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No privatisation in the service of fair competition? Article 345 TFEU and the EU market-state balance after Essent

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***264** Abstract

Building upon EU law obligations to open national electricity markets for competition, the Netherlands specifically prohibited private companies from maintaining or acquiring ownership entitlements in electricity distribution networks. In Essent*, the Court of Justice held that, despite* art.345 TFEU *proclaiming that the Treaties remain neutral regarding Member States' property ownership systems, EU internal market provisions impose limits on particular ownership choices made in that respect. This comment conceptualises those limits as building blocks for an EU constitutional playing field in which Member States'* art.345 TFEU *choices directly contribute to striking a refined balance between State and market.*

Introduction

The direct effect of supranational market freedoms and the ensuing judicial development of the EU internal market created an unprecedented playing field for balancing EU market freedoms vis-à-vis interventionist national regulation. [1] The Court of Justice's case law on the four freedoms fundamentally constrained national regulatory autonomy in the service of an ever-progressing EU internal market, and indirectly established a refined balance between economic freedom and state regulation. [2] Within this constellation, virtually all Member State rules can be subjected to Court-led internal market scrutiny, which could result in their disapplication in relation to goods, services, persons, and capital originating from other Member States. [3]

In relation to national property law rules, however, art.345 TFEU expressly proclaims that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. As a result, EU law would seem to remain *neutral* vis-à-vis the format and structure of national property law systems. [4] The Court's Grand Chamber judgment of October 22, 2013 in the Essent case confirmed that ***265** such neutrality can no longer be maintained in the present stages of EU internal market integration. [5] Rather than creating a shield against internal market scrutiny, art.345 TFEU neutrality should be interpreted as providing a sword to establish an even more refined balance between economic freedom and state intervention in the marketplace.

This comment outlines the Court's approach in Essent and the resulting role of art.345 TFEU in the European Union's economic constitutional law framework. The section that follows briefly sets the scene by restating the two interpretations that emerge consistently in relation to art.345 TFEU neutrality. The Essent case and the Court's clear choice for only one of those interpretations are then discussed. Finally, the comment provides an analysis of the implications of that choice for the constitutionally sanctioned balance between state and market underlying EU internal market law.

Two approaches to Article 345 TFEU neutrality

Article 345 TFEU states that the Treaties shall not prejudice the rules governing the *system* of property ownership in the Member States. The provision particularly addresses systemic choices that any Member State makes in relation to the nature and format of property titles. Such titles can be held or transferred in the public domain (i.e. by the State, public authorities or public undertakings), in the realm of private law or between public and private operators (nationalisation or privatisation of property titles). [6] Those fundamental property choices—and only those choices—cannot be *prejudiced* by EU law. [7]

Two interpretations of art.345 TFEU have been distinguished in that regard. [8] In the first interpretation, art.345 TFEU completely *shields or exempts* the format of property ownership choices from Court-led internal market scrutiny. Member States would retain full regulatory autonomy to determine and define a system of property ownership within their national legal orders in complete disregard of any demands posited by EU internal market law. In this understanding, Member States can—at will, yet in conformity with their own national (constitutional) laws—decide whether to nationalise or privatise ownership entitlement claims and to restructure national property *systems* without any concern about infringing EU fundamental freedoms. [9] Member States' autonomy in that regard is nevertheless limited in both scope and scale.

First, art.345 TFEU neutrality would, in this interpretation, only allow Member States to make a choice in relation to whether property rights would be held by a public or private body. As such, it does not guarantee EU law's deference towards changes in the actual exercise of property rights in particular ***266** situations. [10] This interpretation therefore sustains a conceptual distinction between systemic measures (the existence and format of property rights) and situational changes in ownership (the exercise of those rights). EU free movement rules would continue to structure and confine situational changes in ownership, yet defer systemic choices to the Member States. [11] In practice, however, EU policy-makers and judges have refrained from offering clear guidance as to what systemic measures are, rendering the application of the artificial difference between systemic and situational measures difficult and rather unpredictable. [12]

Secondly, it remains unclear whether the privatisation or nationalisation of a *particular* undertaking could always benefit from the art.345 TFEU shield. In his Opinion in Essent, A.G. Jääskinen argued that the choice to keep particular undertakings *within a specific sector* shielded from private ownership could fall within the exemption of art.345 TFEU. He did not, however, clarify whether the exemption would also apply if national law only shielded one specific undertaking —rather than one particular sector—from private ownership. The Advocate General's statement that art.345 TFEU property choices have to be made in a non-discriminatory and proportionate way appears to indicate that this may not be the case. [13] If that were true, however, national ownership choices would still be subject to EU principles of non-discrimination and proportionality, which also form part of Court-led internal market scrutiny. It would then be difficult to justify the fact that national property choices and formats should always be shielded completely from such scrutiny.

