

# Why is the Court of Justice of the European Union accepted?

## Three mechanisms of opposition abatement

-- First Draft --

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*The Court of Justice of the European Union (CJEU) played a very important role in the process of European integration. Its jurisprudence has again and again strengthened the competencies of the supranational level to the disadvantage of the member states. The CJEU has always been criticized for this pro-integrationist activism but that never had a serious impact on the court's behavior. In recent years, however, the environment for legal integration has changed: The CJEU is increasingly treading on political sensitive issues; and that in a period when the integration project as such is becoming more and more contested. Scholars of legal integration have expected that this would lead to more criticism of, resistance to or even attacks on the court's power and thus to a changing or less important role of the CJEU in the integration process. Yet, this expectation has not been fulfilled. Although there have been much controversy on some recent CJEU decisions, this criticism has never exceeded the local stage and led to attempts to recast the Court's role. The present article approaches this puzzle by investigating the CJEU's jurisprudence on Golden Shares, one of the most controversial lines of case law in recent years. By doing so, three mechanisms of opposition abatement are identified: Uncertainty about the future development of the case law, case-specific concessions made by the CJEU, and limited damage in the concrete cases at hand.*

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## **1. Introduction**

It is broadly acknowledged that the Court of Justice of the European Union (CJEU) is an important engine of European integration. By its case law the Court has again and again pushed European integration beyond what had been foreseeable by the drafters of the European Treaties or reachable in the European Union's political decision-making processes. This pro-integrationist activism of the Court has always provoked – sometimes even fierce – criticism from national politicians, judges and law scholars alike. However, these attacks had almost no effect on the Court's power or its role as a champion of an ever closer union.

Given the fact that the CJEU is more and more treading on political sensitive issues such as citizenship, welfare provisions, labor law and corporate governance – and that in a period where the integration project as such is losing acceptance – the continuing importance of the Court seems far from being self-evident. In the 1990s political scientists and law scholars alike predicted that rising public visibility of the CJEU would undermine its legitimacy and thus its importance for the integration process. But so far this expectation has not been fulfilled. Although there have been much controversy on some recent CJEU decisions, this criticism has never exceeded the local stage and led to attempts to recast the Court's role.

The reasons for this puzzling circumstance are largely underexplored. My article attempts to – at least partially – fill this gap by complementing the very scarce research on this topic with a case study on the CJEU's jurisprudence on Golden Shares, one of the most controversial lines of case law in recent years. By doing so, three mechanisms of opposition abatement are identified: Uncertainty about the future development of the case law, case-specific concessions made by the Court, and fallback solutions for the member states that reduced the political costs of single decisions. Thus, the persistent absence of resistance against the CJEU is explained by the fact that the damage done by European case law is mostly much more bearable than it appears at first glance.

The article is divided into three sections: The first section outlines the puzzle of the strange non-contestation of the CJEU in more detail. The third section presents my explanation for this puzzle on the basis of a case study on the CJEU's case law on corporate governance. The final section concludes.

## 2. The CJEU as an engine of integration: Why is this role not more contested?

The Court of Justice of the European Union played an important role in the integration process. A broad literature convincingly shows how the CJEU has again and again strengthened the competencies of the supranational level to the disadvantage of the member states – and that to a degree that was neither intended by the European legislators nor would have been possible through legislative means (cf. Alter 2001; Burley/Mattli 1993; Stone Sweet 2010; Weiler 1991). Hence, the course of European integration is not only driven by political agreements between European governments but also by a dedicated European judiciary.

The CJEU has always been criticized for this pro-integrationist activism but that never had a serious impact on the court's behavior. In recent years, however, the environment for the CJEU to act as an engine of integration has changed severely (Kelemen/Schmidt 2012: 1f.): Not only has the integration project as such becoming more and more contested, but also is the Court increasingly treading on political sensitive areas such as citizenship, welfare provisions, labor law and corporate governance. Rulings like "Viking", "Laval", "Mangold" or "Volkswagen Law" made the Court's importance not only visible to the broader public but also sparked much more criticism than probably ever before. But a CJEU adjudicating on political sensitivities while being at the forefront of – a more and more Eurosceptic – public opinion might generate counterforces which at worst could try to rein in the Court's power.

