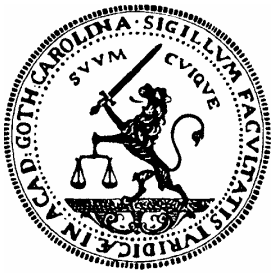

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Master thesis

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The German Volkswagengesetz and the free movement of capital

"Protecting national industrial heritage from hostile-takeovers"

Prof. Henrik Norinder

Four freedoms

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Contents

Summary

My thesis deals with the VW-Gesetz and its compatibility with the free movement of capital (Art. 56 EC).
The whole topic is highly political because Volkswagen is the biggest car-producer in Niedersachsen (Lower Saxony) and provides many jobs in that area. There have been attempts to takeover the company, which have not been successful because the VW-Gesetz includes several provisions, which make the takeover more difficult. Especially two of those have been criticised by the European Commission: That is the 20%-voting cap (§ 2 para. 1 VW-Gesetz) and the mandatory representation of public authorities on the board (§ 4 para. 1 VW-Gesetz). Both provisions detain foreign investors from taking over the company and can therefore be deemed to be an indirect restriction of the free movement of capital. The factual scope of the free movement of capital includes direct and indirect restrictions.
There is a guideline in those matters from the recent judgements of the ECJ in the “golden shares”-cases. There were proceedings the ECJ had to judge on in 2002 against France, Belgium and Portugal where the Commission had started an infringement procedure. In all three cases, the Member states reserved themselves priority rights during the process of legal estate privatisation, the so-called ”golden shares”. The formerly state-owned companies were part of the telecommunications, armament, aviation, and energy supply sector. The states wanted to justify those priority rights with the interest of the general public. They primarily wanted to prevent hostile take-overs of those companies by foreign competitors. The Court rules that all national rules are contrary to the free movement of capital besides those of Belgium.
However the VW-Gesetz is of a slightly different character. It only stipulates obstacles for a foreign takeover which are not directly comparable with the ”golden shares”-cases. The 20%-voting cap and the mandatory representation of public authorities on the board nevertheless create an indirect restriction to the free movement of capital because they deter foreign investors.
The next point, which also played a substantial role in the golden shares-decisions, is Art. 295 EC. According to the jurisdiction of the ECJ, only the original property order can be excluded from the scope of the Treaty, but not special rules of the Member States in order to protect certain parts of the

economy. The implementation of the internal market has a higher priority in that regard.

There is no justification for the restrictions of the free movement of capital. The character of the VW-share as a people's share, the danger of a job loss and the promotion of science through the Volkswagenstiftung are not sufficient to be regarded as mandatory requirements in the sense of the "*Cassis de Dijon*"-formula.

Therefore, I come to the conclusion that the VW-Gesetz stands in contradiction to the free movement of capital.

Preface

The idea for this thesis came to my mind in October 2004 when the Commission announced to take Germany to Court because of the VW-Gesetz and this news spread across the media. Since I was born and raised in Niedersachsen, where the Volkswagen-Company is situated I became interested in the whole matter, which is highly political in my country.

I would like to dedicate this Master Thesis to my parents, Dr. Günter and Dr. Beate Grünwald, who gave me a lot of support during my undergraduate studies in Germany and my postgraduate studies here in Sweden, and thereby contributed to their outcome.
I want to thank Prof. Henrik Norinder for his motivating aid and helpful advice during the preparation of this thesis.
Finally among many good friends I made in the past I would especially like to thank Anne Katharina Wozny who I met here in Lund and Sebastian Hanke from my time in Osnabrück. Both helped me a lot during recent times.

Abbreviations

AG	Advocate General, Aktiengesellschaft
AktG	Aktiengesetz
Art.	Article
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
DVBl.	Deutsches Verwaltungsblatt
EC	Treaty establishing the European Community
EEC	European Economic Community
ECJ	European Court of Justice
EMU	European Monetary Union
EU	Treaty on the European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
JuS	Juristische Schulung
lit.	littera
NJW	Neue Juristische Wochenschrift
Nr.	Number
NZG	Neue Zeitschrift für Gesellschaftsrecht
P.	page
Para.	paragraph
Rn.	Randnummer (side number)
VW	Volkswagen
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht

I. Introduction

1. Background

In several European states public entities have been transformed into private entities. But the states did not want to disappear from those firms that were important either business wise or politically. Therefore they reserved themselves special rights independent of their actual share property.

In the stock corporation law there is the principle that one share means one vote[1]. Dissenting from that there were introduced special majority voting rights in the seventies and eighties, in order to defend the increased amount of takeover offers at that time.

Nevertheless, during the time those majority voting rights were abolished in Germany, except the VW-Gesetz[2]. In that law the German legislator introduced some variations to the German Aktiengesetz[3] in order to protect the biggest car-producer of Niedersachsen (Lower-saxony) from hostile takeovers.
In regard to the ever closer Europe, whose main element is the common market without borders in the Community, those measures of repelling take-overs constrain the four freedoms laid down in the Treaty. In this case these are the free movement of capital and the freedom of establishment.

In order to get a better understanding of the whole topic, I would first of all like to show which way the proceedings took so far and what the European Commission accuses the German Authorities of.

a) The proceedings regarding the VW-Gesetz
On the 19th of March 2003 the European Commission sent a message of formal notice to the German authorities which said that the VW-Gesetz stands in contradiction to the free movement of capital[4]. What was taken

[1] Grundmann/Möslein, ZGR 2003, p. 317 (319); Mülbert in: Ferrarini, Reforming Company and Takeover Law in Europe, p. 718.
[2] Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerke GmbH in private Hand vom 21.07.1960.
[3] Quoted as AktG further on.
[4] European Commission, Brussels, 19th March 2003, IP 03/410.

into account was the 20% voting cap, in combination with a 20% blocking minority as well as the mandatory representation of public authorities on the Supervisory Board, all stipulated in the VW-Gesetz. Following that, the European Commission decided to send a formal request to Germany to amend certain provisisons of the VW-Gesetz on the 30th of March 2004[5]. According to Art. 226 EC, where the infringement procedure is laid down, the formal request is the second stage of the proceedings. This formal request denotes the infringement of the Treaty by the Member State in respect to the law as well as the facts[6].

In the formal request, the European Commission referred mainly to the same points as in the formal notice from March 2003. Consequently the European Commission set a condition by saying that if the German authorities do not take the necessary steps to remedy the infringement of Community law within two months of receiving the reasoned opinion they would refer the Case to the ECJ[7]. The German authorities in their reply refused to amend the Volkswagen law as requested. The European Commission considered Germany's arguments in defence of the VW-Gesetz to be unsatisfactory in the light of the relevant Court of Justice case law[8]. This is why the European Commission decided to take Germany to the ECJ with respect to certain provisions of the VW on the 13th October 2004[9]. Subsequently, the claim reached the ECJ on the 18th March 2005. A judgement is to be expected by the end of 2006[10].

b) The content of the infringement procedure

In the VW-Gesetz there are several provisions that are problematic in regard to the free movement of capital. The European Commission named those controversial regulations in the formal request it sent to Germany in 2004[11]. The European Commission namely points at two major obstacles in the VW-Gesetz.

One is the fact that according to the law, any shareholder holding more than 20 % of voting shares in VW may only cast a maximum of 20 % of the votes in a shareholder's meeting. In addition to that, a majority of more than 80 % of shareholder votes is required for important decisions in the

[5] European Commission, Brussels, 30th March 2004, IP 04/400.
[6] Geiger, EUV/EGV, Art. 226 EGV, Rn. 13.
[7] European Commission, Brussels, 30th March 2004, IP 04/400.
[8] European Commission, Brussels, 13th October 2004, IP/04/1209.
[9] Ibid.
[10] http://www.123recht.net/article.asp?a=12369&f=nachrichten_europarecht_20050318-13311ng6&p=1., 18th March 2005.
[11] European Commission, Brussels, 30th March 2004, IP 04/400.

company, meaning that any shareholder holding 20 % of voting rights enjoys a veto over company decisions[12].
The other feature the VW-Gesetz provides is the fact that the Federal Government (Bund) and the Land of Lower Saxony own shares in the company. This means that they should each have two seats on the Supervisory Board (consisting of 20 members, half of which represent the shareholders). This exception means a derogation from ordinary German company law, four out of the ten members representing shareholders can be directly appointed by public authorities[13].

