Series on International Tax Law
Univ.-Prof. Dr. Dr. h.c. Michael Lang (Editor)
Volume 100

CJEU – Recent Developments in Direct Taxation 2015

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Zitiervorschlag: *Author* in *Lang et al* (Eds), CJEU – Recent Developments in Direct Taxation 2015 (2016) page

Supported by the City of Vienna

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

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ISBN 978-3-7073-3531-6 (Print)
ISBN 978-3-7094-0820-9 (E-Book-PDF)
ISBN 978-3-7094-0819-3 (E-Book-ePub)

© Linde Verlag Ges.m.b.H., Wien 2016

1210 Wien, Scheydgasse 24, Tel.: 01/24 630
www.lindeverlag.at

Druck: Hans Jentzsch & Co GmbH
1210 Wien, Scheydgasse 31

Dieses Buch wurde in Österreich hergestellt.

PEFC zertifiziert
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www.pefc.at

Gedruckt nach der Richtlinie „Druckerzeugnisse" des Österreichischen Umweltzeichens, Druckerei Hans Jentzsch & Co GmbH, UW Nr. 790

Preface

In recent years, the Court of Justice of the European Union (CJEU) has had to deal with more and more cases concerning direct taxation. This growing amount of case law is driven by the increased willingness of national courts to approach the CJEU through preliminary rulings as well as by the fact that the European Commission seems to be more and more willing to initiate infringement procedures against EU Member States. As all these cases are of great interest for academics as well as practitioners, they need to be analyzed carefully.

The conference, "Recent and Pending Cases at the CJEU on Direct Taxation" was held in Vienna on 19 to 21 November 2015. A large number of experts on European and international tax law accepted our invitation to attend the conference and took part in the discussions. At the conference, cases in the field of direct taxation now pending before or recently decided by the CJEU were presented by experts from the respective countries. These national reporters provided insights into the national as well as the European background of the cases. Their presentations were the basis for further lively discussions among the international participants. Possible consequences of the pending cases, future CJEU decisions and future trends in the CJEU's case law were discussed and analyzed in detail. The results of the conference are published in this book.

The conference would not have been possible without the City of Vienna to whom we would like to express our thanks. In addition, we would like to warmly thank the authors who contributed to the conference by presenting cases from their countries and actively participating in the discussions. Furthermore, these individuals supported the entire project and the publication of this book by committing themselves to a strict time schedule. We are also grateful to the Linde publishing house for its cooperation and the quick realization of the book's publication. Linde has generously agreed to include this book in its catalogue.

Our particular thanks go to Renée Pestuka for the smooth organization of the conference, to Eleanor Campbell, who edited and polished the texts of the authors, and to Matthias Mayer, who supported us in deciding on the structure of the conference and in the preparation and publication of this book.

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Alexander Rust
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Portugal: Recent and Pending Cases

Ana Paula Dourado

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I. Brisal – Auto Estradas do Litoral S.A., KBC Finance Ireland v Fazenda Pública, Case C-18/15

A. Facts

At the time when the facts occurred in *Brisal*, interest payments received by non-resident financial institutions were submitted to a final withholding tax of 20 % or lower under a double taxation convention, on gross income, with no possibility of deducting business expenses directly related to the financial activity carried out. In contrast, resident financial institutions were submitted to a corporate income tax rate of 25 %, on net income: the interest received by resident financial institutions is incorporated in the total taxable income, with deduction of any expenses related to the activity pursued when determining the profit for the purposes of corporation tax, so that the basic rate of 25 % was applied to the *net* interest income.

Although the following aspects have not been mentioned in the referral, it is worth adding, that Portuguese banks also benefit from no withholding tax on payments of interest to a permanent establishment of a Portuguese bank established outside Portugal; that interest on loans granted to resident credit institutions by non-resident financial institutions is exempt from tax, provided that such interest is not attributable to a Portuguese permanent establishment of the non-resident financial institution; and that interest on time bank deposits made by non-resident credit institutions is exempt from tax.

