Privatisations and golden shares : bridging the gap between the State and the market in the area of free movement of capital in the EU

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2 Free movement of capital in the EU

1 INTRODUCTION

Contrary to the rather fragmented international legal regime regarding capital liberalisation, the European legal framework on capital movements is much more comprehensive and sophisticated. The free movement of capital under Article 63 TFEU constitutes one of the four fundamental freedoms of the EU's Internal Market. There is a complex grid of Treaty provisions and a series of judgments of the Court of Justice covering a wide range of both intra- and extra-EU capital movements and forming a highly advanced and thorough legal regime aiming at facilitating financial integration in the EU. This is perhaps explained by the fact that, when compared to the international community, the EU is a regional organisation consisting of Member States with relatively similar economic, political and social development.[1]

While known as one of the four fundamental freedoms of the EU's Internal Market, the free movement of capital is rather special. Liberalising capital movements is of vital importance, not only for the achievement of the Internal Market, but also for the realisation of the Economic and Monetary Union and the protection of monetary stability in Europe.[2] At the same time, the achievement of capital liberalisation is a *conditio sine qua non* for the successful completion of the Capital Markets Union and the Banking Union, the two recent

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1 Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 341 citing Maurice Allais, winner of the Nobel Prize in Economic Sciences, who wrote that: 'une libéralisation totale des échanges et des mouvements de capitaux n'est possible, et n'est souhaitable, que dans le cadre d'ensembles régionaux groupant des pays économiquement et politiquement associés, et de développement économique et social comparable', see Maurice Allais, *La crise mondiale d'aujourd'hui: Pour de profondes réformes des institutions financières et monétaires* (Clément Juglar 1999), p. 77.

2 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 518-519.

initiatives of the European Commission, which are expected to accelerate financial integration and boost economic growth in the EU.[3]

Chapter 2 constitutes the second descriptive component of the thesis, which completes the study of the theoretical background of capital liberalisation and lays the groundwork for the next two normative chapters focusing on privatisations and golden shares (Chapters 3 and 4). In particular, it provides a comprehensive legal analysis of the free movement of capital at the European level. In order to do so, firstly, it starts with a brief description of the rather slow historical evolution of the free movement of capital from the Treaty of Rome to the Treaty of Lisbon in order to demonstrate the unique features of the capital freedom and the differences from the other three fundamental freedoms (Chapter 2, Section 2). Secondly, it explores in a detailed manner the current legal regime on the free movement of capital through the exercise of a doctrinal legal analysis of the relevant Treaty provisions and the pertinent case law (Chapter 2, Section 3). This analysis focuses primarily on the main legal issues arising from the interpretation of the fundamental freedoms (i.e. scope, relationship with the other freedoms, direct effect, restrictions, derogations and proportionality).

2 A HISTORICAL OVERVIEW

Renumbering of Treaty articles on the free movement of capital

Treaty of Rome	Article 67 EEC on capital movements and Article 106 (1) EEC on current payments
Treaty of Maastricht Treaty	Article 73b(1) EC
Treaty of Amsterdam	Article 56 (1) EC
Treaty of Lisbon	Article 63 TFEU

3 European Commission, *Completing the Capital Markets Union by 2019 – time to accelerate delivery, Communication from the Commission* (COM(2018) 114 final, 2018). The bibliography on the Capital Markets Union and the Banking Union is already very rich. To name but a few, see in particular: Danny Busch and Guido Ferrarini (eds), *European Banking Union* (Oxford University Press 2015); Niamh Moloney, 'European Banking Union: assessing its risks and resilience' (2014) 51 *Common Market Law Review* 1609; Stefan Grundmann, 'The Banking Union Translated into (Private Law) Duties: Infrastructure and Rulebook' (2015) 16 *European Business Organization Law Review* 357; Niamh Moloney, 'Capital markets union: "ever closer union" for the EU financial system?' (2016) 41 *European Law Review* 307; Niamh Moloney, ' Institutional governance and capital markets union: incrementalism or a 'big bang'?' (2016) 13 *European Company and Financial Law Review* 376.

2.1 Treaty of Rome: the early tentative steps

In comparison with the other fundamental freedoms, the free movement of capital followed a slow historical development in the course of European integration. This slow historical development can be explained by the political and economic controversies of the time and the concomitant suspicion and hesitant attitude of the Member States as well as the European Institutions towards unrestricted capital flows. In the light of the politico-economic climate of the post-war period and the explicit choices of the international monetary system in favour of capital controls, it was only natural for the EU to follow the international trend towards restricting capital mobility. As a result, the capital freedom did not follow the same liberalisation process as the other freedoms. The 1956 Spaak Report, which laid down the foundations of the EU's Internal Market, made allusion to the gradual liberalisation of capital movements as the last component of the Internal Market and as a corollary to the free movement of labour.[4] Article 67 of the 1957 Treaty establishing the European Economic Community (Treaty of Rome/EEC Treaty) contained a qualified obligation: the abolition of capital restrictions between Member States was to be achieved only to the extent necessary to ensure the proper functioning of the common market. Furthermore, Member States were allowed to introduce safeguard measures and many financial operations were subject to prior authorisation requirements known as 'exchange controls'.

From the perspective of the theoretical accounts of European Integration, the free movement of capital displays features of *liberal intergovermentalism*, which is not the framework the four freedoms have traditionally been associated with.[5] Up until the beginning of the 1990s, the free movement of capital did not follow the same integration process as the other freedoms. The Commission and the Court were reluctant to proceed to full capital liberalisation and to deprive Member States of their sovereign right to impose capital restrictions. This was due to the general post-war climate and the suspicion towards unfettered capital liberalisation, which was viewed as a potential source of crises and a threat to monetary stability. The Commission was not a staunch supporter of the complete abolition of capital restrictions and the Court was reluctant to follow the integrationist approach it had developed in the frame-

4 Paul-Henri Spaak, *The Brussels Report on the General Common Market* (The European Community for Coal and Steel, 1956). The relevant passage reads as follows: 'As for free movement of capital, this was based on the liberalisation of capital transfers relating to commodity or service transactions or to free movement of labour. It also required recognition of the right of nationals of member countries to acquire capital from any of the six member countries and to transfer and use it within the common market'.

5 Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' in Craig and De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011).

work of the other freedoms.[6] By contrast, the liberalisation process was left to the Council, which through the adoption of secondary legislation would gradually open up the capital markets of the Member States.

Against this backdrop, the Court in *Casati* initially refused to recognise direct effect of the relevant provision (Article 67 (1) EEC Treaty), fearing that a complete freedom of capital could 'undermine the economic policy of the Member States or create an imbalance of payments, thereby impairing the proper functioning of the common market'.[7] The case concerned an Italian national residing in Germany who was charged with attempting to export from Italy the sum 24000 Deutsche Marks without the authorisation that was prescribed by the pertinent Italian legislation. He had previously imported that money into Italy without declaring it with a view to purchasing equipment for his business in Germany and he claimed that he was obliged to re-export the currency because the factory from which he intended to buy the equipment was closed for holidays.[8] The judgement of the Court was rather striking especially in the light of the seminal judgements in *Dassonville*[9] and *Cassis de Dijon*,[10] which had been delivered some years before. In essence, the Court refrained from applying the classic negative integration approach to the free movement of capital. To the contrary, it acknowledged that this was a rather special and sensitive case, which the Member States had decided to exclude from complete liberalisation. The Court first noted that the freedom to move certain types of capital was in practice a precondition for the effective exercise of the other freedoms guaranteed by the Treaty, and in particular the freedom of establishment.[11] Secondly, it underlined that 'capital movements are closely connected with the economic and monetary policy of the Member States' and that

> 'it cannot be denied that complete freedom of movement of capital may undermine the economic policy of one of the Member States or create an imbalance in its balance of payments, thereby impairing the proper functioning of the Common Market'.[12]

6 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 520.
7 Case 203/80 *Criminal Proceedings Against Guerrino Casati,* ECLI:EU:C:1981:261, para 9.
8 Ibid, para 2.
9 Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville,* ECLI:EU:C:1974:82.
10 Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon),* ECLI:EU:C:1979:42.
11 Case 203/80 *Casati*, para 8.
12 Ibid, para 9.

Thirdly, it emphasised that

> 'Article 67 (1) differs from the provisions on the free movement of goods, persons and services in the sense that there is an obligation to liberalise capital movements only "to the extent necessary to ensure the proper functioning of the Common Market".'[13]

Contrary to the traditional integrationist approach, the Court refused to take on the role of the motor of integration it had assumed few years earlier in relation to the free movement of goods. Instead, it recognised that the liberalisation of capital movements '*was a matter for the Council*', which in accordance with Article 69 EEC Treaty was responsible for the adoption of secondary legislation for the progressive implementation of Article 67 EEC Treaty.[14] The Council had indeed adopted two directives, which, however, did not require the Member States to adopt any liberalising measures regarding the physical importation and exportation of financial assets (including bank notes).[15] The Court was, therefore, bound to respect the clear legislative choice of the Council according to which

> 'it [was] unecessary to liberalise the exportation of bank notes' and 'there [was] no reason to suppose that, by adopting that position, it [had] overstepped the limits of its discretionary power'.[16]

2.2 The Council Directives

Under Article 69 EEC, the Council was authorised to adopt directives concerning the progressive liberalisation of capital movements. The First Capital Directive was adopted in 1960[17] and the Second Capital Directive in 1963.[18] They essentially divided capital movements into four annexed lists (A, B, C and D), which would follow a different degree of liberalisation. The movements covered by lists A and B (such as direct investments, investments in real estate, personal capital movements, gifts and endowments, dowries, inheritances and various operations in securities) were subject to unconditional liberalisation;[19]

13 Ibid, para 10.
14 Ibid, para 11.
15 Ibid, para 11.
16 Ibid, para 12.
17 'First Council Directive for the implementation of Article 67 of the Treaty' (1960) *OJ 43, 12.7.1960, p. 921-932*.
18 'Second Council 63/21/EEC Directive of 18 December 1962 adding to and amending the First Directive for the implementation of Article 67 of the Treaty' (1963) *OJ 9, 22.1.1963, p. 62-74*.
19 Articles 1 and 2 of the 'First Council Directive for the implementation of Article 67 of the Treaty' (1960) *OJ 43, 12.7.1960, p. 921-932*.

for movements covered by list C (such as the issue and placing of securities of a domestic undertaking on a foreign capital market), Member States could maintain or reintroduce exchange restrictions if free movement of capital was capable of forming an obstacle to the achievement of its economic policy objectives.[20] Finally, with respect to the capital movements referred to in list D (such as loans, credits and the physical importation and exportation of financial assets), the directives did not require the Member States to adopt any liberalising measures.

Although the first two directives laid the groundwork for the progressive liberalisation of capital movements, the major breakthrough came with the Third Capital Directive, Directive 88/361,[21] which 'brought about the full liberalisation of capital movements'[22] and gave the single market its full financial dimension. This Directive was adopted on the basis of Articles 69 and 70 (1) of the Treaty of Rome, the two old legal basis provisions which allowed the Council to adopt unanimously secondary measures in the field of the free movement of capital.[23]

The adoption of secondary legislation was not a self-evident decision. The Council was well aware of the risks and potential drawbacks of capital liberalisation and this was imprinted in the Preamble to Directive 88/361. In particular, the Preamble warned that free capital movements could seriously disturb the monetary or financial situation of Member States or cause serious stresses on the exchange markets.[24] It even stated that capital liberalisation might prove harmful for the cohesion of the European Monetary System, the smooth operation of the Internal Market and the progressive achievement of

20 Ibid, Article 3.

21 'Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty' (1988) *OJ L 178, 8.7.1988, p. 5-18*.

22 Joined cases C-358/93 and C-416/93 *Criminal proceedings against Aldo Bordessa and Vicente Marí Mellado and Concepción Barbero Maestre,* ECLI:EU:C:1995:54, para 17.

23 It should be noted that today these two provisions do not exist. Under the current legal regime there is no specific legal basis provision regarding free movement of capital between Member States (intra-EU capital movements). Article 64 (2) and (3) TFEU do provide the legal basis for the adoption of secondary legislation, but only in relation to capital movements to/from third countries (extra-EU capital movements). In particular, Article 64 (2) TFEU provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment (including investment in real estate) establishment, the provision of financial services or the admission of securities to capital markets. Article 64 (3) TFEU, on the other hand, provides that the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures, which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

24 Preamble to 'Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty' (1988) *OJ L 178, 8.7.1988, p. 5-18*.

the Economic and Monetary Union.[25] It therefore expressed the view that Member States should, if necessary, be able to take measures to restrict temporarily capital movements, which were liable to seriously disrupt the conduct of their monetary and exchange rate policies.[26] It drew special attention to the serious implications that capital liberalisation could have for the market of secondary residences in Member States located in border areas as well as to the risks of tax evasion and tax avoidance resulting from the divergent national systems of taxation.[27] Furthermore, it recognised that capital liberalisation would be particularly detrimental for the Hellenic Republic and Ireland, which were faced, albeit to differing degrees, with difficult balance-of-payments situations and high levels of external indebtedness.[28] It therefore granted to those two Member States further time to comply with the obligations arising from the Directive.[29]

Despite the initial hesitation and the possible risks associated with capital liberalisation, Article 1 of Directive 88/361 required Member States to abolish all restrictions on movements of capital taking place between persons resident in Member States. Shortly after the adoption of the Directive, the Court, in *Bordessa*, ruled that this prohibition on capital restrictions laid down in Article 1 thereof was directly effective and thus could be relied upon before national courts by individuals.[30] The case concerned two sets of criminal proceedings initiated against an individual due to the fact that he had exported a certain amount of money from Spain without possessing the requisite authorisation from the competent Spanish authorities. The Court was therefore asked to appraise the compatibility of the Spanish requirement of prior authorisation for the export of money with the Treaty provisions. In its assessment, the Court first noted that rules making the export of coins, banknotes or bearer cheques conditional upon a prior declaration or administrative authorisation did not fall within the scope of Articles 30 and 59 of the Treaty (today Article 34 and 56 TFEU), but rather within the scope of Article 67 of the Treaty (today Article 63 TFEU) and the scope of Directive 88/361.[31]

Next, in relation to its conformity with the provisions of Directive 88/361, the Court first emphasised that

25 Ibid.
26 Ibid.
27 Ibid.
28 With the benefit of hindsight, it is fair to say that this estimation was more than accurate.
29 Preamble to 'Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty' (1988) *OJ L 178, 8.7.1988, p. 5-18*.
30 Joined cases C-358/93 and C-416/93 *Bordessa*, paras 33-35.
31 Ibid, paras 11- 15, citing the Case 7/78 *Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss,* ECLI:EU:C:1978:209, para 25, in which the Court had ruled that means of payments were not to be regarded as goods.

> 'the Directive brought about the full liberalisation of capital movements, for which purpose Article 1 required Member States to abolish restrictions on movements of capital taking place between persons resident in Member States'.[32]

However, under Article 4 of the Directive, Member States were allowed to:

> 'take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation and prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information'.[33]

The use of '*inter alia*' allowed the Court to expand the scope of possible justifications and to accept that

> 'other measures are also permitted in so far as they are designed to prevent illegal activities of comparable seriousness, such as money laundering, drug trafficking or terrorism'.[34]

However, in the proportionalisty assessment, the Court found that the requirement of prior authorisation is disproportionate as:

> 'it has the effect of suspending currency exports and makes them conditional in each case upon the consent of the administrative authorities, which must be sought by means of a special application. A requirement of that nature would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory'.[35]

The government could have adopted a less restrictive measure such as a system of declaration, as

> 'unlike prior authorisation, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations'.[36]

The ruling in *Bordessa* was one of the first rulings in which the Court developed the distinction between *authorisation* and *declaration*: a system of declaration allows the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations without entailing the suspension of the transaction in question; by contrast, a system of prior authorisation suspends the transaction in question and creates an unreasonable

32 Joined cases C-358/93 and C-416/93 *Bordessa*, para 17.
33 Ibid, para 18. Today, this derogation is found in Article 65 (1) (a) TFEU.
34 Ibid, para 21.
35 Ibid, paras 24-25.
36 Ibid, para 27.

burden on the individual applying for it. Thus, a system of prior authorisation will most likely fail to meet the requirements of the principle of proportionality, if a system of declaration could have been adopted instead. The distinction between prior authorisation and declaration is a recurrent theme in the capital case law, which illustrates the preference of the Court for administrative procedures which do not impose unreasonable burden on the economic operators and do not hinder their economic activity, whilst at the same time allowing the public authorities to exercise the necessary regulatory supervision over the economic activities that take place within the territory of the Member State concerned.

Another important feature of Directive 88/361 is the non-exhaustive nomenclature of capital movements contained in Annex I, which includes a wide variety of financial transactions such as direct investments, investments in real estate, operations in securities (e.g. shares and bonds), operations in units of collective investment undertakings, operations in securities and other instruments normally dealt in on the capital market, operations in current and deposit accounts with financial institutions, credits related to commercial transactions, financial loans and credits, sureties, other guarantees and rights of pledge, transfers in performance of insurance contracts, personal capital movements (e.g. gifts and endowments, dowries, inheritances and legacies), physical import and export of financial assets and other capital payments. The Court has ruled that:

> 'even though Directive 88/361 was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which was later replaced by Article 73b et seq. of the EC Treaty, the nomenclature in respect of movements of capital still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq'.[37]

Therefore, in the absence of a definition of the concept of 'movement of capital' within the meaning of Article 63 (1) TFEU, the Court still uses the non-exhaustive list of capital movements annexed to Directive 88/361 when determining whether a specific transaction qualifies as 'capital movement'.

2.3 The Maastricht Treaty

The free movement of capital developed into a fully-fledged freedom of the EU's Internal Market in 1993 with the entry into force of the Maastricht Treaty

37 Case C-222/97 *Manfred Trummer and Peter Mayer,* ECLI:EU:C:1999:143, para 21; Joined cases C-105/12 to C-107/12 *Staat der Nederlanden v Essent NV, Essent Nederland BV, Eneco Holding NV and Delta NV,* ECLI:EU:C:2013:677, para 40.

and the establishment of the Economic and Monetary Union,[38] which is arguably one of the most significant developments in the history of European Integration. After a long period of economic turmoil and persistent political controversies, the entry into force of the Maastricht Treaty marked the transition to the fourth stage of economic integration, which enabled European economies to not only benefit from an Internal Market with free circulation of goods, persons, services and capital, but also to converge on a macro-economic level, to develop common economic and monetary policies and eventually to adopt a common currency.[39] In order to achieve this transition, it was

38 For an overview of the historical evolution, the institutional foundations and economic, political and legal implications of the functioning of the EMU, see in particular: Mads Andenas and others, *European Economic and Monetary Union: The Institutional Framework* (Kluwer Law International 1997); Jean-Victor Louis, 'The New Monetary Law of the European Union and its Scope of Application' in Mario Giovanoli (ed), *International Monetary Law: Issues for the New Millennium* (Oxford University Press 2000), pp. 137-59; Kenneth Dyson, *European States and the Euro: Europeanization, Variation, and Convergence* (Oxford University Press 2002); Kenneth Dyson and Kevin Featherstone, *The Road To Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999); Dermot Hodson, *Governing the Euro Area in Good Times and Bad* (Oxford University Press 2011); Tommaso Padoa-Schioppa, *The Road to Monetary Union in Europe: The Emperor, the Kings, and the Genies* (Oxford University Press 2000); Kenneth Dyson, 'Economic and Monetary Union' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford Univrsity Press 2012); Peter Kenen, *Economic and Monetary Union in Europe: Moving beyond Maastricht* (Cambridge University Press 1995); Mark Hallerberg, Rolf Rainer Strauch and Jürgen von Hagen, *Fiscal Governance in Europe* (Cambridge University Press 2009); Paul Masson and Mark Taylor, *Policy Issues in the Operation of Currency Unions* (Cambridge University Press 1993); Otmar Issing, *The Birth of the Euro* (Cambridge University Press 2001).

