ARTICLE

The EU Free Movement of Capital and Third Countries: Recent Developments

Ana Paula Dourado*

This article discusses the recent developments on the EU free movement of capital and third countries. It critically reviews the CJEU jurisprudence on the overlapping between the freedom of establishment and free movement of capital, namely in the case of dividends and direct investment where the taxpayer exercises definite influence over the company paying the dividends. Departing from the SECIL case*, this article also discusses the lack of exchange of information as a relevant justification for restrictions to free movement of capital, when third countries come into play, direct effect of association agreements, their repercussion in the standstill clause under Article 64 (1), and horizontal comparison.*

1 Introduction

1.1. Acte Clair *in Direct Tax Issues*

Ten years ago, a comprehensive book, 'The EU and Third Countries: Direct Taxation', discussed (in thirty national reports and a general report) the impact of the free movement of capital under the EC Treaty on relations with third countries.[1] In the book, most reporters were in favour of an *erga omnes* effect of the then Article 56 EC Treaty, while others contended that it should apply only to inbound movements of capital and payments in the European Union.[2]

At the time, only two cases on direct taxes and third countries had been decided by the European Court of Justice (the Court or the ECJ), namely *van Hilten*[3] and *Thin Cap GLO*,[4] the former relating to the overlapping between movement of persons and capital, and trailing taxes, the latter relating to establishment and movement of capital. *Fidium Finanz*, which was decided before *Thin Cap GLO*, concerned financial services (not taxes) and involved a Swiss financial institution and German investors. However, the overlap of services and capital led the ECJ to contend that the restrictive effect on free movement of capital was an unavoidable consequence of the instrumental nature of capital in relation to services, and therefore, the free movement of capital was not applicable.[5] *Fidium Finanz*, as well as *van Hilten*[6] and *Thin Cap GLO*[7] seemed to announce a restrictive interpretation of free movement of capital.

However, the Court has consistently argued that:

> even if the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market, such as, in particular, that of ensuring the credibility of the single Community currency on world financial markets and maintaining financial centres with a world-wide dimension within the Member States, it is clear that, when the principle of free movement of capital was extended, pursuant to Article 56(1) EC, to movement of capital between third countries and the Member States, the latter chose to enshrine that principle in that article and in the same terms for movements of capital taking place within the Community and those relating to relations with third countries.[8]

Notes

* Professor of the University of Lisbon, Member for the EU Platform on Tax Good Governance. Email: anadourado@fd.ulisboa.pt.

1 *The EU and Third Countries: Direct Taxation* (M. Lang & P. Pistone eds., Linde 2007). In the same book, *see* P. Pistone, *General Report*, at 15–55.

2 *See* the summary and discussion in Pistone, *supra* n. 1, at 21–24.

3 NL: ECJ, 23 Feb. 2006, Case C-513/03, *Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,* para. 35.

4 UK: ECJ, 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, para. 34.

5 DE: ECJ, 3 Oct. 2006, Case C-452/04, *Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht*, para. 49.

6 Van Hilten (C-513/03), para. 46.

7 Thin Cap GLO (C-524/04), para. 31–35.

8 SE: ECJ, 18 Dec. 2007, Case C-101/05, *Skatteverket v. A.*, para. 31.

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Although all of the questions that have by now been referred to the Court on the free movement of capital and third countries could have been anticipated, the responses by the Court have not been clear.

Ten years ago, there were also discussions regarding whether it was possible to apply the *acte clair* doctrine in direct tax issues, due to the lack of harmonization in this field. The answer could be found in the jurisprudence of the Court on the temporal effects of its decisions.

The Court insisted on the retroactive effects of its decisions, also when declaring the incompatibility of national direct taxes with the fundamental freedoms, and even when the Member States referred to the 'disastrous financial consequences' of the refunding of unduly paid amounts.[9]

Exceptionally, the Court accepted restrictions on the temporal effects of its rulings if there had been no ruling interpreting a specific point of law – in other words, if the interpretation of a specific point of law was not *acte clair.* It resulted from the Court's decision in the *Meilicke* case[10] that *acte clair* was also applicable to direct taxes as long as the national regimes were almost identical or similar.[11]

After these years of jurisprudence, regarding many complex and controversial topics (such as juridical double taxation[12] and exit taxes[13]), the case law of the Court became foreseeable, settled and – in respect of the core issues – even *acte clair.* This is true whether the aforementioned groups of cases involved movement of capital or any other fundamental freedom.

1.2 *Free Movement of Capital and Third Countries: Scope, Overlap and Trends in Case Law*

In contrast, the case law on the free movement of capital and third countries, in situations involving an overlap of the free movement of capital with other fundamental freedoms, became increasingly confusing and unpredictable. Indeed, many academic articles and books have been written on the issue.[14] Unpredictability also applies in respect of valid justifications for restrictive or discriminatory measures on movement of capital, even though to a lesser extent.

Interpretation of the Treaty on the Functioning of the European Union (TFEU) leads the author to conclude that the free movement of capital is granted the broadest scope in comparison to the other fundamental freedoms. This is so for three reasons:

First, capital – as defined in EC Directive 88/361[15] – covers any rights on movable and immovable assets. The nomenclature of capital movements, in Annex I to the Directive, refers to: direct investments; establishment and extension of branches; real estate; operations in securities; operations in units of collective investment undertakings; operations in current and deposit accounts with financial institutions; credits related to commercial transactions or to the provision of services; financial loans and credits; sureties; other guarantees and rights of pledge; transfers in performance of insurance contracts; personal capital movements (including loans, gifts and endowments, dowries, inheritances and legacies, physical import and export of financial assets); and other capital movements.

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[9] A.P. Dourado, *Is It* Acte Clair*? General Report on the Role Played by* CILFIT *in Direct Taxation*, in 56–57 *The Acte Clair in EC Direct Tax Law* (A.P. Dourado & Borges eds, IBFD 2008). *See also* FR: ECJ, 13 Feb. 1996, Case C-197/94, *Société Bautiaa v. Directeur des Services Fiscaux des Landes*; GR: ECJ, 4 Oct. 2001, Case C-294/99, *Athinaïki Zythopiia AE v. Elleniko Dimosio*; IT: ECJ, 14 Sept. 2006, Case C-228/05, *Stradasfalti Srl v. Agenzia Entrate Ufficio Trento*; UK: ECJ, 15 Mar. 2005, Case C-209/03, *Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*; DE: ECJ, 6 Mar. 2007, Case C-292/04, *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler v. Finanzamt Bonn-Innenstadt.*

[10] *Meilicke I* (C-292/04), para. 62.

[11] Dourado, *Is It* Acte Clair*?*, *supra* n. 9, at 54–55; M. Lang, *Acte Clair and Limitations of the Temporal Effects of ECJ Judgments*, in *The* Acte Clair *in EC Direct Tax Law*, *supra* n. 9, at 143–155.