2. Purpose

These are the main issues the ECJ is now facing in the pending proceedings. Of course it is hard to estimate the outcome of the proceedings and the content of the judgement. Nevertheless it appears to be suitable to make an analyis of the subject based on the recent jurisdiction regarding golden shares and the literature dealing with the free movement of capital and the VW-Gesetz.
The aim of this thesis therefore, is to examine whether the VW-Gesetz is in accordance with European law, especially with the free movement of capital. With the help of this example, I also want to show how the Community policy influences national legal systems and their way of protecting national industrial heritage.

3. Method

In my investigation I mainly use the recent jurisdiction on golden shares and also the contemporary literature on this issue and on the free movement of capital. I also refer to the recent press releases of the European Commission and of the Federal Ministry of Justice in Berlin. I included the Volkswagen-Gesetz in its original version at the end of the thesis (Supplement A, pdf-file).

4. Delimitation

[12] Ibid.
[13] Ibid.

My work primarily focuses on the VW-Gesetz and takes the recent golden shares-decision into account only where there is a linkage to the VW-Case. I also concentrate on the free movement of capital whereas the freedom of establishment is not considered further in my thesis. I restrict myself on German company law without going too much into details since the questions on European law issues have to stand in the foreground in this elaboration. I also do not focus on the takeover directive.

II. Free movement of capital – Basic principles and relevance

In order to understand the importance of the free movement of capital, it is necessary to see the importance the free movement of capital has within the European Union.

1. Overall basics of the international movement of capital and their effects on the market

In an internal market, goods and services like workers and self-employed persons must be able to choose their place of activity. The same has to be valid for the flow of capital as well. It has to be liberalised as far as possible. When this is achieved, one can speak of unlimited mobility of the means of production and products.

For a long time the rules on free movement of capital only were of minor importance for the internal market and also within the political and scientific debate[14]. In many textbooks the chapter on the free movement of capital is actually much shorter than those on the other freedoms. But the international movement of capital is essential for the internal market, which can be seen in Art. 2, 3 and 4 of the Treaty[15].

The importance of a common policy for capital transactions increased at the beginning of the nineties due to the increasing dynamics of the international financial markets. One reason for that were the new information and communication technologies.

The international capital transactions have a special impact on the balance of payments, on the external trade, on the economic growth and competition within the Member States[16].

[14] Rohde, EWS 1999, p. 453 (453).
[15] Ibid., p. 453 (453).
[16] Kleinschmit, Volkswagengesetz, p. 31.

2. Relevance of the free movement of capital inside the European Union

Following to the economic analysis of the free movement of capital I want to outline the relevance of the free movement of capital within primary law, according to the aims of the Treaty and in connection to the EMU.
The free movement of capital is laid down in Art. 56 et seqq of the Treaty. It is also explicitly mentioned in Art. 14 para. 2 of the Treaty as one major element for the realisation of the internal market. The free movement of capital is also essential for the implementation of the other freedoms.

According to Art. 2 and 3 lit. c) of the Treaty the free movement of capital is qualified as a common policy. Its relevance is also enhanced by Art. 1 para. 3 of the EU where it is stated that the Union is founded on the European Communities and its policies. In regard to this contractual position the ECJ classified the free movement of capital as the fourth freedom beside the free movement of goods, services and workers[17].

From an economic point of view, the EU can be seen as an attempt to combine the Member States to an internal market[18]. In order to achieve this aim there are certain objectives laid down in Art. 2 EC and in Art. 2 EU, which shall have an impact on all measures based on the Treaties.
Art. 2 EU contains the essential provisions in regard to the objectives of the European Union. Those objectives are legally binding and are important guiding points for the interpretation of the EU-Treaty[19]. In Art. 2 first dash EU the promotion of economic progress, a high level of employment through the strengthening of economic and social cohesion and through the establishment of economic and monetary union are explicitly mentioned. These objectives are implemented by the provisions of the EC-Treaty such as Art. 98 et. seqq. for the economic and monetary policy, Art. 125 et. seqq. for the employment and Art. 136 et. seqq. for the social policy.

Apart from the objectives laid down in Art. 2 EU, it is worth mentioning Art. 2 EC defining the tasks of the Community, which can also be assessed

[17] C-203/80, Casati (1981) ECR 2595; also Oppermann, Europarecht, Rn. 1482; Fischer, Europarecht, § 18, Rn. 1.
[18] Kleinschmit, Volkswagengesetz, p. 33.
[19] Geiger, EUV/EGV, Art. 2 EUV, Rdn. 1.

as objectives of the Treaty[20]. According to the latter the community shall have as its task, by establishing a common market and an economic and monetary union to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance. Those objectives are not precise enough to be directly applicable to Community law[21]. Nevertheless it is possible to take the objectives into account when interpreting primary and secondary Community law[22].

The free movement of capital therefore has always to be seen in regard to the economic aims from Art. 2 EU and Art. 2 EC. The free movement of capital is of high importance for the European internal market, since it has a positive influence on the development of business life within the Community[23].

There is also a close connection between the free movement of capital and the EMU, which consists of the importance of capital flow in the EMU[24]. The EMU includes the monetary policy as well as the introduction of a uniform currency in order to guarantee the primary goal of price stability[25]. One evidence for the linkage between the free movement of capital and the EMU is Art. 116 para. 2 lit. a) first dash EC where it is explicitly mentioned that each Member State shall take measures to comply with the prohibitions laid down in Art. 56 of the Treaty.
Thus one can say that there is a close connection between the free movement of capital and the EMU.

The free movement of capital has effects within the internal market that support the realisation of the objectives of the Treaties and the EMU. Therefore the free movement of capital is of high importance within the Community.

[20] Zuleeg in: Groeben/Thiesing/Ehlermann, Kommentar zum EWG-Vertrag, Art. 2 EGV, Rdn. 2.
[21] C-126/86, Giminez/INSS (1987), ECR 3697, para. 11, C-339/89, Alsthom Atlantique (1991), ECR 107, para. 9.
[22] Oppermann, Europarecht, Rdn. 685.
[23] Kleinschmit, Volkswagengesetz, p. 36.
[24] C-203/80, Casati (1981) ECR 2595.
[25] Nicolaysen, Europarecht II, p. 368.

III. Content and scope of the free movement of capital

After having assessed the actual importance of the free movement of capital within the Community, I now want to illustrate its content and scope.

1. Definition of the free movement of capital within the Union

The term "capital transactions" is not defined neither in the Treaties nor in secondary Community law[26]. Also the ECJ did not give a complete definition. In literature, the term is defined as the uni-lateral transmission of values in terms of real capital or in terms of monetary capital from one member state to the other, which are not caused by movement of goods or services[27].
In order to define the term further one should take a closer look at the primary and secondary law.

a) Primary law

In primary law, it is hard to find a legal definition for the term capital transactions. Nevertheless Art. 3 lit. c), 14 II, 57 EC, Art. 67 et seqq. and the additional protocols to the EC offer some help for explanation.
According to Art. 3 lit. c) and Art. 14 para. 2 EC the internal market is characterised by the abolition, as between the Member States, of obstacles to the free movement of goods, persons, services and capital.
There exist also additional protocols, which are an integral part of the Treaty according to Art. 311 EC and which are therefore also part of primary law[28]. In these protocols, the acquisition of second homes and of basic property for instance is subject to certain restrictions[29].

[26] Geiger, EUV/EGV, Art. 56 EGV, Rn. 3.
[27] Lenz/Borchardt, EU- und EG-Vertrag, Vorb. Art. 56-60, Rn. 8; Geiger, EUV/EGV, Art. 56 EGV; Rn. 3.
[28] Borchardt, Rechtliche Grundlagen der EU, Rn. 63.
[29] Kleinschmit, Volkswagengesetz, p. 41.

Concluding this, one can say that primary law only partially helps with finding a definition for the term free movement of capital.

b) Secondary law

In secondary law, there is one regulation of major importance for the definition of the term capital transactions[30], and that is the Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty[31].

aa) Applicability of the directive 88/361 EEC

Nevertheless, the applicability of the Directive is in question: The legal basis for the Council directive is Art. 69 and 70 EEC[32]. The problem is that Art. 67 – 73 EEC have been substituted by Art. 73 a EC so that this directive might be of no further importance for the definition of the term capital transactions.

Therefore one opinion in literature says that as a consequence of the omission of the former legal basis (Art. 69 and 70 EEC) also the secondary law based on it, especially the Directive on capital transactions from 1988 has become obsolete[33].