39 According to one of the leading post-war trade economist, the Hungarian Béla Balassa, economic integration as a process refers to measures designed to abolish discrimination between economic units belonging to different national states and as a state of affairs it is the absence of discrimination between national economies. Béla Balassa distinguished five stages of economic integration: (1) Free trade areas, where tariffs are eliminated between member countries, which means that there is free movement of goods within this area; (2) Customs Union, where in addition to the abolition of tariffs, member states establish a common customs rules regarding imported goods from third countries; (3) Common Market, which combines a customs union with free movement not only of goods but also of the other factors of production, i.e. free movement of persons, services and capital; (4) Economic Union, where in addition to the four freedoms, member states undertake some degree of harmonisation of national economic policies; and (5) Complete Economic Integration, which entails 'the unification of monetary, fiscal, social and countercyclical policies' and 'the setting up of a supra-national authority whose decisions are binding for the member states'. See Bela Balassa, *The Theory of Economic Integration* (Irwin Homewood 2011); André Sapir, 'European Integration at the Crossroads: A Review Essay on the 50th Anniversary of Bela Balassa's Theory of Economic Integration' (2011) 49 *Journal of Economic Literature* 1200. For more literature on economic integration see Richard Baldwin and Anthony Venables, 'Regional economic integration' in Gene Grossman and Kenneth Rogoff (eds), *Handbook of International Economics* (Elsevier 1995), pp. 1597-1644; Richard Baldwin and Charles Wyplosz, *The Economics of European Integration* (McGraw-Hill 2012); Richard Baldwin and others, *Market Integration, Regionalism and the Global Economy* (Cambridge University

decided that capital movements had to be liberalised not only within the EU but also in relation to third countries. The entry into force of the Maastricht Treaty was therefore a turning point in the history of European financial integration, as it signified the fundamental deviation from the post-war international scepticism regarding unfettered capital flows and the adoption of a much more liberal approach at the European level.

3 THE CURRENT LEGAL FRAMEWORK

This part of the thesis addresses the main legal questions arising from the interpretation of the free movement of capital as one of the four fundamental freedoms of the EU's Internatl Market, i.e. the material and territorial scope of Article 63 TFEU (section 3.1); the relationship with the other freedoms (section 3.2); the direct effect of Article 63 TFEU (section 3.3); the definition of restrictions on capital movements (section 3.4); the derogations from the free movement of capital (section 3.5) and the proportionality assessment applied by the Court of Justice (section 3.6).

3.1 The scope of Article 63 TFEU

3.1.1 Difference between 'capital movements' and 'payments'

As is evidenced by its wording, Article 63 (1) TFEU prohibits all restrictions on capital movements, while Article 63 (2) TFEU prohibits all restrictions on payments. In the past, the abolition of restrictions on 'payments' was provided for under Article 106 EEC, which stipulated that payments relating to the provision of services had to be liberalised to the extent to which the movement of services itself was liberalised, which in turn, by virtue of Article 59 of the Treaty, had to be achieved by the end of the transitional period. Today, Article 106 EEC Treaty has been repealed and restrictions on both capital movements and payments are prohibited under Article 63 TFEU.

The distinction between 'capital movements' and 'payments' was first recognised by the Court in *Luisi and Carbone*.[40] The case concerned two Italian residents who were fined for the Treasury for purchasing various currencies for tourism and medical treatment abroad which exceeded the maximum amount permitted by Italian law. The plaintiffs claimed that the restrictions on the export of means of payment in foreign currency for the purpose of

Press 1999).

40 Joined cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* ECLI:EU:C:1984:35.

tourism or medical treatment were contrary to the provisions of the EEC Treaty relating to current payments and the movement of capital. The Court clarified that:

> 'current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service'.[41]

Therefore, the physical transfer of bank notes as a means of payment for a transaction involving the movement of goods or services (such as tourism, medical treatment, education or business) was classified as 'current payment' and not as 'capital movement'.[42] These restrictions on current payments relating to the provision of services had to be abolished by the end of the transitional period.[43]

The distinction between 'capital movements' and 'current payments' was reiterated in the *Lambert* judgment.[44] The case concerned Mr Lambert, a Luxembourg cattle dealer, who accepted payment in banknotes, both in foreign currency (German marks and Dutch guilders) and in Belgian and Luxembourg francs for the sales of cattle in Germany and the Netherlands. The Luxembourg legislation applicable at that time required exporters to have foreign currency payable in respect of their sales paid through a bank and to exchange such currency on the regulated foreign exchange market. Essentially, it prohibited exporters from obtaining payment in banknotes. Mr Lambert challenged this legislation, arguing that the requirement to sell foreign currency to approved banks (i.e. the controlled exchange market) had the effect of reducing the value of the money ultimately received by the exporter by 5% to 10% compared to what could have been obtained on the free market. The Court referred to *Luisi and Carbone* and clarified once again the difference between 'current payments' and 'capital movements'.[45] *In casu*, the Court found that the transaction which Mr Lambert carried out 'did not constitute a capital movement but was a transfer of foreign currency connected with a movement of goods'.[46] The logic behind the requirement for exporters to have foreign currency payable through a bank was

41 Ibid, para 21.
42 Ibid, paras 22-23.
43 Ibid, para 24.
44 Case 308/86 *Criminal proceedings against R. Lambert,* ECLI:EU:C:1988:405.
45 Joined cases 286/82 and 26/83 *Luisi and Carbone*, para 10.
46 Case 308/86 *Lambert*, para 14.

> 'to ensure that current payments are made exclusively on the regulated foreign exchange market and that the free market is reserved for capital movements. It is therefore intended to ensure the separation of the two markets'.[47]

Such a requirement was compatible with the Article 5 (1) of the First Capital Directive, which allowed Member States to

> 'maintain a two-tier foreign exchange market to adopt themeasures necessary to ensure that current payments are made exclusively on the regulated market and that the free market is reserved for capital movements'.[48]

It was also compatible with Article 106 EEC Treaty since it dealt 'solely with the way in which the exporter must receive payment, regardless of whether that payment is expressed in foreign or national currency'.[49] Furthermore, the Court emphasised that:

> 'the prohibition of exporters obtaining payment in banknotes, which is the corollary of the abovementioned requirement, is also not contrary to Article 106 of the Treaty the aim of which is […] to ensure that the necessary monetary transfers may be made for the free movement of goods. […] [T]ransfers of banknotes cannot be regarded as necessary for the free movement of goods since it is a method of payment which is not in conformity with standard practice'.[50]

Accordingly, the Court concluded that, as Community law stood at the time:

> 'rules which require exporters to have foreign currency payable in respect of their sales paid through a bank and to exchange such currency on the regulated foreign exchange market and which prohibit them as a result from taking payment in banknotes, are not a barrier to the liberalisation of payments connected with the movement of goods which is incompatible with Article 106 of the Treaty'.[51]

3.1.2 Territorial scope

Perhaps the most salient feature distinguishing the free movement of capital from the other freedoms is the fact that it applies to not only to Member States but also to third countries (*erga omnes* effect).[52] The extra-EU territorial di-

47 Ibid, para 12.
48 Ibid, para 15.
49 Ibid, para 16.
50 Ibid, para 17.
51 Ibid, para 18.
52 The third-country-dimension of the free movement of capital has attracted a remarkable scholarly attention. See, for instance, Michael Lang and Pasquale Pistone (eds), *The EU and Third Countries: Direct Taxation* (Kluwer Law International 2008); Alexandre Maitrot de la Motte, 'Les spécificités de la libre circulation des capitaux: l'exemple de la contestation des entraves fiscales' in Édouard Dubout and Alexandre Maitrot de la Motte (eds), *L'unité des*

mension of the free movement of capital was recognised by the Court in *Sandoz*, where it was emphasised that Article 73b (I) of the Treaty (today Article 63 TFEU) covered all restrictions on movement of capital between Member States and between Member States and third countries.[53] This unique feature elevates the free movement of capital to a whole different level, rendering it a potential gateway through which extra-EU investors can approach and ultimately access the EU's Internal Market.

Even though the Treaty does not state the reasons why the scope *ratione loci* of the free movement was extended so as to cover also capital movements to/from third counties, it is commonly accepted that this extension was impelled by the EU's monetary policy.[54] Indeed, the external dimension of the free movement of capital may pursue objectives other than that of establishing the internal market, such as, in particular, that of ensuring the credibility of the single currency on the international financial markets and creating and maintaining financial centres with a world-wide dimension within the Member States.[55]

The external dimension of the free movement of capital has been used in order to bring into the scope of the EU's Internal Market investments and financial transactions to and from third countries, which otherwise would be excluded from the benefits of the single market. In particular, the *erga omnes* effect of the free movement of capital has been interpreted so as to cover restrictions on capital movements involving the provision of financial services between Member States and third countries,[56] national measures which restrict pay-

libertés de circulation – In varietate concordia (Bruylant 2013), pp. 289-329; Axel Cordewener, Georg W. Kofler and Clemens Philipp Schindler, 'Free Movement of Capital and Third Countries: Exploring the Outer Boundaries with Lasertec, A and B and Holbo¨ck' (2007) 47 European Taxation 371; Axel Cordewener, Georg W. Kofler and Clemens Philipp Schindler, 'Free Movement of Capital, Third Country Relationships and National Tax Law: An Emerging Issue before the ECJ' (2007) 47 European Taxation 107; Martha O'Brien, 'Taxation and the Third Country Dimension of Free Movement of Capital in EU Law: The ECJ's Rulings and Unresolved Issues' (2008) 6 British Tax Review 628; Philippe Vigneron, 'L'effet erga omnes de la libre circulation des capitaux dans la Constitution européenne: un retour en arrière?' (2004) 23 *Euredia* 369; Christiana Hjipanayi, 'The Fundamental Freedoms and Third Countries: Recent Perspectives' (2008) 48 *European Taxation* 571; Cees Peters and Jan Gooijer, 'The free movement of capital and third countries' (2005) 45 *European Taxation* 475; Joanna Mitroyanni, 'Exploring the Scope of the Free Movement of Capital in Direct Taxation' (2005) 8 *EC Tax Journal* 1; Louis Vogel, *Traité de droit économique, Tome 4: Droit européen des affaires* (Bruylant 2015), pp. 300-302.

53 Case C-439/97 *Sandoz GmbH v Finanzlandesdirektion für Wien,* ECLI:EU:C:1999:499, para 18.

54 *Opinion of Advocate General Bot in Case C-101/05 Skatteverket v A,* ECLI:EU:C:2007:493, paras 75-77.

55 Case C-101/05 *Skatteverket v A,* ECLI:EU:C:2007:804, para 31.

56 Case C-560/13 *Finanzamt Ulm v Ingeborg Wagner-Raith,* ECLI:EU:C:2015:347, para 37.

ments of dividends deriving from investments to or from third countries[57] and national tax legislation under which the dividends paid by companies established in a Member State to an investment fund established in a non-Member State are not the subject of a tax exemption, while investment funds established in that Member State receive such an exemption.[58]

However, this expansion of the territorial boundaries of the Internal Market carries an element of risk, especially in cases of abuse where third-country investors attempt to extend the scope of other freedoms through the backdoor of the free movement of capital. This is the reason why the delineation of the border between the freedom of establishment or services (which apply only to intra-EU transactions) and the free movement of capital (which applies to extra-EU transactions as well) is of paramount importance (Chapter 2, Sections 3.2.2 and 3.2.3). It should be noted, however, that the extended territorial scope of the free movement of capital is counterbalanced by additional justification grounds available to Member States in order to protect sensitive national interests when these are threatened by capital flows to/from third countries (Chapter 2, Section 3.5.1.2). Therefore, while it is true that non-EU investors can in principle rely on Article 63 TFEU, the Member States nevertheless enjoy a wider discretion regarding the imposition of restrictions on capital movements to/from third countries.

3.1.3 Material Scope

Contrary to the freedom to provide services,[59] the Treaty provisions on the free movement of capital do not define the concept of 'capital movements'. In the absence of any definition of capital movements in the Treaty, the Court has held that the non-exhaustive nomenclature in Annex I of Directive 88/361 has indicative value for the purposes of defining capital movements. This list includes a wide variety of capital movements, such as the physical import and export of financial assets and other capital payments,[60] direct invest-

57 Case C-446/04 *Test Claimants in the FII Group Litigation,* ECLI:EU:C:2006:774, para 183.

58 Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company,* ECLI:EU:C:2014:249, para 35.

59 Article 57 TFEU provides a broad definition of 'services' within the meaning of the Treaty, stating that they are normally provided for remuneration on a temporary basis and they particularly include activities of an industrial or commercial character, activities of craftsmen and various professions.

60 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, paras 17-18; Joined cases C-358/93 and C-416/93 *Bordessa*, paras 13-15; Case C-190/17 *Lu Zheng v Ministerio de Economía y Competitividad,* ECLI:EU:C:2018:357.

ments,[61] investments in real estate,[62] operations in securities (e.g. resale of shares,[63] bonds,[64] receipt of dividends[65]), financial loans and credits,[66] mortgages and other guarantees,[67] gifts and endowments[68] and inheritances.[69] The most important categories are examined in more detail in the sections that follow.

3.1.3.1 Investments in real estate

In *Konle*, the Court held that investments in real estate on the territory of a Member State by non-residents are covered by Annex I of Directive 88/361 and thus constitute capital movements for the purposes of Article 63 TFEU.[70] The case concerned a German national who, in the context of a procedure for compulsory sale by auction, acquired a plot of land in Austria on the condition that he obtain the administrative authorisation required under the Austrian legislation at that time. In order to obtain such an authorisation, the acquirer

61 Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares),* ECLI:EU:C:2006:608, para 19; Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh en Price Waterhouse Belastingadviseurs BV tegen Algemene Raad van de Nederlandse Orde van Advocaten, in tegenwoordigheid van: Raad van de Balies van de Europese Gemeenschap,* ECLI:EU:C:2002:98, para 38; Case C-174/04 *Commission v Italy (golden shares),* ECLI:EU:C:2005:350, para 12; Case C-39/11 *VBV – Vorsorgekasse AG v Finanzmarktaufsichtsbehörde (FMA),* ECLI:EU:C:2012:327, para 21; Case C-483/99 *Commission v France (golden shares – Société Nationale Elf-Aquitaine),* ECLI:EU:C:2002:327, para 37; Case C-503/99 *Commission v Belgium (golden shares),* ECLI:EU:C:2002:328, para 38.

62 Case C-370/05 *Criminal proceedings against Uwe Kay Festersen,* ECLI:EU:C:2007:59, para 23; Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung,* ECLI:EU:C:2003:493, para 7; Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Hans Reisch and Others,* ECLI:EU:C:2002:135, para 29; Case C-446/04 *Test Claimants in the FII Group Litigation*, paras 23-24.

63 Richard Baldwin and Charles Wyplosz, *The Economics of European Integration* (MacGraw-Hill Education 2006), para 29.

64 Case C-329/03 *Trapeza tis Ellados AE v Banque Artesia,* ECLI:EU:C:2005:645, para 34.

65 Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen,* ECLI:EU:C:2000:294, paras 28-30.

66 Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht,* ECLI:EU:C:2006:631, para 42; Case C-282/12 *Itelcar – Automóveis de Aluguer Lda v Fazenda Pública,* ECLI:EU:C:2013:629, para 14; Case C-39/11 *VBV – Vorsorgekasse*, para 36; Case C-478/98 *Commission v Belgium (Eurobond),* ECLI:EU:C:2000:497, para 17.

67 Case C-222/97 *Trummer and Mayer*, paras 24, 34; Case C-279/00 *Commission v Italy,* ECLI:EU:C:2002:89, para 37.

68 Case C-318/07 *Hein Persche v Finanzamt Lüdenscheid,* ECLI:EU:C:2009:33, paras 24,25.

69 Case C-256/06 *Theodor Jäger v Finanzamt Kusel-Landstuhl*, ECLI:EU:C:2008:20, para 25; Case C-513/03 *Heirs of M. E. A. van Hilten-van der Heijden,* ECLI:EU:C:2006:131, para 42; Case C-364/01 *The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen,* ECLI:EU:C:2003:665, para 58.

70 Case C-302/97 *Klaus Konle v Republik Österreich,* ECLI:EU:C:1999:271, para 22. See also the case comment Alina Lengauer, 'Case C-302/97, Klaus Konle v. Republic of Austria, Judgment of the Full Court of 1 June 1999' (2000) 37 *Common Market Law Review* 177.

had to prove that the planned acquisition would not be used to establish a secondary residence. However, such a requirement of proof was not applicable to Austrian nationals, for whom a mere declaration was sufficient in order to obtain the authorisation. When the Austrian authorities rejected his application, he challenged the compatibility of the national legislation with EU law. The questions referred to the Court concerned both the discriminatory treatment of foreign nationals (TGVG 1993) and the system of authorisation as such which was applicable to both Austrian and foreign nationals (TGVG 1996). With respect to the first issue, the Court acknowledged that it was a discriminatory restriction against nationals of other Member States in respect of capital movements between Member States,[71] which was however covered by Article 70 of the Act of Accession allowing Austria to maintain different schemes for the acquisition of land depending on the nationality of the acquirer as laid down in the TGVG 1993. In relation to the general scheme of authorisation laid down in TGVG 1996, this was not covered by the Act of Accession and therefore it entailed a restriction on the free movement of capital.[72]

3.1.3.2 Direct and portfolio investments

Direct and portfolio investments are another important category of capital movements that has given rise to a wide range of cases, most notably the line of case law relating to golden shares, which is extensively discussed in Chapter 4. The Court has ruled on numerous occasions that the nomenclature contained in Directive 88/361 includes both 'direct' investments, i.e. participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and 'portfolio' investments, i.e. the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking as capital movements for the purposes of Article 63 TFEU.[73]

71 Case C-302/97 *Konle*, para 23.

72 Ibid, para 39.

73 Case C-222/97 *Trummer and Mayer*, para 21; Case C-483/99 *Commission v France (golden shares – Sociéte Nationale Elf-Aquitaine)*, paras 36-37; Case C-98/01 *Commission v UK (golden shares)*, ECLI:EU:C:2003:273, para 40.

3.1.3.3 Loans, mortgages and commercial credits

Loans,[74] mortgages[75] and commercial credits[76] are also included in the concept of capital movements. In that respect, in *Fidium Finanz*, the Court held that loans and credits granted by non-residents to residents feature under Heading VIII of Annex I to Directive 88/361, entitled 'Financial loans and credits' and thus constitute capital movements for the purposes of Article 63 TFEU. It also noted that, according to the explanatory notes of Annex I, this category includes also consumer credit.[77] Furthermore, it has also been found that the cross-border lending of a vehicle free of charge constitutes a capital movement within the meaning of Article 63 TFEU.[78]

3.1.3.4 Receipt of dividends

The receipt of dividends, although not expressly mentioned in the nomenclature annexed to Directive 88/361, necessarily presupposes participation in undertakings referred to in Heading I (2) of the nomenclature and is therefore inextricably linked to 'capital movements' according to the judgment in *Verkooijen*.[79] Dividends from a company established in another Member State and quoted on the stock exchange can even qualify as 'acquisition by residents of foreign securities dealt in on a stock exchange' as referred to in Heading III A (2) of Annex I to Directive 88/361.[80]

3.1.3.5 Resale of shares

Furthermore, the resale of shares to the issuing company has also been recognised as 'capital movement' within the meaning of Article 63 TFEU in *Bouanich v Skatteverket*,[81] which concerned the refusal of the Swedish Local Tax Board to refund to Ms Bouanich, a French national and shareholder in a Swedish public limited company, the amount of the tax charged on the repurchase of her shares by the company in connection with a reduction in its share capital. The Court found that that the national legislation at issue constitutes arbitrary discrimination against non-resident shareholders in so

74 Case C-478/98 *Commission v Belgium*.
75 Case C-222/97 *Trummer and Mayer*.
76 Case C-452/04 *Fidium Finanz*, paras 42-43.
77 Ibid.
78 Case C-39/11 *VBV – Vorsorgekasse*, para 36.
79 Case C-35/98 *Verkooijen*, para 28.
80 Ibid, paras 29-30.
81 Richard Baldwin and Charles Wyplosz, *The Economics of European Integration* (MacGraw-Hill Education 2006), para 29.

far as it taxes them more onerously than resident shareholders in an objectively comparable situation.[82]

3.1.3.6 Inheritances

Inheritances involving a transfer to one or more persons of assets left by the deceased fall within Heading XI entitled 'Personal capital movements' of Annex I to Directive 88/361 and therefore are considered to be 'capital movements' for the purposes of Article 63 TFEU, except in cases where their constituent elements are confined within a single Member State, as it was established in *Jäger*.[83]

3.1.3.7 Gifts and endowments

Finally, gifts and endowments are also listed in Annex I to Directive 88/361 and are thus capital movements for the purposes of Article 63 TFEU. In *Persche*, the Court held that the qualification of gifts as capital movements is irrespective of whether those gifts are in money or in kind.[84] The case concerned a German resident who claimed a tax deduction for his donation of bed linen and towels to a retirement and children's home situated in Portugal. The German legislation applicable at that time allowed the deduction for tax purposes only of gifts made to charitable institutions located in Germany. The Court found that those national rules contravened Article 63 TFEU.