[12] DE: ECJ, 30 June 2016, Case C-123/15, *Max-Heinz Feilen v. Finanzamt Fulda*; BE: ECJ, 30 June 2016, Case C-176/15, *Guy Riskin & Geneviève Timmermans v. État belge*; NL: 17 Sept. 2015, joined cases C-10/14, C-14/14 and C-17/14, *Miljoen, X,* and *Société Générale v. Staatssecretaris van Financiën*; FR: ECJ, 13 Mar. 2014, Case C-375/12, *Margaretha Bouanich v. Direction départementale des finances publiques de la Drôme*; NL: ECJ, 21 Nov. 2013, Case C-302/12, *X. v. Minister van Financiën*; DE: ECJ, 28 Feb. 2013, Case C-168/11, *Dr Manfred Beker and Christa Beker v. Finanzamt Heilbronn*; NL: ECJ, 18 Oct. 2012, Case C-498/10, *X. NV v. Staatssecretaris van Financiën*; ES: ECJ, 8 Dec. 2011, Case C-157/10, *Banco Bilbao Vizcaya Argentaria SA v. Administración General del Estado.*

[13] PT: ECJ, 21 Dec. 2016, Case C-503/14, *Commission v. Portuguese Republic*; DE: ECJ, 21 May 2015, Case C-657/13, *Verder LabTec GmbH & Co. KG v. Finanzamt Hilden*; DE: ECJ, 23 Jan. 2014, Case C-164/12, *DMC Beteiligungsgesellschaft mbH v. Finanzamt Hamburg-Mitte*; DK: ECJ, 18 July 2013, Case C-261/11, *European Commission v. Kingdom of Denmark*; ES: ECJ, 25 Apr. 2013, Case C-64/11, *European Commission v. Kingdom of Spain*; NL: ECJ, 31 Jan. 2013, Case C-301/11, *European Commission v. Kingdom of the Netherlands*; PT: ECJ, 6 Sept. 2012, Case C-38/10, *European Commission v. Portuguese Republic*; LU: ECJ, 6 Sept. 2012, Case C-380/11, *DI VI Finanziaria SAPA di Diego della Valle v. Administration des contributions directes*; ES: ECJ, 12 July 2012, Case C-269/09, *Commission of the European Communities v. Kingdom of Spain*; NL: ECJ, 29 Nov. 2011, Case C-371/10, *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam.*

[14] *See*, e.g. A.P. Dourado, *Free Movement of Capital, Anti-Tax Avoidance Package and Brexit*, 44(12) Intertax 870 (2016); W. Schön, *Free Movement of Capital and Freedom of Establishment,* Eur. Bus. Org. Law Rev. 229-260 (2016); D.S. Smit, *Freedom of Investment Between EU and Non-EU Member States and Its Impact on Corporate Income Tax Systems Within the European Union* (Tilburg University 2011); J. Englisch, *Taxation of Cross-Border Dividends and the EU Fundamental Freedoms*, 38 Intertax 197, 197–201 (2010); A. Cordewener, *Free Movement of Capital Between EU Member States and Third Countries: How Far Has the Door Been Closed*, 18 EC Tax Rev., 260, 260–263 (2009); S. Hemels et al., *Freedom of Establishment and Free Movement of Capital: Is There an Order of Priority? Conflicting Visions of National Courts and the ECJ*, 19 EC Tax Rev. 19–31 (2010); D.S. Smit, *The Relationship Between the Free Movement of Capital and the Other EC Treaty Freedoms in Third Country Relationships in the Field of Direct Taxation: A Question of Exclusivity, Parallelism or Causality?*, 16(6) EC Tax Rev. 252 (2007); A. Cordewener, G.W. Kofler & C.P. Schindler, *Free Movement of Capital, Third Country Relationships and National Tax Law: An Emerging Issue before the ECJ*, 47(3) Eur. Taxn., at 107 (2007); A. Cordewener, G.W. Kofler & C.P. Schindler, *Free Movement of Capital and Third Countries: Exploring the Outer Boundaries with Lasertec, A and B and Holböck*, 47(8) Eur. Taxn. 371 (2007).

[15] Council Directive of 24 June 1988 for the Implementation of Art. 67 of the Treaty, 88/361/EEC, OL 178/5 (8 July 1988).

Second, the free movement of capital is the only freedom that benefits movements within the EU and to and from third countries, and both EU and third-country nationals.

Third, the freedoms of movement of services and establishment always imply movement of capital, and movement of persons implies movement of movable assets, leading to the convergence of the fundamental freedoms and parallel jurisdiction.[16]

However, the more than frequent overlap with other fundamental freedoms, and the danger that third countries indirectly benefit from the other fundamental freedoms, led the Court to find arguments (legal criteria) to resolve the overlap problem whenever a direct tax issue arose. This is expressly stated in the 2012 *FII GLO* II case:

> Since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom.[17]

The legal arguments that are used to resolve the overlap between free movement of capital and other fundamental freedoms normally operate as tiebreaker rules. This is because they decide in favour of one or the other fundamental freedom.[18] Such arguments have also been used in respect of cases involving only EU Member States, but in this context the choice between one or the other fundamental freedom is irrelevant, as the scope of protection is identical.[19]

Existing case law on the free movement of capital and third countries has revealed certain trends. For example, an overlap between the freedom to provide services and the free movement of capital normally focuses on capital's being 'an indirect consequence' of the free movement of services,[20] or on the predominant consideration[21] but the purpose test has also been applied.[22] Notably, criteria normally used to resolve the overlap issue under Article 63(1) of the TFEU were recently applied to restrict the scope of Article 64. In the *Wagner-Raith* case, the purpose test served to demonstrate that, in order for measures to fall within Article 64(1) of the TFEU, they must relate directly to capital and only indirectly to services. Arguably, Article 64(1) is not intended to cover situations falling within the freedom to provide services.[23]

Until the *FII GLO II* case, the Court usually precluded application of free movement of capital, in favour of the other fundamental freedom at stake.[24] The *Cadbury Schweppes*[25] is interpreted as having put forth the criterion of the purpose of the law to argue that Controlled Foreign Companies (CFC) rules were to be handled under the freedom of establishment and not the free movement of capital. Other cases on specific anti-abuse provisions targeted at multinationals followed the *Cadbury Schweppes* reasoning, regardless of whether a third-country situation came into play.[26]

Moreover, the argument regarding the purpose of the law has absorbed or has the potential to absorb the 'definite influence' argument[27] and the 'indirect consequence thereof' argument.[28] Deviating from this doctrine, more recent cases on direct taxes and CFC rules (or other similar provisions) relied on the *SEVIC* decision[29] and concluded that freedom of establishment requires the pursuit of an activity on a stable and continuous basis in a Member State, whereas the free movement of capital does not require such activity (*Olsen*[30] and *Commission v. UK*[31]).[32]

With regard to most topics relating to free movement of capital and third countries, it is difficult to conclude that they are *acte clair.* One less controversial issue is the

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[16] *See* Schön, *supra* n. 14, at 237-238. This could have been the case in *Van Hilten* (C-513/03), paras 14–15.