In the 1990s, irrespective of their theoretical and professional backgrounds, scholars of legal integration expected exactly this. They almost all argued that should the CJEU increasingly interfere with salient issues, thereby producing policy-effects that would create winners and losers, this would inevitably lead to more criticism of, resistance to or even attacks on the Court's power and thus to a changing or less important role of the CJEU in the integration process:

- Law scholars like Joseph H. H. Weiler predicted that the growing impact of European law on politically sensitive areas would endanger the (public) acceptance of the CJEU and thus would elicit strong criticism, "followed by calls for readjustment, jurisdiction trimming, and greater restraint" (Weiler 1994: 532f.). And Hjalte Rasmussen was convinced that if "the ECJ [today CJEU] is generally perceived as over-stepping the borders circumscribing the EC judicial function, the ECJ's persuasiveness would decline. With it, judicial authority and legitimacy would crumble and unenforceability would result" (Rasmussen 1992: 160).
- The same conclusion prevailed among political scientists. Geoffrey Garrett for example, one of the main advocates of "Intergovernmentalism", argued that "courts which wish to maintain their authority, legitimacy, and independence must strive not to be overturned. As

a consequence, the actions of all courts are fundamentally political in that they anticipate the possible reactions of other political actors in order to avoid their intervention. [...] It is thus reasonable to expect that the justices [of the CJEU] would choose not to act in ways that powerful political actors in the EC would disapprove” (Garrett 1992: 558; cf. also Garrett 1995).

- Garrett’s “neo-functionalist” counterparts, Anne-Marie Slaughter (formerly Burley) and Walter Mattli, although disagreeing with his claim that the CJEU is executing the will of the (most powerful) EU member states nonetheless were convinced too that a CJEU perceived as overtly political would provoke resistance. In their view, the success of the CJEU to act as an engine of integration rests on its seemingly non-political role: “law functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere” (Burley/Mattli 1993: 72). But “with heightened political visibility, the mask of law becomes more porous and the shield more brittle” (Mattli/Slaughter 1995: 189). And “a ‘legal’ decision that is transparently ‘political’ [...] will invite direct political attack” (Burley/Mattli 1993: 73).
- A further example from the political science corner is the work by James L. Gibson and Gregory A. Caldeira (Gibson/Caldeira 1995, 1998). They found that the CJEU enjoyed – at least during the 1990s – only limited political support. This would, as they concluded, become a major obstacle for further judicial activism since a court’s power ultimately rests on its legitimacy. The higher a court’s (diffuse) public support, they argued, the higher is its legitimacy, and the more likely is it that its decisions get accepted – and the less likely are political attacks. Thus, if a court is perceived as constantly overstepping its boundaries and is imposing again and again unpopular judgments, its public support and eventually its authority would decline: “Institutions that attempt to impose unpopular judgments on the mass public risk the expenditure of their political capital, with the possibility that the institution will be attacked or even that its decisions will be ignored. Obviously, it is unlikely that citizens will take to the street in protest against a Court of Justice decision [...] but the reactions of citizens can embolden their political leaders to mount attacks on the Court” (Gibson/Caldeira 1998: 70f.).

Today, fifteen to twenty years later, it is obvious that this expectation has – at least so far – not been fulfilled. Although the Court is much more public visible and its decisions are of much greater salience, this has led to not more than – albeit sometimes quite harsh – criticism on single decisions. General calls to ignore or attack the CJEU are still rare and political attempts to override unpopular case law or to limit its power in general are nonexistent. Instead, the observation Weiler made in the early 1990s that reactions to CJEU activism “tended to be local and never reached the stage of a

more general drive to delegitimize the Court and/or substantially recast its role through, for example, treaty amendment” (Weiler 1994: 526) appears still to be valid. But why is this the case? Why is the heightened political visibility of the CJEU not leading to a much more critical or even hostile attitude towards this institution?

Until now the literature on legal integration has not paid much attention to this puzzling fact. Instead, most of the literature is occupied with showing that the member states have no effective means for “court curbing” (cf. Kelemen 2012; Stone Sweet/Brunell 2012). A decision to override a CJEU judgment or to cut back its power requires, so the argument goes, in the majority of cases a treaty amendment which needs unanimous agreement between the member states and treaty ratifications at the national level. Given the interest heterogeneity of twenty-eight member states the success of such an amendment is highly unlikely. This is an important point but it explains only why attacks on the CJEU’s role are likely to fail. It does not explain why there is not much more contestation and why national politicians don’t even try to fight the Court’s ongoing activism.

The most sophisticated explanation for the non-appearance of court curbing attempts so far is provided by R. Daniel Kelemen (2012). Like Gibson and Caldeira he took a closer look at the rates of public support for the CJEU since the mid-1990s. He found that this support did not only remain stable since the writings of Gibson and Caldeira but also increased: “The ECJ is consistently and by far the most trusted governmental institution in Europe” (Kelemen 2012: 47). Thus, Kelemen concludes, it seems highly unlikely that national politicians will even think of attacking the CJEU or initiate attempts to restrict the Court’s power since this would supposedly only undermine their own legitimacy (Kelemen 2012: 49).