Another opinion says that the Directive 88/361 EEC has not been annulled explicitly and therefore continues to be valid as an additional source of law[34].

In order to settle this dispute for the further examination, I would like to stress that basically the omission of a legal basis does not mean that there are no legal consequences of that provision any longer[35]. There has also been no formal omission of the directive, it is still part of the aquis communautaire as referred to in Art. 3 EU. But still the provisions are not applicable any longer as far as they stand in contradiction to the new contractual law[36].

Therefore the directive 88/361 EEC and its nomenclature in Annex 1 is of an indicative character for the definition of the term capital transactions

[30] Weber in: Lenz/Borchardt, EU- und EG-Vertrag, Art. 56, Rn. 21.
[31] Official Journal L 178 , 08/07/1988 P. 05 – 18.
[32] See the introduction of Council Directive 88/361/EEC (p. 05).
[33] Eckhoff in: Bleckmann, Europarecht, Rn. 1699.
[34] Kiemel in: Groeben/Schwarze, Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, Band 1, Art. 56 EC, Rn. 3; Weber in: Lenz/Borchardt, EU- und EG-Vertrag, Art. 56, Rn. 19; Glaesner in: Schwarze, EU-Kommentar, Art. 56 EC, Rn. 3.
[35] Ibid., Rn. 3.
[36] Ibid., Rn. 3.

which has also been underlined by the ECJ[37]. But still the directive is only of secondary character and hence entails no terminal definition which can be sufficient for primary law[38].

bb) Content of the directive 88/361 EEC

The nomenclature of the directive 88/361 EEC names the following transactions: Direct investments (I.), investments in real estates (II.), operations in securities normally dealt in on the capital market (III.), operations in units of collective investment undertakings (IV.), operations in securities and other instruments normally dealt in on the money market (V.), operations in current and deposit accounts with financial institutions (VI.), credits related to commercial transactions or to the provision of services in which a resident is participating (VII.), financial loans and credits (VIII.), sureties, other guarantees and rights of pledge (IX.), transfers in performance for insurance contracts (X.), personal capital movements (XI.), physical import and export of financial assets (XII.), and other capital movements (XIII.).

According to the analysis of primary law, direct investments are also subsumed under the term of capital transactions according to the directive 88/361 EEC. The nomenclature qualifies direct investments as:

"1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.

2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.

3. Long-term loans with a view to establishing or maintaining lasting economic links.

4. Reinvestment of profits with a view to maintaining lasting economic links.

A - Direct investments on national territory by non-residents

B - Direct investments abroad by residents"

[37] C-222/97, Trummer and Mayer (1999), ECR 1661, para. 21; C-484/93, Svensson and Gustavsson (1995), ECR 3955, para. 6; C-463/00, Commission v. Spain (2003), www.curia.eu.int., para. 52.
[38] Kleinschmit, Volkswagengesetz, p. 43.

What is interesting in that context is that not only the major shareholding but also the acquisition in full of existing undertakings falls within the scope of the directive. Besides the direct investments, it is also worth mentioning the fifth point of the nomenclature, which also lists deals with shares. That means that shares also fall under the scope of the directive. Accordingly the acquisition of shares below the threshold of a direct investment are also protected by the free movement of capital[39].
When one looks at the wording of the introduction, it is obvious that the nomenclature is not complete, what the ECJ already stressed in *Trummer und Mayer*[40]. This result gets further support by the mentioning of the term "*miscellaneous*" in point F of Annex I, seventh category. Any other result would stand in contradiction to the primacy of the primary law, which cannot be restricted through the means of secondary law[41].

c) Negative definition: Delimitation to the other freedoms

In order to define the content of Art. 56 EC, it is worth looking at the other four freedoms in order to have a delimitation to the free movement of capital.

aa) Delimitation to the free movement of goods

Goods according to Art. 28 EC are all things that can be brought across the border and that can be subject to commercial transactions[42]. According to the ECJ, there is no overlap between the free movement of capital and the free movement of goods[43]. In general, the material transfer of assets does not fall under the scope of Art. 28 EC, but under the scope of the free movement of capital[44].
Therefore there is no real problem in having a delimitation to the free movement of goods.

bb) Delimitation to the free movement of services

There is a close linkage between the free movement of capital and the free movement of services which can be seen in Art. 51 Nr. 2 EC, where it says: *"The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the liberalisation of*

[39] Ibid., p. 45.
[40] Case 222/97, Trummer and Mayer, (1999), ECR 1661, para. 21.
[41] Kiemel in: Groeben/Schwarze, Band 1, Art. 56 EC, Rn. 3.
[42] Case 2-90, Commission v. Belgium (1992), ECR I 4431, para 21.
[43] Becker in: Schwarze, EU-Kommentar, Art. 28 EC, Rn. 25.
[44] Ibid., Art. 28 EC, Rn. 25.

movement of capital". One other example in the legislature is Art. 50 para. 1 EC which says: "*Services shall be considered to be "services" within in the meaning of this Treaty where they are normally provided for remuneration, insofar as they are governed by the provisions relating to freedom of movement of goods, capital and persons."*

Apart from this legislative connections, the ECJ did not find a straight way in either keeping both freedoms apart or developing a connection between them. In the *Svensson and Gustavsson* decision, the ECJ saw a breach of both freedoms in a case where a Luxemburgian rule stated that a credit has to be taken at an institute, which is established in Luxemburg[45]. In *Parodi* on the other hand, the ECJ drew the conclusion out of Art. 51 para. 2 EC that in case of restrictions of the free movement of capital the free movement of services is not applicable any longer[46]. In 1998, the ECJ gave a ruling in two cases, *Safir* and *Ambry* where it based its judgement only on the free movement of services and not on the free movement of capital[47]. Therefore there is no clear line of argumentation visible in the judgements of the Court. But there seems to be an overlap between both freedoms at least in certain areas. It is hence important to take a look on the individual case in order to see if the main focus is either on the free movement of capital or on the free movement of services.

cc) Delimitation to the freedom of establishment

The freedom of establishment is laid down in Art. 43 EC. The term establishment is not defined in the Treaty itself.

The ECJ has defined the term as the "allowance for a Community national to participate, on a stable and continuous basis, in the economic life of Member State other than his state of origin"[48].

When one looks at Art. 58 Nr. 2 EC one can see that there is a close linkage between the free movement of capital and the freedom of establishment: There it is said that "the provisions of this chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty". Nevertheless the delimitation between both

[45] Case 484/93, Svensson and Gustavsson (1995), ECR 3955, para. 10.
[46] Case 222/95, Parodi (1997), ECR 3899, para. 9.
[47] Case 118/96, Safir (1998), ECR 1897, para. 35; Case 410/96, Ambry (1998), ECR 7875, para. 40.
[48] Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (1995) ECR I-4165.

freedoms is problematic and sometimes confusing[49]. There exist different opinions concerning that:

(1) Exclusivity between both freedoms

According to one opinion there is a strict separation between both freedoms, which is due to their autonomous field of application[50].
In the judgements concerning golden shares AG Ruiz-Jarabo Colomer had the same opinion when he stressed that the defendant Member States only seek to control the formation of the privatised company's corporate will either by intervening in the composition of the membership or by influencing specific management decisions[51]. In his eyes, the emphasis in such cases is on the freedom of establishment and not on the free movement of capital[52].

(2) Parallel applicability

Another opinion argues in favour of a parallel applicability of both freedoms. The ECJ dealt with the relationship between both freedoms in the ”golden shares”-decisions. In those cases, it argued that the free movement of capital is closely linked to the freedom of establishment[53]. There is hence no relationship of exclusivitiy between both freedoms. One further argument for that opinion is that Art. 56 EC provides the same ground of justification as Art. 73d, both based on public security[54].
So the ECJ generally takes both freedoms into account when examining a possible breach of law.

(3) Own statement

In my eyes it is almost impossible to keep both freedoms apart, since they are too closely connected with each other. In all kinds of investments there are both freedoms which can be restricted, for instance by the aquisition of a real estate which is used as industrial property. For that reason I would argue in favour of a parallel applicability of both freedoms based on the content of the individual case.