3.2 Relationship with the other freedoms

Although, in principle, the aforementioned types of transactions qualify as capital movements, it is sometimes difficult to determine which fundamental freedom is applicable. The following three sections focus on the relationship between the free movement of capital and the other fundamental freedoms and seek to shed light on the somewhat confusing case law of the Court.

3.2.1 Capital v goods

The delineation of the material scope of the free movement of goods and the free movement of capital is a rather easy exercise, which does not give rise to any particular difficulty. Thus, the Court as early as in 1978 clarified that

82 Ibid, para 41.

83 Case C-256/06 *Jäger*, para 25; Case C-513/03 *van Hilten-van der Heijden*, para 42; Case C-364/01 *Barbier*, para 58; Case C-11/07 *Hans Eckelkamp and Others v Belgische Staat,* ECLI:EU:C:2008:489, para 39.

84 Case C-318/07 *Persche*, paras 24-25.

'means of payment' are not to be regarded as goods.[85] In particular, in *Regina v Thomson*, it was held that silver alloy coins which constituted legal tender in a Member State were, by their very nature, to be regarded as 'means of payment' and therefore not falling within the scope of the free movement of goods.[86] The same was true for South African Krugerrands, which, although not means of legal payments, were treated in some Member States as coins equivalent to currency.[87]

3.2.2 Capital v Establishment

3.2.2.1 The theory of parallelism

Contrary to the distinction between capital and goods, the distinction between capital and establishment is a rather difficult exercise. As early as in 1981, the Court underlined the special character of the free movement of capital by explaining that although it constitutes one of the fundamental freedoms, it is also quite often a precondition for the effective exercise of other freedoms guaranteed by the Treaty, in particular the right of establishment.[88] The need to insert reciprocal reservations in the Treaty reveals how closely intertwined and inextricably linked these two freedoms are. In particular, Article 49 (2) TFEU provides that the freedom of establishment covers the right to take up and pursue activities as a self-employed person and the right to set up and manage undertakings, subject to the provisions of the Chapter relating to capital. At the same time, under Article 65 (2) TFEU, the provisions of the Chapter on capital shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.

One could probably argue that, at first glance, the existence of these two reservations implies that capital and establishment are mutually exclusive (theory of *exclusivity*).[89] However, the Court's reasoning has been consistently based on the premise that fundamental freedoms can apply in parallel (theory

85 Case 7/78 *Regina v Thompson and Others*, para 25.
86 Ibid, para 26.
87 Ibid, para 27.
88 Case 203/80 *Casati*, para 8.
89 This was in fact the argument of the Dutch Government in the *Baars* case. See Case C-251/98 *C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem,* ECLI:EU:C:2000: 205, para 18. See also *Opinion of Advocate General Alber in Case C-251/98 Baars,* ECLI:EU:C: 1999:502, para 24, where he expressed the view that the second paragraph of Article 49 TFEU must mean that a restriction on capital movements is not *per se* an infringement of the freedom of establishment. Conversely, Article 65 (2) TFEU should be interpreted as meaning that when a measure directly restricts establishment, it should be examined only from the angle of establishment.

of *parallelism*).[90] Indeed, Article 49 (2) TFEU and Article 65 (2) TFEU are based on the principle that the freedom of establishment and the free movement of capital can apply simultaneously. Otherwise there would be no need to insert two reservations clarifying that the application of the one freedom shall be without prejudice to the application of the other. In other words, the two reservation clauses would be superfluous if a certain factual situation could *a priori* be captured only by one freedom.[91] Furthermore, the parallel application of the two freedoms is also supported by the fact that when the free movement of capital developed into a fully-fledged freedom of the EU's Internal Market with the advent of the Maastricht Treaty, 'the intention was to add a further fundamental freedom to those already in existence, and extend the range of protected cross-frontier economic activities'.[92] The endorsement of the theory of *parallelism* is thus based not only on the grammatical reading of the Treaties, but also on a teleological interpretation of the fundamental freedoms and a historical perception of the evolution of the Internal Market.

3.2.2.2 The exercise of definite influence as the test to determine which freedom has priority

The next question is to determine which of the two has *priority*. In other words, in a situation where the contested national legislation is captured by both the freedom of establishment and the free movement of capital, the question arises which of the two is going to take precedence over the other. As a general rule, according to well-established case law, the *purpose* of the national legislation at issue is the main factor determining which fundamental freedom is applic-

90 Case C-204/90 *Hanns-Martin Bachmann v Belgian State,* ECLI:EU:C:1992:35, para 34, where the Court held that rules on capital movements do not cover restrictions which flow indirectly from the restriction of other fundamental freedoms; Case C-484/93 *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme,* ECLI:EU:C:1995:379, paras 8-11, where the Court found that a provision which makes lending by banks more difficult might constitute an infringement of bot Article 56 TFEU and Article 63 TFEU; Case C-222/95 *Société civile immobilière Parodi v Banque H. Albert de Bary et Cie,* ECLI:EU:C:1997:345, para 10, where the Court stated that the freedom to provide services would only cease to apply where there is a restriction on the free movement of capital which is compatible with Community law; Case C-410/96 *Criminal proceedings against André Ambry,* ECLI:EU:C:1998: 578, para 40, where the Court applied the freedom to provide services to national rules barring non-resident credit institutions from lodging certain securities, leaving open the question whether such rules might also infringe Article 63 TFEU; Case C-302/97 *Konle*, para 22, where the Court, while stating that both capital and establishment were applicable to an Austrian legislation rendering more difficult the acquisition of land by foreigners, in the end it limited its analysis only to Article 63 TFEU. All these cases show that regardless of the actual application, the Court starts from the premise that the parallel application of capital with either establishment or services is *in principle* possible.

91 Wolfgang Schön, 'Free Movement of Capital and Freedom of Establishment' (2016) 17 *European Business Organization Law Review* 229.

92 *Opinion of Advocate General Alber in Case C-251/98 Baars*, para 23.

able.[93] However, where a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears that the other freedoms are entirely secondary.[94] In that respect, Advocate General Alber in *Baars* formulated a three-step test for the determination of the applicable freedom: (1) If the contested national measure restricts directly the free movement of capital and only indirectly the freedom of establishment, only the rules on capital apply; (2) If the measure restricts directly the freedom of establishment and only indirectly the free movement of capital, only the rules on establishment apply; (3) if the measure restricts both capital and establishment, both freedoms should apply simultaneously.[95]

However, despite its appeal, this test could not always capture all the intricacies and the different characteristics of the national measures under scrutiny. Thus, although certainly informed by the contribution of the Advocate General, the Court gradually developed a more elaborate test allowing for a more clear delimitation of the fundamental freedoms. The golden shares case law can help us understand the methodological approach the Court has followed in order to determine the applicable freedom. Golden shares are primarily examined from the perspective of the free movement of capital and secondarily from the perspective of the freedom of establishment.[96] The criterion applied by the Court in order to distinguish between freedom of establishment and free movement of capital is the exercise of *definite influence* over the management of the company. On the one hand, provisions of national law which apply to the possession, by nationals of a Member State, of holdings in the capital of a company established in another Member State allowing them to exert a definite influence on the company's decisions and to determine its

93 Case C-157/05 *Winfried L. Holböck v Finanzamt Salzburg-Land,* ECLI:EU:C:2007:297, para 22; Case C-196/04 *Cadbury Schweppes plc,* ECLI:EU:C:2006:544, paras 31-33; Case C-452/04 *Fidium Finanz*, paras 34, 44-49; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation,* ECLI:EU:C:2006:773, paras 37 and 38; Case C-446/04 *Test Claimants in the FII Group Litigation*, para 36; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation,* ECLI:EU:C:2007:161, paras 26-34.

94 Case C-233/09 *Gerhard Dijkman and Maria Dijkman-Lavaleije v Belgische Staat,* ECLI:EU:C:2010:397, para 33; Case C-42/07 *Liga Portuguesa,* ECLI:EU:C:2009:519, para 47; Case C-452/04 *Fidium Finanz*, para 34.

95 *Opinion of Advocate General Alber in Case C-251/98 Baars*, para 26 and 30.

96 For instance, in the Case C-244/11 *Commission v Greece (golden shares),* ECLI:EU:C:2012:694, para 23, the Court preferred to apply the freedom of establishment instead of the free movement of capital on the ground that the Greek prior authorisation scheme covered only the acquisition of more than 20% of the capital shareholding and was thus intended to cover investments aiming at exerting a definite influence over the managements and control of the undertaking concerned. See Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 144.

activities, fall within the ambit *ratione materiae* of Article 49 TFEU.[97] On the other hand, 'direct investments', i.e. investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the company to which that capital is made available in order to carry out an economic activity, fall within the scope of Article 63 TFEU.[98] National legislation which is not limited to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Articles 49 and 63 TFEU.[99]

97 Case C-244/11 *Commission v Greece (golden shares)*, para 21; Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA),* ECLI:EU:C:2011:717, paCase C-196/04 *Cadbury Schweppes*ra 42; Case C-326/07 *Commission v Italy (golden shares),* ECLI:EU:C:2009:193, para 34; Case C-543/08 *Commission v Portugal (golden shares – EDP),* ECLI:EU:C:2010:669, para 41; Case C-251/98 *Baars*, para 22; Case C-436/00 *X and Y,* ECLI:EU:C:2002:704, paras 37, 66-68. Case C-446/04 *Test Claimants in the FII Group Litigation*, para 37; Case C81/09 *Idryma Typou AE v Ypourgos Typou kai Meson Mazikis Enimerosis,* ECLI:EU:C:2010:622, para 47; Case C-310/09 *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor SA,* ECLI:EU:C:2011:581, para 32; Case C31/11 *Marianne Scheunemann v Finanzamt Bremerhaven,* ECLI:EU:C:2012:481, para 23; and Case C-35/11 *Test Claimants in the FII Group Litigation,* ECLI:EU:C:2012:707, para 91; Case C-196/04 *Cadbury Schweppes*, para 31. As it was acknowledged by Advocate General Kokott, 'the Court has not established a holding threshold of general application which must be reached in order for a determining influence to be presumed' (see *Opinion of Advocate General Kokott in Case C-311/08 Société de Gestion Industrielle,* ECLI:EU:C:2009:545, para 29). However, it is clear that sole ownership or majority ownership (51% or more) leads to definite influence over the management of the company and thus falls within the ambit of Article 49 TFEU (see in particular Case C31/11 *Marianne Scheunemann*, para 19). In a reasoned order given under Article 104 (3) of the Rules of Procedure of the Court, it found that a participation amounting to 25 % of voting rights conferred a dominant influence over the company and thus was regarded as falling within the material scope solely of the freedom of establishment, see Case C-492/04 *Lasertec Gesellschaft für Stanzformen mbH v Finanzamt Emmendingen,* ECLI:EU:C:2007:273, paras 21-24. Similarly, in Case C31/11 *Marianne Scheunemann*, paras 25-30, the Court found that a direct holding of more than one quarter of the capital of the company affected primarily the freedom of establishment. Moreover, it has also been established that national legislation concerning relationships within a group of companies falls primarily within the scope of the freedom of establihsment (in that respect see Case C-196/04 *Cadbury Schweppes*, para 32; Case C-231/05 *Oy AA,* ECLI:EU:C:2007:439, para 23; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation*, para 33).

98 Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*, para 43; Case C-112/05 *Commission v Germany (golden shares – Volkswagen I),* ECLI:EU:C:2007:623, para 18; Case C-326/07 *Commission v Italy (golden shares)*, para 35; Case C-543/08 *Commission v Portugal (golden shares – EDP)*, para 42; Case C-446/04 *Test Claimants in the FII Group Litigation*, paras 36-38; Case C-157/05 *Holböck*, paras 23-25.

99 Case C81/09 *Idryma Typou*, para 49; Case C-326/07 *Commission v Italy (golden shares)*, para 36.

3.2.2.3 The distinction between direct and portfolio investments

In more recent case law, the Court introduced a further distinction between 'direct' and 'portfolio' investments: on the one hand, 'direct investments' are investments in the form of participation in an undertaking through the holding of shares, which confers the possibility of effectively participating in its management and control; on the other hand, 'portfolio' investments are investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking.[100] At first sight one could argue that 'direct investments' fall within the ambit of establishment and 'portfolio investments' fall within the ambit of capital. Nevertheless, this is not case. Both direct and portfolio investments are referred to in Annex I of Directive 88/361 and thus fall within the scope of Article 63 TFEU.[101] This approach arguably blurs the distinction between establishment and capital as articulated by the Court through the use of the *definite influence* criterion.

In particular, in the case of 'portfolio investments', the aim of the investor is driven essentially by the desire to make a financial profit either in the long or in the short term without having any intention of effectively participating in the management of the company or influencing somehow the decision-making process within the organs of the company.[102] It is thus only logical that 'portfolio investments', which most of the time take the form of minority shareholdings,[103] would fall only within the scope of the free movement of capital.[104]

However, the problem arises in relation to 'direct investments'. The determination of the applicable freedom in the case of 'direct investments' is a much more complex question. In its 1997 Communication the Commission expressed

100 Joined cases C-105/12 to C-107/12 *Essent NV*, para 40; Case C-182/08 *Glaxo Wellcome GmbH & Co. KG v Finanzamt München II,* ECLI:EU:C:2009:559, para 40; Case C81/09 *Idryma Typou*, para 48; *Opinion of Advocate General Wahl in Case C-201/15 AGET Iraklis,* ECLI:EU:C:2016:429, para 36. See also European Commission, *Case Law Guide of the European Court of Justice on articles 63 et seq. TFEU, Free Movement of Capital* (DG FISMA, 2015), p. 54 et seq.

101 Joined cases C-105/12 to C-107/12 *Essent NV*, para 40; Case C-182/08 *Glaxo Wellcome*, para 40; Case C81/09 *Idryma Typou*, para 48; *Opinion of Advocate General Wahl in Case C-201/15 AGET Iraklis*, para 36.

102 Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 130.

103 It seems that minority shareholdings below 10% are regarded as 'portfolio investments' and thus fall within the scope of free movement of capital. See in particular Case C-168/11 *Manfred Beker and Christa Beker v Finanzamt Heilbronn,* ECLI:EU:C:2013:117, para 29; Case C-377/07 *Finanzamt Speyer-Germersheim v STEKO Industriemontage GmbH,* ECLI:EU:C:2009:29, para 56; Joined cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v Finanzamt Linz,* ECLI:EU:C:2011:61, para 36.

104 Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 130.

the view that the acquisition of controlling stakes is covered by both the free movement of capital and the freedom of establishment. This is because Article 49 (2) TFEU includes the right of EU investors to set up and manage undertakings in a Member State under the same conditions as the ones applicable for domestic investors.[105] Therefore, it seems that that 'direct investments', i.e. controlling stakes, are to be distinguished from stakes which enable the holder to have a *definite influence* on the company. The former can fall within the scope of both establishment and capital, whereas the latter will necessarily fall only within the scope of establishment pursuant to the aforementioned case law of the Court.[106]

Taking everything into account, the approach that has been so far followed by the Court (and the Commission) can be summarised as follows: Firstly, when the shareholding in question enables the investor to exercise *definite influence* over the company, then it falls within the scope of establishment. Secondly, if the shareholding in question does not meet the threshold of *definite influence*, but nevertheless is a *direct investment* which allows the exercise of control over the company, then both establishment and capital are applicable. Finally, if the shareholding at issue is a *portfolio investment* which is intended merely to make a financial profit, then it is the free movement of capital which applies.

3.2.2.4 The distinction between capital and establishment in legal literature

The distinction between capital and establishment has attracted significant scholarly attention. Jérémie Houet, in his doctoral dissertation on golden shares, made an interesting synthesis of the existing case law and distinguished three types of 'direct investment' in the golden shares case law.[107] Firstly, when the Court is faced with a situation concerning a direct investment which confers a certain and definite influence over the company, it should examine it from the perspective of the freedom of establishment. Secondly, when the direct investment at issue is intended to maintain direct and long-lasting relations with the company, we have to look at the contested golden shares: if the special rights introduced with the golden shares at issue concern the management of the company, then they fall within the scope of the freedom of establishment, as a matter of priority; when, on the other hand, the special rights at issue concern the structure of the capital shareholding of the company,

105 European Commission, *Communication of the Commission on Certain Legal Aspects concerning Intra-EU Investment* (Official Journal C 220, 1997), p. 16.

106 Case C-244/11 *Commission v Greece (golden shares)*, para 21; Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*, para 42; Case C-326/07 *Commission v Italy (golden shares)*, para 34;Case C-543/08 *Commission v Portugal (golden shares – EDP)*, para 41; Case C-251/98 *Baars*, para 22; Case C-436/00 *X and Y*, paras 37, 66-68.

107 Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 137.

they should be examined from the perspective of the free movement of capital.[108]

Wolfgang Schön, on the other hand, argues that the use of the definite influence criterion and the subsequent quantification of shareholdings for the purposes of determining the applicable freedom has not produced any clear results, which leads us to the conclusion that 'the solution is being sought in the wrong place'.[109] For him, the starting point for the determination of the applicable freedom is the acceptance that establishment captures activity-related measures, whereas capital concerns investment-related measures. If the objective of the measure in question is to regulate an economic activity or the business behaviour of the operators then it is captured by Article 49 TFEU. If on the other hand its objective is the relocation or acquisition of assets, it falls within the scope of Article 63 TFEU.[110]

The distinction between capital and establishment should not be regarded as a legal formalism, but rather as an important factor, which can determine the outcome of the case. This is due to the different justification grounds and the different territorial scope of the two freedoms. As regards the justification grounds, it is true that Article 52 TFEU and Article 65 TFEU do not refer to the same public interest considerations.[111] In particular, Article 52 TFEU provides that restrictions on the freedom of establishment can be justified on three general justification grounds of the Internal Market, i.e. of public policy, public security or public health. By contrast, Article 65 TFEU lays down justification grounds, which reflect the distinct and sensitive nature of the restrictions imposed on capital movements. Nevertheless, despite these differences, the case law of the Court has to a great extent aligned the analysis of justifications in the context of the two freedoms.[112] It has, therefore, reduced the practical importance of the distinction between establishment and capital and has implicitly endorsed the theory of *convergence* of the fundamental freedoms, at least in relation to the interpretation of restrictions and justifications.[113]

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108 Ibid, p. 137.

109 Wolfgang Schön, 'Free Movement of Capital and Freedom of Establishment' (2016) 17 European Business Organization Law Review 229, p. 13.