This is indeed a convincing explanation for the nonexistence of serious contestation against the activism of the CJEU. If an attack on the CJEU means to fight against Europe’s most respected institution then this is certainly not a wise strategy for national politicians. However, Kelemen’s approach still does not explain why the CJEU is still so much accepted among Europe’s citizen. How can it be that the increased public visibility of the Court has apparently no negative impact on its public support? The next section deals exactly with this question. I will show that the persistent acceptance of the CJEU stems – at least partially – from the fact, that the damage done by the Court is actually less grave and manageable.

### 3. Three mechanisms of opposition abatement – Insights from the CJEU case law on Golden Shares

In order to approach the puzzling non-contestation of the CJEU, this section takes a closer look at the jurisdiction on Golden Shares. This instance of CJEU activism is one of the most controversial lines of CJEU case law in the last decade, upsetting governments and organized interests (especially unions) in many member states. Therefore, this adjudication can be seen as a “most likely case” for the formation of protest and counterforces.

Golden Shares are special rights which a lot of member state governments – among them France, Germany, United Kingdom, Spain and Italy – used to retain control over ownership and central decisions of privatized companies, mostly from the communication and energy sector. In a series of 18 decisions,<sup>1</sup> delivered between 2000 and 2013, the CJEU found that these special rights restricted the free movement of capital, one of the four fundamental freedoms constituting Europe’s common market. Golden Shares, the judges declared, could deter potential investors from acquiring shares of the companies affected since these special rights inhibit the influence of private shareholders. Member states are therefore obliged to amend or abolish all national measures that have such deterring effect on investors, unless the measure is (a) justified on the basis of overriding reasons of general interest, (b) effective to achieve its objective pursued, and (c) not going beyond what is necessary to attain its objective. Thus member states still can use Golden Shares – although in a much more restricted form than before.

Law scholars have pointed out that by these rulings the CJEU not only restrained the use of an important instrument to control companies of high strategic and economic importance. Moreover, the basic principles developed by the Court in this case law could potentially also be used against all other national regulations that are limiting the control rights of shareholders in a company, for example codetermination rights of workers – common in many member states – or – also common – defensive actions of the company’s management to frustrate hostile takeovers (Andenas et al. 2005; Gerner-Beuerle 2012; Rickford 2009; Ringe 2008). Thus, with its Golden Share judgments the CJEU developed a general, *market liberal approach* for the regulation of *corporate governance* with

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<sup>1</sup> Case C-58/99 (Commission vs. Italy) [2000], Case C-367/98 (Commission vs. Portugal) [2000], Case C-483/99 (Commission vs. France) [2000], Case C-503/99 (Commission vs. Belgium) [2000], Case C-98/01 (Commission vs. UK) [2000], Case C-463/00 (Commission vs. Spain) [2003], Case C-174/04 (Commission vs. Italy) [2005], Cases C-282/04 and C-283/04 (Commission vs. Netherlands) [2006], Case C-112/05 (Commission vs. Germany) [2007], Cases C-463/04 and C-464/04 (Federconsumatori) [2007], Case C-274/06 (Commission vs. Spain) [2008], Case C-207/07 (Commission vs. Spain) [2008], Case C-326/07 (Commission vs. Italy) [2009], Case C-171/08 (Commission vs. Portugal) [2010], Case C-543/08 (Commission vs. Portugal) [2010], Case C-212/09 (Commission vs. Portugal) [2011], Case C-244/11 (Commission vs. Greece) [2012], Case C-95/12 (Commission vs. Germany) [2013].

potentially far-reaching consequences for the member states and their existing regimes of corporate control.

This development is remarkable and politically extraordinarily sensitive since, so far, all political attempts to create a common European standard for corporate control have failed (Lannoo/Khachatryan 2004; Werner 2013: chapter 2.2; Wouters 2000). The differences between the member states have always been vast, ranging from Great Britain's shareholder dominated model of corporate governance to Germany's stakeholder-oriented regime (Aguilera/Jackson 2003; Gourevitch/Shinn 2005; Vitols 2001), which made a common denominator hard to find. And the salience of the issue – stemming from the fact that the regulation of corporate control affects the most important organization of a capitalist economy, thereby influencing a nation's employment level, its conditions of work and production as well as its deployment and distribution of wealth – further impeded all efforts to overcome this heterogeneity. Thus, proposals for harmonizing essential questions failed all together or – if agreement could nonetheless be found – it either concerned only technical questions or made crucial points nonbinding. One example in this last regard is the 2004 adopted Takeover Directive (2004/25/EC) concerning mergers and acquisitions, one of the most controversial legislative projects in the history of the European Parliament (Hix et al. 2007: 200). The most important as well as most contentious provision was the requirement of the board of directors of a target company to be neutral during the takeover process. In the end, the directive could only be adopted because this neutrality rule was made optional for the member states (Edwards 2004). So if there ever was something like a common denominator for regulating (at least) crucial issues of corporate control it was the agreement that the member states should keep their autonomy. But with its rulings on Golden Shares the CJEU proactively limited this autonomy in favor of a pro-market approach.