[17] UK: ECJ, 13 Nov. 2012, Case C-35/11, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, Commissioners for Her Majesty's Revenue & Customs*, para. 100.

[18] *See* Cordewener, Kofler & Schindler, *supra* n. 14; D.S. Smit, *EU Freedoms, Non-EU Countries and Company Taxation: An Overview*, 21(5) EC Tax Rev., 233, 238–239 (2012).

[19] Dourado, *supra* n. 14, at 872.

[20] *Fidium Finanz* (C-452/04), paras 49, 50; BE: ECJ,28 Jan. 1992, Case C-204/90, *Bachmann v. Belgian State, para.* 34. *See*, as an exception: LUX: ECJ 14 Nov. 1995, Case C-484/93, *Peter Svensson, Lena Gustavsson v. Ministre du Logement et de l'Urbanisme*, where the court considered that building loans provided by banks constitute capital and services (paras 8, 11, 12).

[21] *Fidium Finanz* (C-452/04), paras 49, 50.

[22] DE: ECJ, 21 May 2015, Case C-560/13, *Finanzamt Ulm v. Ingeborg Wagner-Raith*, paras 31–34.

[23] *Wagner-Raith* (C-560/13), paras 34–36.

[24] *See also* Smit, *supra* n. 18, at 238–239.

[25] UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes v. Commissioners of Inland Revenue.*, para. 32; ECJ, 12 Dec. 2006, Case C-446/04, *Test Claimants in the Franked Investment Income Group Litigation v. Commissioners of Inland Revenue*, para. 118; *Thin Cap GLO* (C-524/04). para. 33.

[26] E.g. DE: ECJ, 12 Dec. 2002, Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt,* para. 32; *Thin Cap GLO* (C-524/04). *Thin Cap GLO* (C-524/04). para. 33.

[27] In this respect, *see* DE: ECJ, 19 July 2012, Case C-31/11, *Marianne Scheunemann v. Finanzamt Bremerhaven* (and the other cases cited therein), paras 22–23.

[28] *Wagner-Raith* (C-560/13), paras 31–34.

[29] DE: ECJ, 13 Dec. 2005, Case C-411/03, *SEVIC Systems Aktiengesellschaft v. Amtsgericht Neuwied*, para. 18.

[30] NO: EFTA Court, 9 July 2014, Joined Cases E-03/13 and E-20/13, *Fred. Olsen and Others and Petter Olsen and Others v. the Norwegian State*, paras 96–97, 125.

[31] UK: ECJ, 13 Nov. 2014, Case C-112/14, *European Commission v. United Kingdom*, para. 20. *See also SEVIC* (C-411/03), para. 18.

[32] Adopting the *SEVIC* position, *see* W. Schön, *Europaïsche Kapitalverkehersfreiheit und nationale Steuerrecht*, in *Gedächtnisschrift für Brigitte Knobbe-Keuk* 747 (W. Schön ed., Verlag Dr Otto Schmidt 1997).

meaning of capital. The Court always begins by acknowledging that an asset is capital under the Directive.[33] Portfolio investments or investments not aimed at definite influence situations are also clearly within the scope of Article 63(1) of the TFEU, which means that small investments involving third countries are granted more protection by the TFEU than large investments.[34]

And then, for example, Article 64 of the TFEU, as an exception to Article 63, has been consistently interpreted strictly, so that it preserves the practical effect of Article 63:

> Article 64(1) TFEU sets out an exhaustive list of capital movements to which Article 63(1) TFEU is liable not to apply and, as a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly (see judgment in Case C-181/12 *Welte*, EU:C:2013:662, paragraph 29).[35]

2 Overlap between freedom of establishment and free movement of capital

2.1 *The Case of Shareholdings and Dividends*

This article focuses on the overlap between the freedom of establishment and the free movement of capital, specifically in the case of shareholdings and dividends.

One example concerns cases on inheritances consisting in the transfer of assets, where the arguments related to the definite influence and the purpose of the law have been repeatedly applied. The Court begins by recognizing that inheritances constitute capital for purposes of the TFEU. According to the Court, although inheritances fall under heading XI of Annex I to Directive 88/361, an inherited shareholding enabling the holder to exert a definite influence over a company's decisions and determine its activities is covered by the freedom of establishment and not by the free movement of capital.[36]

In *Scheunemann*, the Court stated as follows:

> It is also clear from the case law of the Court that the tax treatment of inheritances falls, in principle, under Article 63 TFEU on the free movement of capital. Inheritances consisting in the transfer to one or more persons of assets left by a deceased person, falling under heading XI of Annex I to Directive 88/361, which is entitled 'Personal capital movements', are movements of capital for the purposes of Article 63 TFEU (see, inter alia, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 39; Case C-43/07 *Arens-Sikken* [2008] ECR I-6887, paragraph 30; Case C-35/08 *Busley and Cibrian Fernandez* [2009] ECR I-9807, paragraph 18; and Case C-25/10 *Missionswerk Werner Heukelbach* [2011] ECR I-497, paragraph 16).
>
> However, it should be noted that, according to settled case law, national legislation which is intended to apply only to shareholdings enabling the holder to exert a definite influence over a company's decisions and determine its activities is covered by the Treaty provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of capital (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 35 and the case law cited).[37]

Based on multiple and hardly reconciliatory arguments used by the Court, dividends have sometimes been considered under both the freedom of establishment and the free movement of capital,[38] while other times under only one of them.[39]

2.2 *The* SECIL *case*

On 24 November 2016, the Court decided the very much anticipated *SECIL* case,[40] which concerned direct investment by a Portuguese company (SECIL) in Tunisia and Lebanon. SECIL is a Portuguese resident company with subsidiaries in Tunisia and Lebanon, neither of which country is a Member of the EU, nor the European Economic Agreement (EEA), but with which association agreements have been concluded.

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[33] E.g. LU: ECJ, 11 Oct. 2007, Case C-451/05, *Européenne et Luxembourgeoise d'investissements SA (ELISA) v. Directeur général des impôts and Ministère public*; FR: ECJ, 5 May 2011, Case C-384/09, *Prunus SARL & Polonium SA v. Directeur des Services Fiscaux* (a cross-border investment in immovable property constitutes a movement of capital within the meaning of Art. 63 TFEU); *Wagner-Raith* (C-560/13); *Feilen* (C-123/15); *Riskin & Timmermans* (C-176/15); *Miljoen* (C-10/14).

[34] Smit, *supra* n. 78, at 238–239; Cordewener, Kofler & Schindler, *supra* n. 14, at 374.

[35] *Wagner-Raith* (C-560/13), para. 21. For the preservation of the practical effect of Art. 64(1) of the TFEU, *see* para. 42.