110 Ibid, pp. 9-10, 13-14.

111 Ibid, p. 5.

112 Ibid, p. 5.

113 Ibid, p. 1. For a more general but very thorough and insightful analysis of the trends of convergence or divergence of the fundamental freedoms see Niamh Nic Shuibhne, *Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013); *Opinion of Advocate General Maduro in Joined Cases C-158 & 159/04 Alfa Vita Vassilopoulos AE,* ECLI:EU:C:2006:212; Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (non-)economic European constitution' (2004) 41 *Common Market Law Review* 743; Peter Oliver and Wulf-Henning Roth, 'The internal market and the four freedoms' (2004) 41 *Common Market Law Review* 407; Jukka Snell, 'And then there were two: Products

However, the distinction remains still relevant as regards the territorial scope of the freedoms. Indeed, it has already been stated, the free movement of capital is unique in that it applies not only to capital movements between Member States, but also capital movements to/from third countries. This distinctive feature has a significant bearing on the determination of the applicable freedom. Firstly, it confronts the Court with a much wider range of rules than the ones that are being challenged in the framework of the other freedoms. Due to the external dimension of the free movement of capital, the Court might have to deal not only with national rules but also with rules of an international nature, such as international conventions regulating explicitly or implicitly international capital flows.[114] Secondly, Article 63 TFEU can be used as an instrument of policy-making with respect to foreign investments, allowing the Court to disapply national provisions which restrict intra-EU capital flows and threaten the process of economic integration within the EU, while at the same time safeguarding that European undertakings are not surrendered to foreign control. Thus, when the Court wants to limit the territorial scope of its rulings to investors coming from Member States and to exclude third country investors, it upholds the application of the freedom of establishment, which applies only to nationals of Member States. This is what happened with the Greek golden shares case.[115] The contested Greek legislation introduced a prior authorisation scheme for shareholdings above the threshold of representing 20%, targeting essentially the shareholders who were able to exert a definite influence over the management and control of the companies concerned. Thus, the Court used the 'definite influence' criterion and applied the freedom of establishment.[116]

For Jérémie Houet this decision falls within his scheme: prior authorisation and arrangements of *ex post* control restrict the possibility of investors to attain the level required to exercise control over the management of the company.

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and Citizens in Community Law' in Takis Tridimas and Paolisa Nebbia (eds), *European Union Law for the Twenty-First Century* (Hart Publishing 2005); Henri de Waele and Jochen Meulman, 'A Retreat from Säger? Servicing or Fine-Tuning the Application of Article 49 EC' (2006) 33 *Legal Issues of Economic Integration* 207; Jesper Lau Hansen, 'Full Circle: Is there a Difference Between the Freedom of Establishment and the Freedom to Provide Services?' in Mads Andenas and Wulf-Henning Roth (eds), *Services and Free Movement in EU Law* (Oxford University Press 2002), p. 197; Miguel Poiares Maduro, 'Harmony and Dissonance in Free Movement' (2001) 4 *Cambridge Yearbook of European Legal Studies* 315; David O Kee?e and Antonio Bavasso, 'Four freedoms, one market and national competence: In search of a dividing line' in David O Keeffe (ed), *Judicial Review in European Union Law: Essays in Honour of Lord Slynn* (Springer Netherlands 2000).

114 Arie Landsmeer, 'Movement of Capital and Other Freedoms' (2001) 28 Legal Issues of Economic Integration 57, p. 68.

115 Case C-244/11 *Commission v Greece (golden shares)*.

116 Ibid, para 23.

Thus, the freedom of establishment should apply.[117] Although this explanation is absolutely correct, one could also argue that the prior authorisation scheme was a measure affecting the structure of the shareholding and not the management of the company, and therefore the free movement of capital should also apply. This is why we have reasons to believe that another factor was also crucial for the determination of the applicable freedom: the argument of the Greek government that the legislation was intended primarily to control speculative hostile acquisitions by sovereign wealth funds established in non-member countries.[118] Aware of the serious repercussions of its judgment and cautious about opening Pandora's box in the field of extra-EU investments, the Court preferred to limit the territorial scope of its ruling to EU nationals by ruling that the freedom of establishment was applicable.[119]

3.2.2.5 The distinction between capital and establishment in tax law

As a final remark it should be noted that in its tax law, the Court follows a different methodological approach regarding the distinction between establishment and capital.[120] The differentiation that is observed in the field of taxation might be due to the fact that the objective of taxation is to provide the State with the necessary revenue to fulfil its social and other missions and as such it lacks the 'tendency to regulate professional behaviour'.[121] The evolution of the case law in the field of taxation reveals a preference for capital as opposed to establishment, without however setting clear and consistent criteria for the determination of the applicable freedom.[122] The approach that has been recently adopted is the following: although according to settled case law it is the *purpose* of the legislation concerned that determines which freedom

117 Jérémie Houet, *Les Golden Shares en droit de l'Union Européenne* (Larcier 2015), p. 144.
118 Case C-244/11 *Commission v Greece (golden shares)*, para 26.
119 Ibid, para 25.
120 Tax lawyers have extensively commented on the distinct approach that is being followed in the field of taxation. See, for instance, Mattias Dahlberg, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital* (Kluwer Law International 2005); Steven Den Boer, 'Freedom of Establishment versus Free Movement of Capital: Ongoing Confusion at the ECJ and in the National Courts?' (2010) 50 *European Taxation* 250; Daniel 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?' (2007) 16 *EC Tax Review* 252.
121 Wolfgang Schön, 'Free Movement of Capital and Freedom of Establishment' (2016) 17 European Business Organization Law Review 229, p. 24.
122 The legal uncertainty created by the case law regarding the distinction between establishment and capital in the field of taxation has been criticised by Sigrid Hemels and others, 'Freedom of establishment or free movement of capital: Is there an order of priority? Conflicting visions of national courts and the ECJ' (2010) 19 *EC Tax Review* 19.

is applicable,[123] when the contested measure is generally applicable with no principal purpose related to a particular freedom, capital and establishment apply simultaneously. This means that if the dispute concerns a third country company, the free movement of capital may be relied on regardless of the holdings at issue, except in cases of abuse, the reason being the purely intra-Community nature of the freedom of establishment.[124]

More precisely, in *Kronos*,[125] the Court distinguished between three possible situations: (1) if the national legislation at issue is intended to apply solely to shareholdings which enable the holder to exercise *definite influence* over the company, then it has to be examined in the light of freedom of establishment;[126] (2) if the national legislation applies to shareholdings acquired solely with the intention of making a *financial investment* without any intention to influence the management and control of the undertaking, then it falls within the scope of the free movement of capital;[127] (3) if, however, the national legislation at issue is intended to apply both to *definite influence* holdings and to *investment* holdings, we should distinguish between dividends originating in a Member State (intra-EU) and dividends originating in a third country (extra-EU). With regard to *intra-EU dividends*, account should be taken of the facts of the case in point in order to determine the applicable freedom.[128] It should be noted, however, that in the light of Article 54 TFEU, the freedom of establishment applies only on the condition that the company in question has been incorporated in accordance with the law of a Member State.[129] With regard to *extra-EU dividends*, however, the free movement of capital may be relied on regardless of the holdings at issue, except in cases of abuse,[130] the reason being the purely intra-Community nature of the freedom of establishment.[131] In the case at hand, Kronos International Inc., a holding company incorporated under the laws of the State of Delaware (USA), whose management seat was located in Germany, was permitted to rely on Article 63 TFEU

123 Case C-196/04 *Cadbury Schweppes*, paras 31-33; Case C-452/04 *Fidium Finanz*, paras 34, 44-49; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation*, paras 37-38; Case C-446/04 *Test Claimants in the FII Group Litigation*, para 36; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation*, paras 26-34.

124 See indicatively the recent Case C-157/05 *Holböck*, paras 22-24; Case C-47/12 *Kronos International Inc. v Finanzamt Leverkusen,* ECLI:EU:C:2014:2200.

125 Case C-47/12 *Kronos International*.

126 Ibid, para 31.

127 Ibid, para 32.

128 Ibid, para 37.

129 Ibid, paras 45-46.

130 The Court is aware of the risk of abuse and has therefore clarified that the free movement of capital cannot be used in order to circumvent the territorial limitation of the freedom of establishment, see ibid, para 53 and Case C-35/11 *Test Claimants in the FII Group Litigation*, para 100.

131 Case C-47/12 *Kronos International*, paras 38-39.

in order to challenge the discriminatory taxation of its foreign-sourced dividends.

In view of the possible far-reaching implications of the possibility of third country investors to invoke the free movement of capital, scholars have argued that the Court should be very vigilant against abusive attempts to rely on the free movement of capital in order to circumvent the limitation of the territorial scope of the freedom of establishment and extend its reach through the back door.[132] The Court itself is also aware of this risk and has emphasized that the interpretation of Article 63 TFEU should not enable economic operators who do not fall within the territorial scope of the freedom of establishments to profit from that freedom.[133] However, both in *Kronos* and in *SECIL*, it has found that there is no such risk when the tax treatment of dividends is at issue, since this does not concern the conditions of access in a Member State by a company from a third country.[134]

3.2.3 Capital v Services

The distinction between capital and services is less problematic, though not entirely clear. In *Fidium Finanz*, the Court had the opportunity to clarify the demarcation between services and capital and the starting point of its reasoning was that 'where a national measure relates to the freedom to provide services and the free movement of capital at the same time, it is necessary to consider to what extent the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other'.[135] The reasoning of the Court starts again from the premise that both freedoms can in principle apply in parallel (*theory of parallelism*). This general rule means that in case one freedom is entirely secondary to the other, then the Court should apply only the one which is directly relevant for the case at hand.[136] The case concerned the authorisation requirement under

132 Wolfgang Schön, 'Free Movement of Capital and Freedom of Establishment' (2016) 17 European Business Organization Law Review 229, p. 23.

133 Case C-47/12 *Kronos International*, para 53; Joseph Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (W. W. Norton Company 2016), para 42.

134 Case C-47/12 *Kronos International*, para 54; Joseph Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (W. W. Norton Company 2016), para 43.

135 Case C-452/04 *Fidium Finanz*, para 34; Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH,* ECLI:EU:C:2004:181, para 47; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn,* ECLI:EU:C:2004:614, para 27; Case E-1/00 *State Debt Management Agency,* (EFTA Court), para 32.

136 Case C-452/04 *Fidium Finanz*, para 34; Case C-275/92 *Her Majesty's Customs and Excise tegen Gerhart Schindler en Jörg Schindler,* ECLI:EU:C:1994:119, para 22; Case C-390/99 *Canal Satélite Digital,* ECLI:EU:C:2002:34, para 31; Case C-71/02 *Karner*, para 46; Case C-36/02 *Omega*, para 26; Case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van*

German legislation for the operation of lending activities in Germany by the Swiss undertaking Fidium. The Court first examined whether the activity of granting credit on a commercial basis was a service or a capital movement. In that regard, it noted that according to settled case law, that the business of a credit institution consisting of granting credit constitutes a service within the meaning of Article 56 TFEU.[137] This conclusion was reinforced by reference to Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions, which sought to regulate the activity of granting loans, *inter alia*, from the point of view of both the freedom of establishment and the freedom to provide financial services. At the same time, the Court acknowledged that loans and credits granted by non-residents to residents feature under Heading VIII of Annex I to Directive 88/361. Thus, the granting of credit on a commercial basis was activity falling within the scope of both Article 56 and 63 TFEU.[138]

Nevertheless, the 'predominant consideration' was the freedom to provide services, as the rules impeding access to the German financial market for companies established in non-member countries affected primarily their freedom to provide financial services.[139] The effect of reducing cross-border financial traffic relating to credit services was merely an *unavoidable consequence* of the restriction on the freedom to provide services.[140] Consequently, the Court held that national rules whereby a Member State makes the granting of commercial credit by a non-EU company subject to prior authorisation, and which provide that such authorisation must be refused if that company does not have its central administration or a branch in that territory, affect primarily the exercise of the freedom to provide services.[141] However, the freedom to provide services does not cover the economic activities of third-country companies. Its territorial scope is limited to intra-EU provision of services. Therefore, the Court concluded that the Treaty provisions on services could not be relied on by an undertaking established in a third country and there were no grounds for examining the compatibility of the national rules with the free movement of capital.[142] This case is another example of the efforts of the Court to prevent the circumvention of the territorial boundaries of the Internal Market by the invocation of the external dimension of the free movement of capital. The 'predominant consideration' criterion was employed by

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Der Linden and Anthony De Jong, ECLI:EU:C:2005:307, para 35; Case C-42/07 *Liga Portuguesa*, para 47; Case C-233/09 *Dijkman*, para 33; Case C-182/08 *Glaxo Wellcome*, para 37.

137 Case C-452/04 *Fidium Finanz*, para 39. See also the case law cited: Case C-484/93 *Svensson*, para 11; Case C-222/95 *Parodi*, para 17.

138 Case C-452/04 *Fidium Finanz*, para 43.

139 Ibid, para 49.

140 Ibid.

141 Ibid, paras 47-49.

142 Ibid, paras 47, 51.

the Court in order to restrict the ambit and the implications of the *erga omnes* effect of Article 63 TFEU and prevent abusive behaviour from non-EU companies.[143]

By the same token, the Court applied the freedom to provide services in the *Van der Weegen* case,[144] which concerned the refusal of the Belgian tax authorities to grant a tax exemption for interest payments received from savings accounts held in banks established in other Member States. In a previous case against Belgium, the Court had already found that by introducing and maintaining a system of discriminatory taxation of interest payments made by non-resident banks, resulting from the application of a tax exemption reserved solely to interest payments made by resident banks, Belgium had failed to fulfil its obligations under Article 56 TFEU and Article 36 of the EEA Agreement.[145] In that case, the Court justified its choice to examine the national legislation in question from the perspective of the freedom to provide services under Article 56 TFEU on the basis of the fact that 'the provision of banking services constitutes a service within the meaning of Article 57 TFEU'.[146] It then found that there was no need for a separate examination of that legislation

143 Martha O'Brien, 'Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, judgment of the Court of Justice (Grand Chamber) of 3 October 2006' (2007) 44 *Common Market Law Review* 1483, at p. 1495. The case has been extensively discussed by scholars and has provoked a heated debate among taxation experts. The relevant academic literature include, among others, the following journal articles: Daniel 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?' (2007) 16 EC Tax Review 252; Pasquale Pistone, 'Kirchberg 3 October 2006: Three Decisions that Did ... Not Change the Future of European Taxes' (2006) 34 *Intertax* 582; Tatiana Falcao, 'Third-Country Relations with the European Community: A Growing Snowball' (2009) 37 *Intertax* 307; Sergey Bezborodov, 'Freedom of Establishment in the EC Economic Partnership Agreements: in Search of its Direct Effect on Direct Taxation' (2007) 35 *Intertax* 658; Christiana HJI Panayi, 'Thin Capitalization Glo et al. – A Thinly Concealed Agenda?' (2007) 35 *Intertax* 298; Vassilis Hatzopoulos, 'The Court's approach to services (2006-2012): From case law to case load?' (2013) 50 *Common Market Law Review* 459; Sigrid Hemels and others, 'Freedom of establishment or free movement of capital: Is there an order of priority? Conflicting visions of national courts and the ECJ' (2010) 19 EC Tax Review 19; Mathieu Isenbaert, 'The Contemporary Meaning of 'Sovereignty' in the Supranational Context of the EC as Applied to the Income Tax Case Law of the ECJ' (2009) 18 *EC Tax Review* 264; Ryan Murphy, 'Why does tax have to be so taxing? The court revisits the Franked Investment Income litigation (Case Comment)' (2013) 38 European Law Review 695; Stefan Enchelmaier, 'Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11)' (2011) 36 *European Law Review* 615.

144 Case C-580/15 *Maria Eugenia Van der Weegen and Others v Belgische Staat,* ECLI:EU:C:2017:429.

145 Case C-383/10 *Commission v Belgium,* ECLI:EU:C:2013:364. The relevance of the EEA Agreement is not explained in the judgment, but it seems to be related to the situation of Belgian savers who are customers of the Luxembourg subsidiary of an Icelandic bank referred to in paragraph 18 of the judgment.

146 Ibid, para 41.

in the light of Article 63 TFEU.[147] In the same vein, in *Van der Weegen*, which concerned an amended version of the aforementioned Belgian legislation abolishing the discriminatory element, but still maintaining certain restrictive conditions which were *de facto* specific to the national market,[148] the Court again chose to apply only the freedom to provide services under Article 56 TFEU. It explained that:

> 'although such national legislation was capable of coming within the scope of the two fundamental freedoms alluded to by the referring court, the fact remains that any restrictive effects which that legislation might have on the free movement of capital would be no more than the inevitable consequence of any restrictions on the freedom to provide services'.[149]

In other words, despite the fact that operations in current accounts or deposit accounts effected by residents with foreign financial institutions are set out in point VI.B of the nomenclature annexed to Directive 88/361,[150] the Court found that the free movement of capital was entirely *secondary* in relation to the freedom to provide services. This confirms the *Fidium Finanz* approach that when banking services are concerned and when the Court wants to restrict the territorial application of its judgment only to Member States (to the exclusion of third countries), it applies the freedom to provide services and not the free movement of capital.

3.2.4 Capital v Workers

The distinction between capital and workers is straightforward and does not raise any difficulties. Nevertheless, in the recent *Jahin* case,[151] the free movement of capital was invoked by an EU national in an effort to circumvent the territorial scope of the free movement of workers, which applies only to EU nationals who have made use of their free movement rights within the territory of the EU. In particular, the case concerned a French national, Mr Jahin, who was living in China and was affiliated to a private social security scheme there. Mr Jahin was asked to pay some levies on income from real estate and on a capital gain realised on the transfer of immovable property. Those levies were linked to the French social security. Under Regulation 883/2004, the legislation of a single Member State only is to apply in matters of social security, which in practice means that a person insured under a social security scheme of a Member State other than that of his nationality is exempted from the obligation

147 Ibid, para 74.
148 Case C-580/15 *Maria Eugenia Van der Weegen*, para 29.
149 Ibid, para 25.
150 Case C-383/10 *Commission v Belgium*, para 20.
151 Case C-45/17 *Frédéric Jahin v Ministre de l'Économie et des Finances and Ministre des Affaires sociales et de la Santé*, ECLI:EU:C:2018:18.

to pay social security contributions in his home State. Mr Jahin contested the unequal treatment between French persons insured under a social security scheme of a Member State and French persons insured under a social security scheme of a third country, arguing that such difference in treatment amounted to a violation of the free movement of capital under Article 63 TFEU.

The Court started by clarifying that Article 63 TFEU was indeed applicable in the case at hand, as the levies related to investments in real estate, which under settled case law, constitute capital movements.[152] It then found that such a difference in treatment was in principle prohibited under Article 63 TFEU, as it was liable to dissuade natural persons affiliated to a social security scheme of a third country from making investments in immovable property in the Member State whose nationality they hold and was therefore liable to hinder the movement of capital from such third countries to that Member State.[153] However, this difference in treatment was justified since the situation of a French national residing in China is not objectively comparable to the situation of a French national residing in a Member State, insofar as the latter alone can benefit from the provisions of Regulation 883/2004, by reason of his movement within the EU.[154] By contrast, a French person residing in China or a French person residing in France cannot benefit form the provisions of Regulation 883/2004, since they have not made use of their free movement rights in the EU.[155] This conclusion can also be drawn from the personal scope of application of Regulation 883/2004, which covers only nationals of a Member State who are subject to the social security legislation of another Member State.[156] The Court finally underlined that the external dimension of Article 63 TFEU cannot be used in order to enable persons who do not come within the territorial scope of the free movement of workers to profit from that freedom.[157] In other words, just like with establishment and services, the Court in *Jahin* prevented to use the free movement of capital as a means to expand the territorial scope of the free movement of workers.