B. Questions Referred

The Portuguese Supreme Administrative Court (2nd Chamber), referred the following questions to the CJEU:

> "Does Article 56 TFEU preclude national tax legislation under which financial institutions not resident in Portuguese territory are subject to tax on interest income received in that territory, withheld at source at the definitive rate of 20 % (or at a lower rate if there is an agreement to avoid double taxation), a tax applied to gross income with no possibility of deducting business expenses directly related to the financial activity carried out, whereas the interest received by resident financial institutions is incorporated in the total taxable income, with deduction of any expenses related to the activity pursued when determining the profit for the purposes of corporation tax, so that the basic rate of 25 % is applied to the net interest income?"
>
> 2. "Does the same hold good even if the tax base of resident financial institutions, after deduction of the financing costs related to the interest income, or of expenses directly related, economically, to such income, is or may be subject to a higher tax than is deducted at source from the gross income of non-resident institutions?"
>
> 3. "For this purpose, can the financing costs associated with the loans granted, or the expenses directly related, economically, to the interest income received, be proved by the data provided by the EURIBOR ('Euro Interbank Offered Rate') and by the LIBOR ('London Interbank Offered Rate') — which represent the average interest rates charged on interbank financing used by banks to carry out their activity?"

In short, the issues are whether the regime is incompatible with the free movement of capital (current Article 63 TFEU); whether the same holds true where net taxation applicable in the concrete case is more burdensome; and whether the financing costs associated with the loans granted can be proved by the data provided by the EURIBOR (Euro Interbank Offered Rate) and by the LIBOR (London Interbank Offered Rate) – since these correspond to the average interest rates charged on interbank financing.

Meanwhile, there have been developments in the Portuguese tax regime. The current statutory Corporate Income Tax rate is 21 % and the withholding tax rate is 25 %, widening the gap between the applicable tax rates; non-resident corporate taxpayers can now elect to be handled as Portuguese residents and the withheld tax can be reimbursed. The cash-flow disadvantage in the application of a withholding tax is clear and typically not applied in internal situations where Portuguese banks are concerned.

C. Brisal as a follow-up to C-105/08 Commission vs Portugal

Brisal is a follow-up to the CJEU case *Commission vs Portugal*[1], where the Court did not rule on the material question on the grounds of lack of data presented by the European Commission to assess the issues (reason for third question referred to allow domestic court to make a similar assessment).

According to the decision:

> "...it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information required to enable the Court to establish that the obligation has not been fulfilled, and in doing so the Commission may not rely on any presumption."[2]
>
> "In the present case, in order to prove that the Portuguese legislation, which, it is not disputed, treats resident and non-resident legal entities differently with regard to IRC, results in higher taxation of non-resident legal entities, the Commission relies on an arithmetical example based on the assumption that the profit margin achieved by the entity in question in that example is 10%".[3]
>
> "In so far as the calculation in question, which the Commission itself describes as 'theoretical', is disputed by the Portuguese Government on the ground that the premiss underlying it bears no relation to the true position, and since that government puts forward a calculation based on a different profit margin which produces a solution in which resident legal entities are taxed more heavily, the onus was on the Commission, as the Advocate General observed at point 40 of her Opinion, to establish that the figures on which its calculation is based reflect the economic reality. Thus, the Commission could have furnished, inter alia, statistical data or information concerning the level

1 *Commission v Portugal*, C-105/08, EU:C:2010:345.
2 *Commission v Portugal*, C-105/08, EU:C:2010:345, para. 26.
3 *Commission v Portugal*, C-105/08, EU:C:2010:345, para. 27.

> of interest paid on bank loans and relating to the refinancing conditions in order to support the plausibility of its calculations."[4]
>
> "It is however, clear that, in the present case, the Commission failed to produce either during the written procedure or the hearing, and not even after an express request by the Court, any conclusive evidence whatever which would have been capable of establishing that the figures which it puts forward in support of its argument are in fact borne out by the actual facts and that the arithmetical example on which it relies is not purely hypothetical."[5]