The second interpretation avoids the above-mentioned problems associated with the exemption approach by formally *embedding* the totality of art.345 TFEU in the wider EU economic constitutional law framework, which also includes

the fundamental freedoms and the competition law provisions. [14] In that understanding, art.345 is used as a *sword* for the European Union to assess national property choices in the light of an ongoing market integration project.

In this interpretation, Member States remain capable of transferring property titles from the private to the public realm or vice versa. These transfer operations are no longer shielded, however, but need to be conducted in compliance with other EU law provisions, such as freedom of establishment and the free movement of capital. As a result, national property ownership choices can be restrained directly as a matter of EU primary law. Any nationalisation or privatisation of property entitlements could potentially comprise a (non-)justifiable restriction of the Treaty free movement provisions.

The extent to which reliance on art.345 could actually justify free movement restrictions remains unclear within this second interpretation. While it could be maintained that the choice for a particular property regime comprises an overriding reason in the public interest, the Court's case law clearly states that ***267** economic objectives cannot be considered as overriding reasons. [15] Modifications to property regimes could, in that regard, be considered to be motivated by economic reasons that could not be justified under EU free movement law. If that were the case, however, the distinctive added legal value of art.345 remains doubtful, as it would not appear to tolerate particular national property law choices.

The Court's judgment in ***Essent***

The Essent judgment allowed the Court to take a clear stance on the scope of art.345 TFEU in relation to EU internal market fundamental freedoms. The circumstances in which the judgment came to being are rather specific and appear against the background of a particular framework of EU-induced market liberalisation in the electricity sector. This section first outlines this factual background, illustrates the ways in which both art.345 interpretations resurfaced throughout the case, and analyses the Court's clear choice for only one of those interpretations in its Grand Chamber judgment.

Article 345 and electricity unbundling

In an attempt to enhance competition in the offering of electricity services within the internal market and to avoid monopolistic publicly owned electricity undertakings hampering such competition, [16] the European Union mandated that access to electricity transmission and distribution facilities should be granted to different suppliers in a non-discriminatory way. [17] A particular instrument to enhance competition lay in the compulsory *unbundling* of undertakings that controlled both the infrastructure and the provision of electricity services. Unbundling implied that legal and functional separations had to be built between infrastructure and service providers that were previously combined in one vertically integrated undertaking. [18] Such unbundling could result in the effective divestment or re-allocation of ownership entitlements held by particular public or private undertakings.

Consecutive EU liberalisation packages gradually yet increasingly required a more enhanced separation between infrastructure providers and suppliers of electricity. [19] The supply of electricity takes place through infrastructural transmission and distribution networks. Transmission networks ensure that electricity generated can be transported to different distribution substations. Distribution networks enable the continued transport from those substations to natural or legal persons' premises. [20] Given the important strategic value of transmission networks to ensure the delivery of electricity towards all substations, Directive 2009/72 required full ownership unbundling of transmission network operators and suppliers/generators of electricity. [21] As a result, transmission networks could not be owned by electricity generating or supplying companies. Additional governance safeguards were put in place to avoid any remaining conflicts of interest in that regard. ***268** [22]

Distribution networks have not (yet) been subjected to similar stringent unbundling requirements as a matter of EU law. EU law only required their functional separation from a vertically integrated undertaking—without, however, mandating their divestment or ownership unbundling. The liberalisation Directives consistently stated that:

"Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent at least in terms of its legal form, organisation and decision making from other activities not relating to distribution. Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking." [23]

As such, distribution networks could remain part of a larger undertaking engaged in the generation or supply of electricity. [24]

In implementing the EU liberalisation packages, the Netherlands went beyond obligations imposed by EU secondary law and established a clear group prohibition. Any undertaking involved in the generation or supply of electricity could not directly or indirectly maintain ownership entitlements—through shares or otherwise—in a distribution network operator active in the Netherlands and vice versa. [25] The group of which the distribution system was part could not engage in activities unrelated to distribution or adversely affecting the operations of that system. [26] As a result, distribution systems could only be owned by companies or groups of undertakings specialised in electricity distribution. Those "group prohibition" and related activities restrictions imposed by Dutch law did not, in themselves, address the public or private nature of electricity undertakings' ownership.