[49] Freitag, EWS 1997, p. 186 (189).
[50] Ibid., p. 186 (190).
[51] AG Ruiz-Jarabo Colomer, C-463/00, Commission v. Spain (2003), www.curia.eu.int., para. 36.
[52] Ibid., para. 36.
[53] C-367/98, Commission v. Portugal (2002), ECR I-4731, para. 56; C-483/99, Commission v. France (2002), ECR I-4781, para. 56.
[54] C-503/99, Commission v. Belgium (2002), ECR I-4809, para. 59.

d) Summary

The free movement of capital includes a lot of different aspects. It is partly defined by primary law, but the main legal source seems to be the directive 88/361 I outlined above. According to that, the trade with shares falls under the scope of the free movement of capital. It is always important in that context to promote a wide definition of the term free movement of capital with respect to the internal market[55].

2. Factual scope of application

The factual scope of application is what I want to examine now, and it is closely linked with the restrictions put on the free movement of capital.
Restrictions on the movement of capital are all state measures that set up different kind of rules for the import and export of capital in contrast to the internal capital market[56]. In Art. 56 EC there is a total ban on restrictions either on the movement of capital between the Member States and also in relation to third states[57].

a) Prohibition of restrictions

The term restriction in Art. 56 EC has to be discussed further. The actual inducement for that is that the European Commission found the Volkswagengesetz to be a restriction of the free movement of capital, especially the 20 % voting cap, in combination with a 20% blocking minority and the mandatory representation of representatives on the board[58].

aa) Definition of the term

In order to find out whether the VW-Gesetz is a restriction of the free movement of capital, it is necessary to examine what is actually meant by the term restrictions.
There are different approaches to that question. Once again the whole scenery is not very clear. It is either possible to define the term by using the dogmatic jurisdiction on the four freedoms or by referring to an own term of restrictions based on the movement of capital.

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[55] Kleinschmit, Volkswagengesetz, p. 55.
[56] Glaesner in: Schwarze, EU-Kommentar, Art. 56 EC, Rn. 16.
[57] Ibid, Art. 56 EC, Rn. 17.
[58] Free movement of capital: Commission asks Germany to amend the Volkswagen law, Brussels, 30th March 2004 (Document: IP/04/400).

The ECJ has ruled on restrictions on the free movement of capital on several occasions. In *Svensson v. Gustavsson,* the Court ruled that it is a restriction of the free movement of capital when a Member State makes the grant of a housing benefit subject to the requirement that the loans intended to finance the construction have been obtained from a credit institution approved in that Member State[59]. In that context it is also worth mentioning the *Sanz de Lera*-Case, where the ECJ stated that the free movement of capital precludes rules which make the export of coins, banknotes or bearer cheques conditional on prior authorisation[60]. In one of the "golden shares"-decisions the ECJ underlined that the free movement of capital includes any kind of restrictions on the movement of capital between Member States[61]. In that case, France had introduced "golden shares" in order to guarantee the energy supply in times of crisis.

But the ECJ went further by using the same standards as in the jurisdiction regarding the free movement of capital and the free movement of services[62]. The Court refers to the principles it set out in the "Dassonville-Formula" and in the "Cassis-de-Dijon-Formula"[63]. According to the "Dassonville-Formula", all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions[64]. According to that formula, indirect restrictions also fall under the scope of Art. 56 EC[65].

The ECJ went further by applying the "Cassis-de-Dijon-Formula" on the free movement of capital. According to that, formula restrictions are valid, only if there are no Community measures on that and if the restrictions are necessary and justified by urgent requirements[66]. I will examine the questions of justification later on in my work, with regard to the VW-Gesetz.

The European Commission defined the term "prohibition of restrictions" in a similar way as the ECJ did by stressing that Art. 56 para. 1 EC prohibits

[59] C-484/93, Svensson and Gustavsson (1995), ECR 3955, para. 10.
[60] C-163/94, 165/94 and 250/94, Sanz de Lera (1995), ECR I-4821, para. 39.
[61] C-483/99, Commission v. France (2002), ECR I-4781, para. 40.
[62] Kiemel in: Groeben/Schwarze, Band 1, Art. 56 EC, Rn. 11.
[63] Weber in: Lenz/Borchardt, EU-und EG-Vertrag, Art. 56 EGV, Rn. 14.
[64] C-8/74, Procureur du Roi v. Dassonville (1974), ECR 837, para. 5.
[65] C-483/99, Commission v. Great Britain (2002), ECR I-4781, para. 44.
[66] Weber in: Lenz/Borchardt, EU-und EG-Vertrag, Art. 56 EGV, Rn. 14.

all national rules that create obstacles inasmuch as they are liable to impede, or render less attractive, the exercise of this freedom[67].
Also scholars argue in favour of a wide definition of the term restrictions[68]. They see the term restriction closely related to the jurisdiction concerning the free movements of goods, especially to the "Dassonville-Formula"[69]. They thereby refer to the similarities between capital in form of coins or shares and goods. As far as the payment is non-physical, only the service is crossing the border so that the principles of the free movement of services are applicable[70]. So the literature very much focuses on the jurisdiction regarding the "Dassonville-Formula" when defining the restrictions.

bb) Summary/Comment

In my point of view, it seems to be suitable to apply the criteria laid down in the Dassonville-judgement on the free movement of capital. The recent jurisdiction has shown that there is a close linkage between all four freedoms. In favour of an internal market it is important to apply the same standards on the free movement of capital as on the other freedoms. This position gets also support by Art. 3 Nr. 1 lit. c) EC where the importance of the internal market is explicitly mentioned.
Subsequently it is only the ability of restricting capital movements and not the actual restriction, which counts[71]. In regard to the Volkswagen-Case it is only a potential restriction of the shareholder's rights, which is relevant for the further analysis.

b) Analysis of the VW-Gesetz

After having outlined the main content of Art. 56 EC and the definition of its restrictions, I would now like to examine the VW-Gesetz with regard to the scope of the free movement of capital and its restrictions.
The two main points the European Commission criticises – as I have explained above – are the 20 % voting cap, in combination with the

[67] The Commission in: C-483/99, Commission v. Great Britain (2002), ECR I-4781, para. 21.
[68] Smits, Freedom of payment and capital movements under EMU, p. 245 (p. 249 et seqq.); Juillard, Lecture critique des Articles 73B, 73 C et 73 D TCE, p. 177 (p. 178 et seqq.).
[69] Weber in: Lenz/Borchardt, EU-und EG-Vertrag, Art. 56 EGV, Rn. 14; Freitag, EWS 1997, p. 186 (187).
[70] See Weber in: Lenz/Borchardt, EU-und EG-Vertrag, Art. 56 EGV, Rn. 14.
[71] C-13/78, Eggers (1978), ECR-I 1935, para. 25 et seqq.

blocking minority and the mandatory representation of public authorities on the board.

The first question in that context is whether the VW-Gesetz contains a "golden share-rule".
In order to answer that question it is necessary to define the term "golden share":
In literature several attempts have been made for a definition: In a narrow sense it is a share which is linked to special rights[72]. Those rights can be a state reservation of authorisation for important business decisions in companies that are economically important[73]. A wider definition would see "golden share" arrangements as legal structures applying to individual corporations for the purpose of preserving the influence of a public authority on the shareholder structure or the management of that corporation beyond the extent to which such influence would be afforded under general corporate and securities law[74].
The jurisdiction has dealt with that issue in several cases. "golden share" arrangements in a wider sense have been implemented in Portugal, France, Belgium, Spain, Italy and the United Kingdom[75]. In all these cases, the ECJ had to deal with certain kinds of protective arrangements. I would like to highlight the most important of them in order to make a comparison to the Volkswagen-Case.

aa) The recent judgements on golden shares

The first cases dealing with golden shares were three judgements from the 4th June 2002 where the European Commission had started an infringement procedure against France, Portugal and Spain[76]. In all three cases the Member states reserved themselves priority rights during the process of legal estate privatisation. The formerly state-owned companies were part of the telecommunications, armament, aviation, and energy supply sector[77]. The states wanted to justify those priority rights with the interest of the

[72] Kilian, NJW 2003, p. 2653 (2653).
[73] Ibid, p. 2653 (2653).
[74] Adolff, Turn of the Tide?, German Law Journal No. 8 (1 August 2002), p. 4.
[75] Ibid, p. 4.
[76] C-367/98, Commission v. Portugal (2002), ECR I-4731, para. 56; C-483/99, Commission v. France (2002), ECR I-4781, para. 56; C-503/99, Commission v. Belgium (2002), ECR I-4809, para. 59.
[77] Annotation to: C-367/98, Commission v. Portugal (2002), ECR I-4731; C-483/99, Commission v. France (2002), ECR I-478; C-503/99, Commission v. Belgium (2002), ECR I-4809; Soria, DVBl. 2002, p. 1106.

general public. They primarily wanted to prevent hostile take-overs of those companies by foreign competitors[78].

