consequence of that contributes to reinforce the supranational freedom.

The third legal technique, maybe the most prominent one, refers to a substantial change on the legal effects of the new provisions regulating the free movement of capital: the freedom was solidly consolidated by recognizing direct effect of articles 1 and 4 of the Directive 88/361 and of the provisions of the Treaty. Since this recognition, the general presumption is that all transfers of capital throughout the borders of the Member States (*Bordessa*)[31] and, importantly, between Member States and third countries (*Sanz de Lera*)[32] are allowed. It is clear to everybody that the consequences of recognizing direct effect to the main provisions of the regime which regulates capital movements go beyond the legal field, but the repercussion on it is extremely large. Examining first the strictly legal consequences of these rulings we must notice that since the direct effect of the provisions on capital movements is declared, a new legal issue emerges: should community economic freedoms be respected separately, or are they a unique framework? In other words, should a money transfer comply with the capital movement provisions, or with all the economic freedoms granted by EU law? In the *Svensson* ruling, the Court decided that a national measure was contrary both to the free movement of capital and to the freedom to provide services. It replied to our question thus applying cumulatively all community provisions. Advocates General Tesauro and Mischo were clearly opposed to this decision and suggested, in *Safir*[33] and *Ambry*[34] respectively, that the Court should first decide about which is the applicable legal regime, and then analyze if the particular measure infringes it. But the Court took no notice of those opinions of Advocates General and declared in *Konle* that both the freedom of establishment and the provisions on capital movements were applicable.[35] This cumulative application of the economic freedoms implies not only that the provisions on movement of capitals are no more subsidiary to the other freedoms, but also that the supranational economic freedoms are

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of regulations. A very small change in interest rates for instance is often enough to transfer capital streams. This is due to the fact that developments in technology have made capital much more volatile compared to goods and services". A. Landsmeer, *op. cit. supra* note 27 (p. 199).

29 Case C-35/98 *Staatssecretaris van Financiën v. B. G. M. Verkooijen* [2000] ECR I-4071.

30 Case C-439/97 *Sandoz GmbH v. Finanzlandesdirektion für Wien, Niederösterreich and Burgenland* [1999] ECR I-07041.

31 Joined cases C- 358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Vicente Marí Mellado and Concepción Barbero Maestre* [1995] ECR I-00361.

32 Joined cases C-163/94, C-165/94 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu* [1995] ECR I-04821.

33 Case C-118/96 *Jessica Safir v. Skattemyndigheten i Dalarnas Län* [1998] ECR I-1897.

34 Case C-410/96 *Criminal proceedings against André Ambry* [1998] ECR I-7875.

35 Case C-302/97 *Klaus Konle v. Republik Österreich* [1999] ECR I-03099 (paragraph 22).

conceived as a whole and that they thus constitute an entire block that must always be respected. This conception lays the foundations of the new constitutional status of the economic freedoms generally, and of the free movement of capitals in particular, as we will see below.

But the consequences of declaring the direct effect of provisions on the free movement of capital are even wider. To what refers to the margin of maneuver of Member States when restricting the freedom, we must bear in mind that it was reduced since the Maastricht Treaty established a new framework for movements of capital in which capital flows should be as free as possible. In addition, in the same Treaty the foundations of an Economic and Monetary Union were laid, so the previous allowance of national measures in order to protect national economic interests and Member States' balance of payments were not so necessary. Therefore, in *Bordessa* and *Sanz de Lera* the Court stated that prior authorization from the administrative authorities in this sense is not compatible with the Treaty provisions, and just declarations are allowed (declarations which may be object of subsequent checking in order to protect those economic interests). However, these rulings have been clarified by the Court, which has stated first that article 56 EC does not preclude a system of prior authorization if the protection of public policy or public security is at risk (*Konle*);[36] and later that because of the extremely mobile money transfers are, a prior declaration may prove ineffective (*Église de Scientiologie*).[37] The condition it imposes in order to validate a national system of prior authorization is thus that the norm by which virtue it exists is accurate enough in order to assure legal certainty among citizens (and economic operators, we must add). It is important to note to this respect that the Court has not made a legal reasoning adapting the free movement of goods case-law on national controls[38] to the field of movements of capital, as Advocate General Saggio suggested in his opinion,[39] but that it just appealed to the principle of legal certainty in order to assess the validity of a transnational investment. For legal scholars it goes without saying that adapting the free movement of goods case-law on national controls to the field of movements of capital would have increased legal certainty, as it would have made explicit the criteria required for a national measure to be valid. But the Court preferred to retain some power and resorted to a legal principle which its limits it is the sole legitimated to determine. Therefore, adopting this strategy the Court paradoxically restraints legal certainty by retaining the final decision about the legality of capital movements.