[36] NL: ECJ, 11 Dec. 2013, Case C-364/01, *The heirs of H. Barbier v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen*, para. 58.

[37] *Scheunemann* (C-31/11), paras 22–23.

[38] E.g. AT: ECJ, 24 May 2007, Case C-157/05, *Winfried L. Holböck v. Finanzamt Salzburg-Land*, paras 23–24.

[39] (Case C-446/04), FII GLO I, paras 89–92; UK: ECJ, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, paras 37, 38; C-446/04, *Test Claimants in the FII Group Litigation* 2006, paras 36, 80 and 142; PL: ECJ, 10 Apr. 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company v. Dyrektor Izby Skarbowej w Bydgoszczy*, paras 25–28.

[40] PT: ECJ, 24 Nov. 2016, Case C-464/14, *SECIL – Companhia Geral de Cal e Cimento SA v. Fazenda Pública*. *See also* A.P. Dourado, Lang et al. *Portugal – Recent and Pending Cases, CJEU*, in *Recent Developments in Direct Taxation 2015* (175–180 Linde Verlag 2016).

Under the Portuguese corporate income tax code in force at the time of the facts (2009), domestic dividends and dividends coming from EU and EEA Member States would benefit from either an integral or partial deduction.[41] Moreover, this regime was, under certain conditions, extended to profits distributed to some contractual investors[42] and to resident entities by subsidiaries resident in Portuguese-speaking African countries and East Timor.[43]

In contrast, dividends from Tunisia and Lebanon were subject to the general regime, implying full taxation and economic double taxation. The applicable tax treaty between Portugal and Tunisia did not address the issue of economic double taxation[44] and there was no tax treaty with Lebanon. As a result, inbound dividends from Tunisia and Lebanon were subject to higher taxation than that applicable to domestic and inbound dividends from another EU Member State, an EEA Member State or countries qualifying under Article 42 of the Estatuto dos Benefícios Fiscais (EBF).

SECIL was a challenging case for the Court – perhaps, the case of the year in direct tax matters – because many unclear issues were at stake, namely the overlap of fundamental freedoms; the standstill clause under Article 64(1) of the TFEU; the relationship between an association agreement and the TFEU and whether there is a hierarchy between them; the direct effect of provisions under association agreements on fundamental freedoms and repercussions on direct taxes; and vertical and horizontal comparison. As Advocate-General Wathelet mentioned in his Opinion in the case, this was the first time that concurrent applicability of the provisions in TFEU and the Euro-Mediterranean Agreements, was raised, namely whether the application of the provisions of the EC-Tunisia and the EC-Lebanon Agreements precluded application of the provisions of the TFEU or the other way around.[45] The Court concluded that the Portuguese legislation was incompatible with the free movement of capital under the TFEU.[46]

SECIL presents an opportunity to revisit the meaning and scope of free movement of capital in direct taxes whenever establishment, EU and third countries are involved.

2.3 *The Purpose of the Law and Market Access*

In respect of dividends and situations involving third countries, the latest reasoning by the Court combines an analysis of two arguments, namely the purpose of the law and access to the market. This analysis confirms previous case law, concluding that dividends fall under the free movement of capital, as long as the national law 'did not intend to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities'.[47]

This was the situation in *SECIL*: resident companies benefited from full deduction on domestic and inbound dividends if the latter had been subject to tax and not exempt from corporation tax. The Portuguese law applied:

> both to dividends received by a resident company on the basis of a shareholding that confers definite influence over the decisions of the company distributing the dividends and enables its activities to be determined, and to dividends received on the basis of a shareholding which do not confer such influence.[48]

In *SECIL*, the Court then repeated the arguments used in 2012 *FII GLO*,[49] *Kronos International*[50] and *Emerging Markets Series.*[51] It results from the way that the arguments are put forward by the Court that they are to be applied in steps, as follows:

(1) The point of departure is that tax treatment of dividends may fall within the scope of freedom of establishment and free movement of capital: 'and' means 'or'.[52]

Notes

[41] PT: Art. 46(1) or (8) Corporate Income Tax Code.

[42] PT: Art. 41(5)(b) Tax Benefits Code (*Estatuto dos Benefícios Fiscais*, EBF).

[43] Art. 42 EBF.

[44] *SECIL* (C-464/14), paras 9, 10, 12 & 49.

[45] PT: Opinion of AG Wathelet, 27 Jan. 2016, *SECIL* (C-464/14), paras 31–40.

[46] Art. 63 TFEU.

[47] *Cadbury Schweppes* (C-196/04), paras 31, 32; C-524/04, *Test Claimants in the Thin Cap Group Litigation* (paras 28 to 33), *a contrario.*

[48] *SECIL* (C-464/14), para. 39. More specifically: 'where the beneficiary entity is not covered by the fiscal transparency regime provided for in Article 6 of that code and where it has a direct holding in the capital of the company distributing the profits of not less than 10% or with an acquisition value of not less than EUR 20 000 000, with that holding having to be in its ownership for an uninterrupted period of one year on the date on which the profits were made available to it or, if it had been in its ownership for a shorter period, is retained until such time as that period is completed' *SECIL* (C-464/14), para. 37.'Where the conditions provided for in Article 46(1) of the CIRC relating to fiscal transparency and the shareholding in the distributing company are not met, the company receiving the dividends is entitled under Article 46(8) of the CIRC to a deduction equal to 50% of income included in taxable profits' *SECIL* (C-464/14), para. 38.

[49] *FII GLO II* (C-35/11), paras 89–92.

[50] DE: ECJ, 11 Sept. 2014, Case C-47/12, *Kronos International Inc. v. Finanzamt Leverkusen*, paras 35–55.

[51] *Emerging Markets Series* (C-190/12), paras 25—33.

[52] *SECIL* (C-464/14), para. 31.

(2) In order to determine which of these two freedoms is applicable in a third-country situation, the interpreter must take into account the purpose of the law relating to the tax treatment of dividends.[53] Three situations can occur, namely:

(a) If national law is intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities, the freedom of establishment is applicable.[54]

(b) If national law is intended to apply to shareholdings acquired solely with the intention of making a financial investment, without any intention to exert a definite influence on a company's decision and to determine its activities (or 'without any intention to influence the management and control of the undertaking'), free movement of capital is applicable.[55]

(c) If, according to the facts, a national company exercises decisive influence over the company paying the dividends, but national law is not exclusively applicable to these situations, free movement of capital is applicable.[56]

(3) Freedom of establishment would be at stake when national rules concern the conditions of access to the market, whereas the tax treatment of dividends falls only on the outcome of an investment.[57]

The point of departure acknowledges the overlap. Then, the purpose test acts as a tiebreaker rule; subsequently, there is a clarification, stating that the factual analysis is not capable of contradicting the results of the purpose test; and then, a further clarification, based on the market access argument, and stating that if the purpose test leads to the application of the free movement of capital, the tax treatment of dividends will be handled under free movement of capital.