In order to get a better understanding of the cases I want to outline the essential facts: In the case *Commission v. France*[79] the Court had to deal with a French rule concerning the acquisition of shares of the Societe national Elf-Aquitaine. Any direct or indirect shareholding by a natural or legal person, acting alone or in conjunction with others, exceeding the ceiling of one tenth, one fifth or one third of the capital of, or voting rights in, the company had to be approved by the Minister for Economic Affairs. Further on the state could intervene in the transfer of subsidiaries of the company. The Court came to the conclusion that those rules stand in contradiction with the free movement of capital[80].

The second case which was decided on the very same day was *Commission v. Portugal*[81]. That case dealt with national rules precluding investors from another Member State from acquiring more than a given number of shares in certain Portuguese undertakings. Secondly there was an obligation whereby prior authorisation had to be obtained for the acquisition of an interest in a Portuguese undertaking above a certain level[82]. The ECJ ruled that both national rules are contrary to Art. 56 EC.

The third case on the same day was *Commission v. Belgium*[83] where the Court had to give a ruling on special shares for the Belgium state concerning two energy suppliers. With the help of these shares, the responsible Minister was entitled to oppose such operations if he considered that they adversely affect the national interest in the energy sector. The Minister could also appoint two representatives of the Federal Government to the board of directors of the company. Those representatives could propose to the Minister the annulment of any decision of the board of directors or of the management committee which they regard as contrary to the guidelines for the country's energy policy. In that case there was no breach of Art. 56 EC because the legislation in issue was justified by the objective of guaranteeing energy supplies in the event of a crisis[84].

The ECJ continued its jurisdiction with the judgements against Spain and Great Britain from the 13th may 2003. In the case *Commission v. United*

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[78] Ibid, p. 1106.
[79] C-483/99, Commission v. France (2002), ECR I-4781.
[80] Ibid.
[81] C-367/98, Commission v. Portugal (2002), ECR I-4731.
[82] Ibid.
[83] C-503/99, Commission v. Belgium (2002), ECR I-4809.
[84] Ibid., para. 55.

Kingdom[85] the Court had to deal with special rights for a privatized operating company of airports. The provisions namely limited the possibility of acquiring voting shares in BAA plc ('BAA'), and there was also a procedure required for consent to the disposal of the company's assets. The ECJ evaluated this kind of restriction and also the authorization requirement as a breach of Art. 56 EC[86].

There was a similar approach in the judgement *Commission v. Spain*[87], where the ECJ had to deal with companies from the tabacco, banking, petroleum, telecommunications and electricity sector. In that case the national authorities had to give a prior approval for decisions of commercial undertakings related to important business decisions such as the undertaking's winding-up, demerger or merger, a change in the undertaking's object, or a reduction of the State's shareholding below a certain degree[88]. The Court held that this system of prior administrative approval is not in accordance with Article 56 EC[89].

So there are several instruments the public authorities use in order to prevent hostile-takeovers, which can be classified in the following way: One is the restriction of the voting power without the consideration of the capital share the share-holder holds. The other is a greater voting power than there ought to be in relation to the capital share. The third way is the so-called "golden-share" where the state has a special veto power in order to prevent a hostile take-over[90].

It seems as if national legislators developed a huge creativity when it comes to protecting their national entities against foreign takeover ambitions.

bb) The VW-Gesetz

It is surely debatable if the VW-Gesetz fits into one of those categories I mentioned above and whether the recent jurisdiction can hence be transferred to the Volkswagen-Case.

It is clear that the VW-Gesetz does not include any kind of restrictions regarding the aquisition of shares like there were in the cases *Commission v.*

[85] C-98/01, Commission v. Great Britain (2003), www.curia.eu.int.
[86] C-98/01, Commission v. Great Britain (2003), www.curia.eu.int, para. 1.
[87] C-463/00, Commission v. Spain (2003), www.curia.eu.int.
[88] Ibid., para. 54.
[89] Ibid., para. 84.
[90] Soria, DVBl. 2002, p. 1106.

France[91] and *Commission v. Belgium*[92]. There is also no restriction for foreign investements like in *Commission v. Portugal*[93] in the German rules.
The VW-Gesetz does not know any authorization requirements nor any special rights for the public authorities[94]. None of the points the Court critized in its recent judgements as a restriction to the free movement of capital can be directly applied to the VW-Case[95].
Everyone is able to purchase shares in a large amount as long as they are available. But the question is whether the VW-Gesetz lowers the attractivity of the shares to such an extent that there is an indirect restriction of the free movement of capital[96].

c) Possible restriction of the free movement of capital

In the following I want to examine the provisions in the VW-Gesetz the Commission criticises.

aa) 20 % voting cap, in combination with a 20 % blocking minority

The first point critized by the Commission is the 20 % voting cap, in combination with a 20 % blocking minority.
The basic principle in a stock corporation is that the voting power equals the capital share (”one share, one vote”). This principle is laid down in German company law in the §§ 12, 134 para. 1 first sentence AktG. According to that every share guarantees the same amount of votes.
The Volkswagen-AG is listed on the stock exchange. The 20% voting cap does not exist through a statute but through law, i.e. § 2 para. 1 VW-Gesetz. This cap is obviously not in accordance with the German Aktiengesetz.
Compared with the recent cases on golden shares, especially with *Commission v. France*[97] and *Commission v. Great Britain*[98], there is one striking difference: In both cases the aquisition of shares with voting power was restricted, which was seen as a restriction of the free movement of capital. The rules the two judgements dealt with mainly focused on the aquisition of shares whereas the VW-Gesetz on the other hand codifies that

[91] C-483/99, Commission v. France (2002), ECR I-4781.
[92] C-503/99, Commission v. Belgium (2002), ECR I-4809.
[93] C-367/98, Commission v. Portugal (2002), ECR I-4731.
[94] Kilian, NJW 2003, p. 2653 (2654); Kilian, Europäisches Wirtschaftsrecht, p. 260.
[95] Ibid., p. 2653 (2655).
[96] Kleinschmit, Volkswagengesetz, p. 66.
[97] C-483/99, Commission v. France (2002), ECR I-4781.
[98] C-98/01, Commission v. Great Britain (2003), www.curia.eu.int, para. 1.

shares can be purchased in any quantity, the restriction is only on the voting right.
The Commission especially criticises the 20 % voting cap in combination with the majority of more than 80 % of shareholder votes which is needed for important decisions in the company. That means that every shareholder who holds 20 % of voting rights enjoys a veto over company decisions. The Commission further outlines to that point that the contested provisions may in practice give a special blocking minority right to VW's biggest shareholder, the Land of Lower Saxony, whose shareholding has been and continues to be the equivalent of roughly 20 % of the voting shares[99].
The German government on the other hand does not see any problems in that provision. They just say that it is the character of a voting cap that it is harder to achieve a majority. But in their eyes this does not necessarily mean a restriction of the free movement of capital. The shareholder who is concerned by the voting cap can still participate in the administration and the control of the company[100].
The main point in that context is whether a voting cap can be a restriction of the free movement of capital. One could assume a lower attractivity of the VW-share and as a consequence of that an indirect restriction[101].
In order to solve that question, it is necessary to find out which goals are to be achieved with a voting cap and then to take a look at what effect it has on the free movement of capital.

In order to understand what a voting cap is, one should define it:
Voting caps are designed to prevent large shareholders exercising control[102]. Such special voting rights are used to make a company takeover more difficult. It is therefore likely that voting caps will result in the reduction of takeover-activity and blockholder domination. Such voting caps were recently used in Germany, for instance in the VW-Gesetz[103].

After having pointed out the reasons for a voting cap I want to examine now how these aims find support through the VW-Gesetz. It is further

[99] See: Free movement of capital: Commission asks Germany to amend the Volkswagen law, Brussels, 30th March 2004 (Document: IP/04/400). The exact share the Land Niedersachsen holds is 18,16 % of the share capital of the VW-AG.
[100] Press release, Berlin 13th of October, http://www.bmj.bund.de/enid/0,0/58.html?druck=1&pressartikel_id=1677.
[101] Kleinschmit, Volkswagengesetz, p. 70.
[102] McCahery, Renneboog, Ritter, Haller in: Ferrarini, Reforming Company and Takeover Law in Europe, p. 591.
[103] Ibid., p. 591.

questionable if the rules might prevent foreign investors from taking over the company.