Specially important for our research is one of the arguments used by Saggio when scrutinizing the Member States' regimes of prior authorization: he has argued that what national authorities were protecting with those regimes were not their national interests, but a common one, since the benefits of the stability of both the public policy and public security are shared among all Member States. Therefore, exceptions to the common freedom of capital movements (community of market risks) would be based on the (multilevel) protection of a common interest (community of social insurance). We can

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36 *Konle*, *supra* note 35.

37 Case C-54/99 *Association Église de Scientiologie de Paris and Scientiology International Reserves Trust v. French Republic* [2000] ECR I-1335.

38 Case C-367/89 *Criminal proceedings against Richardt* [1991] ECR I-4621. In fact, the *Bordessa* and *Sanz de Lera* rulings were the translation to the free movement of capital regime of a consolidated case-law in other freedoms. They thus put all the community freedoms on the same level. This conclusion was evident already when the ruling took place, as shows up the case comment of M. Jarvis, 'Free Movement of Capital Comes of Age', 20 (1995) *European Law Review*, 514-521.

39 Opinion of Advocate General Saggio (paragraph 16) in *Église de Scientiologie*, *supra* note 37.

find some features of a federalist strategy in this reasoning, mainly in what refers to the existence of a common public policy and a common public security which deserve to be protected form both national and supranational level. However, the Court did not assume Advocate General's opinion and it seemed to persist in considering nationally-based all exceptions to the free movement of capital, what fits better in the renationalizing strategy.

Be it as it may, the *Bordessa* and *Sanz de Lera* rulings not only widened the scope of the free movement of capital (as was designed by Members States in the Maastricht Ttreaty), but they also restricted the scope of the control that the national authorities can exercise in order to protect their economies. As a result of these two rulings, and in accordance with the abovementioned ones, the free movement of capital was given during these years a constitutional status (since it prevails over any other norm).[40]

However, during this second stage of the Court's case law there were also some rulings limiting the scope of the free movement of capital. The cases in which the Court decided to stop the expansion of its scope were basically related to issues in which a conflict between the supranational economic constitution,[41] based on the economic freedoms (community of market risks), and the nationally based welfare politics (community of social insurance), took place. In fact, despite this new constitutional status achieved by the free movement of capital, in all cases in which there existed a collision between the supranational economic freedoms and the national welfare policies, the Court ruled that Member State's competences on these issues prevailed over community provisions. This was what happened when norms protecting national culture conditioned the transfer of money from one country to another (*Veronica*),[42] or when a prior authorization was required in order to acquire a property which would constitute a second residence (*Konle*).[43] In this latter case the Court considered the national norms were valid only under very restricted conditions, particularly referred to the achievement of a certain level of protection of an economic activity or of a permanent population residing in a very well delimited area. The Court has ratified this case-law on several occasions,[44] but despite its reasoning resorted to economic arguments, a non-economic dimension underlies in all this saga of rulings on this issue.[45] In addition, the foundations

40 Several institutions have posed a question mark after the new constitutional status of the free movement of capital, and even have rebelled against the new dimension the freedom acquires with this new interpretation of the Court. On the difficulties of the Spanish Supreme Court in order to accept the *Bordessa* ruling and its consequences for penal law, see A. Fernández Tomás, 'Libre circulación de capitales, control de cambios y delitos monetarios: la solución a unas discrepancias entre el Tribunal de Luxemburgo y el Tribunal Supremo español', 1 (1997) *Revista de Derecho Comunitario Europeo*, 175-193.

41 On the notion of 'economic constitution' see Ch. Joerges, 'What is left of the European Economic Constitution? A melancholic eulogy', 30 (2005) *European Law Review*, 461-489.

42 Case C-148/91 *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media* [1993] ECR 487.

43 *Konle*, *supra* note 35.