It seemed clear that the Court would assess whether the Portuguese regime was incompatible with the free movement of capital, if a Portuguese court referred a concrete case on the basis of infringement procedures. *Brisal* is therefore an opportunity to obtain clarity on the compatibility of the Portuguese regime with the TFEU. Moreover, it is desirable that the CJEU does not adopt the position held in the *Truck Centre* case[6], where the comparison test was mainly focused on Belgium and its position as a source country in the case, and the Court neither focused on the meaning and scope of the fundamental freedoms, nor on the taxpayers, as the right beneficiaries of the fundamental freedoms: it was considered that Belgium did not have to handle interest accrued by non-residents and residents in the same manner, because as source state it was not in the same position when acting as a residence state:

> "In that regard, the difference in treatment between companies receiving income from capital, established by the tax legislation at issue in the main proceedings, consisting in the application of different taxation arrangements to companies established in Belgium and to those established in another Member State, relates to situations which are not objectively comparable.
>
> Firstly, when both the company paying the interest and the company receiving that interest are resident in Belgium, the position of the Belgian State is different to that in which it finds itself when a company resident in Belgium pays interest to a non-resident company, because, in the first case, the Belgian State acts in its capacity as the State of residence of the companies concerned, while, in the second case, it acts in its capacity as the State in which the interest originates.
>
> Secondly, the payment of interest by one resident company to another resident company and the payment of interest by a resident company to a non-resident company give rise to two distinct charges which rest on separate legal bases."[7]

If the CJEU considers that the Portuguese regime under analysis is discriminatory, it will have to specify which expenses (financial costs) are deductible. It is herein contended that an optional regime, allowing the election to be handled as a resident taxpayer is the best solution in light of the TFEU, because the non-resident taxpayer will not always be favoured by adopting the latter regime.[8]

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4 *Commission v Portugal*, C-105/08, EU:C:2010:345, para. 29.
5 *Commission v Portugal*, C-105/08, EU:C:2010:345, para. 30.
6 *Truck Center*, C-282/07, EU:C:2008:762.
7 *Truck Center*, C-282/07, EU:C:2008:762, paras. 41–43.
8 See A.P. Dourado & J.Almeida Fernandes, *The Infringement Procedures involving Portugal*, in: M. Lang et al. (eds.), *ECJ – Recent Developments in Direct Taxation 2008* (Vienna: Linde, 2008) p. 337.

II. Case C-343/13 Modelo Continente Hipermercados SA v Autoridade para as Condições do Trabalho – Centro Local do Lis (ACT)

A. Facts

On 24 June 2013 there was a request for a preliminary ruling from the Tribunal do Trabalho de Leiria (Portugal) concerning the following facts: on 15 February 2011 an inspection was carried out by the Portuguese Authority for Labour Conditions (ACT) at one of the Lisbon stores of the company "Good and Cheap Comércio Retalhista, SA" (GC)During this inspection the company was requested to present certain documents. On 31 March 2011, "Modelo Continente Hipermercados, SA", a public limited liability company, acquired GC, including the store that had been previously inspected. Its assets were globally transferred to Modelo.

After the registration of the merger, ACT served the wound up company GC with a report informing it of the application of an administrative penalty due to the violation of labour laws. Article 19 of Directive 2011/35/EU was transposed by Article 112 of the Portuguese Commercial Companies Code:

> "With the registration of the merger on the competent legal institution:
>
> a) The merged companies are wound up or, in the case of the creation of a new company, all the merged companies are wound up. Its rights and obligations are transferred to the acquiring company or to the new company;
> b) The shareholders of the wound up companies become shareholders of the acquiring or new company." (author's translation)

B. Questions referred to the CJEU

The following questions were referred to the CJEU:

> "1. In the light of Community law and, in particular, Directive 2011/35/EU and Article 19 thereof, does the merger of companies entail a system of transfer of liability for administrative offences to the acquiring company for acts committed by the company being acquired before registration of the merger?
> 2. Can a penalty for administrative offences be considered a debt owed to third parties (in the present case the State, for infringement of rules concerning administrative offences) for the purposes of the application of the Directive, with the consequence that the corresponding debt (fine) for an administrative offence, in respect of which the State is the creditor, is transferred to the acquiring company?
> 3. Does an interpretation of Article 112 of the PT Commercial Companies Code according to which it does not imply termination of proceedings for an administrative offence committed before the merger, or of the corresponding fine to be imposed, conflict with the abovementioned Community Directive, which sets out the consequences of a company merger, thereby constituting a broad interpretation of the provision contrary to the principles of Community law and, in particular, Article 19 of the Directive?