152 Ibid, para 23.
153 Ibid, para 28.
154 Ibid, para 42.
155 Ibid, para 43.
156 Ibid, para 45.
157 Ibid, para 46.

3.3 Direct effect of Article 63 TFEU

3.3.1 Vertical Direct effect

One of the most important factors why the free movement of capital followed a slow historical development compared to the other freedoms was the fact that up until 1995 the Court had not recognised the direct effect of Article 67 EEC Treaty, thus depriving the individuals of the possibility to rely on it. As a result of the absence of direct effect, very few cases were reaching the Court of Justice in relation to that provision. It was only with the Maastricht Treaty and the advent of the EMU that the Court realised that the time was ripe for the free movement of capital to become directly effective. The recognition of direct effect of the current Article 63 TFEU, first in *Sanz de Lera*[158] and then in *Skatteverket v. A*,[159] accelerated the evolution of the case law and provided a new impetus for legal scholarship.[160]

The joined cases *Sanz de Lera* concerned two Spanish and one Turkish national who were arrested for transferring a certain amount of banknotes exceeding the maximum amount permitted under Spanish legislation to a third country (Switzerland and Turkey) without having sought prior authorisation from the Spanish authorities.[161] The latter initiated criminal proceedings against those persons and the national court decided to stay the proceedings and ask the Court of Justice through a preliminary ruling procedure whether the requirement of prior authorisation was compatible with the free movement of capital.

Firstly, the Court clarified that even though the facts of the case occurred before the entry into force of the Maastricht Treaty (1 November 1993), nevertheless the relevant provisions of the Maastricht Treaty were applicable, on the ground that the principle, recognised in Spanish law, of the retroactive effect of the more favourable criminal provision would render inoperative national provisions under which allegedly criminal offences were committed if such provisions were found to be incompatible with the free movement of capital provisions as amended with the Maastricht Treaty (Articles 73b to

158 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, para 41.

159 Case C-101/05 *Skatteverket v A*, para 21.

160 Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' in Craig and De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011); Jonh Usher, 'The Evolution of the Free Movement of Capital' (2007) 31 Fordhman International Law Journal 1533; Steve Peers, 'Free Movement of Capital: Learning lessons or slipping on spilt milk?' in Barnard and Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002); Leo Flynn, 'Free movement of capital' in Barnard and Peers (eds), *European Union Law* (Oxford University Press 2017); Arie Landsmeer, 'Movement of Capital and Other Freedoms' (2001) 28 Legal Issues of Economic Integration 57.

161 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, paras 2-4.

73d).[162] These new articles brought about full capital liberalisation not only between Member States but also between Member States and third countries.[163] Under this new regime introduced by the Maastricht Treaty, Article 106 EEC on 'current payments' was repealed; thus, both capital movements and payments were covered by the first and the second paragraph of Article 73b of the Treaty respectively. The Court explained that the export of banknotes at issue did not represent payments for trade in goods or services within the meaning of Article 73b (2) of the Treaty, but capital movements within the meaning of Article 73b (1) of the Treaty.[164]

Secondly, the Court for the first time ruled that Article 73b (1) of the Treaty was directly effective, as 'it [laid] down a clear and unconditional prohibition for which no implementing measure [was] needed'.[165] With the advent of the Maastricht Treaty, this provision had developed into a fully-fledged freedom and '[conferred] rights on individuals which they may rely on before the courts and which the national courts must uphold'.[166] The Court explained that the exception contained in the *grandfather* clause,[167] according to which Member States were allowed to retain existing restrictions on capital movements to/from third countries, was not sufficient to deprive Article 73b (1) of its direct effect.[168] Neither was the legislative power granted to the Council by virtue of Article 73c (2) of the Treaty,[169] as the measures that it could adopt related only to the categories of capital movements to/from third countries and were not a prerequisite for the implementation of the general prohibition of capital restrictions.[170] Therefore, the Court held that 'Article 73b(1) […] may be relied on before national courts and may render inapplicable national rules inconsistent therewith'.[171]

3.3.2 Horizontal direct effect

So far, the case law of the Court has acknowledged that Article 63 TFEU is vertically directly effective. In other words, it has recognised that Article 63 TFEU can be relied on by individuals before their national courts against the State. However, the question of the horizontal applicability of Article 63 TFEU,

162 Ibid, para 14.
163 Ibid, para 19.
164 Ibid, paras 17-18.
165 Ibid, para 41.
166 Ibid, para 43.
167 At the time Article 73c (1) of the Treaty and today Article 64 (1) TFEU.
168 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, para 44.
169 Today this power is conferred on the Council together with the Parliament under Article 64 (2) TFEU.
170 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, paras 45-46.
171 Ibid, para 48.

i.e. the invocation of this provision by an individual against another individual, has not been explicitly dealt with by the Court of Justice. Catherine Barnard argues that this may be explained by the fact that a substantial part of the case law raising questions on the interpretation of the free movement of capital concerns taxation, 'a quintessentially vertical subject matter'.[172] In the golden shares case law, the Court was faced with the question of a possible horizontal application of the free movement of capital, but it chose to evade it by qualifying the measures at issue as 'State measures'. Nevertheless, in view of the multidimensional nature of the various corporate governance arrangements that exist in the Member States (which can be contained not only in national legislation, but also in private agreements, Articles of Association of companies etc.), it is very likely that sooner or later the Court will have to deal with the question of horizontality of Article 63 TFEU. The relevant case law and the intricate legal issues arising from the question of the horizontal effect of the free movement of capital are extensively analysed in Chapter 4, Section 3.1.

3.4 Restrictions

The long-standing debate on the distinction between non-discrimination and market access does not resonate – at least not to the same extent – in the field of the free movement of capital.[173] The wording of Article 63 TFEU goes beyond the mere elimination of unequal treatment on grounds of nationality and prohibits all restrictions on the movement of capital between Member States and between Member States and third countries.[174]

3.4.1 Discriminatory measures

3.4.1.1 Direct discrimination

Although rare, cases of direct discrimination do exist in the capital case law and they are treated as manifest infringements of Article 63 TFEU. Thus, the Court has disapplied a Portuguese provision which precluded investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings,[175] an Austrian provision which exempted only Austrian nationals from having to obtain authorisation before acquiring

172 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 526.

173 Leo Flynn, 'Freedom to Fund?: The Effects of the Internal Market Rules, With Particular Emphasis on Free Movement of Capital' in Neergaard and others (eds), *Social services of general interest in the EU* (Spinger 2013), p. 188.

174 Case C-98/01 *Commission v UK (golden shares)*

175 Case C-367/98 *Commission v Portugal (golden shares),* ECLI:EU:C:2002:326 para 40.

a plot of land[176] and an Italian provision exempting only Italian nationals from the requirement of obtaining an authorisation to buy a property in certain parts of the national territory.[177]

3.4.1.2 Indirect discrimination

In relation to indirect discrimination, the Court has found that the Danish legislation on agriculture imposing a residence requirement, which could be waived only with the authorisation of the minister responsible for agriculture, restricted the free movement of capital.[178] Furthermore, the Belgian rules which resulted in an inheritance consisting of immovable property situated in Belgium being subject to transfer duties that were higher than the inheritance duties payable if the person whose estate was being administered had, at the time of death, been residing in that Member State – were found to have the effect of restricting the movement of capital.[179] Similarly, the Court held that a Portuguese provision under which the amount of capital gains realised by residents when transferring immovable property was to be taken into account as to only 50% of its amount, whereas for non-residents the full amount of capital gains was subject to tax, constituted a capital restriction.[180] Very recently, in *SERGO*, the Court explicitly used the term 'indirect discrimination' when scrutinising the Hungarian legislation under which usufruct rights which had previously been created over agricultural land and the holders of which did not have the status of close relation of the owner of that land were extinguished by operation of law and were, consequently, deleted from the property registers.[181] The Court found that the contested legislation was operating to the disadvantage of nationals of other Member States more than Hungarian nationals and was therefore liable to conceal *indirect discrimination* based on the usufructuary's nationality or the origin of the capital.[182]

176 Case C-302/97 *Konle*, para 23.
177 Case C-423/98 *Alfredo Albore,* ECLI:EU:C:2000:401, para 16.
178 Case C-370/05 *Festersen*, para 25.
179 Case C-11/07 *Eckelkamp*, paras 45-46.
180 Case C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública,* ECLI:EU:C:2007:600, paras 36, 40.
181 Joined cases C-52/16 and C-113/16 *'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal,* ECLI:EU:C:2018:157.
182 Ibid, para 74.

3.4.2 Non-discriminatory measures

3.4.2.1 Direct investments

3.4.2.1.1 Golden shares

The broad interpretation of capital restrictions can be evidenced especially – but not exclusively – in the golden shares case law.[183] The Court has consistently ruled that the special rights retained by the State in privatised undertakings restrict capital movements, as they are liable to *deter/discourage* foreign investors form investing in the undertakings at issue. This rigorous application of the free movement of capital has far-reaching implications for national corporate governance systems. This is why the Member States tried to argue that, under certain conditions, golden shares should be placed beyond the reach of free movement rules through the application of a *Keck*-inspired approach. However, so far the Court has not accepted this argument, without however dismissing it in principle (Chapter 4, Section 3.2).[184]

3.4.2.1.2 Authorisation requirement

Another important restriction on capital movements is the authorisation requirement which is usually imposed by national legislation for certain types of investments. According to settled case law, a requirement of prior authorisation is considered to be a disproportionate restriction on capital movements, as it causes the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus renders that freedom

183 Case C-58/99 *Commission v Italy (golden shares – ENI/Telecom Italia),* ECLI:EU:C:2000:280; Case C-309/99 *Wouters and others*; Case C-483/99 *Commission v France (golden shares – Société Nationale Elf-Aquitaine)*; Case C-503/99 *Commission v Belgium (golden shares)*; Case C-463/00 *Commission v Spain (golden shares),* ECLI:EU:C:2003:272; Case C-98/01 *Commission v UK (golden shares)*; Case C-174/04 *Commission v Italy (golden shares)*; Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*; Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*; Joined cases C-463/04 and C-464/04 *Federconsumatori and Others and Associazione Azionariato Diffuso dell'AEM SpA and Others v Comune di Milano (AEM/Edison),* ECLI:EU:C:2007:752; Case C-274/06 *Commission v Spain (golden shares),* ECLI:EU:C:2008:86; Case C-207/07 *Commission v Spain (golden shares in the energy sector),* ECLI:EU:C:2008:428; Case C-326/07 *Commission v Italy (golden shares)*; Case C-543/08 *Commission v Portugal (golden shares – EDP)*; Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA),* ECLI:EU:C:2010:412; Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA)*; Case C-244/11 *Commission v Greece (golden shares)*; Case C-95/12 *Commission v Germany (golden shares – Volkswagen II),* ECLI:EU:C:2013:676.

184 Case C-463/00 *Commission v Spain (golden shares)*; Case C-98/01 *Commission v UK (golden shares)*; Case C-171/08 *Commission v Portugal (golden shares – Portugal Telecom SGPS SA)*; Case C-543/08 *Commission v Portugal (golden shares – EDP)*; Case C-212/09 *Commission v Portugal (golden shares – GALP Energia SGPS SA).*

illusory.[185] Instead of prior authorisation, the national authorities can adopt less restrictive measures, such as a system of *declaration*.[186] It should be noted, however, that in *Église de Scientologie*, the Court clarified that 'it has not held that a system of prior authorisation can never be justified, particularly where such authorisation is in fact necessary for the protection of public policy or public security'.[187]

3.4.2.1.3 Qualification requirement

Qualification requirements can also restrict capital movements. For instance, the Court has ruled that national legislation providing that the members of companies and firms operating pharmacies can only be pharmacists prevents investors from other Member States who are not pharmacists from acquiring stakes in companies and firms of that kind and, consequently, imposes restrictions on the freedom of establishment and the free movement of capital.[188]

3.4.2.2 Investments in real estate

With respect to investments in real estate, the Court has qualified as capital restrictions primarily authorisation and residence requirements. Thus, it has ruled that a prior authorisation procedure is likely to discourage non-residents from making investments in immovable property and therefore such an obligation constitutes a restriction on the free movement of capital under Article 63 TFEU.[189] Furthermore, the Court has held that Article 63 TFEU precludes national legislation which lays down as a condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property.[190]

185 Joined cases C-358/93 and C-416/93 *Bordessa*, para 25; Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, para 141; Case C-54/99 *Association Eglise de scientologie de Paris,* ECLI:EU:C:2000:124, para 14; Case C-302/97 *Konle*, para 39; Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch*, para 32; Case C-567/07 *Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius,* ECLI:EU:C:2009:593, para 22; Case C-197/11 *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering,* ECLI:EU:C:2013:288, paras 46-47; Case C-39/11 *VBV – Vorsorgekasse*, paras 22, 27.

186 Joined cases C-358/93 and C-416/93 *Bordessa*, paras 26-27.

187 Case C-54/99 *Association Eglise de scientologie de Paris*, para 19.

188 Case C-531/06 *Commission v Italy (pharmacies),* ECLI:EU:C:2009:315, paras 47-48.

189 Case C-302/97 *Konle*, para 39; Case C-567/07 *Sint Servatius*, para 39; Case C-197/11 *Libert and Others*, paras 46-47; Case C-452/01 *Margarethe Ospelt*, para 34.

190 Case C-370/05 *Festersen*, paras 25, 48; Case C-302/97 *Konle*, para 40; Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch*, para 33; Case C-452/01 *Margarethe Ospelt,* para 34.

3.4.2.3 Mortgages

With respect to mortgages the Court has found that the prohibition on the creation of a mortgage in a foreign currency constitutes a restriction on capital movements, as it deprives the private parties concerned of a component element of the free movement of capital and payments.[191] The effect of such a prohibition is to weaken the link between the debt to be secured, payable in the currency of another Member State, and the mortgage, whose value may, as a result of subsequent currency exchange fluctuations, come to be lower than that of the debt to be secured. This can only reduce the effectiveness of such a security, and thus its attractiveness.[192]

3.4.2.4 Financial loans and credits

The Court has also found that provisions implying that a bank must be established in a Member State in order for recipients of loans residing in its territory to obtain an interest rate subsidy from the State out of public funds are liable to dissuade those concerned from approaching banks established in another Member State and therefore constitute an obstacle to movements of capital such as bank loans.[193] Furthermore, national legislation which discriminates according to the place where the loan is contracted is likely to deter residents from contracting loans with persons established in other Member States and therefore constitutes a restriction on the movement of capital.[194] Finally, national legislation which prohibits the acquisition by persons resident in a Member State of securities of a loan issued abroad constitutes a restriction within the meaning of Article 63 TFEU.[195]

3.4.2.5 Taxation

The case law on taxation is very rich and covers different types of measures and economic transactions. Given its distinct and technical nature, it has attracted significant scholarly attention as a separate field of law.[196] For the purposes of the present thesis, this section presents some examples of taxation rules that have been scrutinised by the Court of Justice under the free movement of capital.

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191 Case C-222/97 *Trummer and Mayer*, paras 26-28.
192 Ibid.
193 Case C-484/93 *Svensson*, para 10.
194 Case C-439/97 *Sandoz*, para 31.
195 Case C-503/99 *Commission v Belgium (golden shares)*, paras 15, 19.
196 Sjoerd Douma, *Optimization of Tax Sovereignty and Free Movement* (IBFD 2011); Paul Farmer and Richard Lyal, *EC Tax Law* (Oxford University Press 1995); Laurence Gormley, *EU Taxation Law* (2005).

3.4.2.5.1 Taxation of profits from the sale of shares

In relation to the sale of shares, the Court has ruled that national legislation under which the profits from sales of shares in foreign limited companies are taxable as soon as the shareholding amounted to 1%, whereas the profits from sales of shares in limited companies governed by national law were taxable only when that shareholding amounted to 10% introduces a difference in treatment on the basis of the place of investment of the capital and has the effect of discouraging a shareholder from investing his capital in a company established in another State.[197]

3.4.2.5.2 Taxation of dividends

The Court has also ruled that Article 63 TFEU precludes national legislation on dividends taxation which makes the granting of a tax advantage (e.g. tax exemption or reduced tax rate) subject to the condition that the dividends are paid by companies established within national territory.[198]

3.4.2.5.3 Corporate tax

In corporate taxation, a taxpayer's right to deduct from his taxable profits the losses relating to the partial reduction in value of the shares held in the company, where the reduction in value of the shares results from the distribution of the profits, undeniably constitutes a tax advantage.[199] The Court has ruled that the grant of that advantage to a resident taxpayer only where he acquires shares in a resident company from a resident shareholder makes shares held by non-residents less attractive and is, therefore, likely to dissuade the resident taxpayer from acquiring them. In addition, such a difference in treatment is also likely to dissuade non-resident investors from acquiring shares in the resident company and therefore to represent an obstacle to that company's accumulation of capital from other Member States. Thus, it constitutes a restriction on the free movement of capital.[200] In addition, national legislation under which a resident company cannot deduct from its taxable revenue reductions in profit resulting from the partial write-down of holdings in non-resident companies, whereas it can do so in relation to holdings in resident companies has a restrictive effect on capital movements.[201]

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197 Case C-436/06 *Per Grønfeldt and Tatiana Grønfeldt v Finanzamt Hamburg-Am Tierpark,* ECLI:EU:C:2007:820, paras 13-14; Case C-446/04 *Test Claimants in the FII Group Litigation*, para 166.

198 Case C-35/98 *Verkooijen*, paras 34-36; Case C-194/06 *Staatssecretaris van Financiën v Orange European Smallcap Fund NV,* ECLI:EU:C:2008:289, para 65; Case C-513/04 *Mark Kerckhaert and Bernadette Morres v Belgische Staat,* ECLI:EU:C:2006:713, para 24; Case C-379/05 *Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam,* ECLI:EU:C:2007:655, paras 15, 25-28; Case C-101/05 *Skatteverket v A*, paras 41-43; Case C-446/04 *Test Claimants in the FII Group Litigation*, para 74.

199 Case C-182/08 *Glaxo Wellcome*, paras 53-59.

200 Ibid, paras 53-59.

201 Case C-377/07 *STEKO*, paras 25-27.

3.4.2.5.4 Taxation of gains from movable and immovable property

In relation to income from capital and movable property, the Court found that the Belgian tax legislation which established less favourable tax treatment of income from capital and movable property received by non-resident investment companies with no permanent establishment in Belgium in comparison with income earned by resident investment companies or non-resident companies with a permanent establishment in Belgium constituted a capital restriction.[202] In the same vein, regarding immovable property, the Court recently found that the Belgian legislation regarding the calculation of income tax from immovable property, according to which if the immovable property was situated on national territory the tax base was calculated on the basis of the *cadastral* value, whereas if the immovable property was located outside Belgium the tax base was calculated on the *actual* rental value, constituted a restriction on the free movement of capital under Article 63 TFEU.[203] Similarly, the Portuguese provision laying down a basis of assessment of 50% applicable only to capital gains realised by taxable persons residing in Portugal and not to those realised by non-resident taxable persons was found to be a restriction on the movement of capital.[204]

3.4.2.5.5 Inheritance tax

The Court has developed a profuse case law on inheritance taxation which in essence prohibits national provisions whose effect is to reduce the value of the inheritance of a resident of a State other than the Member State in which the assets concerned are situated and which taxes the inheritance of those assets.[205] In particular, in *Barbier*, the Court found that the Dutch legislation under which in order to assess the property's value, the fact that the person holding legal title was under an unconditional obligation to transfer it to another person who has financial ownership of that property may be taken into account if, at the time of his death, the former resided in that Member State, but may not be taken into account if he resided in another Member State.[206] Furthermore, in *Olivier Halley*, the Court ruled that the Belgian legislation which resulted in a distinction being made in relation to the limitation period for the valuation of registered shares for the purposes of inheritance tax according to the location of the issuing company's centre of effective

202 Case C-387/11 *Commission v Belgium (tax on income from capital and movable property)*, ECLI:EU:C:2012:670, paras 38-40.

203 Case C-110/17 *Commission v Belgium (tax on income from immovable property)*, ECLI:EU:C:2018:250.

204 Case C-443/06 *Hollmann*, paras 35-36, 39.

205 Case C-484/93 *Svensson*, para 10; Case C-222/97 *Trummer and Mayer*, para 26; Case C-439/97 *Sandoz*, para 19; Case C-364/01 *Barbier*, para 62; Case C-513/03 *van Hilten-van der Heijden*, para 44; Case C-194/06 *Orange European Smallcap Fund*, para 37; Case C-11/07 *Eckelkamp*, para 44; Case C-256/06 *Jäger*, para 30.