Given the political significance of Golden Shares in particular and of corporate governance in general, and given the persistent and vehement protection of the national corporate control regimes by the member states, one might have expected harsh and broader protest against this case law and maybe even attempts to undo this instance of CJEU activism. But this never happened. In some cases, especially after the decision against Germany concerning the Volkswagen Law, there have been heated public debates. However, this has never led to more general criticism of or attacks on the Court. Thus, the Golden Share jurisprudence is a prime example for the general – and puzzling – fact that the CJEU is pushing the integration beyond the politically feasible without provoking serious opposition.

To understand the nonappearance of broader resistance against the Golden Share case law a closer look at its legal details and political circumstances are necessary. In doing so, three mechanisms of

opposition abatement can be identified: Uncertainty about the future development of the case law, concessions made by the CJEU, and political options that reduced the damage done. The following subsections will describe these mechanisms in more detail, thereby showing that the actual impact of the Golden Share case law is politically much more bearable than it appears at first glance.

### **3.1 Legal Uncertainty**

The exact extent of member states' loss of autonomy in the field of corporate governance was never and still is not fully obvious, since the CJEU developed its far-reaching, market-enhancing principles regarding corporate control not in one big leap, but in a series of smaller steps. The transformation of the EU Treaty article concerning the free movement of capital, prescribing only very unspecific that "all restrictions on the movement of capital between Member States [...] shall be prohibited" (Art. 63 TFEU), into a tool for strengthening shareholder rights in a company to the detriment of other stakeholders was the cumulative result of a gradual (and still not completed) process of judicial interpretation.

When the until now valid provision on the free movement of capital came into effect with the Treaty of Maastricht in 1992 (as a crucial prerequisite for the completion of the European Monetary Union), the exact meaning of the two key terms of the provision – "restriction" and "capital" – were unclear and in need of interpretation (Flynn 2002). However, a common, market liberal standard for corporate governance was not intended with the introduction of this rule. At the moment of the signing of the Maastricht Treaty a European consent concerning major questions of corporate control was not only out of sight. The disagreement about corporate governance was even one of the main reasons for the introduction of the subsidiarity principle in the Maastricht settlement (Rhodes/Apeldoorn 1998: 422).

At the end of the 1990s – before the first Golden Share decisions – the CJEU had specified the meaning of "capital" and "restriction" to a certain degree (Flynn 2002). Regarding "capital" the Court used the annex of Directive 88/361 as guidance. This directive, adopted in 1988, was the last of several amendments regulating capital movements in Europe before the Maastricht Treaty. In order to facilitate the application of the directive an annex was added, listing all sorts of capital movements. Regarding "restriction" the CJEU found that this term means more than a prohibition of unequal treatment in terms of nationality (discrimination). Instead, the prohibition of "restrictions" implies also that all national regulations that are non-discriminatory but liable to render the free movement of capital illusory or making it less attractive are not allowed (unless they can be justified). With this interpretation, the CJEU followed its understanding of the other fundamental market



freedoms of the common market it had established with its famous “Dassonville” and “Cassis de Dijon” decisions. But even with these specifications of the key terms of the provision concerning the free movement of capital the implications for questions of corporate control remained unclear.

This changed with the first rulings concerning Golden Shares, delivered in 2002. From now on it was apparent that national regulations restricting the *acquisition of shares* of certain companies for foreigners and nationals alike fall into the scope of the free movement of capital. This was only a small step in terms of judicial interpretation since the foundations for this decision were already established in the Court’s earlier judgments: In order to clarify whether acquiring shares of a company are protected by the capital provision or not, the Court referred again to the annex of Directive 88/361. Here the judges found the term “direct investments” which describes in particular investments in a company in form of a shareholding. And regarding the question whether a national, non-discriminatory provision making the acquisition of a shareholding dependent on prior approval by the state respectively subject to a veto by the authorities constitutes a restriction of the free movement of capital, the CJEU had already confirmed that also non-discriminatory provisions fall in principle into the scope of the capital provision. From these foundations it was only a very small and quite obvious deductive step for the Court to conclude that rules intervening into the ownership structure of a company “are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings”, being therefore “liable [...] to render the free movement of capital illusory.”<sup>2</sup> However, despite the fact that the Court for the first time connected the free movement of capital provision with the field of corporate control these first Golden Share decisions concerned only one aspect of corporate governance – and not the most important one, i.e. the internal governance structure of a company. Whether the core of corporate control would fall into the scope of the free movement of capital might now have appeared likely but it was not certain.