(1) Possibilites of taking over the Volkswagen company

There could be a limited possibility of participating in the administration of the company or in the control of it. It might even be harder to take over the company. One essential point with regard to the 20 % voting cap therefore is whether it is possible for a shareholder to participate in the control of Volkswagen or to take over the company.

The major shareholder in Volkswagen is the Land Niedersachsen. It is crucial to find out its impact on Volkswagen in order to see whether a takeover might be restricted. The Land Niedersachsen might have a dominant position in the Volkswagen company. The term dominant position is laid down in § 17 para. 1 AktG. According to that, a company is dependent on another if one company has an indirect or direct impact on another company and can therefore dominate the company.

One important element in that context is the mandatory representation of public authorities on the board[104]. The supervisory board plays a major role in the company's strategic decision making. It is therefore likely that the Land Niedersachsen has a dominant position within Volkswagen.

The next question would be if a potential investor can achieve a position as powerful as that of the Land Niedersachsen by a direct investment in order to participate in the control of the company.

It is still possible that an investor could purchase 20 % of the capital with a voting right. The consequence would be that the impact on the company would be the same as for the Land Niedersachsen.

Three major shareholders could hence collaborate and could take a strong influence on the company's business policy.

It is therefore still possible that a potential investor could participate in the control and administration of the Volkswagen Company in spite of the voting cap.

Following that, it is necessary to examine whether the voting cap makes it harder to take over the company. Even if there would be a second major shareholder beside Niedersachsen it could not establish a majority participation because the majority would only be the same that Niedersachsen already has.

It is also difficult for a private investor to take over the shares the Land Niedersachsen owns. Still there is a highly political interest in keeping these

shares for the Land Niedersachsen, which is at least as important as the economic interest[105].
For that reason it is not possible to achieve the majority in the general meeting for a second investor.
But still there could be the possibility of compensating that obstacle by the effects of having the capital power. According to § 4 para. 3 VWG, it is necessary to have 80 % of the capital of the company for decisions that require only 75 % according to the AktG. The legislator wanted to create a relationship between the capital power and the voting cap that makes it possible for the capital power at least to hinder the restriction of the voting cap[106]. The holding of the capital majority can therefore impede the development of the company but it cannot lead to an active takeover[107].
So concluding this one can say that the voting cap makes the takeover harder since it is combined with a lot of difficulties. A takeover only based on the capital power can only be achieved through a longterm influence on the other shareholders, which is actually far more difficult than using the voting or capital majority without a voting cap[108].

(2) Restriction of the free movement of capital through a negative development of the exchange rates

A restricted amount of capital transactions could occur because potential investors might think that the exchange rate might develop in a bad way due to the voting cap.
One can make that assumption due to the fact that hostile takeovers seem to be unrealistic as I have pointed out above. But still the main indicators for the development of the exchange rate are the company's policy, the profit expectations and all other developments of the company[109]. Changes of the exchange rate due to the voting cap might only occur in a short-term basis which is not sufficient for a restriction of the free movement of capital[110].

(3) Summary

As a result of the previous examination I would state that investors from other Member States might be afraid of investing in the Volkswagen-Company because they don't have the possibility of a takeover. That makes

[104] Ibid., p. 78.
[105] Ibid., p. 80.
[106] See BGHZ 70, 117 (122).
[107] Kleinschmit, Volkswagengesetz, p. 82.
[108] Ibid., p. 84.
[109] Endell, NZG 2000, p. 1160 (1161).

it less attractive for them to invest in Volkswagen and could hence be seen as an indirect restriction of the free movement of capital due to the voting cap.

bb) Mandatory representation of public authorities on the board

Another important point the Commission claimed was the mandatory representation of public authorities on the board. It is laid down in § 4 para. 1 of the VW-Gesetz and according to that the Bund (Federal Government) and the Land Niedersachsen are entitled to have two seats on the Supervisory Board each as long as they own shares in the company. This rule could be an unproportionate privilege for the public authorities against the other shareholders and might hinder the free movement of capital.

One could interpret this rule as a Golden share in a wide sense[111]. On the one hand, there is no special share created by this rule that is different from the other shares of the Volkswagen company. On the other hand, the shareholding includes the mandatory representation of public authorities on the board. The main point in that regard is that ”normal” shareholders don’t have this special right[112].

The two or four seats on the supervisory board do not form a majority on its own but they can be decisive for close votes[113]. The placement of people on the supervisory board is also of a huge importance because it is up to them to decide who shall sit on the board of directors, that has a huge impact on the administration of the company[114]. If a foreign company wants to take over the VW-Company, it is essential to place confidential people on the supervisory board, which is not possible if the Land Niedersachsen and the Bund have two seats each there[115]. It is also worth considering the fact that the Land and the Bund have to own only one share each in order to have the seats on the supervisory board[116].

All these consequences of the mandatory representation are likely to dissuade potential investors from investing in the company. Therefore I share the Commission’s view in that point that this rule is restricting the free movement of capital.

cc) Summary

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[110] Kleinschmit, Volkswagengesetz, p. 95.
[111] Wellige, EuZW 2003, p. 427 (429).
[112] Ibid., p. 427 (429).
[113] Ibid., p. 427 (429).
[114] Krause, NJW 2002, p. 2747 (2750).
[115] Ibid., p. 2747 (2750).

The main points the Commission criticises are valid in my eyes. A takeover of the Volkswagen-Company becomes very difficult due to the voting cap and the mandatory representation on the supervisory board as it is laid down in the VW-Gesetz. Therefore we have a restriction of the free movement of capital in that.

d) Limits of the property order

According to Art. 295 EC the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.
One could assume that the VW-Gesetz is part of the German property order with the consequence that in spite of restrictions of the free movement of capital the Community is not competent for having jurisdiction on that case.
The VW-Gesetz could be part of the property order because of its history and could therefore fall under the scope of Art. 295 EC.

aa) The history of the Volkswagen-Company

In order to find that out it is worth taking a look at the history of the Volkswagen-Company[117].
By the end of the second world war the British military government took control of the VW-Company which was built up by the Nazi-Regime. In the following time, both the Federal Republic of Germany and the Land Niedersachsen claimed property rights regarding the VW-Company. At the same time, the Unions also claimed property rights because the Nazi had used the money they took out of the Union's suppression to built up the company. In 1949, the British military government also drew back from the company with the consequence that Volkswagen became abandoned property. The company then prospered and it followed a long and intense discussion about the property rights regarding the company. As a compromise to that, the Bund and the Land Niedersachsen signed a treaty in 1959 which included all the provisions we now find in the VW-Gesetz. The provisions in the Treaty had to be transformed into a law that had to be adopted by the German parliament (Bundestag) and the parliament of Niedersachsen (Landtag). The result is the VW-Gesetz as we know it today. The idea behind it was to spread the shares as widely as possible and not to have one shareholder dominating the company and its decisions. The VW-

[116] Kleinschmit, Volkswagengesetz, p. 105.
[117] The main points refer to the press release of the Federal Ministry of Justice, Berlin 13th of October, http://www.bmj.bund.de/enid/0,0/58.html?druck=1&pressartikel_id=1677.

Gesetz was made in order to have a balance of interests between all the different groups claiming property rights about the company[118].
Concluding all this, one could interpret the VW-Gesetz as a part of the property order in a theoretical sense.

bb) The VW-Gesetz as a part of the property order

In order to see whether the VW-Gesetz falls under the scope of Art. 295 EC it is of importance how this provision is to be interpreted.
The term property order includes all constitutional rules on private property, comdemnation, socialisation, and the limits of property usage[119].
The question still is whether Art. 295 EC only covers the property orders of the Member State in a general sense or whether it also covers the authority to dispose about the property.

(1) Property order in general

One position says that Art. 295 EC does not protect individual property rights but only the property order of the Member States in general[120]. The emphasis is put on the exercise of property rights through a control over the sharing of property ownership between private individuals[121].
As an argument for a narrow interpretation of Art. 295 EC, it is stated that many rules in the EC necessarily have an impact on property rights and that the whole Treaty puts a strong emphasis on business matters, as we can see for example in Art. 4 and Art. 98 EC[122].
According to that opinion, the privatization and the socialisation of companies fall under the scope of Art. 295 EC[123], as long as the exercise of property rights is in accordance with Community law[124].
The question is whether the VW-Gesetz falls under this definition of the term. According to the opinion I explained above, the privatisation of the company itself through the emission of shares would fall under the scope of Art. 295 EC. But the exercise of those property rights such as the voting cap or the mandatory representation on the supervisory board would not be part of the property order since they stand in contradiction with the free movement of capital[125].