44 See Case C-355/97, *Beck and Bergdorf* [1999] ECR I-4977 and Case C-300/01, *Doris Salzmann* [2003] ECR I-4899. The *Bordessa* and *Sanz de Lera* case-law on the legality of prior notification regimes instead of prior authorization ones to the field of the acquisition of second residences can be found in Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157 and in Case C-452/01 *Margarethe Ospelt* [2003] ECR I-9743.

45 "EU law sees property in neutral terms as 'real estate', and its sale and purchase as a straightforward contractual bargain, barriers to which constitute an interference with an efficient single market. Land must be alienable to residents from other Member States: there must be no discrimination, in national land ownership law, between nationals and non-resident aliens. With a number of the new Member States, the most widely expressed (because least controversial) objections to opening up their property

of those decisions were grounded on time-limited provisions included in Accession Treaties (mainly in the Austrian one), so we cannot consider this a general exception to the free movement of capital legal regime, but just an isolated and temporary one. In any case, the most clear example of the limit that national competences over welfare policies suppose for the expansion of the scope of the free movement of capital is the Court's ruling in *French Republic v. Commission*,[46] in which a non legally binding document of the Commission was annulled since it dealt with the pension funding problems, what is considered to be a national problem. The Court stated that the competences over these issues were clearly national and the European Union had not any say on it. Completing this case law, the well-established principle of procedural autonomy of the Member States was also considered a limit of the scope of the freedom (*Fenocchio*).[47] In sum, from this case-law it can be said that renationalizing arguments were predominant when the Court aimed at limiting the scope of the free movement of capital.

What can we infer from the legal regime on the free movement of capital during this second stage of the Court's case-law on the issue? First of all that the new formula by which the freedom is regulated (article 56 EC) maintains the distinction between movements of capital (first section) and means of payments (second section), despite their legal regimes were from then on exactly the same. This means that the *Luisi and Carbone* ruling loses some effect, since the distinction among both categories has no relevance any more. And this is so by equating the current payments' legal regime to the capital movements' one,[48] which means that the latter's has widened its material scope because of the legislator's will.

Our second conclusion is that despite the fact that the federal strategy guides the drafting of the new articles of the Treaty, when delimiting the scope of the free movement of capital (widening it) as well as when determining its exceptions (both broadening and restricting that scope) the Court adopts a renationalizing strategy. In its reasoning respecting national points of view over sensitive issues is still an important feature, maybe in order to legitimate as much as possible its rulings.

Finally and foremost, the new regime on capital movements and the case-law recognizing the direct effect of its provisions settled a constitutionally protected freedom in which national economic interests were not as relevant for the European Union as

markets in this way were phrased using a similar market-based logic. The fear expressed was that relative differences in land values and wealth as between the old and new Member States would lead to acquisition of significant areas of land by foreigners. To prevent this from occurring could not be regarded as discriminatory because equality involves the idea of treating like cases alike. And since foreigners and nationals are not in a like position as regards their wealth, treating them differently is not discriminatory. (…) However, in relation to derogations from the single market *acquis*, this tells only half the story. Relative wealth differentials do not of themselves account for the Protocols, since Denmark negotiated an opt-out relating to second homes in the Maastricht Treaty despite its relative wealth, as indeed have other Member States, such as Austria in its Accession Treaty. The missing part of the story is cultural rather than economic". Ch. Hilson, 'The Unpatriotism of the Economic Constitution? Rights to Free Movement and their Impact on national and European Identity', 14 (2008) *European Law Journal*, 186-202 (p. 195).

[46] Case C-57/95 *French Republic v. Commission of the European Communities* [1997] ECR I-01627.

[47] Case C-412/97 *ED Srl v. Italo Fenocchio* [1999] ECR I-03845.