4. Does that interpretation constitute a breach of the principle that there can be no administrative offence without strict (mitigated) liability or liability for fault on the part of the acquiring entity?"

C. Reasoning

It was established in the CJEU Case C-90/09P[9] (a competition law case – on the transfer of liability to a parent company) that there was no transfer of liability for administrative offences to the acquiring company for acts committed by the company being acquired before registration of the merger as long as there was no decisive influence in the behaviour that constituted an offence.

It had been contended in a previous analysis of Case C- 343/13, that the need to define the concept of creditor for the purposes of the Directive might lead the Court to apply the private creditor's test, used by the Court in state aid cases.[10]

Although this is not a tax case, the relation that the author previously established with tax cases arose from the case law of the Court on the transmission of losses from the acquired company to the acquiring company, in the context of the Directive 2009/133/EC of 19 October 2009 on the taxation of mergers.[11]

It was also contended that the arguments by the CJEU in its case law on the transmission of losses could not be transposed to this case, because the administrative offence has to be based on a subjective liability of the company. The latter requires an unlawful and guilty behaviour to be proved and it is an *ad personam* kind of liability.

On the other hand, the deduction of losses is related to objective facts (taxable base).

It was also claimed that there could be no administrative offence without strict (mitigated) liability or liability for fault on the part of the acquiring entity.[12]

D. The CJEU decision

In the case under analysis, C 343/13, the CJEU decided differently from the aforementioned case C-90/09P and from the author's previous arguments and assessment. Rather, it decided that a merger by acquisition in Article 3 (1) of the Directive implies the transfer by the acquiring company of the obligation to pay a fine committed by the acquired company prior to the merger and imposed by final decision after the merger.[13]

9 *General Química and Others v Commission*, C-90/09P, EU:C:2011:21.
10 See A.P. Dourado & A.G. Rocha, *Recent and Pending Cases at the ECJ on Direct Taxation: Portugal (case C-343/13)*, in: M. Lang et al. (eds.), *ECJ - Recent Development in Direct Taxation 2013* (Vienna: Linde, 2014) p. 197.
11 See *Foggia*, C-126/10, EU:C:2011:718.
12 A.P. Dourado & A.G. Rocha, in: M. Lang et al. (eds.), *ECJ – Recent Development in Direct Taxation 2013* (2014) p. 198.
13 *Modelo Continente Hipermercados*, C-343/13, EU:C:2015:146, para. 35.

And, according to the CJEU, in paragraph 33 of the same decision, "if such liability were not transferred, a company could use a merger by acquisition as a means of escaping the legal consequences of offences it has committed to the detriment of the Member State concerned or other potential interested parties".

III. C-464/14 Secil

A. Free movement of capital and third countries

The *Secil* case concerns a potential discriminatory treatment of inbound dividends from third countries and it is an opportunity for the CJEU to decide on a number of new topics related to the fundamental freedoms (more specifically, free movement of capital) and third countries. It is also an opportunity for the CJEU to further develop its doctrine on a group of issues that cannot yet be considered acte clair, namely: the direct effect of provisions in the association agreements on fundamental freedoms and their impact in direct taxes; the overlapping of fundamental freedoms; vertical and horizontal discrimination; the standstill clause under Article 64 paragraph 1 of the TFEU.

B. Facts

Secil is a resident company in Portugal with subsidiaries in Lebanon and Tunisia, countries that are neither party to the European Union, nor the EEA, but with which association agreements have been concluded. Under the Portuguese corporate income tax code, incoming dividends from Lebanon and Tunisia fall into the general tax regime which implies higher taxation than the one to which domestic dividends and dividends coming from the European Union and EEA Member States are submitted.