Yet, this step was taken by the CJEU in the next round of Golden Share decisions, delivered in 2003. Here the CJEU found that not only the restriction of acquiring shares of certain companies constitute a violation of the free movement of capital but also the possibility to veto important *decisions* of those companies – to close or sell facilities, for example. This was again only a small step for the Court. It just stated that a restriction of the free movement of capital can emanate not only from national rules limiting the acquisition of shareholdings but also from rules “which restrict in some other way the scope for participating effectively in the management of a company or in its control.”<sup>3</sup> This touched for the first time the most essential question of corporate governance: who controls a

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<sup>2</sup> Case C-367/98 (Commission vs. Portugal) [2000], para 45.

<sup>3</sup> Case C-98/01 (Commission vs. UK) [2000], para 44.

company, and for which purpose? And by arguing that a national rule limiting the power of shareholders in a company is a restriction of their right to freely invest in European corporations, the answer of the CJEU to this question is distinct: It is a market-liberal understanding of corporate governance which was never universally acceptable in the EU.

However, whether the CJEU really favored such a market-liberal approach to corporate governance became fully obvious only in later Golden Share decisions. A prime example in this regard is the judgment concerning the German Volkswagen (VW) Law, issued in 2007. Here the Court explained in further detail what constitutes a restriction. In doing so, the CJEU made three remarkable arguments (cf. Gerner-Beuerle 2012: 122ff.; Roth 2008: 473; Rühlend 2008: 517ff.):

1. For the Court, one of the problems of the German provision was that the state (i.e. the federal land of Lower Saxony) could exert more influence in VW than its shareholding of approx. 20% would normally allow.<sup>4</sup> This suggests that for the Court a national rule already deters investors when it establishes *disproportionality between investment and control*. Yet, the principle of “one share – one vote”, cornerstone of a market for corporate control, is no common standard in Europe’s corporate governance regimes and is explicitly not harmonized.
2. Another problem of the German regulation was, according to the CJEU, that it was *compulsory*: The provisions of the VW Law were not the result of an agreement between VW’s shareholders but were imposed by way of legislation and are therefore not changeable for shareholders.<sup>5</sup> Thus, it seems that the Court considers national laws regarding corporate governance as a restriction of the free movement of capital when they are binding for shareholders. Basically, this would turn all mandatory requirements of corporate governance – like remuneration demands for top management or codetermination rights of employees – from obligations into voluntaristic possibilities. Politically, a principle like this could never been implemented on EU level nor in most member states.
3. The third reason why the VW Law constituted a restriction was, in the eyes of the Court, that the German authorities “may use their position in order to defend general interests which might be contrary to the economic interests of the company concerned, and therefore, contrary to the interests of its other shareholders.”<sup>6</sup> This implies that the *interests of the company* are solely those of the *shareholders* and not of all constituencies that hold a stake in a company or are affected by its actions. In consequence, all member state rules that do not adhere to this conviction could from now on be qualified as a restriction of the free

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<sup>4</sup> Case C-112/05 (Commission vs. Germany) [2007], para 62 and 78.

<sup>5</sup> Case C-112/05 (Commission vs. Germany) [2007], para 40.

<sup>6</sup> Case C-112/05 (Commission vs. Germany) [2007], para 79.

movement of capital. But the idea that a corporation is bound to the will of its shareholders alone was – like the two principles described before – never universally accepted in Europe.

However, although the CJEU removed with this decision some of the uncertainties that remained after the previous rulings and thereby strengthening its market liberal approach to corporate governance, one crucial question is still not answered. So far, the decisions of the Court only concerned Golden Shares which is just one legal instrument of corporate control. Thus, unclear is whether the principles developed by the Court are applicable for other instruments of corporate governance – and if yes in which exact manner. Unsurprisingly, these questions are until today heavily discussed by law experts (for a good and still valid overview of this debate see Bekkum 2010).