[48] "The distinction between capital and current payments was accepted in *Luisi and Carbone*, in which the Court referred to the existence of different Treaty provisions dealing with each of these notions. However, the significance of any difference between capital movements and current payments has diminished since that judgment was delivered, as the decision to combine the rules on both in a single chapter of the Treaty shows". L. Flynn, *op. cit. supra* note 25 (p. 776).

they were before. This radical change can be explained because of the inclusion in the Maastricht Treaty of the provisions designing an Economic and Monetary Union. As a consequence of all that, the new regime permits all money transfers across national borders inside the European Union, and even between Member States and third countries. What should also be noted is that whereas before this new regime free movement of capital and the other economic freedoms coexisted and each money transfer should be considered a capital movement or attached to one of the other freedoms, after it all money transfers are considered part of the free movement of capital.[49] Therefore, this new regime widens the scope of the free movement of capital beyond what its ancient limits were. In addition, the interrelation among community freedoms has been strengthened and it now forms a solid block of law which must be respected. Cumulative application of economic provisions shows up how much they have been reinforced. As we have seen, the sole reasons which the Court accepted in order to forbid those movements are now referred to the protection of the competences, the cultural interests or the welfare policies of Member States. The controls taken in order to protect them should be implemented without disturbing the correct functioning of the freedoms, so prior authorizations should be changed for mere declarations. This scheme shows that the new conception lying behind the free movement of capital is closer to the federal strategy rather than to the renationalizing one, as it once was. Free movement of capital has become a constitutional-type rule which must be observed even by national legislators.

Last but not least, it should be noted that instead of establishing a clear set of norms which would allow citizens to be sure of what the legal regime allows them (or not) to do, the Court has decided to retain as much power over capital movements' decisions as it can. This strategy from the part of the Court has had a as a consequence that particulars had to resort to judges in order to solve their uncertainties, what has increased the number of cases the European Court of Justice has to deal with.

IV.- The third stage (the 2000's) : the age of privatizations

During the decade of 1990, while an Economic and Monetary Union was being build up and the case-law on the free movement of capital quickly developed, Member States were pushed to think about privatizing what have been their public companies, usually providing public services to their citizens. Confronted with that decision, in many cases very unpopular, national governments included in the articles of association of those privatized companies some clauses which allow them, in one way or another, to retain a substantive power over the most relevant decisions a company may take. These provisions have been eagerly denounced by the Commission and have finally gave rise to a new saga of decisions of the Court, known as the 'golden shares' rulings. It is not the aim of this paper to scrutinize the legal winding paths of these rulings, but to assess to which of our three conceptions of the European Union the Court is more close to when

[49] This has been made clear by the Court in its saga of rulings on the acquisition of second residences. As Hilson puts it, "EU laws on free movement of capital require there to be no discrimination, as between nationals and non-national EU citizens, in their ability to purchase real property. While earlier, discrimination-based case-law on property acquisition was based on other freedoms including establishment (Case 182/83, *Fearon* [1984] ECR 3677; Case 305/87, *Commission v Greece* [1989] ECR 1461), the court's more recent case-law has focused, increasingly exclusively, on capital". Ch. Hilson, *op. cit. supra*, note 45 (p. 194, note 58).

it decided in these cases. Therefore, we will focus on the main arguments and major trends of this case-law instead of analyzing them in detail.

First of all, we must note that the first ruling of the saga (*Commission v. Italy*),[50] which took place in 2000, did not imply any relevant feature since the Italian Republic admitted its liability and neither its legal service nor the Advocate General developed a strong legal reasoning. Very different was the second step of the saga, which comprised three different rulings (*Commission v. Portugal*; *Commission v. France*; and *Commission v. Belgium*).[51] Despite the different decision the Court adopted in the Belgium case – the sole one of the entire saga in which the Court considered a golden share clause justified – what is relevant for our research are the arguments of the Advocate General Ruíz-Jarabo Colomer. In his opinion, Colomer considers that the provisions which the Commission denounced were part of the system of property ownership each Member State is allowed to decide about by virtue of article 295 EC. Therefore, he holds that they always comply with the Treaty provisions. The sole infringement of community law he considers that may take place is referred to how those national norms are implemented, since for instance they may provoke discriminations between nationals and non-nationals, but not to the norms themselves, which are valid since the Treaty explicitly mentions that it does not prejudge the ownership system of each Member State.[52] Colomer supported this opinion with convincing arguments, pointing out that the article 295 EC is located in the sixth part of the Treaty ("General and final provisions"), from what it should be deduced that it inspires the rest of articles of the Treaty. He also highlights that this provision is literally based on the Schuman Declaration, hence it has an influence on the European integration process itself. But despite all these arguments, the Court did not take into account Colomer's, opinion and considered that the free movement of capital regime was the applicable one.[53] It not only did not accept that by virtue of article 295 EC those national regimes were respectful with community law, but basing its reasoning on the 'close connection' concept,[54] it also decided that it was the free movement of capital and not the freedom of establishment which should be applied to the case.