[118] Ibid.
[119] Brinker in: Schwarze, EU-Kommentar, Art. 295 EC, Rn. 2.
[120] Ibid., Art. 295 EC; Rn. 6.
[121] C-483/99, Commission v. France (2002), ECR I-4781, para. 23.
[122] Grundmann/Möslein, Die Goldene Aktie, ZGR 2003, p. 317 (339).
[123] Brinker in: Schwarze, EU-Kommentar, Art. 295 EC, Rn. 3.
[124] The Commission in: C-503/99, Commission v. Belgium (2002), ECR I-4809, para. 22.
[125] Kleinschmit, Volkswagengesetz, p. 120.

One other scholar in that context says that the Community acknowledges the national property orders in the state they were in when the Community was founded[126]. The Roman Treaties with Germany as a contracting party entered into force on the 1st of january 1958 whereas the VW-Gesetz took effect on the 22nd of July 1960. This means that the VW-Gesetz would not fall under the scope of Art. 295 EC according to this opinion as well.

(2) Covering also the authority to dispose about the property

Another opinion sees the term property order in a wider sense saying that also the authority to dispose about the property shall be covered by Art. 295 EC[127]. It is the AG Ruiz-Jarabo Colomer who expresses this opinion in his joined opinion regarding the golden shares-cases.

In his eyes, the first indication of the fundamental importance which must be accorded to Article 295 EC within the EC Treaty is to be found in its position in the document. It is included in Part Six, which is devoted to general and final provisions and affects all the Treaty rules, so to speak put "in front of the bracket"[128]. The AG further develops on that point by saying that by a literal interpretation Art 295 EC constitutes not a legal, but rather an economic concept[129]. He then takes a teleological approach by stating that the objective of the Treaties establishing the European Communities was to achieve sectorial and partial, integration. In his eyes, the implementation of economic policy remains in the hands of the States since the Treaties do not affect the other instruments of intervention, of which the most important is the capacity to influence economic life through ownership of the undertakings[130].

The AG describes all the different types of measures as possiblities to participate in the activities of certain undertakings of strategic interest for the national economy, with the purpose of imposing economic policy objectives. Therefore according to him, such measures are reserved for the sovereignty of the Member States and do not fall under the scope of Article 295 EC[131]. He even goes one step further by saying that if socialisation does not fall under the scope of Art. 295 EC there is no reason why a system of private ownership subject to special powers should not be treated less

[126] Brinker in: Schwarze, EU-Kommentar, Art. 295 EC, Rn. 6.
[127] Joined opinion of AG Ruiz-Jarabo Colomer, in: Commission v. Portugal – Joint Cases: C-367/98, C-483/99, C-503/99 (2002), I-4731, para. 39 et seqq.
[128] Ibid., para. 43.
[129] Ibid., para. 47.
[130] Ibid., para. 53.
[131] Ibid., para. 62.

favourably[132]. The Court of Justice is in his eyes ill-equipped to carry out complex evaluations of economic policy, because it does not have the necessary resources, nor is that its task[133]. So he argues in favour of a very wide definition of the term property order in Art. 295 EC.
Applied on the VW-Gesetz, that would mean that the mandatory representation on the supervisory board would be legal, because the state reserved the rights to dispose about the property when privatising the Volkswagen company. The same would count for the voting cap because the public authorites are free to organise their property in the company by themselves[134].

(3) Own statement

The debate on the scope of Art. 295 EC seems to be quite academic. But it is also essential for the whole economic policy of the EU and about the deliminitation of the Community's power from the sovereignty of the Member States.
The argumentation of the AG does not seem to be very consequent in all points. He leaves a very wide field of discretion to the Member States and their economic policies. His opinion contradicts the strong emphasis the EU puts on the completion of the internal market as it is laid down in Art. 4 and Art. 14 of the Treaty. In my eyes the EU could not promote the internal market if it would apply the wide definition on the property order as the AG proposes it. I would therefore strongly argue for a narrow scope of Art. 295 EC with regard to the Community's interest and the need for a further integration in business matters.
So I would understand the term property order as the original property order as it is expressed in the first opinion I outlined above. That would mean that the voting cap as well as the mandatory representation do not fall under the scope of Art. 295 EC and are justiciable in spite of the company's history.

e) Summary

The previous examination has shown that the VW-Gesetz includes two restrictions of the free movement of capital. Firstly the voting cap because it

[132] Ibid., para. 66.
[133] Ibid., para. 72.
[134] Kleinschmit, Volkswagengesetz, p. 123.

makes the takeover of the company harder. The second is the mandatory representation on the supervisory board because it also deters potential investors from investing in the company.
It is also not possible to apply the justification laid down in Art. 295 EC on the Treaty. The contested provisions in the VW-Gesetz only deal with the exercise of property rights but not with the original property order.
As a result to that, one can state that the provisions in the VW-Gesetz fall under the scope of Art. 56 EC.

3. Personal scope of application

The remaining question in that context is to whom Art. 56 is applicable in our case.
The free movement of capital is applicable for all citizens of the Community and for all legal persons that have a seat in one Member State[135].
It is primarily the Member States that are obliged by the four freedoms[136]. That means that the public authorities are responsible for a breach of Art. 56 EC. In Germany that can be the Bund, the Länder or the local authorities regardless in what way they act[137].
The VW-Gesetz is a federal law and has to be attributed to the Bund. Consequently it is an act of a public authority. Germany, therefore, is responsible for this law and is the addressee of the pending proceedings. The VW-Gesetz also falls under the personal scope of the free movement of capital.

4. Summary

The VW-Gesetz means a restriction of the free movement of capital because of the voting cap and the mandatory representation of public authorities on the supervisory board. There is no justification based on Art. 295 EC because the VW-Gesetz cannot be deemed to be part of the property order. It also falls under the personal scope of application of Art. 56 EC.

[135] Glaesner in: Schwarze, EU-Kommentar, Art. 56 EC, Rn. 18.
[136] Ehlers, Jura 2001, p. 266 (273).
[137] Ibid., p. 266 (273-274).

IV. Justification of the restriction of the free movement of capital

As there is a restriction of the free movement of capital, one has also to consider a possible justification of that. The provision regulating that is Art. 58 EC. There exist written and unwritten justifications for the free movement of capital.
The written justifications are laid down in Art. 58 EC whereas the unwritten primarily ask for overriding requirements of the general interest as a justification[138].

1. Art. 58 para. 1 lit. b) 3. Alt. EC

One written justification is laid down in Art. 58 para. 1 lit. b) 3. Alt. EC.
According to that, the Member States can take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
This justification has played an essential role in the recent golden shares judgements. The term public security was defined by the ECJ as ”all basic principles laid down by the state, touching essential interests of the state”[139]. When it comes to state control and its restriction of the free movement of capital, a justification is only possible when privatised companies are active in fields involving the provision of services in the public interest or strategic services[140]. The requirement of the public security must be thereby interpreted restrictively and their scope can’t be determined unilaterally by the Member States. They also must pass the proportionality test, be in conformity with the principle of legal certainty and must not be implemented for purely economic ends[141]

[138] C-367/98, Commission v. Portugal (2002), ECR I-4731, para. 49; C-483/99, Commission v. France (2002), ECR I-4781, para. 45; C-503/99, Commission v. Belgium (2002), ECR I-4809, para. 45.
[139] C-30/77, Bouchereau (1977), ECR I-1999.
[140] C-367/98, Commission v. Portugal (2002), ECR I-4731, para. 47; C-483/99, Commission v. France (2002), ECR I-4781, para. 43; C-503/99, Commission v. Belgium (2002), ECR I-4809, para. 43.
[141] C-98/01, Commission v. Great Britain (2002), ECR I-4781, para. 21.

There is no justification for obstacles prohibited by the Treaty for economic reasons[142]. In the recent golden shares decisions, the restrictions were justified for reasons of public security, in order to guarantee the safeguarding of supplies of petroleum products in the event of a crisis[143], or to ensure continuity in public services[144].
In case of the VW-company there is no private actor providing services in the public interest. Both, the mandatory representation of public authorities as a privilege of the public authorities and the voting cap can't be justified by Art. 58 para. 1 lit. b) 3. Alt. EC.