C. Detailed and precise questions referred (as recommended by the CJEU to domestic courts)

The competent first instance tax court – referred the following questions to the CJEU:

"1. Does Article 31 of the Agreement with Tunisia constitute a provision which is clear, precise and unconditional and, as such, directly applicable, and from which it must be inferred that the right of establishment is applicable to the present case?
2. If so, does the right of establishment under that provision entail the consequences which the applicant claims, in the sense that, if that right is not to be infringed, it requires that the full deduction mechanism provided for in Article 46(1) of the CIRC [(Code on corporation tax)] be applied to the dividends which the applicant received from its subsidiary in Tunisia?
3. Does Article 34 of the Agreement with Tunisia constitute a provision which is clear, precise and unconditional and, as such, directly applicable, and from which it must be inferred that the free movement of capital is applicable to the present case and must therefore be regarded as covering the investment made by the applicant?

4. If so, does the free movement of capital under that provision have the implications which the applicant claims, inasmuch as it requires that the full deduction mechanism established in Article 46(1) of the CIRC be applied to the dividends which the applicant received from its subsidiary in Tunisia?
5. Does it result from Article 89 of the Agreement with Tunisia that the foregoing questions must be answered in the affirmative?
6. Is the restrictive treatment of the dividends distributed by Société des Ciments de Gabés justified, given that the framework for cooperation established in Council Directive 77/799/EEC 2 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation does not exist in the case of Tunisia?
7. Do the provisions of Article 31 and Article 33(2) of the Agreement with Lebanon constitute a rule which is clear, precise and unconditional and, as such, directly applicable, and from which it must be inferred that the free movement of capital is applicable to the present case?
8. If so, does the free movement of capital under those provisions have the implications which the applicant claims, inasmuch as it requires that the full deduction mechanism established in Article 46(1) of the CIRC be applied to the dividends which the applicant received from its subsidiary in Lebanon?
9. Does it result from Article 85 of the Agreement with Lebanon that the foregoing questions must be answered in the affirmative?
10. Is the restrictive treatment of the dividends distributed by Ciments de Sibline, S.A.L. justified, given that the framework for cooperation established in Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation does not exist in the case of Lebanon?
11. Are the provisions of Article 56 EC (now Article 63 TFEU) applicable to the present case and, if so, does the free movement of capital established in that provision have the effect of requiring the application to the dividends distributed in the 2009 financial year by Société des Ciments de Gabés, S.A. and Ciments de Sibline, S.A.L. to the applicant of the full deduction mechanism provided for in Article 46(1) of the CIRC or, in the alternative, of the partial deduction mechanism provided for in Article 48(8) of the CIRC?
12. Even if the free movement of capital is considered to be applicable in the present case, may the non-application to the dividends in question of the mechanisms for the elimination or mitigation of economic double taxation provided for in the Portuguese legislation in force at that time be regarded as being justified by the fact that the framework for cooperation established in Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation does not exist in the case of Tunisia and Lebanon?
13. Does the 'standstill' clause contained in Article 57(1) EC (now Article 64 TFEU) preclude the application of the free movement of capital, together with the consequences claimed by the applicant?
14. Must the 'standstill' clause contained in Article 57(1) EC (now Article 64 TFEU) not be applied on account of the introduction in the meantime of the scheme of tax benefits for contractual investments established in Article 41(5)(b) of the EBF [(Tax advantages scheme)] and the scheme provided for in Article 42 of the EBF for dividends from the PALOP [(Portuguese-speaking African Countries)] and East Timor?"

D. The Role of the Association Agreements

In the case under analysis, it has to be asked whether the aforementioned association agreements may prohibit discriminatory tax treatment of incoming dividends from Lebanon and Tunisia.

1. Direct effect of Freedom of Establishment and Free Movement of Capital in the EC Association Agreement with Tunisia (30 March 1998)

It has first to be decided whether Articles 31 and 34 of the Association Agreement with Tunisia, have direct effect. According to Article 31 *"(1) The Parties agree to widen the scope of the Agreement to cover the right of establishment of one Party's firms on the territory of the other and liberalisation of the provision of services by one Party's firms to consumers of services in the other.*

> 2. The Association Council will make recommendations for achieving the objective described in paragraph 1."