In addition, however, Dutch law also imposed a more controversial "privatisation prohibition" on distribution network operators. In accordance with that prohibition, shares in distribution system operators could only be maintained by and transferred among the State of the Netherlands, the provinces of the Netherlands or its municipalities, or other specified legal persons, all of whose shares were owned, directly or indirectly, by those authorities. [27] Ownership over distribution networks thus had to be kept in the hands of approved Dutch public authorities or in undertakings owned by those authorities. Publicly owned undertakings involved in a distribution network operator, on the one hand, could not engage in activities related to the generation or supply of electricity in the Netherlands. Privately owned undertakings, on the other hand, had no opportunity to be involved in distribution network operations in the Netherlands.

Three Dutch electricity undertakings engaged in both the distribution and the supply of electricity argued that the Dutch system was contrary to EU internal market law. The Netherlands claimed that the choice of prohibiting privatisation was captured by art.345 and therefore shielded from EU internal market law scrutiny. [28] As a result, the group prohibition and related activities restrictions would also fall outside the realm of EU law, or would at the very least be justified as overriding reasons in the public interest. As the Dutch courts were divided on the scope of art.345 TFEU and its place in the Treaty framework, the Dutch Supreme Court eventually referred the matter to the Court of Justice. ***269** [29]

The Court's judgment

Contrary to the Advocate General, who sought to reconcile the shield and sword interpretations of art.345, [30] the Court clearly favoured the sword interpretation. It held, in a rather blunt fashion, that art.345 TFEU does not mean that rules governing the system of property ownership in the Member States are not subject to the fundamental rules of the TFEU. Those rules "include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital". [31] Consequently,

"the fact that the Kingdom of the Netherlands has established, in the sector of electricity or gas distribution system operators active in its territory, a body of rules relating to public ownership covered by Article 345 TFEU does not mean that Member States are free to disregard, in that sector, the rules relating to … free movement …." [32]

National property choices are indeed always to be made against the background of binding EU primary and secondary law provisions. The Court therefore proceeded to analyse the privatisation prohibition in the light of the Treaty's fundamental freedoms.

The Court focused particularly on the free movement of capital in art.63 TFEU. The free movement of capital notion inter alia includes the ability to acquire shares in an undertaking in order to exercise control over that undertaking. [33] Such ability would be restricted if national provisions imposing quantitative or qualitative restrictions on investments made in one Member State directly applied to companies established in other Member States. [34] In this case, the privatisation prohibition meant that no private investor could acquire shares or interests in the capital of an electricity or gas distribution system operator active in the Netherlands. As a result, it restricted investment opportunities in distribution network operators for companies established in other Member States. [35] Not surprisingly, the group prohibition was to be read in the same light. As the prohibition restricted any company active in the generation or supply of electricity in the Netherlands to own shares in Dutch distribution network operators, and vice versa, the free movement of capital was once again restricted. [36] Additional restrictions placed on related activities further curtailed the free movement of capital. [37]

The Court subsequently questioned the extent to which those restrictions could be justified as overriding reasons in the public interest. In relation to the privatisation prohibition, the Court held that the *reasons* underlying the choice of the rules of property ownership adopted by the national legislation within the scope of art.345 TFEU should not necessarily be economic in nature, but should rather reflect public interest considerations. [38] Those considerations could, in return, comprise factors that may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital. [39] The national court was specifically called upon to inquire into those considerations. [40]

The Court devoted more time to analysing justificatory overriding reasons in the light of the group prohibition. It held that the group prohibition and related activities restrictions contributed to ensuring ***270** undistorted competition on the markets for the generation/production, supply, and trade of electricity and gas in the Netherlands, and to guaranteeing adequate investment in the electricity and gas distribution systems. The Court first of all held that the objective of undistorted competition on those markets is also pursued by the TFEU, the Preamble to which underlines the need for concerted action in order to guarantee, inter alia, fair competition, the ultimate aim of that action being to protect consumers, which also constitutes an overriding reason in the public interest. [41] The Court also maintained that the objective of guaranteeing adequate investment in the electricity and gas distribution systems was designed to ensure, inter alia, security of energy supply, an objective that the Court has also recognised as being an overriding reason in the public interest. [42] The fact that EU secondary legislation favoured the unbundling of distribution networks from suppliers was also considered to present an additional justificatory argument. [43] The national court remained responsible for determining the proportionality of the national measures. [44] In essence, however, the Court gave a clear signal that those measures were to be justified as a matter of EU law. [45]

National property law choices in the EU internal market after ***Essent***

The Essent judgment provides a clearer picture of the relevance of art.345 within the European Union's constitutional balance between state intervention and market freedoms in the wake of market liberalisation. The Court not only clearly

opted for the second—sword—interpretation of art.345 TFEU, it also offered more specific guidance as to how national property law choices could strategically be employed in the service of the EU internal market project.