The third step in the 'golden shares' saga came with two more rulings (*Commission v. Spain* and *Commission v. United Kingdom*).[55] What I would like to highlight to this respect is not the Court's decision, but Advocate General Colomer's reaction to the prior

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50 Case C-58/99 *Commission v. Italian Republic* [2000] ECR I-3811.

51 Case C-367/98 *Commission v. Portuguese Republic* [2002] ECR I-4731; Case C-483/99 *Commission v. French Republic* [2002] ECR I-4781; and Case C-503/99 *Commission v. Kingdom of Belgium* [2002] ERC I-4809.

52 "The Advocate General was able to conclude that Article 295 EC implied that the privatization measures did not have to be considered as being incompatible *per se* with the EC Treaty but were covered by a presumption of legitimacy by virtue of Article 295 EC. Only if the *exercise* of the powers infringed the EC Treaty rules would there be a cause of complaint. The Advocate General singles out the non-discrimination Treaty clause (Article 12 EC) and the competition rules (Articles 81, 82 and 86 EC), *not* the free movement rules as the legal basis for an infringement complaint". E. Szyszczak, 'Golden Shares and Market Governance', 29 (2002) *Legal Issues of Economic Integration*, 255-284 (p. 267).

53 This interpretation has been supported also by some legal scholars. See M. Urrea Curres, 'El regimen de autorizaciones administrativas previas en las empresas privatizadas', 15 (2003) *Revista de Derecho Comunitario Europeo*, 683-697 (p. 694).

54 *Trumer & Mayer*, *supra* note 21.

55 Case C-463/00 *Commission v. Kingdom of Spain* [2003] ECR I-4581; and Case C-98/01 *Commission v. United Kingdom of Great Britain and Northern Ireland* [2003] ECR I-4641.

judgment in the abovementioned cases. He put his finger on the sore spot by insisting on the point of view he had expressed on his previous opinion. Three are the main points to which respect he disagrees with the Court. First, he considers that the will to control a privatized company is just (very) incidentally related to the free movement of capital. In last case, freedom of establishment and not of movements of capital should be applied. For the first time an Advocate General questioned the resorting to the secondary law in order to interpret the Treaties (remember that that was the main contribution of the *Trummer and Mayer* ruling to the case-law on capital movements). In second place, and to what refers to article 295 EC, Colomer accuses the Court of remaining silent in the previous rulings on a vital decision whish determines substantially the way national governments can exercise some control over extremely important economic sectors. And finally, he also questioned the different solution the Court gave to the French and the Belgium case, since the sole difference among them was the economic sector affected (an oil company in the French case, energy pipelines in the Belgium one).

Unfortunately, this opinion of the Advocate General had not an echo on the Member States' pleas before the Court. Perhaps a strong defense of their respective systems of property ownership by the part of national governments would have forced the Court, at least, to argue against the applicability of article 295 EC, but since both Spain and United Kingdom almost did not make any reference to the issue, the Court could pass by over it without clearly giving a serious reasoning. What it has done, indeed, was even worst, since in its ruling it subordinated article 295 EC to the economic fundamental freedoms.[56]

The last steps in the continuous saga of the golden shares rulings are mere confirmations of what the Court has established until this moment. Obviously, all of them have a particular feature which makes them interesting from a legal point of view, since the Court has refined its case-law always widening the scope of the now almighty economic freedoms. Hence, the Court has decided that public companies established in other Member States are also susceptible to be dissuaded of acquiring shares from a privatized company because of the existence of a golden share clause (*Commission v. Italy* and *Commission v. Spain*).[57] It also ruled that even when golden shares are not created by legislation but within the framework of domestic company law, article 56 EC is applicable. In such situations the Court considers that the Member State concerned acts not as a private shareholder but as a public authority whose actions fall within the scope of application of article 56 EC (*Commission v. Netherlands*).[58] The scope of the free movement of capital has also been broaden recently by virtue of the recognition that even a genuine public regulation, which only provides for normal rules of company law and which by any means mention the State as the beneficiary of these rules, could constitute a restriction to the freedom (*Commission v. Germany*).[59]

Summing up what is until now the last stage in the Court's case-law on the free movement of capital, a clear conclusion arises: the Treaty provisions on the field have

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[56] *Commission v. Kingdom of Spain*, *supra* note 55 (paragraph 67).