In turn, according to Article 34 *"1. With regard to transactions on the capital account of balance of payments, the Community and Tunisia shall ensure, from the entry into force of this Agreement, that capital relating to direct investments in Tunisia in companies formed in accordance with current laws can move freely and that the yield from such investments and any profit stemming therefrom can be liquidated and repatriated; (2) The Parties shall consult each other with a view to facilitating, and fully liberalising when the time is right, the movement of capital between the Community and Tunisia."*

Both provisions (and corresponding fundamental freedoms) are precise, clear and unconditional and therefore can be granted direct effect.[14]

2. Direct Effect of Freedom of Establishment and Free Movement of Capital in the Euro Med Association Agreement with Lebanon (30 May 2006)

According to Article 30 of the Euro Med Association Agreement with Lebanon (30 May 2006), *"the treatment granted by either Party to the other with respect to the right of establishment and the supply of services shall be based on each Party's commitments and other obligations under the General Agreement on Trade in Services (GATS). This provision shall take effect from the date of the final accession of Lebanon to the WTO."*

14 *Simutenkov*, C-265/03, EU:C:2005:213, paras. 21–24.

And Article 31 of the aforementioned Agreement reads as follows: "*1. Within the framework of the provisions of this Agreement, and subject to the provisions of Articles 33 and 34, there shall be no restrictions between the Community of the one part, and Lebanon of the other part, on the movement of capital and no discrimination based on the nationality or on the place of residence of their nationals or on the place where such capital is invested.*"

Article 33 "*1. The provisions of Articles 31 and 32 shall be without prejudice to the application of any restriction which exists between them on the date of entry into force of this Agreement, in respect of the movement of capital between them involving direct investment, including in real estate, establishment, the provision of financial services or the admission of securities to capital markets.*"

Article 34 "*1. Where one or several Member States of the Community or Lebanon face or risk facing serious difficulties concerning balance of payments, the Community or Lebanon respectively may, in conformity with the conditions laid down within the framework of the GATT and Articles VIII and XIV of the Statutes of the International Monetary Fund, take restrictive measures with regard to current payments if such measures are strictly necessary.*"

The provision on free movement of capital can be granted direct effect, because it is precise, clear and unconditional.[15]

If the CJEU decides that the provisions in the aforementioned association agreements have direct effect, they operate as special rules in relation to the TFEU which means that there is no need to apply the latter treaty.

If both the freedom of establishment and the free movement of capital apply (as seems to be the case in the Association Agreement with Tunisia), there is no need to find a criterion to determine which one prevails. If only the free movement of capital applies, the criteria put forward by the CJEU in order to solve the overlapping issue between the fundamental freedoms are also valid to interpret the meaning of establishment and capital under the Treaty.

E. Overlapping between the freedom of establishment and free movement of capital

The protection of free movement of capital covers any legal transaction that is necessary to attain the transfer of those assets but overlapping of freedoms has created interpretation problems. In general terms, any right concerning assets is capital for the purposes of the TFEU and movement of capital is the transfer of rights concerning assets. The meaning of capital covers portfolio investments

15 See *Simutenkov*, C-265/03, EU:C:2005:213.

across states, transfers related to insurance contracts[16], different types of direct investment and establishment of branches and subsidiaries. The CJEU has clarified in the *A* case, that the scope of free movement of capital in the EC Treaty (the same is true in respect of the TFEU) to and from third countries is identical, independently of their being EU Member States or EU and third countries.[17]

However, the CJEU has set up criteria to solve the issue of overlapping between free movement of capital and other fundamental freedoms applicable to direct tax cases.[18] The expressions used by the CJEU to solve the overlapping issue vary and it is questionable whether they have the same meaning. For example, the CJEU has often referred to a "predominant consideration" or to "an indirect consequence of" when the freedom to provide services and the free movement of capital overlap[19]. But it has also used the latter expression in cases involving capital and workers and capital and establishment.

In most cases of overlapping between capital and establishment, the CJEU refers to the "definite influence criterion": a holding in the capital of a company established in another Member State "*which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment.*"[20]

In a later case it referred to the purpose of the legislation, and subsequently combined this criterion with a further step: whether the factual situation confirmed the purpose of the legislation.[21] Abuse of establishment was considered to be the applicable freedom in *Glaxo*[22]. And in *FII GLO 2*[23], the CJEU clarified that inbound dividends fell under the free movement of capital, because dividends are not related to market access.