This section submits, in particular, that the Essent judgment allowed the Court to identify and sustain an *experimental* market organisation framework in which art.345 plays a constitutive role in enabling and restraining Member States' market regulation powers. In doing so, art.345 confirms the complementary roles of State and market as internal market building blocks. Those building blocks serve to shape a competitive market environment based on fair competition. In that understanding, State ownership can be tolerated or encouraged to the extent that it contributes to the fair functioning of the internal market. Essent should be read as directly inviting Member States to experiment with public ownership structures that contribute to such a fair competition image. At the same time, however, Member State experimentation will continue to be policed by the Court on a case-by-case basis, reconfirming the Court's primary role in maintaining and developing EU internal market law. These claims will now be discussed in more detail.

State and market as complementary internal market building blocks

Despite arguing that policy justifications underlying Member State ownership choices could be taken into account as non-economic reasons for the assessment of justifications for free movement restrictions related to the privatisation prohibition,[46] the Court did not address in a clear and detailed fashion what those reasons could be. The Court only—yet firmly—reiterated that the European integration project promotes a particular intertwining of State (ownership) and market freedoms in order to achieve the operationalisation of the internal market. ***271**

In expressing this market-State intertwining, the Court first of all distinguished Essent from other cases where property rights conflicted with free movement provisions,[47] most notably the "golden shares" cases.[48] In those cases, restrictions were created by privileges that public authorities attached to their position as *shareholders* in a privatised undertaking.[49] In Essent, the privatisation prohibition served as a means to enhance competition among electricity providers and thus to open national markets for competition. Rather than restricting competition in the marketplace, a prohibition on privatisation ensured that a public authority held shares in a distribution system that was predominantly to be used by a wide variety of private electricity suppliers.[50] State ownership in that understanding was said to contribute to the development of a competitive market for electricity supply in the Netherlands.

State and market are usually contrasted as two incompatible ways of organising an economic system.[51] In EU law, however, State and market have long been intertwined in the Treaty framework, thus creating a playing field in accordance with which States and markets have distinctive roles in the European Union.[52] A shift can be noticed in that regard from the State being a market participant to the State being a market regulator and/or supervisor.[53] Active State participation in the market economy has severely been restrained, whereas the regulation and enforcement of free and competitive markets has become a major responsibility of Member States.[54] In the realm of liberalised markets, EU law obliged the Member States to establish national regulatory authorities tasked with overseeing non-discriminatory access to infrastructural services.[55] As such, Member States' roles in liberalised markets are relegated to organising, maintaining, and facilitating competitive market conditions for all market operators. Whereas that role could be operationalised through the organisation of effective market supervision structures, EU law does not seem per se to exclude other forms of market participation by the State that also effectively contribute to competitive market conditions. ***272**

Essent confirms this intertwining of State and market within EU internal market law. State property choices—governed by art.345 TFEU—can in that understanding contribute to the creation of an internal market and guarantee the effective functioning of that market. As Member States remain at liberty to decide upon the public or private nature of ownership

entitlements, EU law would not impede—and could even be said to promote—public ownership claims that seek to enhance the effectiveness of the internal market in electricity. Public ownership entitlements could thus fall within the scope of non-economic justifications of free movement restrictions, if and to the extent that they contribute to the realisation of non-economic ends serving the proper or adequate functioning of competitive markets.

State ownership as a fair competition guarantee mechanism in a competitive market environment

The Essent judgment predominantly hints at one type of such non-economic ends serving the proper or adequate functioning of competitive markets, i.e. State-structured concerted action that seeks to guarantee or enhance *fair competition* within a market environment. Since the ultimate aim of fair competition is the protection of consumers, [56] States can take particular measures with a view to enhancing consumer choice and ensuring that consumers effectively have access to a variety of service providers offering such choices within a fair market environment. While the Court on previous occasions contested that consumer protection was the *ultimate* goal of EU competition law, [57] it most certainly acknowledged the importance of consumer protection as one of the keystones of EU internal market integration. [58] To the extent that nationally structured property ownership arrangements contribute to the corrective goals of enhancing consumer protection in the interest of fairness in the marketplace, they could be relied upon to justify restrictions of free movement entitlements.

The judgment's references to the security of energy supply also incorporate a similar fairness image. If and to the extent that Member States could not take measures to guarantee the security of energy supply, electricity undertakings could "capture" a State in complying with conditions set by those undertakings, thereby impeding the State from exercising its market supervision powers effectively and consumers benefiting from State-supervised liberalised markets. A fair distribution of operating, regulatory and supervisory tasks between Member States and private undertakings therefore also justifies the placing of particular limits on those undertakings' powers in relation to electricity supply and distribution activities.