However, in some previous case law assessing discriminatory treatment of dividends, the purpose of the law led to simultaneous application of both the freedom of establishment and the free movement of capital. For example in *Holböck*, the Court stated as follows:

> As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well established case law that the purpose of the legislation concerned must be taken into consideration (see, to that effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 31 to 33; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 34 and 44 to 49; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-0000, paragraphs 37 and 38; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-0000, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-0000, paragraphs 26 to 34).
>
> Unlike the situations in *Cadbury Schweppes and Cadbury Schweppes Overseas* (paragraphs 31 and 32) and *Test Claimants in the Thin Cap Group Litigation* (paragraphs 28 to 33), the Austrian legislation in the present case is not intended to apply only to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities.
>
> National legislation which makes the receipt of dividends liable to tax, where the rate depends on whether the source of those dividends is national or otherwise, irrespective of the extent of the holding which the shareholder has in the company making the distribution, may fall within the scope of both Article 43 EC on freedom of establishment and Article 56 EC on free movement of capital (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, paragraphs 37 and 38, and *Test Claimants in the FII Group Litigation*, paragraphs 36, 80 and 142).[58]

In respect of third countries, however, the freedom of establishment could not be invoked and only for this reason, was the aforementioned freedom set aside.[59] In other cases, simultaneous application of freedom of establishment and capital seems to guarantee that the Court's decision will fit the concrete facts. This was the case in *Accor.*[60]

But in addition to the purpose, the factual situation was to be taken into account according to the first *FII GLO* decision in 2006:

> It should be pointed out in that regard that national legislation which makes the receipt of dividends by a resident company liable to tax, where not only the tax base but also the ability to deduct from that tax a tax

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[53] *Ibid.*, paras 31, 34; *FII GLO II* (C-35/11), paras 89, 90 and the case law cited; *Emerging Markets Series* (C-190/12), paras 25, 29.

[54] *SECIL* (C-464/14), para. 32; *FII GLO II* (C-35/11), para. 91 and the case law cited.

[55] *SECIL* (C-464/14), para. 33; *FII GLO II* (C-35/11), para. 92; *Emerging Markets Series* (C-190/12), para. 29 and the case law cited.

[56] *SECIL* (C-464/14), para. 35; *Emerging Markets Series* (C-190/12), para. 30.

[57] *SECIL* (C-464/14), para. 43.

[58] *Holböck* (C-157/05), paras 22–24.

[59] *Ibid.*, paras 28–29.

[60] FR: ECJ, 15 Sept. 2011, Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique v. Accor SA*, paras 33–38; Smit, *supra* n. 18, at 240.

> paid in the State in which the company making the distribution is resident depends on whether the source of the dividends is national or otherwise and the extent of the holding which the company receiving the dividend has in the company paying it, may fall within both Article 43 EC on freedom of establishment and Article 56 EC on the free movement of capital.
>
> The order for reference shows that the cases chosen as test cases in the proceedings before the national court concern United Kingdom-resident companies which received dividends from non-resident companies that are wholly owned by them. As the nature of the interest in question will confer on the holder definite influence over the company's decisions and allow it to determine the company's activities, the provisions of the EC Treaty on freedom of establishment will apply (Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 21 and 22; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 37 and 66 to 68; and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-0000, paragraph 31).
>
> As the Advocate General stated at point 33 of his Opinion, the nature of the holdings of the other companies which are parties to the dispute has not been put before the Court. It may therefore be that the dispute also relates to the effect of the national legislation at issue in the main proceedings on the situation of resident companies which received dividends on the basis of a holding which does not give them definite influence over the decisions of the company making the distribution and does not allow them to determine its activities. That legislation must therefore also be considered in the light of the Treaty provisions on the free movement of capital.[61]

The perspective in 2006 *FII GLO* was confirmed in *Burda*,[62] *KBC Bank*,[63] *Aberdeen*[64] and *Accor*.[65] These decisions led academics to argue that definite influence situations were outside of Article 63(1) of the TFEU and that the purpose test was no longer sufficient to determine the application of that provision.[66]

According to the Court in *KBC Bank*:

> In addition, the Court has already held that, as regards the movement of capital between Member States and third countries, Article 56(1) EC, in conjunction with Articles 57 EC and 58 EC, may be relied on before national courts and may render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question (*A*, paragraph 27, and *The Test Claimants in the CFC and Dividend Group Litigation*, paragraph 91).
>
> If, by virtue of the application of the national legislation, dividends from a company established in a non-member State are treated less favourably than dividends from a company with its seat in Belgium, it is for the national court to determine at the outset whether Article 56 EC is applicable.
>
> In that regard, in order to determine whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well established case law that the purpose of the legislation concerned must be taken into consideration (see Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22, and the case law cited).
>
> The Court has held also that national legislation, the application of which does not depend on the extent of the holding which the company receiving the dividend has in the company paying it, may fall within the purview both of Article 43 EC on freedom of establishment and of Article 56 EC on the free movement of capital (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 36, and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 71).
>
> However, to the extent to which the holdings in question confer on their owner a definite influence over the decisions of the companies concerned and allow it to determine their activities, it is the provisions of the Treaty relating to freedom of establishment which apply (*Test Claimants in the FII Group Litigation*, paragraph 81).[67]

In contrast, the decisions in 2012 *FII GLO II*,[68] *Kronos International*,[69] *Emerging Markets Series*,[70] *Itelcar*[71] and

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[61] *FII GLO* (C-446/04), paras 36–38.

[62] DE: ECJ, 26 June 2008, Case C-284/06, *Burda Verlagsbeteiligungen GmbH v. Finanzamt Hamburg-Am Tierpark*, para. 74.

[63] BE: 4 June 2009, Joined Cases C-439/07 and C-499/07, *Belgische Staat v. KBC Bank NV and Beleggen, Risicokapitaal, Beheer NV v. Belgische Staat.*

[64] FI: ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy v. Uudenmaan verovirasto and Helsingin kaupunki*, paras 30 et seq.

[65] *Accor* (C-310/09), paras 33–38.

[66] Smit, *supra* n. 18, at 239; M. Lang, *Der Anwendungsbereich der Grundfreiheiten Massgeblichkeit des Sachverhaltes oder der nationalen Rechtsvorschrift?*, in *Europaïsches Steuerrecht, FS für Friedrich Rödler zum 60. Geburtstag* 526–528 (2010); G. W. Kofler, *Kapitalvekehrsfreiheit, Kontrollbeteiligungen und Drittstaaten,* 8 Taxlex 330 (2008).

[67] *KBC Bank* (C-439/07 & C-499/07), paras 66–70.

[68] *FII GLO II* (C-35/11), paras 89–92.

[69] *Kronos International* (C-47/12).

[70] *Emerging Markets Series* (C-190/12).