16 See *Svensson & Gustavsson*, C-484/93, EU:C:1995:379; *Bachmann v Belgian State*, C-204/90, EU:C:1992:35; *Safir v Skattemyndigheten I Dalarnas Län*, C-118/96, EU:C:1998:170; *Danner*, C-136/00, EU:C:2002:558; *Skandia and Ramstedt*, C-422/01, EU:C:2003:380; *Fidium Finanz*, C-452/04, EU:C:2006:631.

17 *A*, C-101/05, EU:C:2007:804.

18 See *Baars*, C-251/98, EU:C:2000:205; *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774; *Holböck*, C-157/05, EU:C:2007:297; *Burda*, C-284/06, EU:C:2008:365; *KBC Bank and Beleggen, Risicokapitaal, Beheer*, joined cases C-439/07 and C-499/07, EU:C:2009:339; *Aberdeen Property Fininvest Alpha*, C-303/07, EU:C:2009:377; *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707.

19 *Bachmann v Belgian State*, C-204/90, EU:C:1992:35; *Fidium Finanz*, C-452/04, EU:C:2006:631.

20 *Baars*, C-251/98, EU:C:2000:205, para. 22.

21 *Holböck*, C-157/05, EU:C:2007:297; *Burda*, C-284/06, EU:C:2008:365; *KBC Bank and Beleggen, Risicokapitaal, Beheer*, joined cases C-439/07 and C-499/07, EU:C:2009:339; *Aberdeen Property Fininvest Alpha*, C-303/07, EU:C:2009:377.

22 *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II*, C-182/08, EU:C:2009:559.

23 *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707.

Furthermore, in the EFTA Court case, *Olsen*[24] and the subsequent CJEU *Commission/United Kingdom* case[25] it was considered that mere investment falls under free movement of capital (even if there is control).

FII GLO 2 is still valid for inbound dividends and therefore it is herein contended that the dividends received by SECIL from Lebanon and Tunisia are protected under Article 56 of the EC Treaty (currently, Article 63 of the TFEU). But this protection will only apply, if the CJEU considers that the provisions in the Association Agreements do not have direct effect.

F. The Standstill Clause (Article 64 [1])

The scheme of tax benefits for contractual investments established in Article 41(5)(b) of the Portuguese EBF [(Tax advantages scheme)] and the scheme provided for in Article 42 of the EBF for dividends from the PALOP [(Portuguese-speaking African Countries)] and East Timor was introduced after 31 December 1993.

Thus, if the discriminatory treatment of the dividends coming from Lebanon and Tunisia falls under Article 56 EC of the Treaty (Article 63 TFEU), it has to be assessed whether the standstill clause under Article 57 (1) (Article 64 (1) TFEU) applies.

The Court has already held that the words "restrictions which exist on 31 December 1993" presuppose that **the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date.** If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from non-Member States which existed as part of the national legal order on 31 December 1993 but have not been maintained.[26] In the *Secil* case, due to the aforementioned tax benefits granted to some third countries, the standstill clause cannot be invoked.

G. Justifications

There is no international treaty or convention providing for mutual assistance between Portugal and Lebanon. In principle, this could justify the discriminatory treatment.[27] However, the Portuguese tax regimes granting exemption to other incoming dividends do not submit such exemption to the condition of mutual assistance. Thus, it can be argued, that the absence of mutual assistance between Portugal and Lebanon is not a valid justification for the discriminatory treatment. In contrast the double taxation convention between Portugal and Tunisia provides for exchange of information corresponding to the international standard.

24 *Fred. Olsen and Others and Petter Olsen and Others, vs. the Norwegian State*, 9 July 2014, joined cases E-3/13 and E-20/13, para. 115.
25 *Commission v United Kingdom*, C-112/94, EU:C:2014:2369.
26 *A*, C-101/05, EU:C:2007:804, para. 48; *Prunus and Polonium*, C-384/09, EU:C:2011:276, para. 34.
27 A contrario, *Établissements Rimbaud*, C-72/09, EU:C:2010:645, para. 25.

Spain: Appointment of Resident Fiscal Representatives by Non-Resident Pension Funds and Insurance Companies (Commission vs. Spain, C-678/11)

José Manuel Almudí Cid

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