

Frank S. Benyon. ***Direct Investment, National Champions and EU Treaty Freedoms. From Maastricht to Lisbon.*** Oxford: Hart, 2010. Pp. 144. £45. ISBN: 9781849461085.

Free movement of capital and freedom of establishment are among the very few areas of the European Union's internal market law the limits of which still need clarification. The political relevance of both freedoms is remarkable, particularly in the current context of economic crisis. This was proven again last summer when the government of Portugal overruled Portugal Telecom shareholders' decision to sell to Telefónica part of their shares in Vivo. The conflict between Member States' desire to protect strategic public interests through the fostering of 'national champions' and the economic freedoms as conceived in the EU treaties has usually been solved by the Court of Justice of the European Union (ECJ) in favour of the latter.¹ But the

¹ See the *Golden Share* saga of rulings: Case C-58/99 *Commission v. Italian Republic* [2000] ECR I-3811; Case C-367/98 *Commission v. Portuguese Republic* [2002] ECR I-4731; Case C-83/99 *Commission v. French Republic* [2002] ECR I-4781; Case C-503/99 *Commission v. Kingdom of Belgium* [2002] ERC I-4809; Case C-463/00 *Commission v. Kingdom of Spain* [2003] ECR I-4581; Case C-98/01 *Commission v. United Kingdom of Great Britain and Northern Ireland* [2003] ECR I-4641; Case C-174/04 *Commission v. Italian Republic* [2005] ECR I-4933; Joined Cases C-282/04 and 283/04 *Commission v. Kingdom of the Netherlands* [2006] ECR I-9141; Case C-112/05 *Commission v. Federal Republic of Germany* [2007] ECR I-8995; Joined Cases C-463/04 and 664/04 *Federconsumatori et al. v. Comune de Milano* [2007] ECR I-10419; Case C-274/06 *Commission v. Kingdom of Spain* [2008] ECR I-26; Case C-207/07 *Commission v. Kingdom of Spain* [2008] ECR I-111; Case C-326/07 *Commission v. Italian Republic* [2009] ECR I-02291; Case C-171/08 *Commission v. Portuguese Republic*, not yet reported; Case C-543/08, *Commission v. Portuguese Republic*, not yet reported.

tension between domestic political will and supranational legal commitments still persists, and, as a result, national governments try to take advantage of any legal gap in order to retain some power and to avoid some of the constraints the economic freedoms impose on them. Accordingly, the ECJ's case law on the field is increasing.

As a response the scholarly literature on free movement of capital has been growing. Among the monographs on the issue is the book under review, which aims at explaining the legal regime applicable to *direct investment* in the European Union. With this concept reference is made to any investment made from one state into another that involves some control of, or at least participation in the control of, the entity that is the subject of the investment. When thinking in EU law terms about this figure, a series of riddles soon emerge. To start with, the relationship between direct investment and the Treaty freedoms must be clarified, since direct investment may fall under the free movement of capital, or the freedom of establishment, or both of them. Secondly, it needs to be specified what measures may render investments less attractive or establish any kind of competitive disadvantage, and thus can be considered restrictions of the applicable market freedoms. Thirdly, it should be clarified under what circumstances such restrictions to the economic freedoms are either in accordance with the Treaties or so well-funded and respectful of the criteria of necessity and proportionality that the ECJ considers them justified. Clarification is also required to determine, fourthly, which authorities (national or European) may impose such restrictions. Finally, direct investment also implicates competition law, since by means of acquisition of a competitor in another Member State a company may distort competition. Thus, criteria need to be established for determining when the Commission will approve such purchase, as well as when national measures preventing it are justified.

These pertinent questions are posed in an appealing and well-structured way in the introduction to the book under review. However, what follows this promising start is an orthodox explanation of the legal regime in the different fields of EU law. The book describes the legal regimes on free movement of capital (Chapter 2) and freedom of establishment (Chapter 3); explains what justifications exist for restrictions of such economic freedoms (Chapter 4); and establishes the relationship between direct cross-border investment and merger control (Chapter 5), distinguishing such constellation from the cross-border movements by companies (Chapter 6). Immediately afterwards, the book refers to company law and cross-border mergers (Chapter 7), and then deals with direct investment from third countries (Chapter 8) and with other related issues of importance for the book's topic, namely the legal regimes applicable to sovereign wealth funds (Chapter 9) and resulting from the coexistence of bilateral investment treaties (Chapter 10).

Despite this wide range of themes covered, the book is not an exhaustive account of the legal provisions and their interpretation in all these areas, but merely an *updated snapshot* of the current state of EU law. *Updated*, since it includes the main innovations in the field, whether they result from the Lisbon Treaty (Article 207 TFEU has made foreign direct investment part of the Common Commercial Policy, an exclusive competence of the EU) or from the ECJ's case law. As a matter of fact, the most relevant novelties stem from the Court's recent rulings on the issue, as the *Sint Servatius* case,² in which it declared that a restriction on free movement of capital could be justified if there was a risk of 'seriously undermining the financial balance of social policies' (at 33).

However, the book just presents a *snapshot* of the current legal regime, since it avoids all doctrinal reflections and theoretical debates on the many politically sensitive issues connected with the topic. The reader may regret not just its brevity (chapters are about ten pages long), but

² Case C-567/07, *Minister voor Wonen, Wijken en Integratie v. Woningstichting Sint Servatius* [2009] ECR I-9021.

mainly its schematic presentation: it does point to legal problems and contradictions, but an in-depth reflection is missing; only in very few instances is reference made to literature;³ and as a matter of fact the book lacks a bibliography.

The author consciously decided merely to describe the legal problems and not to delve more deeply into doctrinal debates (at 6). Nonetheless its superficiality constitutes the book's main flaw. Since it is evident that Benyon is in command of the topic (he has been dealing with these issues for decades while working for the European Commission), further legal analysis would have been of the utmost interest, particularly if we take into account the political dimensions of the matter. This way, however, the book resembles more a Commission official document than an academic text. While this may well be caused by the institutional affiliation of the author, as a result the potential audience is dramatically reduced: on the one hand, readers require some knowledge of EU law, particularly on free movement of capital and freedom of establishment – as specific and technical terms (for instance 'white knights' or 'poison pills' at 68) are not always explained. On the other hand, for those already dealing with this area of law it does not reveal any new insight or approach.

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³ Surprisingly not even some well-established references, like S. Mohamed's *European Community Law on the Free Movement of Capital and the EMU* (1999) or S. Hindelang's *The Free Movement of Capital and Foreign Direct Investment* (2009), are mentioned.