[71] PT: ECJ, 3 Oct. 2013, Case C-282/12, *Fazenda Pública v. Itelcar – Automóveis de Aluguer, Lda*, para. 18.

SECIL have moved away from the factual situation test and have combined the purpose of the law with the access to the market criterion. Presumably, dividends are not related to access to the market, but derive from previous access thereto.

Access to the market, as interpreted by the Court in the aforementioned direct tax cases, distinguishes between the setting up of a company (either primary or secondary establishment) and its outcome, i.e. the dividends. To some extent, this jurisprudence on dividends reproduces *Keck*[72] and the subsequent case law on market access: a national rule that affects the investment itself, by imposing an extra burden on investment or by treating domestic and foreign investment differently, may prevent or impede the setting up a company or a branch in a cross-border situation. This will be so if there is a direct and substantial hindrance to access a market,[73] in which case freedom of establishment is at stake. Thus, a third-country situation is not protected by the TFEU rules.

In contrast, according to the Court, dividends are outside the freedom of establishment, because they 'result [...] from investments made by the beneficiary in the distributing company'.[74] Rules on investment are made equivalent to rules relating to the goods themselves in *Keck*,[75] whereas rules on dividends are made equivalent to rules concerning selling arrangements in *Keck.*[76] Presumably the Court considers that dividends would not have a direct and substantial impact on market access.

This is a rather formalistic approach, because whether or not direct taxes on dividends will have a direct and substantial impact on market access will depend on the amount of the holding and on the tax burden on the dividends. If a Member State applies a classical system leading to full economic double taxation, in respect of third countries, there are reasons to argue – under a market access approach – that the freedom of establishment is at stake, as the tax rules will have a direct and substantial impact on investment.

In more general terms, the scope of the fundamental freedoms evolved from a narrow and more or less formalistic perspective related to access to the market, to a broader one covering any type of restriction. For example Advocate General Maduro, in his Opinion in the 2005 *Marks & Spencer* case, argued in favour of a much broader concept of establishment, which remains in force:

> All these reasons explain the need to retain in tax matters the same concept of restriction on freedom of establishment which is applicable in the other areas. Thus 'all measures which prohibit, impede or render less attractive the exercise of that freedom' must be regarded as restrictions. It remains necessary, however, to give actual shape to that concept in the context of the different freedoms of movement, regard being had at the same time to the specific nature of the areas to which those freedoms are to apply.[77]

This broad interpretation of restriction is confirmed in decisions involving free movement of capital and third countries, such as *Emerging Markets Series*, where the Court stated as follows:

> That difference in the tax treatment of dividends as between resident and non-resident investment funds may discourage, on the one hand, investment funds established in a non-Member country from investing in companies established in Poland, and, on the other hand, investors resident in Poland from acquiring shares in non-resident investment funds (see, to that effect, *Santander Asset Management SGIIC and Others*, paragraph 17).
>
> It follows that national legislation such as that at issue in the main proceedings is such as to entail a restriction on the free movement of capital which is prohibited, in principle, by Article 63 TFEU.[78]

This point in *Emerging Markets Series* was made in a different context from the overlapping issue (it was made in the context of nationality as a comparator), but it sets the basis for the scope of all freedoms, including the freedom of establishment, which goes beyond market access and covers any measure that renders less attractive the exercise of the freedom at stake.

This being said, the arguments on market access used by the Court in respect of dividends (in 2012 *FII GLO II*, *Emerging Markets Series*, *Kronos International* and *SECIL*), have a clear purpose when direct taxes are at stake: they

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[72] ECJ, 1993, Joined Cases C-267/91 & 268/91, *Criminal Proceedings Against Keck and Mithouard*, paras 12–18.

[73] *Keck & Mithouard* (C-267/91 & 268/91), para. 15; Craig & De Búrca, *EU Law, Text, Cases and Materials* 681–695 (Oxford Univ. Press 2015).

[74] *SECIL* (C-464/14), para. 43.

[75] *Keck & Mithouard* (C-267/91 & 268/91), para. 15.

[76] *Ibid.*, paras 16–17.

[77] UK: Opinion of Advocate General Maduro, 7 Apr. 2005, Case C-446/03, *Marks & Spencer*, para. 35 (internal citations omitted).

[78] *Emerging Markets Series* (C-190/12), paras 42–43. *See also,* W. Schön, *supra* n. 14, at 234.

aim to clarify that dividends are covered by the free movement of capital if the national law does not distinguish between control situations and portfolio situations (i.e. if the national legislation does not distinguish between the case of definite influence and other factual situations). They also manage to overcome the previous case law that added the factual analysis of the holding to the argument on the purpose of the law (*Burda*, *KBC Bank*, *Aberdeen*) as a condition to determining whether freedom of establishment or capital was applicable.

In fact, the Court found itself at a deadlock after *Burda*, *KBC Bank* and *Aberdeen*, and the market access argument allowed it to move forward. It is also recognized that the arguments now used by the Court in respect of dividends partially resolve the paradox that resulted (in taxes) from the purpose plus factual situation tests. Portfolio investments could not be subject to discrimination or restriction, but outbound and inbound investments with definite influence could.

However, the aforementioned arguments resolve the paradox only partially, because where the application of the national law depends on the extent of the holding which the company receiving the dividend has in the company paying it, dividends will be considered to fall under the freedom of establishment. This will be so if the purpose of the law is the main argument, and access to the market is merely subsidiary. If they were to be seen as alternative arguments, dividends would always be protected under free movement of capital.

One can therefore conclude that the argument on market access is useful to overcoming the criterion that required the analysis of the factual circumstances: whether the holding granted or not definite influence. But it brings no added value to the criterion regarding the purpose of the law, which is the only meaningful argument to distinguish capital from establishment or capital from any other fundamental freedoms when third-country situations come into play. And such a distinction is necessary because the Treaty does not extend freedom of establishment, services or workers to third countries. It is therefore important to ensure that the interpretation of Article 63(1) of the TFEU as regards relations with third countries does not enable economic operators that do not fall within the limits of the aforementioned freedoms to benefit from Article 63(1).

Finally, the case law resulting from 2012 *FII GLO II*, *Emerging Markets Series* and *Kronos International*, and confirmed in *SECIL*, implies that the Member States' domestic regimes implementing the Parent-Subsidiary Directive are to be extended to third countries, which means that the Parent-Subsidiary Directive involuntarily led to exemption of dividends to and from third countries when all the other conditions are met.

2.4 *Justifications*

In addition to the overlap issue, abuse, the lack of effective fiscal supervision and Article 64 have been used to restrict the scope of free movement of capital, as regards third country situations.