[57] Case C-174/04 *Commission v. Italian Republic* [2005] ECR I-4933; and Case C-274/06 *Commission v. Kingdom of Spain*, not yet reported.

[58] Joined Cases C-282 and C-283/04 *Commission v. Kingdom of the Netherlands* [2006] ECR I-9141.

[59] Case C-112/05 *Commission v. Federal Republic of Germany* [2007] ECR I-8995. On his comment of the ruling, Ringe poses a subtle and interesting question: what would had happened if the German *Land* had sold its share on the company? Will the same law still constitute an infringement of article 56 EC? See W.G. Ringe, 'Comment on the Case C-112/05 *Commission v. Germany*', 45 (2008) *Common Market Law Review*, 537-544 (p. 542-543).

acquired a constitutional status because of the direction the Court has driven its rulings to. To this respect it resulted decisive the abovementioned statement of the Court on the *Commission v. Spain* ruling,[60] putting on top of the hierarchical legal pyramid of the EU law the economic freedoms (described by the Court as 'fundamental freedoms'), even above the general provisions which rule the European integration. This statement supposes the end of the long road that has bring the free movement of capital from being a subordinated freedom to become the most prominent element of a supranational economic constitution. This travel began with the decision to consider that all economic transaction can constitute a capital movement if it is merely indirectly linked with the open list of the Annex I to the Directive (*Trummer and Mayer*). A second step further was made when all reduction in the attractiveness of a transaction may be considered a restriction[61] (*Trummer and Mayer*). Then, cumulative application of the provisions of the different economic freedoms allowed the settlement of a constitutional block of norms (*Konle*). All these decisions paved the way for the subsequent recognizing of an economic constitution by the saga of golden shares rulings (particularly the *Commission v. Spain* one) which was the last step in this fast evolution of the case-law on the free movement of capital.

V.- Conclusions

We can derive two main conclusions from our review of the case-law of the Court on the free movement of capital through the analytic glass of our three models. The first one is that the strategy was more federal as more developed was the case-law: During the first stage the Court, when taking its decisions, always was aware of what the Member States would have agreed if they were on its place (renationalizing strategy); during the second stage, capital movements were liberalized, but the Court still resorted to the renationalization strategy when deciding upon the scope both of the concept of capital movement and the of the restrictions to the free movement (renationalizing strategy combined with a structural federal strategy); and finally during the third stage the Court adopted a completely federal approach when establishing and consolidating the new economic constitution.

The second conclusion refers to the capital movements with third countries. Since the case-law which is applied to intra-community movements (scope, concept of restriction, etc) is the same that applies to them, we could consider that a federal strategy is also suitable to explain these relationships (here federal strategy refers not to the European Union's regime, but to the way its relationships with third countries is structured). But, because the Court's case-law is not binding for these third countries,

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60 *Commission v. Kingdom of Spain*, *supra* note 55.

61 "[S]uch a wide view of the concept of restriction could lead to a conflict with the system of allocation of powers set out in the EC Treaty, with the extension of Community competences to matters which should be left to the regulatory autonomy of the Member States. (…) [S]uch an expansive view could lead to a possible abuse of the Treaty provisions by economic operators challenging any national measure limiting their commercial freedom in any way. The latter danger echoes the situation that prevailed in the field of the free movement of goods prior to the ruling in *Keck*, when all sorts of fanciful attempts were made by traders to invoke article 28 EC in order to challenge national measures, the effect of which on intra-Community trade was often, to say the least, rather far-fetched". A. Looijestijn-Clearie, 'All That Glitters Is Not Gold: European Court of Justice Strikes Down Golden Shares in Two Dutch Companies', 8 (2007) *Europen Business Organization Law Review*, 429-453 (p. 447-448).

and each of them has its own legal regime on capital movements we may think about explaining this relationship through a cosmopolitan strategy, which foresees a situation of legal pluralism among the European Union and the third countries (again, cosmopolitanism should be understood here not as applicable to the European Union but to its relationships with third countries). This hypothesis, however, has to be corroborated on further research through case-law analysis.

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