Whatever the future might bring in this regard, for the purpose of this paper it is essential to see that the gradual development of the case law made it always very difficult to estimate the implications for similar cases and thus the exact extent of the damage done by the CJEU: At the end of the 1990s it was highly unclear whether the provision on the free movement of capital was at all relevant for questions of corporate governance. After the first decisions it became obvious that it is pertaining to this policy field but only for a very specific aspect of it (special rights for the state regarding the acquisition of shares). In the following years the CJEU expanded this stance little by little, thereby slowly creeping into the field's center and consolidating its highly controversial approach. Yet, the Court has still not clarified in how far its market liberal perspective on corporate control is transferable to national rules beyond Golden Shares. But when new advancements of the case law take place in rather small steps, settling only the concrete question at hand and thereby leaving many implications for similar but different cases open to debate, it becomes unclear whether a problem really exists and how big it might be if existing. This is quite an impediment for a potential opposition to emerge: How to mobilize sufficient support for court curbing – a very difficult and costly undertaking – when facing a political problem that might occur only in the heads of a few law experts?

### **3.2 Concessions**

The formation of opposition was hampered further by the fact that the CJEU made concessions. The most important example in this regard is one of the first Golden Share decisions from 2002 concerning the right of the Belgian authorities to veto the selling of shares of SNTC and Distrigaz, two companies of central importance for Belgium's energy supply. Until today, this is one of only two Golden Share cases in which a member state could save its provision. In its decision the Court found that the Belgian regulation, albeit being an impediment to the free movement of capital, was

justified by legitimate reasons of general interest, effective to assure this objective, and not more restrictive than necessary. The details of this decision are not important here. What is crucial here is that the Court showed the member states at the very beginning of its case law a way how they could bring their Golden Share arrangements in line with European law. By establishing a very detailed and strict proportionality test, the Court made clear that Golden Shares are limited but not lost (O'Grady Putek 2004). To the member states this sent the signal that such a national provision can – at least in principle – be successfully defended in a Court trial. And although no government was ever again able to pass the Court's proportionality test, this judge-made resort still is an important obstacle for the formation of CJEU opposition: As long as there is hope to persist before the Court, to win a dispute over a national rule with legal means, it does not appear to be a political wise strategy to mobilize resources for a costly and probably not very successful attempt to somehow rein the Court back.

Another example for a concession made by the CJEU was the judgment concerning the German Volkswagen Law. This law regulated the German car-manufacturer Volkswagen (VW), one of the biggest automotive companies in the world, since its privatization in 1960. It prescribed (1) that the state may appoint two members of VW's supervisory board (*appointment right*), (2) a capping of the share voting rights at 20% for every shareholder (*voting cap*), (3) that important decisions need a majority of 80% of all shareholders at the general meeting (*blocking minority*), and (4) that the formation and relocation of production facilities needs a 2/3-majority in the company's highest decision-making body, the supervisory board (*super-majority for (re)location questions*).

These provisions had two important effects: Firstly, although they almost all applied to private and public shareholders alike, the first three regulations made possible that the Land of Lower Saxony, home of Volkswagen's headquarter and its five main production sites, could block all important company decisions since it holds almost 21% of VW's shares. And secondly, the fourth provision constituted an important veto power for the workforce of VW since, according to the German Co-Determination Act of 1976, half of the company's supervisory board has to consist of representatives of workers. Thus, the decisions for opening and relocating production sites needed approval by VW's employees, giving them decisive influence on the company's internationalization strategy.

In 2007 the CJEU found that the appointment right as well as the "combination"<sup>7</sup> of voting cap and blocking minority constituted a non-justifiable restriction of the free movement of capital. In short, Germany lost the case. So in how far did the Court make a concession? To understand this, it is necessary to take a look at the events followed after the ruling: In response to the highly criticized

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<sup>7</sup> Case C-112/05 (Commission vs. Germany) [2007], para 56 and 82.

decision, Germany adopted a *revised* VW Law which removed the appointment right and the voting cap, but kept not only the super-majority requirement for (re)location questions (which was not covered by the ruling) but also the 20% blocking minority. For many observers, this was a surprising and even bold step taken by the German government. However, the German authorities argued that the blocking minority *per se* is admissible, since the Court had explicitly stated that it is the *conjunction* of voting cap and blocking minority that violated European law.