Both consumer protection and the security of energy supply reflect a non-economic fairness image that can be said to have provided substance to the Dutch choice for State ownership as a matter of EU law. ***273** [59] The Dutch choice for public ownership over distribution networks in that understanding presents one way of enhancing fairness in the EU market place. It enables representatives of the "public interest" to keep control over electricity distribution networks. At the same time, however, it equally allows for the transfer of public ownership entitlements between public authorities, thus creating a market between different public authorities for control over distribution networks. The Court did not consider the extent to which the establishment of a market in shares held by public authorities in distribution networks actually contributed to the fairness image EU law seeks to project. The privatisation prohibition is nevertheless believed to substantiate this fairness approach effectively by entrusting *public authorities* with ownership over distribution network operations. Whereas EU law requires those networks to be available for different competing suppliers in a fair and non-discriminatory way, Member States retain some autonomy in determining how fair access can be ensured. As Essent made clear, reliance on public ownership and the transfer of distribution network shares between public authorities fall within the scope of such autonomy. [60]

EU law does not indeed object per se to this division of public and private ownership entitlements in the service of fair competition. On the contrary, art.345 TFEU neutrality allows for such division to the extent that it contributes to the fair competition image the EU internal market project seeks to promote. Public ownership over national distribution networks thus presents one facet of permissible State intervention, at least to the extent that a Member State is able to justify such ownership choices as directly contributing to the fair functioning of competitive electricity supply markets.

State ownership as experimental market governance in a multi-layered setting

The fair competition understanding substantiates the sword interpretation underlying art.345 TFEU as outlined in this comment. Member States remain at liberty to create a specific ownership regime, yet that regime is subject to conditions determined by the requirements of the internal market *and of fair competition on that market*. As such, fair competition standards determine the boundaries of a playing field within which Member States can develop and design market regulation and supervision mechanisms that structure those EU boundary conditions into workable regulatory regimes. That playing field apparently not only includes extensive secondary law provisions, but also unwritten "consumer protection" overriding reasons that allow Member States to experiment with State ownership as a market governance mechanism contributing to an image of fairness. [61]

In this image, art.345 TFEU plays a constitutive role in maintaining judicial oversight over the development of national experimental market governance methods grounded in national property choices. [62] Ownership entitlements comprise one means to ensure fair and non-discriminatory access to infrastructure for competitors and to structure or guarantee consumer choice. More than imposing a single solution of either public or private ownership claims, art.345, read in combination with the internal market provisions, serves as an instrument to induce Member States to continue experimenting with innovative governance structures where public ownership could contribute to the market. As long as those entitlements contribute to ensuring fair competition rather than to protecting Member States' vested interests in particular sectors, ***274** Member States remain at liberty to rely on public ownership or to choose a private ownership solution that guarantees fairness as well.

By outlining the—vague—conditions under which public ownership entitlements are desirable, the Court creates a dynamic playing field within which Member States can continue to engage in State intervention through public ownership that contributes to fair competition in the internal market. Entrusting ownership of distribution network operations to public authorities appears to fall within the limits of such a playing field. At the same time, however, Essent does not create a clear and predictable framework within which national experimental choices can be developed. Rather, the Court encourages Member States to self-assess whether property choices could be justified in the light of non-economic reasons and to experiment with property entitlement choices following such self-assessment. Article 345 in that image allows the Court to look into national property choices without clearly imposing strict guidelines as to how those choices should be made.

The experimental governance scheme read into art.345 TFEU does not, therefore, provide clear boundaries as to where national experimentation should end and EU internal market requirements prevail. As such, experimentation results in significant uncertainty for Member States when trying to develop alternative property choices. Article 345 therefore continues to provide little—if any—guidance in that regard and is unlikely to protect choices that remain difficult or impossible to justify without reference to fair competition, unless and until the Court identifies additional reasons in accordance with which State ownership choices can be justified.

Essent at the very least showcases that the Court is willing to police and structure such developments by providing case-by-case guidance to the Member States as to how public ownership entitlements could be relied on. In doing so, the Court firmly remains at the helm of the judicial development of the European Union's attempt to balance State interventions in a transnational market economy on the basis of open-ended economic constitutional law principles. [63] Article 345 TFEU structures Member States' experimentation opportunities in a constitutional framework of internal market integration. Whereas the European Union is not to make a choice relating to the public or private nature of ownership entitlements, Member States have to rely on either ownership regime in the interests of the internal market. Article 345 TFEU neutrality only persists, therefore, if such neutrality does not frustrate the emergence of an internal market in which fair competition plays a quintessential role. Member States will thus have to justify their public ownership choices in the light of such a fairness image.