Abuse as a justification ('an overriding reason in the public interest') to restrictions on the free movement of capital is normally accepted when the law targets artificial arrangements. Presumptions of abuse are rejected. This was so, for example, in *SECIL*,[79] *Glaxo*[80] and *Itelcar.*[81]

It can also be deduced from cases involving the freedom of establishment and free movement of capital that the free movement of capital will prevail if the (any) other fundamental freedom may have been artificially used:

According to the EFTA Court in the Olsen case:

> Accordingly, the concept of establishment under Articles 31 and 34 EEA has a specific EEA meaning and must not be interpreted narrowly. Thus, any person or entity, such as a trust, that pursues economic activities that are real and genuine must be regarded as taking advantage of its right of establishment under Articles 31 and 34 EEA.
>
> The essential feature of real and genuine business activities that constitute establishment is that a person or an entity carries on a business, such as by offering services, which are effected for consideration, for an indefinite period through a fixed establishment …
>
> … In light of the preceding considerations, the answer to the third question must be that beneficiaries of capital assets set up in the form of a trust that are subject to national tax measures such as those at issue in the main proceedings may be able to invoke Article 40 EEA in the event that they are not found to have exercised definite influence over an independent undertaking in another EEA State or engaged in an economic activity that comes within the scope of the right of establishment. It is for the national courts to make the final assessment in that regard, based on the factual circumstances of the case.[82]

Because movement of capital is hardly ever artificial, free movement of capital operates as a fall back fundamental freedom.

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[79] *SECIL* (C-464/14), para. 59.

[80] DE: ECJ, 17 Sept. 2009, Case C-182/08, *Glaxo Wellcome GmbH & Co. KG v. Finanzamt München II*, para. 89.

[81] *Itelcar* (C-282/12), para. 34 and the case law cited.

[82] *Olsen* (E-03/13 and E-20/13), paras 96–97, 125; leading to the same consequences as Olsen: *Commission v. UK* (C-112/14). And *see also Glaxo Wellcome* (C-182/08), paras 50–52.

But in *XBV* and *TBG Limited,* the adoption or enforcement of any measure aimed at preventing the avoidance of taxes pursuant to the tax provisions of domestic tax law in force, has been considered a valid justification for discriminatory measures,[83] probably because the case involved a non-cooperative jurisdiction.

2.5 *Exchange of Information*

Moreover, the need to guarantee the effectiveness of fiscal supervision is, in principle, a valid justification.[84] But this is so where free movement of capital to or from third countries, is dependent upon the existence of exchange of information. It is not yet clear whether exchange of information according to the international standard is considered equivalent to exchange of information under the EU Mutual Assistance Directive.

Although in some cases, the Court makes reference to the existence of a treaty on exchange of information,[85] in *Emerging Markets Series* it asks the referring court to examine whether the obligations under a bilateral agreement are 'in fact' equivalent to those of an EU Directive:

> It is none the less for the referring court to examine whether the obligations under agreements to which the Republic of Poland and the United States of America are party, establishing a common legal framework for cooperation and providing mechanisms for the exchange of information between the national authorities concerned, are in fact capable of enabling the Polish tax authorities to verify, where it may be necessary, the information provided by investment funds established in the United States of America on the conditions for their formation and operation, in order to determine that they operate within a regulatory framework equivalent to that of the European Union.[86]

In *SECIL*, the Court acknowledged once again that the need to ensure the effectiveness of fiscal supervision is a valid justification; that movements between Member States and non-Member States fall within a legal context different from that in force within the Union and that the framework for cooperation between the competent authorities of the Member States established by the Mutual Assistance Directive does not apply to third States. However, a convention or agreement on mutual assistance could play an equivalent role.[87]

It can be argued that where entitlement to a tax benefit such as the full or partial deductions provided for in the corporate income tax code is dependent on the satisfaction of one or more conditions, exchange of information under a legally binding convention or agreement must be at the disposal of the tax authorities. The latter must be in a position to verify compliance with the condition(s) by the distributing company.

According to the facts in *SECIL*, the clause relating to the information exchange contained in the Portugal-Tunisia convention is not binding and no such agreement was concluded between Portugal and Lebanon. In *SECIL*, the Court claimed that in respect of those benefits that depend on the satisfaction of conditions in Tunisia, it is for the referring court to examine whether the obligations arising under the Portugal-Tunisia convention are such as to enable the Portuguese tax authorities to obtain the information from Tunisia.[88]

The *SECIL* decision goes on to state as follows:

> It is the Court's settled case law that, therefore, where the legislation of a Member State makes a more advantageous tax system dependent on the satisfaction of requirements, compliance with which can be verified only by obtaining information from the competent authorities of a non-member State, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that non-member State is not under any obligation pursuant to a convention or agreement to provide information, it proves impossible to obtain such information from that non-member State (judgment of 17 October 2013, *Welte*, C-181/12, EU:C:2013:662, paragraph 63 and the case law cited).[89]

2.6 *Association Agreements and Article 64*

Article 31 of the EC-Tunisia agreement, under Title III ('Right of establishment and services'), provides as follows:

> 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.

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[83] *X BV* (C-24/12), *TBG Limited* (C-27/12).

[84] *A.* (C-101/05), para. 55; BE: ECJ, 5 July 2012, Case C-318/10, *Société d'investissement pour l'agriculture tropicale SA (SIAT) v. État belge*, para. 36 and the case law cited. *See also Prunus* (C-384/09), para. 38.

[85] AT: ECJ, 10 Feb. 2011, Joined Cases C-436/08 & C-437/08, *Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v. Finanzamt Linz.*

[86] *Emerging Markets Series* (C-190/12), para. 88.

[87] *SECIL* (C-464/14), para. 63; *Haribo & Salinen* (C-436/08 & C-437/08), paras 65, 66.

[88] *SECIL* (C-464/14), para. 68.

[89] *Ibid.*, para. 64.

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

In turn, Article 34 of that agreement, under Chapter I ('Current payments and movement of capital') of Title IV ('Payments, capital, competition and other economic provisions'), provides as follows:

> 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.

Article 31 of the EC-Lebanon agreement, under Chapter 1 ('Current payments and movement of capital') of Title IV thereof, ('Payments, capital, competition and other economic provisions') provides as follows:

> 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) of that agreement, in the same chapter thereof, provides as follows:

> Subject to other provisions in this Agreement and other international obligations of the Community and Lebanon, 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.

In *SECIL* it was discussed whether the aforementioned provisions were precise, clear and unconditional, and therefore could be granted direct effect.[90]

The issue of concurrent applicability, on the one hand, of Articles 49, 63 and 64 of the TFEU, and, on the other hand Articles 31, 34 and 89 of the EC-Tunisia agreement and Articles 31, 33 and 85 of the EC-Lebanon agreement was raised by Advocate General Wathelet.[91] According to the Advocate General, 'the provisions for the freedom of establishment and the free movement of capital are in line with the underlying principles of the TFEU and do not pursue objectives that are inconsistent with those pursued by that treaty'.[92] Because of this, the Advocate General considered that the provisions under the association agreements were the only ones applicable, on the basis of the principle *lex posterior derogat legi priori.*[93] He also considered that the rules on establishment and capital had direct effect, as they were clear, precise and unconditional.[94]

In turn, the Court acknowledged that rules on the free movement of capital in the association agreements between the EU and Tunisia[95] and the EU and Lebanon[96] had direct effect. However, the Court paid attention to the association agreements only in order to assess whether Article 64(1) was applicable to the case. Article 64(1) introduces a grandfather clause, under which:

> the provision of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

In *Emerging Markets Series*, the meaning of Article 64(1) confirms previous case law:

> As regards the temporal criterion laid down by Article 64(1) TFEU, it is apparent from the Court's settled case law that while it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by a European Union measure, it is for the Court of Justice to provide guidance on interpreting the concept of European Union law which constitutes the basis of a derogation under

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[90] Following ES: ECJ, 12 Apr. 2005, Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, paras 21, 22–24.