By this maneuver the most important effects of the preceding VW Law – to establish crucial veto powers for state and workforce – were maintained. The Commission, who had initiated the legal action against Germany in 2003, was not satisfied with this reaction and launched again infringement proceedings against Germany, this time for non-complying with a CJEU ruling. In doing so, the Commission was backed by another German car-manufacturer – Porsche – who since the beginning of the CJEU trial planned to take over its much bigger rival Volkswagen, an intention which ultimately depended on the abolition of the VW Law. However, the German government withstood this pressure and the revised VW Law was upheld unchanged. So once again the CJEU had to resolve the dispute, and in 2013 the Court declared the revised VW Law from 2008 as fully compliant to its previous judgment.<sup>8</sup>

Thus, the CJEU made here a concession not by arguing that the national provision concerned is somehow justified (as in the Belgian case) but by declaring only some (minor) parts of the regulation to violate European law. However, the effect of this type of concession was the same as in the Belgian example: The Court showed the member states that their loss of autonomy in the field of corporate governance is not absolute but that there are – at least in the concrete issues at hand – judicial ways to successfully defend their national provisions. And it is exactly this accommodation that reduced political resistance to the Court's activism. It calmed the parties directly concerned since they could maintain the preferred status quo. And it also quietened potentially further affected constituencies by signaling them that a case before the Court does not inevitably end with a total defeat.

### **3.3 Limited Damage**

A third reason for absent opposition to the CJEU activism regarding corporate governance stems from the fact that even those decisions where member states lost their cases without any doubt did not create untenable political situations. Instead, the member states concerned could often resort to

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<sup>8</sup> Case C-95/12 (Commission vs. Germany) [2013].

different fallback solutions to safeguard those interests which were originally protected by the Golden Shares.

One example in this regard is the French Golden Share case. The French provision in question concerned special rights of the government in the oil company Elf Aquitaine. This company was the successive corporation of two agencies established by the French state during the 1940s to foster the country's energy supply by gas and oil produced on home territory. When Elf Aquitaine was privatized in the mid-1990s the French government introduced a special share, making the acquisition of larger company shares dependent on prior approval by the state. The purpose behind this step was to make sure that French oil supply wouldn't fall in undesired, especially foreign hands, which could have, as the government argued, threatened the French energy supply in case of a crisis.<sup>9</sup> Thus, for France the Golden Share in Elf Aquitaine "was a matter of internal security."<sup>10</sup>

At the end of the 1990s Elf Aquitaine became a potential target for a (hostile) takeover by one of its rivals, especially outside of France. Due to falling oil prices the company's profits were declining, resulting in lower share prices, and some recent mergers in the energy sector, mostly between British and US competitors, put pressure on Elf to increase its size to prevent competitive disadvantages in the market for petroleum products. In early 1999 rumors were spreading that British rival Shell might launch a hostile takeover bid. Given the uncertain future of the company the French government decided that a merger with another company might become the inevitable destiny of Elf. But, of course, this other company had to be *French*, namely TotalFina, Elf's long-standing domestic rival who welcomed this plan.<sup>11</sup>

Yet, the problem was that the management of Elf Aquitaine was opposing the intentions of the French government and its competitor Total to create a "French" solution to the intensifying competition in the oil sector. The negotiations between Elf and Total brokering an amicable arrangement for merging failed which in turn forced TotalFina to launch a hostile takeover bid.<sup>12</sup> To prevent that Elf was going to look for unwanted, especially foreign, help in fighting back this attempt, the French government declared that it would use its Golden Share to prevent any such steps.<sup>13</sup> This threat finally broke Elf's resistance and in September 1999 the merger between the two French rivals

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<sup>9</sup> Judgment of the CJEU of 4 June 2002, *Commission vs. French Republic* (C-483/99), para. 28.

<sup>10</sup> Judgment of the CJEU of 4 June 2002, *Commission vs. French Republic* (C-483/99), para. 28.

<sup>11</sup> *The Times*, 26 April 1999. Later that year, French Finance Minister Strauss-Kahn declared that this merger would keep French energy supplies out of "Anglo-Saxon or American hands" (*Reuters News*, 6 July 1999).

<sup>12</sup> *Reuters News*, 5 July 1999.

<sup>13</sup> *Reuters News*, 6 July 1999.

was agreed.<sup>14</sup> The deal created TotalFinaElf (today just Total), the world's fourth biggest oil company – a true French champion.

So what happened here is that the French government used its Golden Share before the CJEU decided about the lawfulness of this regulation to orchestrate a merger between Elf and another French energy supplier. By this it effectively banned all takeover threats in the foreseeable future since the sheer size of the new company would, according to the French Finance Minister Strauss-Kahn, protect it “from any takeover bid by an Anglo-American oil company.”<sup>15</sup> When the CJEU finally delivered its judgment in 2002, the Golden Share (which was transferred to TotalFinaElf in 1999) was quickly abandoned since, as Strauss-Kahn commented, the by then much bigger company had all “the means to take care of its own future; as a result, the issue [the CJEU ruling] is no longer dangerous for us.”<sup>16</sup>

Another example where a member state had a comfortable fallback option was the British case. The British Airport Authority (BAA) was the company that owned Britain's seven most important airports, among them London's Heathrow, Stansted and Gatwick. When BAA was privatized in 1987 the government kept a Golden Share to retain control over the ownership and important decisions of the company: In order to protect the „general interest“, acquiring more than 15% of the company's share or selling single airports was dependent on prior approval by the British government.