2. Mandatory requirements

The ECJ has created with its so-called *"Cassis de Dijon"* formula a path for the Member States to legitimise a questionable national measure. According to the Court's decision in the "*Cassis de Dijon*" case[145], a measure can not only be justified by reasons given in Art. 30 EC, but also if necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the protection of the consumer. The measure must pursue an objective of general interest and non-economic character that serves the requirements of the free movement of goods and must be proportionate to that aim. The "Cassis de Dijon" formula can only be invoked to justify indistinctly applicable measures.
The "*Cassis de Dijon*" formula has been transferred to the free movement of capital as well[146]. But for that freedom the ECJ has not developed a positive catalogue of mandatory requirements like for the free movement of goods[147].
Although sometimes the justification has been based on mandatory requirements. In the recent golden shares decisions only the Spanish government invoked strategic interests for the need to ensure continuity in public services[148]. But that case dealt with a group of commercial banks operating in the traditional banking sector and a tobacco producer which are

[142] C-367/98, Commission v. Portugal (2002), ECR I-4731, para. 52.
[143] C-483/99, Commission v. France (2002), ECR I-4781, para. 47.
[144] C-463/00, Commission v. Spain (2003), www.curia.eu.int.
[145] C-120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (1979), ECR –I 649 (662).
[146] C-367/98, Commission v. Portugal (2002), ECR I-4731, para. 49; C-483/99, Commission v. France (2002), ECR I-4781, para. 45; C-503/99, Commission v. Belgium (2002), ECR I-4809, para. 45.
[147] Kilian, NJW 2002, p. 3599 (3600).
[148] C-463/00, Commission v. Spain (2003), www.curia.eu.int., para. 70.

not undertakings whose objective is to provide public services in the eyes of the Court.
In case of the VW-Gesetz, a possible justification might be based on mandatory requirements. In order to justify the contested provisions it might be possible to take into account the character of the VW-share as a people's share, the promotion of science and the danger of job loss[149].

a) People's share

The character of the VW-share as a people's share could be interpreted as a mandatory requirement.
The aim of the legislator when privatising the VW-company was to spread the shares widely among the shareholders, in order to avoid a concentration of the shareholdings[150]. The VW-share is not a people's share any longer after 40 years of having the VW-Gesetz[151]. Therefore any considerations regarding that cannot be interpreted as a mandatory requirement and cannot be adducted to justify the voting cap or the mandatory representation.

b) Danger of job loss

One further reason is the danger of the loss of jobs as a mandatory requirement in order to justify the voting cap and the representation on the board[152].
In 2004 there were 342.500 people working for Volkswagen, 177.300 of those worked in Germany[153]. It is possible that the takeover has the consequence of job losses because the management changes the structure of the company.
But according to the jurisdiction of the ECJ, the danger of job loss is not sufficient for the justification of restrictions of the free movement of capital[154]. Therefore this argumentation is not valid for the VW-Gesetz.

c) Promotion of science

One other reason for justification that is brought up is the promotion of science.

[149] Kleinschmit, Volkswagengesetz, p. 138.
[150] Ibid., p. 139.
[151] Wellige, EuZW 2003, p. 427 (433).
[152] Krause, NJW 2002, p. 2747 (2751).
[153] http://www.volkswagen-ag.de/german/defaultNS.html.
[154] Armbrüster, NJW 2002, p. 224 (227).

There was also a foundation established called the "Stiftung Volkswagenwerk"[155] for the promotion of science and technology in research and development.

Kilian, a German law professor, argues that the financial support through the Volkswagenstiftung can be deemed as a mandatory requirement in order to justify the VW-Gesetz[156]. In order to establish a possible justification based on that it is necessary to explain the interrelation between the foundation and the provisions in the VW-Gesetz. The VW-company is a joint-stock company but the biggest part of its former and also a considerable part of its current capital is used for the promotion of sciences through the Volkswagenstiftung[157].

According to that opinion, a transferee could achieve by his voting majority that the seat of the company and also production and research facilities could be transferred into a country with lower taxes. That would mean that no more money from the shareholdings of Niedersachsen could be led away to the Volkswagenstiftung, without that the Land Niedersachsen would have to close universities according to Kilian[158]. He furthermore emphasises that the promotion of science and research is evaluated as a high-ranking aim according to Art. 3 para. 1 lit. n EC, which is deemed to legitimise the restrictions of the free movement of capital[159].

The opposite view states that this aim is not a mandatory requirement because the promotion of science could also be kept on without the restrictions of the free movement of capital[160].

This view seems to be more realistic to me because the potential takeover of a company and the possibility for that in an internal market seems to be much more important to me than the promotion of science in Niedersachsen. It is rather the financial interest of the Land Niedersachsen that counts here which cannot be considered as mandatory requirements in a general interest[161].

Therefore the promotion of science cannot justify restrictions of the free movement of capital through the VW-Gesetz.

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[155] Furtheron quoted as Volkswagenstiftung.
[156] Kilian, NJW 2002, p. 3599 (3600).
[157] Ibid., NJW 2002, p. 3599 (3600).
[158] Ibid., NJW 2002, p. 3599 (3601).
[159] Ibid., NJW 2002, p. 3599 (3601).
[160] Armbrüster, NJW 2002, p. 224 (227).
[161] Kleinschmit, Volkswagengesetz, p. 145.

d) Summary

As we have seen there is no real justification for the restrictions of the free movement of capital.

All possible reasons have to be neglected because they cannot be deemed to be mandatory requirements in the sense of the *"Cassis de Dijon"*-formula. These are all reasons that are only of a fiscal nature but are not sufficient to justify the restrictions.

V. Summary of the most important results / Final conclusion

The examination of the VW-Gesetz has shown that there are several obstacles to the free movement of capital, namely the 20 %-voting cap and the mandatory representation of public authorities on the supervisory board.

The 20 %-voting cap makes it almost impossible for a foreign investor to take over the company. This means an indirect restriction of the free movement of capital because foreign investors are alienated of making direct investments into the company.
The mandatory representation of public authorities on the supervisory board is also an obstacle to the free movement of capital because it means a privilege for the public authorities to have an unproportionately high influence on the decision-making that cannot be explained by a comparable shareholding.
The next point which has played a substantial role in the golden shares-decisions is Art. 295 EC. According to the jurisdiction of the ECJ, only the original property order can be excluded from the scope of the Treaty, but not special rules of the Member States in order to protect certain parts of the economy. The implementation of the internal market has a higher priority in that regard.
There is no justification for the restrictions in the free movement of capital. The character of the VW-share as a people's share, the danger of a job loss and the promotion of science through the Volkswagenstiftung are not sufficient to be regarded as mandatory requirements in the sense of the "*Cassis de Dijon"*-formula.
Therefore I come to the conclusion that the VW-Gesetz stands in contradiction to the free movement of capital.

One indicator for the invalidity of golden shares is the German Corporate Governance-Code[162] where the "one share-one vote" principle is laid down in point 2.1.2. It is also stated that there should not be shares with multiple voting rights, preferential voting rights (golden shares) or maximum voting rights. The aim of the Code is to make Germany's corporate governance rules transparent for both national and international investors in order to

[162] http://www.corporate-governance-code.de/index-e.html.

strengthen confidence in the management of German corporations[163]. This also shows the old-fashioned character of golden-shares rules in our contemporary industrial landscape.

One might also think of any measures less severe than the VW-Gesetz to protect the company from takeovers. Authorisation requirements come to my mind in that regard. But as we have seen in *Commission v. France*[164] such provisions are also not in accordance with the free movement of capital. Therefore I can see no possible alternative.

Nevertheless the result of the pending proceedings at the ECJ is not sure yet. Although the provincial government of Niedersachsen and the Federal Government of Berlin are still fighting for the continuity of the VW-Gesetz it is doubtable if the law will pass the examination by the Court[165].

The whole VW-Gesetz is not modern any more because it is still based on the ownership structure after the Second World War. The internal market within the EU has developed constantly since then. It can still be considered as the main pillar within the whole Community system as it is laid down in Art. 3 para. 1 lit. c) EC and Art. 14 para. 2 EC. Therefore all efforts German authorities make in order to protect the industrial heritage from the grasp of foreign investors will presumably be without avail.

[163] Ibid.
[164] C-483/99, *Commission v. France* (2002), ECR I-4781.
[165] "Germany faces legal action over VW law", in: http://www.dw-world.de/dw/article/0,,812366,00.html., 19th March 2003.

Supplement A


VW-Gesetz.pdf

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