206 Case C-364/01 *Barbier*, para 62.

management constituted a restriction on the free movement of capital for the purposes of Article 63 TFEU.[207]

3.5 Derogations

As with the other fundamental freedoms, restrictions on the free movement of capital can be justified either by express derogations set out in the Treaty provisions or by case law made derogations ('mandatory requirements', 'overriding reasons in the public interest', 'imperative requirements of general interest' or the so-called 'rule of reason' doctrine). According to the classic doctrinal approach which is followed in Internal Market law, discriminatory measures (i.e. distincly applicable) can only be justified by the expressly provided Treaty exceptions, whereas non-discriminatory restrictions (i.e. indistinctly applicable) can be justified not only by the expressly provided Treaty exceptions but also by the open-ended list of case law-made overriding reasons in the public interest.[208] Regarding indirectly discriminatory measures (which are indistinclty applicable in law but distinctly applicable in fact), despite the initial uncertainty, it has now been established that they can be upheld not only by the express Treaty derogations but also by the case law made objective justifications.[209]

3.5.1 Express derogations

The express derogations laid down in the Treaty provisions are divided between, on the one hand, those that apply to capital movements to/from both Member States and third countries laid down in Article 65 TFEU and, on the other hand, those that apply exclusively to capital movements to/from third countries.

3.5.1.1 Derogations for capital movements between Member States and between Member States and third countries

Article 65 TFEU (the exception clause) contains two express derogations, one specific in Article 65 (1) (a) TFEU and one general in Article 65 (1) (b) TFEU.

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207 Case C-132/10 *Olivier Halley, Julie Halley and Marie Halley v Belgische Staat*, ECLI:EU:C:2011:586, paras 23-25.

208 Stefaan Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International 2005), p. 150 et seq.

209 Case C-237/94 *John O'Flynn tegen Adjudication Officer*, ECLI:EU:C:1996:206, paras 19-20; Case C-29/95 *Pastoors and Trans-Cap v Belgian State*, ECLI:EU:C:1997:28, para 19; Case C-57/96 *Meints v Minister van Landbouw, Natuurbeheer en Visserij*, ECLI:EU:C:1997:564, para 45; Case C-187/96 *Commission v Greece*, ECLI:EU:C:1998:101, para 19.

3.5.1.1.1 Article 65 (1) (a) TFEU (specific derogation – tax differentiation)
Article 65 (1) (a) TFEU contains a rather special derogation that allows Member States to apply national legislation which distinguishes between *resident* and *non-residents* taxpayers in relation to matters of taxation. In the absence of fiscal harmonisation at EU level, Member States felt the need to insert into the Maastricht Treaty (then Article 73d (1) (a) of the Treaty) a derogation that would allow for a certain degree of fiscal differentiation of taxpayers according to their place of residence (fiscal non-residents benefit from tax exemptions in most Member States) or the place where the capital is invested (usually, foreign investments will be discriminated against through less favourable tax treatment).[210] Even before the entry into force of the Maastricht Treaty, national tax legislation differentiating between resident and non-resident taxpayers was justified on the condition that it applied to situations which were not objectively comparable or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system.[211] This rule was essentially the codification of the *Schumacker* and *Bachmann* case law.[212]

The underlying rationale of this permitted discrimination lies in the sensitive notion of fiscal sovereignty and the principle of territoriality. The principle of territoriality is a principle enshrined in international tax law and recognised by EU law, according to which each Member State is entitled to tax profits generated in its territory.[213] Independent tax systems coexist without hierarchy between them and in the EU context this entails the need to ensure a balanced allocation of the Member States' powers to impose taxes.[214]

The tax differentiation set out in Article 65 (1) (a) TFEU is a unique provision since it allows economic considerations relating to taxation to be regarded as justification grounds for capital restrictions.[215] However, this provision, insofar as it derogates from the fundamental principle of the free movement

210 European Commission, *European Economy* (Directorate-General for Economic and Financial Affairs, No 6/2003), p. 321.
211 Case C-35/98 *Verkooijen*, para 43.
212 Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker,* ECLI:EU:C:1995:31; Case C-204/90 *Bachmann*; Case C-300/90 *Commission v Belgium,* ECLI:EU:C:1992:37.
213 Case C-250/08 *Commission v Belgium (purchase of immovable property),* ECLI:EU:C:2011:793, para 48; Case C-231/05 *Oy AA*, para 47; Case C-35/08 *Grundstücksgemeinschaft Busley and Cibrian Fernandez v Finanzamt Stuttgart-Körperschaften,* ECLI:EU:C:2009:625, paras 29-30.
214 Case C-250/95 *Futura Participations SA and Singer v Administration des contributions,* ECLI:EU:C:1997:239, para 22; Case C-132/10 *Olivier Halley*, para 75; Case C-479/14 *Sabine Hünnebeck v Finanzamt Krefeld,* ECLI:EU:C:2016:412, paras 49, 65; Case C-342/10 *Commission v Finland,* ECLI:EU:C:2012:688, para 45; Case C-471/04 *Finanzamt Offenbach am Main-Land v Keller Holding GmbH,* ECLI:EU:C:2006:143, para 44.
215 Case C-309/99 *Wouters and others*, para 52.

of capital, must be interpreted narrowly.[216] The Court has ruled that the principle of territoriality must be exercised in accordance with the principles of EU law.[217] Acceptance of the view that a Member State may freely apply a different treatment solely on the basis of the location of the residence would deprive the rules relating to the free movement of capital of all meaning.[218] In *Lenz*,[219] which concerned the Austrian legislation providing for half-rate taxation only in relation to revenue from capital of Austrian origin, the Court highlighted that Article 65 (1) (a) TFEU must be interpreted strictly and does not render automatically any tax legislation making a distinction between taxpayers by reference to the place of residence or place where they invest their capital compatible with the Treaty.[220] The Court added that this derogation should be read in conjunction with Article 65 (3) TFEU (universality clause), according to which the national legislation shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.[221] In other words, the derogation provided for in Article 65 (1) TFEU is itself limited by Article 65(3) TFEU.[222] Therefore, an unequal treatment permitted under Article 65 (1) (a) TFEU must clearly be distinguished from an arbitrary discrimination or a disguised restriction prohibited under Article 65 (3) TFEU.

The Court has consistently held that an unequal treatment of taxpayers on the basis of their residence is compatible with the free movement of capital only insofar as it relates to situations which are not objectively comparable or must be justified by an overriding reason in the public interest, such as the need to safeguard the coherence of the tax system.[223] The assessment of the comparability of the situations is based on the premise that in relation to direct taxation the situations of a resident and a non-resident taxpayer are *in principle* not comparable.[224] A lack of comparability implies that a possible unequal treatment would be justified. Nevertheless, most of the times the Court departs from this principle, as the actual situation of a non-resident taxpayer is *in fact* comparable to that of a resident taxpayer.

216 Case C-256/06 *Jäger*, para 40.
217 Case C-250/08 *Commission v Belgium (purchase of immovable property)*, para 48.
218 Ibid, para 50.
219 Case C-315/02 *Anneliese Lenz v Finanzlandesdirektion für Tirol,* ECLI:EU:C:2004:446.
220 Ibid, para 26.
221 Ibid.
222 Case C-45/17 *Frédéric Jahin*, para 33; Case C-322/11 *K,* ECLI:EU:C:2013:716, para 34; Case C-181/12 *Yvon Welte v Finanzamt Velbert,* ECLI:EU:C:2013:662, para 43.
223 Case C-450/09 *Ulrich Schröder v Finanzamt Hameln,* ECLI:EU:C:2011:198, para 35; Case C-318/07 *Persche*, para 41; Case C-510/08 *Vera Mattner v Finanzamt Velbert,* ECLI:EU:C:2010:216, para 34; Case C-35/98 *Verkooijen*, para 43.
224 Case C-279/93 *Schumacker*, para 31.

Thus, in *Grünewald*,[225] the Court found that due to the comparability of the situations the unequal treatment of taxpayers introduced by the German legislation at issue was not permitted under Article 65 (1) (a) TFEU. The case concerned the deductibility by a German national non-resident in Germany of the support payments he made to his parents in consideration of some shares he received as a gift by way of anticipated succession. The Court cited *Schröder*[226] and explained that, in relation to direct taxes, the situations of residents and of non-residents are generally not comparable, first because non-residents in most cases only receive part of their total income in the Member State in question, and secondly because it is easier to assess their ability to pay tax at the place of their residence.[227]

However, the situations are comparable where the non-resident receives no significant income in the State of his residence and obtains the greater part of his taxable income from an activity performed in the other Member State concerned.[228] Furthermore, with respect to expenses directly linked to an activity that has generated taxable income in a Member State, residents of that State and non-residents are in a comparable situation.[229] The Court found that in the case at hand the situations were comparable and thus the difference in treatment was not justified by Article 65 (1) (a) TFEU.

Similarly, in *Lenz*, in relation to a tax rule designed to attenuate the effects of double taxation of the profits distributed by the company in which the investment was made, shareholders who were fully taxable in Austria and received revenue from capital from a company established in another Member State were therefore in a situation comparable with that of shareholders who were likewise fully taxable in Austria but received revenue from capital from a company established in Austria.[230] Thus, the national legislation at issue could not be justified by the derogation in Article 65 (1) (a) TFEU.

Furthermore, in *Manninen*, the Court held that the principle of territoriality cannot justify different treatment of dividends distributed by companies established in Finland and those paid by companies established in other Member States, if those dividends share the same objective situation.[231]

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225 Case C-559/13 *Finanzamt Dortmund-Unna v Josef Grünewald,* ECLI:EU:C:2015:109.
226 Case C-450/09 *Schröder*, para 37.
227 Case C-559/13 *Josef Grünewald*, para 25; see also Case C-376/03 *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,* ECLI:EU:C:2005:424, para 38.
228 Case C-376/03 *D. v Inspecteur van de Belastingdienst*, para 27.
229 Ibid, para 29.
230 Ibid, para 32.
231 Case C-319/02 *Petri Manninen,* ECLI:EU:C:2004:484, para 39.

Finally, Article 65 (1) (a) TFEU has found application also in the sensitive sector of social security, where the Court usually takes a more prudent approach recognising the competence of the Member States to organise their own social security systems. Thus, in *Blanckaert*, the Court held that it is for the Member States to determine the range of insured persons and the level of their contributions to the social security system.[232] This entails also the competence to allow entitlement to reduction in contributions only to persons insured under that system.[233] Consequently, the Dutch legislation at issue was justified in the light of Article 65 (1) (a) TFEU, by the objective difference between the situation of a person who is insured under the Netherlands social security system and that of a person who is not so insured.[234]

3.5.1.1.2 Article 65 (1) (b) TFEU (general derogation)

Article 65 (1) (b) TFEU is the general derogation clause in the field of free movement of capital, similar to the ones contained in Articles 36, 45 (3) and 52 TFEU concerning the other freedoms. This general derogation recognises three legitimate objectives that Member States can invoke in order to justify the imposition of a restriction on capital movements. First, they are allowed to adopt restrictive measures in order to prevent infringements of national law and regulations, in particular in the field of taxation and prudential supervision of financial institutions. Secondly, the Treaty permits procedures for declarations of capital movements for purposes of administrative or statistical information. Those two derogations were also found in Article 4 of the Directive 88/361. Finally, as with the other freedoms, reasons related to public policy or public security can provide a safety net for national regulatory measures.

3.5.1.1.2.1 Prevention of infringements of national law and regulations in particular in the field of taxation and the prudential supervision of financial institutions

Under Article 65 (1) (b) TFEU, Member States are allowed to adopt restrictive measures in order to prevent infringements of national law and regulations, in particular in the field of taxation and prudential supervision of financial institutions. As evidenced by the words *in particular*, the list of grounds on which Member States are allowed to take restrictive measures in order to prevent infringements of national law and regulations is non-exhaustive. The reference to taxation and prudential supervision of financial institutions sets out the prime objectives of this provision, without however excluding others.

232 Case C-512/03 *J.E.J. Blanckaert v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,* ECLI:EU:C:2005:516, para 49-50.

233 Ibid, para 49.

234 Ibid, para 50.

This was underlined in *Sanz de Lera*[235] and *Bordessa*,[236] where the Court said that other measures are also permitted, as long as they are designed to prevent 'illegal activities of comparable seriousness, such as tax evasion money laundering, drug trafficking or terrorism'. This interpretation is reinforced by the fact that public policy or public security are in any case justification grounds under Article 65 (1) (b) TFEU.[237]

The derogation of Article 65 (1) (b) TFEU was successfully invoked in the *Sandoz* case,[238] which concerned the compatibility with EU law of an Austrian rule under which the tax authorities could levy a stamp duty of 0.8 % on the value of loans contracted by residents borrowers with non-resident lenders. The Court, following the Opinion of Advocate General Léger, ruled that the Austrian legislation deprived residents of a Member State of the possibility of benefiting from the absence of taxation, which may be associated with loans obtained outside the national territory.[239] Therefore, this measure was likely to deter such residents from obtaining loans from persons established in other Member States and as such it constituted an obstacle to the free movement of capital.[240] Nevertheless, the duty was regarded as a requisite measure justified on the grounds of Article 73d (1) (b) of the Treaty (now Article 65 (1) (b) TFEU). In particular, the Court accepted the arguments brought forward by the Austrian Government that first, due to the partial harmonisation of tax law, the imposition of an indirect tax was within the competence of the Member States and second, the contested tax was justified by the need to observe the principle that residents should be treated equally for tax purposes.[241] The purpose of the legislation was to prevent taxable persons from evading the requirements of domestic tax legislation through the exercise of freedom of movement of capital.

The Court also found that the requirements laid down in Article 65 (3) TFEU were fulfilled, as the measure applied to all borrowers resident in Austria without distinction on grounds of nationality or the place where the loan was contracted and thus, it was not a means of arbitrary discrimination.[242] Thus, the measure was considered to be essential in order to prevent infringements of national tax law, as provided for in Article 65 (1) (b) TFEU. It has been suggested that this case should be treated with considerable caution, as the Court appears to be very generous with respect to indistinctly applicable

235 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, para 22.
236 Joined cases C-358/93 and C-416/93 *Bordessa*, para 21.
237 Ibid, para 22.
238 Case C-439/97 *Sandoz*.
239 Ibid, para 19.
240 Ibid, para 20.
241 Ibid, para 23.
242 Ibid, paras 25-26.

national tax rules which are intended to ensure effective fiscal supervision and to combat illegal activities such as tax evasion.[243]

However, the relative clemency with such national rules are treated does not reflect a general trait of this case law, but rather it should be judged on a case-by-case basis. Thus, in *Commission v Belgium*, the Court held that a general presumption of tax evasion or tax fraud cannot justify a fiscal measure which compromises the objectives of the fundamental freedoms, especially when the contested measure consists in an outright prohibition on the exercise of the free movement of capital.[244] The Belgian legislation in question prohibited the acquisition by persons resident in Belgium of securities of a loan issued abroad. This measure was regarded as a manifestly disproportionate measure which could not by justified under Article 65 (1) (5) TFEU.[245]

3.5.1.1.2.2 Procedures for the declaration of capital movements for purposes of administrative or statistical information

So far there has been no case law in relation to this derogation.[246] However, it is interesting to note that the Commission considers that the national tax authorities are entitled, within reasonable limits, to require taxpayers to declare money transfers abroad for administrative or statistical purposes.[247] The Commission further clarifies that it considers reasonable that an EU taxpayer may be required to file a declaration not only when she/he transfers or sells assets to another country but also every year in order to confirm the bank and other details in relation to the assets that she/he holds.[248] This has become relevant in the light of the liquidity crisis that some Member States – particularly Greece – have been experiencing as a result of the massive capital outflows caused by fear of a possible credit event and exit from the Eurozone.

3.5.1.1.2.3 Public policy or public security

Public policy and public security are two traditional derogation grounds applicable to all four freedoms. In relation to the free movement of capital, the Court has explained in *Église de Scientologie* that:

243 Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' in Craig and De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011), p. 557.

244 Case C-478/98 *Commission v Belgium*, para 45, citing Case C-28/95 *Leur-Bloem v Inspecteur der Belastingsdienst/Ondernemingen Amsterdam 2*, ECLI:EU:C:1997:369, para 44.

245 Case C-478/98 *Commission v Belgium*, para 47

246 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 550.

247 European Commission, 'Legal framework of the free movement of capital in the EU' <https://ec.europa.eu/info/files/document-legal-framework-free-movement-capital-eu_en> accessed 31-01-2019

248 Ibid.

> 'while Member States are free to determine the requirements of public policy and public security in the light of their national needs', they must nonetheless be interpreted strictly as derogations from the fundamental freedoms and 'their scope cannot be determined unilaterally by each Member State without any control of the Union institutions'.[249]

It subsequently held that public policy and public security might be relied on 'only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.[250] It further stressed that those derogations must not be misapplied so as to serve purely economic ends and that any person affected have access to legal redress.[251]

The Court has accepted, for instance, that safeguarding supplies of petroleum products in the event of a crisis is a matter of public security capable of justifying restrictions on free movement.[252] Furthermore, in *Kadi I*, it established that the concept of public security covers both the State's internal and external security[253] and that therefore the Member States were entitled under Article 65 (1) (b) TFEU to adopt a Regulation imposing the freezing of individuals funds in connection with the fight against international terrorism.[254]

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249 Case C-54/99 *Association Eglise de scientologie de Paris*, para 17.

250 Ibid.

251 Ibid.

252 Case C-483/99 *Commission v France (golden shares – Sociéte Nationale Elf-Aquitaine)*, para 28; Case 72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others*, ECLI:EU:C:1984:256, paras 34-35.

253 This was already held in relation to the free movement of goods in Case C-367/89 *Aimé Richardt and Les Accessoires Scientifiques SNC*, ECLI:EU:C:1991:376, para 22.

254 Case T-315/01 *Yassin Abdullah Kadi v Council and Commission*, ECLI:EU:T:2005:332, para 110. The Kadi litigation includes also the following cases: Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461; Case T-85/09 *Yassin Abdullah Kadi v Commission*, ECLI:EU:T:2010:418; Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Yassin Abdullah Kadi*, ECLI:EU:C:2013:518. There is abundant literature on the Kadi saga: N. Türküler Isiksel, 'Fundamental rights in the EU after Kadi and Al Barakaat' (2010) 16 *European Law Journal* 551; Samantha Besson, 'European Legal Pluralism after Kadi' (2009) 5 *European Constitutional Law Review* 237; Conor Gearty, 'In Praise of Awkwardness: Kadi in the CJEU' (2014) 10 *European Constitutional Law Review* 15; Angus Johnston, 'Frozen in Time? The ECJ Finally Rules on the Kadi Appeal' (2009) 68 *The Cambridge Law Journal* 1; Armin Cuyvers, 'The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States' (2011) 7 *European Constitutional Law Review* 481; Takis Tridimas, 'Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 455; Joris Larik, 'The Kadi Saga as a Tale of 'Strict Observance' of International Law: Obligations Under the UN Charter, Targeted Sanctions and Judicial Review in the European Union' (2014) 61 *Netherlands International Law Review* 23; Mielle Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities' (2006) 19 *Leiden Journal of International Law* 753; Larissa Van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of

The external dimension of public security has been examined also in the context of national legislation regarding the purchase of real property. In particular, in *Albore*, the Italian rules at issue required an administrative authorisation for any purchase of real property by non-nationals in Barano d'Ischia, an area of the country designated as being of military importance.[255] The Court found that a mere reference to the requirements of defence of the national territory cannot suffice to justify discrimination on grounds of nationality against other EU national regarding access to immovable property.[256] Nevertheless, the Court left a window open for possible justification of discriminatory measures on grounds of public security. It held that if a Member State can demonstrate, for each area to which the restriction applies, that non-discriminatory treatment of EU nationals would expose the military interests of the Member State concerned to real, specific and serious risks, then the restrictive measure could be justified.[257]

3.5.1.2 Derogations applicable only to capital movements to/from third countries

Capital movements to/from third countries are subject to further four derogations. Those derogations clearly create a less liberalised framework for extra-EU capital flows.