However, the Golden Share was not the only instrument that was developed to keep a decisive public influence on the British air transport sector. When BAA was privatized, also a regulatory regime was put in place to make sure that the company acted in line with public interests. Cornerstone of this regime was the Civil Aviation Authority which set strict price limits on how much BAA could charge customers, especially airport fees for the airlines, at the three London airports. By this a crucial instrument to influence the profitability of the company was basically out of the hands of its management, which in turn enabled politics to push BAA to invest in line with the government's aviation policy. Another important aspect of this regulatory regime was the governmental control of granting planning permissions for new runways. By this another dimension of the company's profitability development was under public influence, since this control mechanism allowed the government a veto position in BAA's airport expansion plans. This regulatory regime is still in place, so independent of the Golden Share, any investor striving for a larger involvement in or even a takeover of BAA would have, according to an analyst, to face the fact that “politics is so important for

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<sup>14</sup> The New York Times, 14 September 1999.

<sup>15</sup> Dow Jones International News, 6 July 1999.

<sup>16</sup> The Times, 5 June 2002.

the whole airport development side that it wouldn't be possible for anyone to come in [BAA] without at least an agreement or relationship with the Government themselves.”<sup>17</sup>

In light of these additional, already existing measures maintaining public influence in BAA, it was an easy step for the British government to relinquish the Golden Share in this important company in response to the CJEU ruling. Although one instrument of governmental control was gone, BAA kept being a private company which is heavily influenced by politics: All issues “which were key areas of concern at the time of BAA's privatization, can now be addressed through subsequent legislation without invoking the golden share,” the Department of Transport commented on the repealing of the special share.<sup>18</sup>

### **3.4 Summary**

Taken together, the three mechanisms presented here (legal uncertainty, concessions, limited damage) had the effect that the damage done by the CJEU – a severe limitation of a political significant instrument of corporate control as well as a general, potentially far-reaching imposition of a market liberal approach to corporate governance – did not create an immediately untenable political situation. Instead, the extent of the damage was (and still is) rather uncertain and concessions by the Court as well as available fallback solutions for the member states lowered the direct harm of the case law further. Thus, although the CJEU was in principle exceeding the politically possible in a salient issue, the immediate costs of its case law were rather small. And it was exactly this effect that prevented the formation of any larger CJEU opposition. It just appeared as not necessary.

### **4. Conclusion**

This paper dealt with the persistent but not self-evident public support of the Court of Justice of the European Union. Although the Court is pushing European integration beyond what had been foreseeable by the drafters of the European Treaties or reachable in the European Union's political decision-making processes, and that increasingly in political issues which are of high salience, this activism had – contrary to the expectations of many experts during the 1990s – no negative consequences for the Court itself. Neither had there been any attempts to reduce the power of the judges nor did the acceptance of the Court decline. On the basis of the case law on Golden Shares, a

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<sup>17</sup> The Independent, 14 May 2003.

<sup>18</sup> The Times, 17 September 2003.



recent example of Court activism regarding a politically controversial issue and thus a “most likely” case for the emergence of opposition against the CJEU, I have shown that this puzzling situation can be explained by three factors: (1) the gradual development of the case law which made the extent of the damage done by the CJEU difficult to assess, (2) the signal sent by the Court whereby a national provision that in principle contravenes European law still can be upheld, and (3) the existence of fallback solutions which reduced the damage for those member states that had lost their cases. Thus, the strange non-existence of serious resistance against the CJEU is explained by the fact that the immediate political costs of the case law are rather manageable for the affected constituencies.

This finding can be, of course, only one part of a much more comprehensive approach to explain the ongoing acceptance of the CJEU and its increasingly bold activism. Further research has not only to test whether the argument made here works for other cases as well but has also to identify further explanatory variables. One example in this regard could be the investigation of the “opposition abating” effect of the different strategies applied by the member state governments to pro-actively contain the damage done by the CJEU (Blauberger 2012; Conant 2002). Another example could be a review of the role that “cultural” determinants play, for instance the fact “that judicial independence is a bedrock norm of Western liberal democracies” (Burley/Mattli 1993: 75). But in any case: the very scarce literature on the remarkably persistent acceptance of the CJEU would greatly benefit from more research.

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