Conclusion

The Essent judgment clearly states that, while Member States remain at liberty to opt for a particular property law system, the system itself and any changes made thereto may not frustrate the fundamental freedoms supporting the internal market. Changes in property structures will therefore only be compatible with EU law if and to the extent that they do not impose non-justifiable restrictions on EU fundamental freedoms. According to the Court, such changes can be justified if they contribute to a market environment grounded in fair competition.

In adopting this position, the Court promoted an instrumental reading of art.345 TFEU. That provision was said to reflect a constitutional benchmark empowering Member States' legal orders to contribute to the realisation of the internal market through experimental national property law choices. While EU law does not indeed prejudice national ownership system choices, the Court appeared firmly willing and able ***275** to crystallise the background policy conditions within which those choices are to be made. Essent confirmed that a fair yet competitive market environment comprises at least one of those background policy conditions.

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Footnotes

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1 See most explicitly, J. Snell, "Who's got the Power? Free Movement and Allocation of Competences in EC Law" (2003) 22 Y.E.L. 323.

2 See for an overview, *C. Barnard, The Substantive Law of the EU: The Four Freedoms, 4th edn (Oxford: Oxford University Press, 2013), pp.33–629*. On the difficult and incoherent "scope" of EU free movement law in that image, see recently *N. Nic Shuibhne, The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice (Oxford: Oxford University Press, 2013), pp.189–256*.

3 For that conceptualisation, see *M. Poiares Maduro, We the Court: The European Court of Justice and the European Economic Constitution: a Critical Reading of Article 30 of the EC Treaty (Oxford: Hart Publishing, 1998), p.143*.

4 Among others, see W. Devroe, "Privatizations and Community Law: Neutrality versus Policy?" (1997) 34 C.M.L. Rev. 267, 271; B. Akkermans and E. Ramaekers, "Article 345 TFEU (ex Article 295 EC): its Meanings and Interpretations" (2010) 16 E.L.J. 292, 293.

5 Staat der Nederlanden v Essent NV (C-105/12), Essent Nederland BV (C-105/12), Eneco Holding NV (C-106/12), Delta NV (C-107/12) October 22, 2013.

6 Essent (C-105/12) October 22, 2013 at [30]; B. Akkermans and E. Ramaekers, "Article 345 TFEU (ex Article 295 EC)" (2010) 16 E.L.J. 293, 298. See also F. Losada, T. Juutilainen, K. Havu and J. Vesala, "Property and European Integration: Dimensions of Article 345 TFEU" (2012) 148 Tidskrift utgiven av Juridiska Föreningen i Finland 203, 209.

7 See for that perspective, *R. Kovar, "Nationalisations—privatisations et droit communautaire" in J. Schwarze (ed.), Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty: Contributions to an International Colloquium of the European University Institute held in Florence on 14–15 May 1987 (Nomos, 1988), pp.97–119*. For a critique on the concept and meaning of prejudice—which goes beyond this comment—see Losada et al., "Property and European Integration" (2012) 148 Tidskrift utgiven av Juridiska Föreningen i Finland 203, 208–209 and references included therein.

8 For the clearest development of that distinction so far, see the Opinion of A.G. Jääskinen in Essent (C-105/12) October 22, 2013 at [41]–[43] and references therein.

9 See Commission v Greece (C-244/11) [2013] 1 C.M.L.R. 46 at [15]. At [16], however, the Court states that fundamental rules on free movement remain applicable, thus actually hinting at the application of the second reading outlined below.

10 On the existence versus exercise of property rights and its relevance to EU law, see Devroe, "Privatizations and Community Law" (1997) 34 C.M.L. Rev. 267, 270; and Akkermans and Ramaekers, "Article 345 TFEU (ex Article 295 EC)" (2010) 16 E.L.J. 293, 311.

11 See, for that approach already, the Opinion of A.G. Ruiz-Jarabo Colomer in Commission v Portugal (C-367/98), Commission v France (C-483/99) and Commission v Belgium (C-503/99) [2002] E.C.R. I-4731; [2002] C.M.L.R. 48 at [54].

12 For a similar assessment, see Akkermans and Ramaekers, "Article 345 TFEU (ex Article 295 EC)" (2010) 16 E.L.J. 293, 303–304.