3.5.1.2.1 Article 64 (1) TFEU ('grandfather clause')

The grandfather clause contained in Article 64 (1) TFEU allows Member States to maintain restrictions that existed on 31 December 1993 under national or Union law on capital movements 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.[258] According to the same article, in respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999. The Court has emphasised that the list of capital movements in Article 65 (1) TFEU is restrictive and therefore it does not cover capital movements which are not

Better Protection of the Individual' (2007) 20 *Leiden Journal of International Law* 797; Martin Scheinin, 'Is the ECJ Ruling in Kadi Incompatible with International Law?' (2009) 28 *Yearbook of European Law* 637; Nikolaos Lavranos, 'The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC' (2009) 28 *Yearbook of European Law* 616; Marise Cremona, 'EC Competence, 'Smart Sanctions', and the Kadi Case' (2009) 28 *Yearbook of European Law* 559; Armin Cuyvers, '"Give me one good reason": The unified standard of review for sanctions after Kadi II' (2014) 51 *Common Market Law Review* 1759.

255 Case C-423/98 *Alfredo Albore*, para 12.

256 Ibid, para 21.

257 Ibid, para 22.

258 Alexandre Maitrot de la Motte, 'Les exceptions a' la liberté européenne de circulation des capitaux: réflexions sur le champ d'application de l'article 64 TFUE' (2011) 24 *Revue de Droit Fiscal* 26.

mentioned there, such as inheritances.[259] At the same time, however, the Court has found that the grandfather clause extends not only to measures which restrict investment or establishment, but also measures which restrict payments of dividends deriving from them.[260] Furthermore, the Court has held that the applicability of Article 64 (1) TFEU depends, not on the purpose of the national legislation containing such restrictions, but on its effect on capital movements.[261] This means that Article 64 (1) TFEU applies even where the restriction imposed by the national legislation can also be applied to situations, which have nothing to do with direct investment, establishment, the provision of financial services or the admission of securities to capital markets.[262] In relation to the acquisition of immovable property, Article 64 (1) TFEU has been accepted as a justification ground for the Austrian legislation requiring foreign nationals (including nationals of Switzerland) when acquiring immovable property situated in the province of Vienna to obtain prior authorisation.[263]

In *SECIL*, the Court, however, clarified that a Member State waives the power provided for in Article 64 (1) TFEU where, even without formally repealing or amending the existing rules, it concludes an international agreement, such as an association agreement, which provides, in a provision with direct effect, for a liberalisation of a category of capital referred to in Article 64 (1) TFEU.[264] That change in the legal framework must therefore be deemed to amount, in its effects on the possibility of invoking Article 64 (1) TFEU, to the introduction of new legislation, since it is based on a logic different from that of the existing legislation. Otherwise, a liberalisation of the movement of capital provided for by an international agreement would be devoid of any useful effect.[265]

3.5.1.2.2 Article 64 (2) and (3) TFEU and Article 65 (4) TFEU

Article 64 (2) and (3) and Article 65 (4) TFEU grant legislative powers to the Council to adopt secondary measures regarding capital movements with third countries. In more detail, Article 64 (2) TFEU is a legal basis provision which allows the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt measures regarding the same types

259 Case C-181/12 *Welte*, paras 28-29.
260 Case C-446/04 *Test Claimants in the FII Group Litigation*, paras 171 and 183.
261 Case C-317/15 *X v Staatssecretaris van Financiën,* ECLI:EU:C:2017:119, para 21.
262 Ibid, para 25.
263 Case C-541/08 *Fokus Invest AG v Finanzierungsberatung-Immobilientreuhand und Anlageberatung GmbH (FIAG),* ECLI:EU:C:2010:74, para 49.
264 Joseph Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (W. W. Norton Company 2016), para 89.
265 Ibid, para 90. See also the annotation Martha O'Brien, 'Free movement of capital between EU Member States and third countries and the Euro-Mediterranean Agreements: SECIL' (2018) 55 *Common Market Law Review* 243.

of capital movements to and from third countries as the ones referred to in Article 64 (1) TFEU. Furthermore, Article 64 (3) TFEU allows the Council, acting in accordance with a special legislative procedure, to unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

Article 65 (4) TFEU is a new and special provision, as it allows the Council to pronounce on the legality of restrictive tax measures adopted by Member States concerning third countries. It specifically provides that in the absence of measures pursuant to Article 64 (3) TFEU, the Commission or, 'in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State'.

It has been observed that Article 65 (4) TFEU bears a certain resemblance to Article 108 (2) (3) TFEU, which provides that on application of a Member State, the Council may, acting unanimously, declare certain state aids compatible with the internal market if such decision is justified by exceptional circumstances.[266] This provision constitutes an exception from the rule that the Commission has the exclusive competence in ruling on the compatibility of a state aid with the internal market.[267] Article 65 (4) TFEU goes even further as it grants to the Council the competence to rule on the legality of national measures, something that is normally reserved for the Court.[268]

This new clause was inserted originally in the Constitutional Treaty in 2004 (which never entered into force) and later in the Lisbon Treaty by the Member States in an effort to restrain the expansionist and intrusive negative integration pursued by the Court. As aptly noted, the inclusion of this provision in the Lisbon Treaty demonstrates a distrust of the Court on the part of the Member

266 Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' in Craig and De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011), p. 553.

267 European Commission, *Commission notice on the enforcement of State aid law by national courts* (OJ C 85, p 1–22, 2009); Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH,* ECLI:EU:C:2013:755, para 28; Joined cases C-261/01 and C-262/01 *Belgische Staat v Eugène van Calster and Others,* ECLI:EU:C:2003:571, para 75; Case C-368/04 *Transalpine Ölleitung in Österreich GmbH,* ECLI:EU:C:2006:644, para 38.

268 Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' in Craig and De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011).

States when it comes to capital movements with third countries.[269] It has been regarded as a rebuff to the Court that its excessively broad interpretation of the concept of 'restrictions' has crossed the boundaries set by the Treaties.[270]

3.5.1.2.3 Article 66 TFEU (safeguard measures)
Article 66 TFEU allows the Council, on a proposal from the Commission and after consulting the European Central Bank, to take safeguard measures where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of Economic and Monetary Union.[271] However, the safeguard measures must be strictly necessary and temporary, i.e. for a period not exceeding six months.

3.5.1.2.4 Article 75 TFEU (freezing of funds to prevent and combat terrorism)
Article 75 TFEU is a politically sensitive provision authorising the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities in order to prevent and combat terrorism. This provision constitutes the legal basis for financial sanctions directed against individuals or non-State actors, not towards States.[272] As it currently stands, Article 75 TFEU allows the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, to define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities in order to prevent and combat terrorism and related activities. Those measures shall include necessary provisions on legal safeguards, which are intended to ensure that the right to an effective judicial protection of the individuals concerned is respected.

Article 75 TFEU was moved to Title V on the area of freedom, security and justice with the Lisbon revision. Before Lisbon, Article 60 EC authorised the Council to take the necessary urgent measures as regards *third countries* when this was deemed necessary in light of a decision adopted under Article 301 EC (today Article 215 TFEU). The latter provided that within the framework of the common foreign and security policy (CFSP) Member States could decide

269 Ibid, p. 554.
270 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016), p. 525.
271 Case C-101/05 *Skatteverket v A*, para 33.
272 Bart Van Vooren and Ramses A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014), p. 396.

to interrupt or to reduce economic relations with one or more third countries.[273]

The relationship between these provisions (Article 60 EC, Article 301 EC, Article 75 TFEU and Article 215 TFEU) was analysed in the annulment action that the Parliament brought against Council challenging the legal basis of Regulation 1286/2009[274] on restrictive measures against persons associated with Usama bin Laden, the Al-Qaeda network and the Taliban which the Community had adopted in order to implement the United Nations Security Council Resolution 1390 (2002).[275] The Court explained that after the Lisbon revision, the content of Article 60 EC and 301 EC is mirrored in Article 215, which is found in Part Five of the TFEU on the Union's External Action.[276] Article 301 EC and 215 (1) TFEU are worded in the same way. Furthermore, Article 215 (1) TFEU contains a reference to financial relations to cover the areas previously within the ambit of Article 60 EC.[277] In addition, Article 215 (2) TFEU allows the Council to adopt restrictive measures against natural or legal persons and groups or non-State entities, which before the Lisbon Treaty required also the use of Article 308 EC as an additional legal basis provision.[278] As regards Article 75 TFEU, the Court underlined that its context and its tenor differ from those of Article 60 EC and 301 EC as it does not concern economic relations with third countries, but it is incorporated into Part Three on Internal Actions and in particular in Title V on the Area of freedom, security and justice.[279]

Under the current legal framework, the difference between Article 215 (2) TFEU and Article 75 TFEU is that the latter is the legal basis for the adoption of administrative measures with regard to capital movements and payments necessary to achieve the objectives set out in Article 67 TFEU and refers specifically to the objective of preventing and combating terrorism. By contrast, Article 215 (2) TFEU can be used only after a CFSP decision has been adopted author-

273 Today Article 215 TFEU provides a legal basis for the interruption or reduction, in part or completely, of the Union's economic and financial relations with one or more third countries, where such restrictive measures are necessary to achieve the objectives of the Common Foreign and Security Policy (CFSP). The procedure that needs to be followed is that the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures and it shall inform the European Parliament thereof.

274 'Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban' (2009) *OJ L 346, 23.12.2009, p. 42-46*.

275 Case C-130/10 *Parliament v Council,* ECLI:EU:C:2012:472

276 Ibid, para 51.

277 Ibid, para 52.

278 Ibid, para 53.

279 Ibid, para 54.

ising the adoption of restrictive measures against natural or legal persons, groups or non-State entities. Moreover, it does not specifically refer to the combating of terrorism and it does not limit the scope of the possible measures to the ones relating to capital movements and payments.[280]

In *Parliament v Council*, the Court ruled:

> 'while admittedly the combating of terrorism and its financing may well be among the objectives of the area of freedom, security and justice, as they appear in Article 3(2) TEU, the objective of combating international terrorism and its financing in order to preserve international peace and security corresponds, nevertheless, to the objectives of the Treaty provisions on external action by the Union'.[281]

Thus:

> 'Article 215(2) TFEU constitutes the appropriate legal basis for measures, such as those at issue in the present case, directed to addressees implicated in acts of terrorism who, having regard to their activities globally and to the international dimension of the threat they pose, affect fundamentally the Union's external activity'.[282]

The negative consequences for the Parliament's prerogatives – Articles 75 TFEU provides for recourse to the ordinary legislative procedure whereas, under Article 215 TFEU the Parliament is merely informed – could not affect the choice of the legal basis.[283]

Regarding the interplay of Article 75 and 215 TFEU with the other provisions stipulating possible legitimate derogations from the free movement of capital, the case law on Article 60 EC might give us some useful insights. In particular, the Court explained that the restrictions which the Member States and the Community could impose under Article 57 (1) EC (today Article 64 (1) TFEU) on the movement of capital to or from third countries were, in addition, not only to those provided for in Articles 59 EC (Article 66 TFEU) and 60 EC (Article 75 TFEU) but also to those restrictions resulting from measures adopted by the Member States in accordance with Article 58(1)(a) and (b) EC (Article 65 (1) (a) and (b) TFEU) or which were otherwise justified by an overriding requirement of general interest.[284] This was because the movement of capital to or

280 Ibid, paras 57-58.
281 Ibid, para 61.
282 Ibid, para 78.
283 Ibid, para 79.
284 Case C-101/05 *Skatteverket v A*, para 35.

from third countries takes place in a different legal context from that which occurs within the Community.[285]

Regarding, finally, the judicial review of the acts adopted under Article 60 EC, the Court had ruled that the Council enjoyed wide discretion when adopting economic and financial sanctions on the basis of Article 60 EC and 301 EC, as these decisions were adopted on the basis of the CFSP. Decisions adopted under CFSP are subject to a limited judicial review under Article 24 (1) TEU and Article 275 TFEU.[286] Therefore, the Court could only review whether the rules of procedure and the statement of reasons had been complied with, whether the facts were materially accurate and whether there had been no manifest error of assessment of the facts or misuse of power.[287] Nevertheless, in order to ensure that the right to an effective judicial protection is respected, the parties concerned should be allowed to bring an action before the Court against the decision freezing their assets.[288] The right to an effective judicial protection can be sufficiently safeguarded if the judicial review of the lawfulness of the decision extends to the assessment of the facts and evidence,[289] the right to a fair hearing is observed, the requirement of a statement of reasons is satisfied and the overriding considerations of the Council are well-substantiated.[290] This case law is still valid for the restrictive measures adopted under Article 215 TFEU, which presuppose a decision adopted under CFSP. However, it is doubtful whether it is still relevant for Article 75 TFEU, insofar as the restrictive measures adopted on the basis of the latter are legislative acts adopted in accordance with the ordinary legislative procedure and therefore they are subject to a thorough judicial review.

285 Ibid, para 36.

286 The limited judicial review was one of the reasons why the Court considered that the Draft Agreement on the Accession of the EU to the ECHR was not compatible with EU law. See *Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* ECLI:EU:C:2014:2454, paras 249-257.

287 European Commission, *Commission notice on the enforcement of State aid law by national courts* (2009), para 45; Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council,* ECLI:EU:T:2006:384, para 159.

288 Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council*, paras 152; Judgment of 30 June 2005, *Bosphorus v Ireland,* No 45036/98 (ECtHR), para 165; Judgment of 23 May 2002, *Segi and Others and Gestoras pro Amnisti´a v The 15 Member States of the European Union,* Nos 6422/02 and 9916/02 (ECtHR).

289 Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission,* ECLI:EU:T:2005:331, para 225.

290 Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council*, paras 152-154.

3.5.2 Case law-made derogations (overriding reasons in the public interest/ emergency break)

Apart from the exhaustive list of express derogations provided for in the Treaties, the Court has created a number of public interest requirements or overriding reasons in the public interest that justify restrictions on capital movements.[291] The definition of the overriding reasons in the public interest lies in principle with the Member States, which can indeed decide on the degree or protection which they whish to afford to such legitimate interests and on the way which that protection is to be achieved within the limits prescribed by the principle of proportionality.[292] Thus, in relation to taxation, the Court has recognised as legitimate objectives the need to maintain a balanced allocation of the power to impose taxes between the Member States,[293] the objective of combatting tax evasion and avoidance,[294] the effectiveness of fiscal supervision,[295] the need to safeguard the cohesion of the tax system,[296] the need to ensure effective collection of tax[297] as well as the promotion of research and development.[298] In the field of investment

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291 Case C-271/09 *Commission v Poland (pension funds),* ECLI:EU:C:2011:855, para 55; Case C-274/06 *Commission v Spain (golden shares)*, para 35; Case C-112/05 *Commission v Germany (golden shares – Volkswagen I)*, para 72; Case C-503/99 *Commission v Belgium (golden shares)*, para 45; Case C-174/04 *Commission v Italy (golden shares)*, para 35; Case C-309/99 *Wouters and others*, para 49; Case C-463/00 *Commission v Spain (golden shares)*, para 68.

292 Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*, paras 32-33.

293 Case C-182/08 *Glaxo Wellcome*, paras 31 and 88.

294 Case C-282/12 *Itelcar*, paras 12 and 35.

295 Case C-446/04 *Test Claimants in the FII Group Litigation*, para 47; Case C-101/05 *Skatteverket v A*, para 55; Joined cases C-155/08 and C-157/08 *X and E. H. A. Passenheim-van Schoot v Staatssecretaris van Financiën,* ECLI:EU:C:2009:368, para 55; Case C-262/09 *Wienand Meilicke and Others v Finanzamt Bonn-Innenstadt,* ECLI:EU:C:2011:438, para 41; Case C-318/10 *Société d'investissement pour l'agriculture tropicale SA (SIAT) v État belge,* ECLI:EU:C:2012:415, para 36; Case C-326/12 *Rita van Caster and Patrick van Caster v Finanzamt Essen-Süd,* ECLI:EU:C:2014:2269, paras 46-47.

296 Case C-242/03 *Ministre des Finances v Jean-Claude Weidert and Élisabeth Paulus,* ECLI:EU:C:2004:465, paras 10 and 20-22; Case C-204/90 *Bachmann*, para 28; Case C-300/90 *Commission v Belgium*, para 21; Case C-55/98 *Skatteministeriet v Bent Vestergaard,* ECLI:EU:C:1999:533, para 24; Case C-436/00 *X and Y*, para 52; Case C-251/98 *Baars*, para 40; Case C-168/01 *Bosal,* ECLI:EU:C:2003:479, para 30; Case C-315/02 *Anneliese Lenz*, para 35. In a nutshell, in this case law, the Court explained that in order to be able to justify their national legislation granting tax relief under certain conditions on the need to safeguard the cohesion of the tax system, Member States must demonstrate that there is a direct link between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy, and that link has to be maintained to preserve the cohesion of the tax system concerned.

297 Case C-318/10 *SIAT*, para 64; Case C-498/10 *X NV v Staatssecretaris van Financiën,* ECLI:EU:C:2012:635, para 39; Joined cases C53/13 and C80/13 *Stroji´rny Proste?jov et ACO Industries Tábor,* ECLI:EU:C:2014:2011, para 46; Case C-326/12 *Rita van Caster*, paras 46-47.

298 Case C-10/10 *Commission v Austria (Gifts for Teaching and Research Institutions),* ECLI:EU:C:2011:399, para 37; Case C-39/04 *Laboratoires Fournier,* ECLI:EU:C:2005:161, para 23.

in real estate, the case law acknowledges a town and country planning objective, such as maintaining a permanent population and an economic activity independent of the tourist sector in certain regions,[299] the need to preserve the farming of agricultural land by means of owner-occupancy and to ensure that agricultural property be occupied and farmed predominantly by the owners,[300] the need to preserve a permanent agricultural community, to sustain and develop viable agriculture and to encourage a reasonable use of the available land by resisting pressure on land and by preventing natural disasters[301] and the protection of the environment.[302] As regards direct investments, the Court has recognised that the objective of guaranteeing a service of general interest, such as universal postal service[303] or adequate investment in the electricity and gas distribution systems constitute overriding reasons in the public interests.[304] Requirements related to public housing policy in a Member State and to the financing of that policy are also regarded as overriding reasons in the public interest.[305] Finally, in relation to collective investment undertakings, the Court has held that the need to guarantee the stability and security of the assets administered by an undertaking for collective investment created by a severance fund, in particular by the adoption of prudential rules constitutes an imperative reason of public interest capable of justifying capital restrictions.[306]

The list of overriding reasons in the public interests is an open-ended list, which however, in principle does not cover interests of an economic nature. Indeed, according to the traditional internal market approach, grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the

299 Case C-302/97 *Konle*, para 40; Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch*, para 34.

300 Case C-370/05 *Festersen*, paras 27-28; The Court observed that these objectives are also consistent with those of the common agricultural policy.

301 Case C-452/01 *Margarethe Ospelt*, paras 38-40;

302 Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch*, para 34.

303 Joined cases C-282/04 and C-283/04 *Commission v The Netherlands (golden shares)*, para 38.

304 Joined cases C-105/12 to C-107/12 *Essent NV*, para 59; Case 72/83 *Campus Oil*, paras 34-35; Case Case C-503/99 *Commission v Belgium (golden shares)*, para 46; Case C-174/04 *Commission v Italy (golden shares)*, para 40.

305 Case C-567/07 *Sint Servatius*. The case concerned a Dutch institution active in the public housing sector in the Netherlands (and thus able to contract loans on particularly favourable terms) that was refused to be granted an authorisation for a construction project in Liège (Belgium) on the ground that the project would not be of benefit to the Netherlands housing market. The Court, while striking down the system of prior authorisation, it nevertheless accepted that it could be justified on reasons related to the public housing policy of the Member State.

306 Case C-39/11 *VBV – Vorsorgekasse*, paras 18 and 31. By analogy the same applies to pension funds, see Case C-271/09 *Commission v Poland (pension funds)*, para 57.