[91] PT: Opinion of AG Wathelet, 27 Jan. 2016, *SECIL* (C-464/14), paras 31–57.

[92] *Ibid.*, point 46.

[93] *Ibid.*, paras 52–57.

[94] *Ibid.*, paras 76–83.

[95] *EC-Tunisia Agreement,* paras 99–109.

[96] *EU-Lebanon Agreement,* paras 130–137.

> European Union law for national legislation 'existing' on a particular date (see, to that effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 191).
>
> In that context, the Court has held that any national measure adopted after a date thus fixed is not, by that fact alone, automatically excluded from the derogation laid down in the European Union measure in question. A provision which is, in essence, identical to the previous legislation, or limited to reducing or eliminating an obstacle to the exercise of rights and freedoms established by European Union law in the earlier legislation, will be covered by the derogation. By contrast, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the date fixed in the European Union measure in question (see Case C-446/04 *Test Claimants in the FII Group Litigation*, paragraph 192, and Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 41).[97]

In *SECIL*, the Court asserted that in concluding the association agreements with Tunisia and Lebanon after 1993, Member States eliminated restrictions on movement of capital involving a category of capital covered under Article 64(1) of the TFEU, and that they therefore could not be reintroduced unilaterally by a Member State.[98] The association agreements were considered equivalent to new law enacted after 31 December 1993, as long as they have direct effect[99] and therefore a Member State may not reintroduce measures that are, in substance, discriminatory or restrictive.[100]

2.7 *Horizontal Comparison*

In contrast, the Court did not accept horizontal comparability to interpret Article 64(1) of the TFEU. In fact, the referring court also asked the ECJ about the impact of the introduction, after 31 December 1993, of a tax benefit scheme for contractual investments established in Article 41(5)(b) of the EBF and the scheme under Article 42 of the EBF for dividends from Portuguese-speaking African countries and East Timor.

The Court implicitly concluded that Article 64(1) of the TFEU implies only vertical comparison, by stating that if the adoption of those two schemes under the Estatuto dos Benefícios Fiscais (EBF) did not alter the regime applicable to Tunisia and Lebanon, their adoption has not affected the standstill clause under Article 64(1).[101] As mentioned, the standstill clause was affected, according to the same Court, by the association agreements concluded between the EU and Tunisia and the EU and Lebanon.

The absence of a most favoured nation clause when tax treaties and third countries come into play, was asserted in *Riskin & Timmermans.*[102] The Court distinguished between unequal treatment permitted under Article 65 (1)(a) of the TFEU (application of relevant provisions of Member States' law distinguishing between taxpayers that are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested) from the discrimination prohibited by Article 65(3) of the TFEU (the measures and procedures referred to in paragraphs 1 and 2 of the article may not constitute a means of arbitrary discrimination or disguised restriction on free movement and capital). The regime under tax treaties was considered to deal with the allocation of taxing rights and therefore fell outside of the comparison judgement as to whether only Member States or also third countries come into play:

> In that respect, it must be borne in mind that it is for the Member States to organise, in compliance with EU law, their systems for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them, and that, in the absence of any unifying or harmonising EU measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation (see, to that effect, judgment of 20 May 2008 in *Orange European Smallcap Fund*, C-194/06, EU:C:2008:289, paragraph 48).
>
> Consequently, given the resulting disparities between the tax laws of the various Member States, a Member State may find it necessary, by treaty or unilaterally, to treat dividends from the various Member States differently so as to take account of those disparities (see, to that effect, judgment of 20 May 2008 in *Orange European Smallcap Fund*, C-194/06, EU:C:2008:289, paragraph 49).
>
> In the context of bilateral tax conventions, it follows from the case law of the Court that the scope of such a convention is limited to the natural or legal persons defined by it. Likewise, the benefits granted by it are an

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[97] *Emerging Markets Series* (C-190/12), paras 47–48.

[98] *SECIL* (C-464/14), para. 88.

[99] *Ibid.*, para. 90 et seq.

[100] *Ibid.*, paras 88–89.

[101] *Ibid.*, paras 83, 84.

[102] *Riskin & Timmermans* (C-176/15).

integral part of all the rules under the convention and contribute to the overall balance of mutual relations between the two contracting States (see, to that effect, judgments of 5 July 2005 in *D.*, C-376/03, EU:C:2005:424, paragraphs 54 and 61 to 62, and of 20 May 2008 in *Orange European Smallcap Fund*, C-194/06, EU:C:2008:289, paragraphs 50 to 51). It must be noted, as the Advocate General did at point 43 of her Opinion, that that situation is the same with regard to double taxation conventions concluded with Member States or with third States.[103]

3 Conclusion

Eleven years after the first case on direct tax issues regarding free movement of capital and third countries was decided,[104] case law remains unclear and unpredictable on many matters, particularly in the case of the overlap between free movement of capital and other fundamental freedoms, and also in respect of valid justifications for restrictive or discriminatory measures. This is in contrast to the case law concerning other direct tax matters. The reason lies in the fact that the free movement of capital overlaps with the free movement of workers, establishment and services. As the TFEU does not extend the other fundamental freedoms to third countries, the ECJ acknowledged the importance of ensuring that the interpretation of Article 63(1) of the TFEU did not enable third countries to indirectly benefit from those other freedoms.

However, the jurisprudence on the overlap between the free movement of capital and freedom of establishment has been especially erratic, namely in the case of dividends and direct investment where the taxpayer exercises definite influence over the company paying the dividends.

The good news is that case law on the topic, since *FII GLO II*, seems to be settled. After *FII GLO II*, other cases, the latest of which is *SECIL*, confirmed the approach that the free movement of capital is applicable if national law is not exclusively applicable to definite influence situations. The Court uses two sets of arguments, namely the purpose of the law and market access.

In the author's opinion, the purpose of the law is the proper criterion, and market access was a means to overcome the deadlock created by the Court itself, in some of its previous jurisprudence. Moreover, the argument regarding the purpose of the law, absorbs other arguments used by the Court to resolve the overlap between capital and services.

Notes

[103] *Ibid.*, paras 29–31.

[104] *Van Hilten* (C-513/03).