13 Opinion of A.G. Jääskinen in Essent (C-105/12) October 22, 2013 at [42].

14 See, for that understanding already, Fearon v Irish Land Commission (182/83) [1984] E.C.R. 3677; [1985] 2 C.M.L.R. 228 at [7]; Commission v Italy (C-235/89) [1992] E.C.R. I-777; [1992] 2 C.M.L.R. 709 at [14]; and Commission v United Kingdom (C-30/90) [1992] E.C.R. I-829; [1992] 2 C.M.L.R. 709 at [18]; Konle v Austria (C-302/97) [1999] E.C.R. I-3099; [2000] 2 C.M.L.R. 963 at [38]; Ospelt and Schlössle Weissenberg v Unabhangiger Verwaltungssenat des Landes Vorarlberg (C-452/01) [2003] E.C.R. I-9743; [2005] 3 C.M.L.R. 40 at [24]; (C-171/08) Commission v Portugal (C-171/08) [2010] E.C.R. I-6817; [2011] 1 C.M.L.R. 10 at [64]; Commission v Poland (C-271/09) [2012] 2 C.M.L.R. 11 at [44]; Commission v Greece (C-244/11) [2013] 1 C.M.L.R. 46 at [16]; Essent (C-105/12) October 22, 2013 at [36].

15 A mere reduction in tax revenue would be purely economic; see CIBA v APEH (C-96/08) [2010] E.C.R. I-2911; [2010] 3 C.M.L.R. 21 at [48].

16 See, in the realm of energy, *M. Albers, "Competition Law Issues arising from the Liberalization Process" in D. Geradin (ed.), The Liberalization of Electricity and Natural Gas in the European Union (The Hague: Kluwer Law International, 2001), p.4*, referring to the integrated downstream-upstream energy provision frameworks.

17 Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 [2003] OJ L176/37 art.20; Directive 2009/72 concerning common rules for the internal market in electricity and repealing Directive 2003/54 [2009] OJ L211/53 art.32.

18 On unbundling, see Recital 11 of Directive 2003/54 and Recital 15 of Directive 2009/72.

19 For a concise overview, see *C. Jones, "Introduction" in C. Jones (ed.), EU Energy Law: Volume 1. The Internal Energy Market: The Third Liberalization Package (Brussels: Claeys & Casteels, 2010), pp.3–8*.

20 See for a concise overview in that regard http://www2.eurelectric.org/Content/Default.asp?PageID=820. [Accessed February 19, 2014].

21 Directive 2009/72 art.9.

22 Directive 2009/72 arts 18–19.

23 Directive 2009/72 art.26(1).

24 Directive 2009/72 Recital 26.

25 Essent (C-105/12) October 22, 2013 at [19].

26 Essent (C-105/12) at [20].

27 Essent (C-105/12) at [18].

28 Essent (C-105/12) at [24].

29 Essent (C-105/12) at [26].

30 Opinion of A.G. Jääskinen in Essent (C-105/12) October 22, 2013 at [45].

31 Essent (C-105/12) at [36].

32 Essent (C-105/12) at [37].

33 Essent (C-105/12) at [38]; see for background, *J. Snell, "Free Movement of Capital: Evolution as a Non-linear Process" in P. Craig and G. de Búrca (eds), The Evolution of EU Law (Oxford: Oxford University Press, 2011), pp.547–574*.

34 Essent (C-105/12) at [40].

35 Essent (C-105/12) at [43].

36 Essent (C-105/12) at [45].

37 Essent (C-105/12) at [46].

38 Essent (C-105/12) at [50].

39 Essent (C-105/12) at [53].

40 Essent (C-105/12) at [55].

41 Essent (C-105/12) at [58].

42 Essent (C-105/12) at [59].

43 Essent (C-105/12) at [62].

44 Essent (C-105/12) at [67].

45 Essent (C-105/12) at [66].

46 Essent (C-105/12) at [53].

47 The Court did not refer to earlier instances where property choices conflicted with free movement provisions. In those instances, Member States developed intellectual, industrial or commercial property regimes that directly affected the free movement of goods produced in a Member State on the territory of another Member State. See in that regard, among others, Commission v Italy (C-235/89) [1992] E.C.R. I-777 at [14]: "However, the provisions of the Treaty, and in particular Article 222 [now art.345 TFEU] according to which the Treaty in no way prejudices the rules in Member States governing the system of property ownership, cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the common market as provided for and regulated by the Treaty"; see also Commission v United Kingdom (C-30/90) [1992] E.C.R. I-829 at [18]; Spain v Council (C-350/92) [1995] E.C.R. I-1985; [1996] 1 C.M.L.R. 415 at [22]. In those instances, the Court held that industrial property choices could not be invoked to avoid national measures from being scrutinised under EU free movement law. See also, but without reference to art.345 TFEU, Centrafarm v Winthrop (16/74) [1974] E.C.R. 1183; [1974] 2 C.M.L.R. 480 at [6]. Longstanding case law maintains the same position in relation to EU competition law. See in that regard, among others, Consten and Grundig v Commission (56 and 58/64) [1966] E.C.R. 299; [1966] C.M.L.R. 418; and Italy v Council and Commission (32/65) [1966] E.C.R. 389; [1969] C.M.L.R. 39.