Treaties.[307] In the context of the free movement of capital, the Court has explicitly ruled out objectives such as choosing a strategic partner, strengthening the competitive structure of the market or modernising and increasing the efficiency of means of the production.[308] However, in recent case law, it seems that the Court is attempting to introduce certain nuances as to the economic nature of some interests. In particular, in *Essent*, it reasoned that national legislation might constitute a justified restriction on a fundamental freedom when it is dictated by reasons of an economic nature *in the pursuit of an objective in the public interest*.[309] This reasoning led to the conclusion that the objectives of combatting cross-subsidisation in order to achieve transparency in the electricity and gas markets and to prevent distortions of competition could constitute overriding reasons in the public interest capable of justifying restrictions on free movement of capital.[310] By the same token, the reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU were regarded as factors, which might be taken into consideration as circumstances capable of justifying restrictions on the free movement of capital.[311]

3.6 Proportionality

Once the Court has established that the restriction on capital movements is justified either by one of the explicit derogations of the Treaty or by the case law-made overriding reasons in the public interests, it proceeds to the final step, i.e. it examines whether the measure at issue is proportionate to the objective pursued. In theory, the proportionality assessment consists of a tripartite test: firstly, the *suitability* test, which examines whether the measure

307 Joined cases C-105/12 to C-107/12 *Essent NV*, para 51; Case C-388/01 *Commission v Italy (golden shares),* ECLI:EU:C:2003:30, para 22; Case C-109/04 *Karl Robert Kranemann v Land Nordrhein-Westfalen,* ECLI:EU:C:2005:187, para 34; Case C-35/98 *Verkooijen*, para 48; Case C-120/95 *Nicolas Decker v Caisse de maladie des employés privés,* ECLI:EU:C:1998:167, para 39; Case C-158/96 *Raymond Kohll v Union des caisses de maladie,* ECLI:EU:C:1998:171, para 41; Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias,* ECLI:EU:C:1997:282, para 23; Case C-288/89 *Gouda and Others,* ECLI:EU:C:1991:323, para 11; Case 352/85 *Bond van Adverteerders and others v The Netherlands State,* ECLI:EU:C:1988:196, para 34. The origins of this settled case law go back to one of the oldest Internal Market cases (Case 7-61 *Commission v Italy,* ECLI:EU:C:1961:31), in which the Court held that Article 36 TFEU is 'directed to eventualities of a non-economic kind'. By introducing this 'economic rule', the Court wanted to send a signal that it would not tolerate protectionest measures which could undermine the functionning of the Internal Market. See in this regard Peter Oliver, 'When, if ever, can restrictions on free movement be justified on economic grounds' (2016) 41 *European Law Review* 147.

308 Case C-309/99 *Wouters and others*, para 52.

309 Joined cases C-105/12 to C-107/12 *Essent NV*, para 52.

310 Ibid, para 56 et seq.

311 Ibid, para 55.

is suitable/appropriate to achieve the objective pursued; secondly, the *necessity* test, which examines whether the measure is necessary in order to achieve the objective pursued, namely whether there are other less restrictive measures capable of producing the same result; and thirdly, the *proportionality stricto sensu*, which examines whether, in case there are no less restrictive means, the measure does not have an excessive effect on the applicant's interests.[312] However, in internal market case law, the third step is often subsumed within the second step and, as a result of this subsumption, the Court employs in essence a two-stage test consisting of the suitability and the necessity assessment.[313]

In the area of the free movement of capital, the principle of *legal certainty* appears sometimes as a third requirement in the proportionality assessment, in addition to the suitability and necessity tests. Legal certainty is a fundamental principle of EU law which requires that rules should be clear and precise so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.[314] An illustration of the application of the principle of legal certainty is provided in *Eglise de Scientologie*,[315] where the Court held that the French system of prior authorisation for certain categories of direct foreign investments was not consistent with the principle of legal certainty and as such it constituted an infringement of the free movement of capital. Although the system was justifiable on public-policy and public-security grounds, in the end it was deemed to be incompatible with the free movement of capital, as the investors concerned were given no indication as to the specific circumstances in which prior authorisation was required.[316] Such lack of precision did not enable individuals to be apprised

312 Takis Tridimas, 'The principle of proportionality' in Robert Schu¨tze and Takis Tridimas (eds), *Oxford principles of European Union law Volume I, The European Union legal order* (Oxford University Press 2018), pp. 243-264, at p. 247; Takis Tridimas, *The General Principles of EU law* (Oxford University Press 2006), p. 139; Paul Craig, *EU Administrative Law* (Oxford University Press 2012), p. 592.

313 Vasiliki Kosta, 'The principle of proportionality in EU law: an interest-based taxonomy' in Joana Mendes (ed), *EU Executive Discretion and the Limits of Law* (Oxford University Press forthcoming 2019).

314 Case 169/80 *Administration des douanes v Société anonyme Gondrand Frères and Société anonyme Garancini,* ECLI:EU:C:1981:171, para 17; Case C-143/93 *Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen,* ECLI:EU:C:1996:45, para 27; Case C-110/03 *Belgium v Commission,* ECLI:EU:C:2005:223, para 30; Case C-158/06 *Stichting ROM-projecten v Staatssecretaris van Economische Zaken,* ECLI:EU:C:2007:370, para 25; Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport,* ECLI:EU:C:2008:312, para 69; Case C-201/08 *Plantanol GmbH & Co KG v Hauptzollamt Darmstadt,* ECLI:EU:C:2009:539, para 46; Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport,* ECLI:EU:C:2006:10, para 68.

315 Case C-54/99 *Association Eglise de scientologie de Paris.*

316 Ibid, para 21.

of the extent of their rights and obligations deriving from Article 63 TFEU and, therefore, it was contrary to the principle of legal certainty.[317]

Systems of prior authorisation are usually regarded to be disproportionate when they lack precision or when a system of declaration could have achieved the same objective. An example can be drawn from the *Sanz de Lera* case.[318] In particular, the Court found that although the requirement of prior authorisation constituted a capital restriction, it could in principle be justified on the grounds of the general derogation clause of Article 73d (1) (b) of the Treaty (today Article 65 (1) (a) TFEU), allowing Member States:

> 'to take all requisite measures to prevent infringement of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information or to take measures which are justified on grounds of public policy or public security'.[319]

Furthermore, it was pointed out that measures intended to ensure effective fiscal supervision and to prevent illegal activities such as tax evasion, money laundering, drug trafficking or terrorism, which are permitted by Article 4 (1) of Directive 88/361, are also covered by Article 73d (1) (b) of the Treaty.[320]

Nevertheless, the measure failed the proportionality test. Although the Government had managed to put forward valid justification grounds, the system of prior authorisation was found to be disproportionate to the legitimate objectives it pursued. In particular, the Court repeated its judgment in *Bordessa* that:

> 'authorisation has the effect of suspending currency exports and makes them conditional in each case upon the consent of the administrative authorities, which must be sought by means of a special application'.[321]

> 'The effect of such a requirement is to cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory'.[322]

A less restrictive measure would be a system of *declarations* requiring the competent authorities:

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317 Ibid, para 22.
318 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*. The same reasoning was also followed in Joined cases C-358/93 and C-416/93 *Bordessa*, paras 25-27; Joined cases 286/82 and 26/83 *Luisi and Carbone*, para 34; and Case C-302/97 *Konle*, para 44.
319 Joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera*, para 20.
320 Ibid, para 22.
321 Ibid, para 24.
322 Ibid, para 25.

> 'to proceed with a rapid examination of the declaration and enable them, if necessary, to carry out in due time the investigations found to be necessary to determine whether capital was being unlawfully transferred and to impose the requisite penalties if national legislation was being contravened'.[323]

Thus, unlike a system of prior authorisation, such a system of declarations

> 'would not suspend the operation concerned but would nevertheless enable the national authorities to carry out, in order to uphold public policy, effective supervision to prevent infringements of national law and regulations'.[324]

In *Commission v France (golden shares)*, the Court tried to soften its position by acknowledging that a system of prior authorisation could be proportionate if it was based on objective, non-discriminatory and known in advance criteria and it provided legal remedies to the persons affected.[325] However, *in casu*, the authorisation procedure was disproportionate, as the discretionary power of the Minister to approve any shareholding exceeding certain limits constituted a serious interference with the free movement of capital that went beyond what was necessary in order to attain the legitimate objective of securing petroleum supplies in the event of a real threat.[326] The crucial pitfall that rendered this procedure disproportionate was the fact that the exercise of the right of approval was conditioned only on a general reference to the protection of the national interest. The investors concerned were given no indication whatsoever as to the specific, objective circumstances in which prior authorisation would be granted or refused and, in that sense, such a system was to be regarded as contrary to the principle of legal certainty.[327]

The only golden shares case in which the Court found that the special rights in question were consistent with the principle of proportionality was the *Belgian* case,[328] where the Court found that the national opposition scheme was based on *objective criteria* which were *subject to judicial review*, enabling thus the Belgian government to intervene with a view to ensuring compliance with the public service obligations incumbent on SNTC and Distrigaz, whilst at the same time observing the requirements of *legal certainty* (Chapter 4 Sections 3.3 and 3.4).[329]

323 Ibid, para 27.
324 Ibid, para 28.
325 Case C-483/99 *Commission v France (golden shares – Sociéte Nationale Elf-Aquitaine)*, para 48.
326 Ibid, para 51.
327 Ibid, para 50.
328 Case C-503/99 *Commission v Belgium (golden shares)*.
329 Ibid, para 52.

As a final remark, we should perhaps reflect upon the special nature of proportionality test applied in the field of taxation in relation to non-EU capital movements. As it has been explained, the *erga omnes* effect of Article 63 TFEU is to a certain extent offset by the additional derogation grounds that the Member States can avail themselves of in order to justify a restriction on capital movements. To this wider array of justifications, we should also add the deploying by the Court of a stricter proportionality test, which aims at ensuring that the interests of the Member States to prevent tax evasion and fraud are not being undermined or compromised by the external dimension of capital liberalisation. In particular, the Court has emphasised that the taxation of intra-EU economic activities is not always comparable to that of extra-EU economic activities, due to the higher degree of legal integration that exists in the EU compared to the one that governs the relations of Member States and third countries.[330] In particular, within the framework of the EU, Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation[331] seeks to ensure cooperation between national tax authorities. Under this Directive, Member States' competent authorities are required to facilitate the exchange of tax information in an effort to strengthen administrative cooperation in order to combat tax evasion and avoidance in the EU. By contrast, such a coordinated administrative cooperation in tax matters does not exist (or at least the Court presumes so) between the Member States and third countries.

In light of the aforementioned, the ruling in *Établissements Rimbaud*[332] came as no surprise. The Court ruled that,

> 'where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of an EEA country which is not a Member State of the European Union, it is in principle legitimate for the Member State to refuse to grant that advantage if – in particular, because that non-member State is not bound under an agreement to provide information – it proves impossible to obtain such information from that country'.[333]

In the case at hand, the French tax authorities were unable to obtain from the tax authorities of the Principality of Liechtenstein the information needed to

330 Case C-446/04 *Test Claimants in the FII Group Litigation*, para 170.

331 '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' (1977) *OJ L 336, 27.12.1977, p. 15-20*.

332 Case C-72/09 *Établissements Rimbaud SA v Directeur général des impôts and Directeur des services fiscaux d'Aix-en-Provence,* ECLI:EU:C:2010:645.

333 Ibid, para 44. The status of the EEA countries was explained in paras 16-23. See also Case C-521/07 *Commission v Netherlands,* ECLI:EU:C:2009:360, para 33.

exercise effective tax supervision.[334] Accordingly, the refusal of the French authorities to grant the tax advantage to the undertaking concerned was justified on grounds of prevention of tax evasion and avoidance, since the less restrictive measure of the administrative exchange of information was not available due to the refusal of the Lichtenstein authorities to cooperate.

However, the ruling of the Court was different in *ELISA*,[335] a case which concerned the exact same provision of the French legislation, but this time in relation to a company incorporated under Luxembourg law. The Court was categorical that a refusal to grant a tax advantage to an EU company cannot be justified on the ground that the competent administrative authorities of the home State do not provide the necessary information to the competent authorities of the host State. First, it noted that, in the context of the European Union, Directive 77/799 might be relied on by a Member State in order to obtain from the competent authorities of another Member State information which is necessary for the correct assessment of the taxes covered by the directive.[336] This administrative cooperation between the Member States, however, can be limited by Article 8 (1) of Directive 77/799, which does not oblige the tax authorities of the Member States to cooperate when they are prevented by their laws or administrative practices from carrying out the enquiries or from collecting or using this information for their own purposes. Even though this limitation in effect made impossible the request of information from the Luxembourgish authorities, the Court nevertheless found that the French authorities could request from the taxpayer the evidence which was deemed necessary to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence was not supplied.[337] This judgement reveals the double standards that the Court applies in relation to direct taxation depending on the origin of the taxpayer concerned. Overall, the different proportionality test applied in intra-EU and extra-EU situations is justified by the fact that Directive 77/799, which establishes a legal framework facilitating the exchange between the competent authorities of the Member States of information that may enable them to effect a correct assessment of taxes on income and on capital, is applicable only to Member States. To the contrary, extra-EU situations are not covered by Directive 77/799 and thus the administrative cooperation between a Member State and a third country is presumed to be more difficult.

334 Case C-72/09 *Établissements Rimbaud*, para 43.

335 Case C-451/05 *Européenne et Luxembourgeoise d'investissements SA (ELISA) v Directeur général des impôts and Ministère public,* ECLI:EU:C:2007:594.

336 Ibid, para 92, citing Case C-196/04 *Cadbury Schweppes*, para 71 and Case C-150/04 *Commission v Denmark,* ECLI:EU:C:2007:69, para 52.

337 Case C-451/05 *ELISA*, para 95.

4 Conclusion of Chapter 2

This Chapter has attempted to describe in detail the European legal framework governing the free movement of capital in order to shed light on the unique features of this freedom and its potentially intrusive effect on the regulatory autonomy of the Member States. This descriptive exercise is necessary in order to lay the groundwork for the overarching objective of this research, which is the normative assessment of legal parameters that need to be changed under the existing legal framework in order to allow room for State participation in the market for the purposes of protecting public interest objectives in the fields of privatisations and golden shares.

The free movement of capital under Article 63 TFEU constitutes an essential condition for the achievement of the EU's Internal Market and the successful realisation of the Economic and Monetary Union. At the same time the abolition of capital restrictions is of paramount importance for the establishment of the Capital Markets Union and the Banking Union, the two recent initiatives of the European Commission aiming at facilitating financial integration in the EU. However, despite its crucial role in the completion of financial integration in the EU, the free movement of capital has followed a slow historical development when compared to the other freedoms. This was probably due to the post-war scepticism towards free capital flows, which were notorious for causing financial crises and economic instability. Following the institutional approach of the Bretton Woods system, the EU respected the sovereign right of Member States to introduce restrictions on capital movements and the Court of Justice refused to recognise the direct effect of the Treaty provision on free movement of capital. The most important legislative development came in the late 1980s with the adoption of Directive 88/361, which brought about the full liberalisation of capital movements and gave the single market its full financial dimension.

The free movement of capital developed into a fully-fledged freedom of the EU's Internal Market in 1993 with the entry into force of the Maastricht Treaty and the introduction of the new provision on the free movement of capital (Article 73b of the Treaty, today Article 63 TFEU). Shortly after this development, the Court of Justice in *Sanz de Lera* recognised that the relevant provision on free capital movements was directly effective in *vertical* relations between an individual and the State. To date, the question of the *horizontal* applicability of Article 63 TFEU has not been sufficiently dealt with by the Court of Justice. The Court has very discretely avoided the question, by qualifying all national measures that have come under its scrutiny as *State measures*. However, the complicated nature of some company law requirements that are reviewed in the golden shares case law (some of which originate in private acts) has given

rise to a very interesting scholarly discussion regarding the possible horizontal applicability of Article 63 TFEU.

The most salient feature distinguishing the free movement of capital from the other freedoms is its expanded territorial scope, i.e. the fact that it applies not only to Member States but also to *third* countries (*erga omnes* effect). This unique feature elevates the free movement of capital to a whole different level, rendering it a potential gateway through which extra-EU investors can approach and ultimately access the EU's Internal Market.

Regarding its material scope, in the absence of any definition of capital movements in the Treaty, the Court has held that the non-exhaustive nomenclature in Annex I of Directive 88/361 has indicative value for the purposes of defining capital movements. This list includes a wide variety of capital movements, such as the physical import and export of financial assets and other capital payments, direct investments, investments in real estate, operations in securities, financial credits, mortgages, gifts and inheritances.

Although in principle the aforementioned types of transactions qualify as capital movements, it is sometimes difficult to determine which fundamental freedom is applicable. The most problematic is the relationship between the free movement of capital and the freedom of establishment. The general rule applied by the Court of Justice is that when the shareholding in question enables the investor to exercise *definite influence* over the company, it falls within the scope of establishment. In all other cases, the Court usually shows a preference to the free movement of capital, without however having established clear and consistent criteria for the determination of the applicable freedom. Regarding the relationship between capital and services, a question arising primarily when financial services are at stake, the Court has introduced the *predominant consideration* criterion. According to this criterion, the freedom to provide services is applicable whenever the restrictive effect on the concerned financial transaction is an *unavoidable consequence* of the restriction on the freedom to provide services. It should be noted that the external dimension of the free movement of capital has a significant bearing on the determination of the applicable freedom. When the Court wants to limit the territorial scope of its rulings to investors coming from Member States and to exclude third country investors, it upholds the application of the freedom of establishment or services. On the other hand, when the Court wants to expand the territorial scope of its rulings so as to cover third country investors as well, it promotes the application of the free movement of capital.

In relation to the scope of restrictions on capital movements, the wording of Article 63 TFEU goes beyond the mere elimination of unequal treatment on grounds of nationality and prohibits all restrictions on the movement of capital

between Member States and between Member States and third countries. Examples of restrictions include inter alia golden shares, authorisation requirements, residence requirements for investments in real estate, foreign currency arrangements in mortgages or other financial credits, nationality requirements in relation to dividend or corporate taxation etc.

The strikingly broad interpretation of the notion of capital restrictions is somehow counterbalanced by the wide range of derogations that can be invoked by Member States in order to justify those restrictions. In particular, the Treaty contains two categories of express derogations, one applying to intra- and extra-EU capital movements (Article 65 TFEU) and another applying exclusively to extra-EU capital movements (Articles 64, 65(4), 66 and 75 TFEU). This is a unique feature of the free movement of capital compared to the other freedoms. At the same time, the Court has recognised a number of overriding reasons in the public interest that can justify restrictions on capital movements. These include inter alia the objective of combatting tax evasion and avoidance, the effectiveness of fiscal supervision, the promotion of research and development, town and country planning, environmental protection, the objective of guaranteeing a service of general interest, public housing policy, the objectives of combatting cross-subsidization in order to achieve transparency in the electricity and gas markets and to prevent distortions of competition, as well as the reasons underlying the choice of property ownership under Article 345 TFEU.

Finally, the invoked derogation is accepted only when the national measure complies with the principle of proportionality. Just like in the other freedoms, the proportionality test consists of two steps, i.e. the suitability and the necessity test. However, in the capital case law, there is often a third step, which examines the compliance with the principle of *legal certainty*. If the national measure in question (which is often procedural in nature) lacks the requisite precision and gives national authorities excessively wide discretionary powers, it is not consistent with the requirements of legal certainty and therefore constitutes an infringement of Article 63 TFEU.

Having described the general legal framework on the free movement of capital in the EU, the second part of the thesis turns to the normative assessment of the two case studies of privatisations and golden shares. Within this context, it argues that the interpretative approach of the Court of Justice regarding Article 63 TFEU can limit significantly the regulatory autonomy of the Member States. For this reason, it attempts to illustrate certain changes in the adjudicative approach of the Court which can be used in order to permit the State to participate in the market and strike a fair balance between economic freedoms and social values, whilst at the same time ensuring that protectionist barriers do not hinder capital movements in the EU.