48 For a comprehensive overview of those cases, see C. Gerner-Beuerle, "Shareholders between the Market and the State: The VW Law and other Interventions in the Market Economy" (2012) 49 C.M.L. Rev. 97.

49 Essent (C-105/12) at [54].

50 Essent (C-105/12) at [54].

51 See for an overview of that debate, *V. Vanberg, "Market and State: the Perspective of Constitutional Political Economy", Freiburg Discussion papers on Constitutional Economics 04/10*, http://www.econstor.eu/bitstream/10419/4342/1/04_10bw.pdf [Accessed February 19, 2014].

52 See for an overview, *W. Sauter and H. Schepel, State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts (Cambridge: Cambridge University Press, 2009), pp.29–30*.

53 See for that perspective also *F. de Cecco, State Aid and the European Economic Constitution (Oxford: Hart Publishing, 2012), p.168*.

54 *E. Szyszczak, The Regulation of the State in Competitive Markets in the EU (Oxford: Hart Publishing, 2007), pp.4–5*.

55 See Directive 2009/72 art.35.

56 Essent (C-105/12) October 22, 2013 at [58].

57 See to that extent e.g. GlaxoSmithKline Services Unlimited v European Commission (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P) [2009] E.C.R. I-9291; [2010] 4 C.M.L.R. 2 at [63].

58 See cases such as Commission v Italy (C-260/04) [2007] E.C.R. I-7083; [2007] 3 C.M.L.R. 50 at [27]; Commission v Austria (C-393/05) [2007] E.C.R. I-10195; [2008] 1 C.M.L.R. 42 at [52]; and Commission v Portugal (C-458/08) [2010] E.C.R. I-11599 at [89], referred to in Essent (C-105/12) October 22, 2013 at [58]. See also Océano Grupo Editorial SA v Quintero (C-243/98) [2000] E.C.R. I-4941; [2002] 1 C.M.L.R. 43 at [30]; and Mostaza Claro v Centro Móvil Milenium SL (C-168/05) [2006] E.C.R. I-10421; [2007] 1 C.M.L.R. 22 at [27], having seemingly recognised consumer protection as a general principle of EU law.

59 It should be noted, however, that the consumer protection and security of energy supply justifications have not been explicitly developed in relation to the Dutch privatisation prohibition. The Court instead relied on those justifications in relation to the group prohibition and the related activities' prohibitions; see Essent (C-105/12) October 22, 2013 at [56]. Particular justifications for the privatisation prohibition were completely left to the national court for its consideration. At the same time, however, the privatisation prohibition is inherently related to the group prohibition. As a result, it could be argued that the justifications offered for the group prohibition could also apply to the privatisation prohibition. The Court appears to hint at this possibility at [55], where it states that "the reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU constitute factors which may be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital. Accordingly, in the main proceedings, it is for the referring court to conduct such an examination".

60 Essent (C-105/12) October 22, 2013 at [66], stating that "the objectives referred to by the referring court may, in principle, as overriding reasons in the public interest, justify the identified restrictions on fundamental freedoms".

61 Arguing in favour of EU procedural balancing supporting such experimentation, C. Semmelmann, "The European Union's Economic Constitution under the Lisbon Treaty: Soul-searching among Laywers shifts the Focus to Procedure" (2010) 35 E.L. Rev. 516, 534–535.

62 See for similar evolutions in an administrative context, C. Sabel and J. Zeitlin, "Learning from Difference: the New Architecture of Experimentalist Governance in the EU" (2008) 14 E.L.J. 271. On experimental oversight triggered by the Courts, see J. Scott and S. Sturm, "Courts as Catalysts: Re-thinking the Judicial Role in New Governance" (2007) 13 Columbia Journal of European Law 565.

63 On the open-ended nature of the European Union's economic constitution, see *W. Devroe and P. van Cleynenbreugel, "Observations on Economic Governance and the Search for a European Economic Constitution" in D. Schiek, U. Liebert and H. Schneider (eds), Economic and Social Constitutionalism after the Treaty of Lisbon (Cambridge: Cambridge University Press, 2011), p.113*.

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