Free Movement of Capital, Third Country Relationships and National Tax Law: An Emerging Issue before the ECJ

1. Introduction

Compared to the other EC Treaty freedoms, the free movement of capital stands out in several ways. From a historical perspective, it is particularly striking that this fundamental freedom appears to have been “left behind” for many years by all of the parties involved, i.e., the Member States when they concluded the Treaty on the European Economic Communities in Rome in 1957, the Community institutions when they began to harmonize national legal systems and the European Court of Justice (ECJ) when it started to instil life into the different free-market states set out in the Treaty itself. Briefly, it can be said that Art. 67 to Art. 73 of the EEC Treaty played an insignificant role for several decades. This was despite the fact that the wording of Art. 67(1) of the EEC Treaty appeared to be quite promising:

During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.

Still, the fate of this obligation to achieve the liberalization of capital movements between Member States was inextricably linked with, inter alia, Art. 69 of the EEC Treaty which, as far as it is relevant in the present context, stated in broad terms that “[t]he Council shall, on a proposal from the Commission, ... issue the necessary directives for the progressive implementation of the provisions of Article 67 ...” As the necessary Directives were only adopted slowly in the transitional period (which, under Art. 8 of the EEC Treaty, ended on 31 December 1969) and subsequently,1 and as these had a rather narrow focus that was reflected in their different annexes, the ECJ decided that Art. 67 of the EEC Treaty lacked direct applicability in many areas,2 including that of direct taxation.3 It was only with the enactment of Council Directive 88/361/EEC4 in June 1988 that the area of capital movements finally received a fresh and strong impetus. Specifically, Art. 1(1) of this Directive stated that:

Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.

Whilst it took a few years until the ECJ had an opportunity to rule on this provision, in its Bordessa judgment of February 1995, the Court then made it clear that the Directive had “brought about the full liberalisation of capital movements” and that

* Dr iur., J.M., Lawyer, Flick Gocke Schaumburg, Bonn. The author can be contacted at axel.cordewener@fgs.de.
** Priv.-Doz., Dr., I.M., Acting Assistant Professor of Tax Law, NYU School of Law, New York. The author can be contacted at georg.kofler@nyu.edu.
*** Dr. iur., I.M., Certified Public Tax Adviser, bpv Hügel Rechtsanwälte, Vienna. The author can be contacted at clemens.schindler@bvp-huegel.com.


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the requirement under Article 1 of the Directive for Member States to abolish all restrictions on movements of capital is precise and unconditional and does not require a specific implementing measure.\textsuperscript{7}

Accordingly, taking account of the ECI’s general case law on the direct effect of norms in Directives,\textsuperscript{8} a broad prohibition of “restrictions” on capital movements between Member States applied once the deadline for the transposition of the Directive into domestic law, i.e. 1 July 1990, had expired.\textsuperscript{9} In its subsequent Verkooyen decision of June 2000, the ECJ clarified that the prohibition also applied in the area of direct taxes, as, “although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law”, including secondary EC legislation.\textsuperscript{8}

Yet, whilst the ECJ was still concerned with the clarification of the effects of Directive 88/361/EEC on domestic legal systems in general and on the direct tax systems of the Member States in particular, an important development then took place at the level of primary EC law. As a result of the negotiation of the Maastricht Treaty on the European Union, the previous provisions in Art. 67 to Art. 73 of the EEC Treaty were replaced by the new Art. 73b to Art. 73g of the EC Treaty with effect from 1 January 1994.\textsuperscript{10} In particular, the wording of the new Art. 73b(1) of the EC Treaty was quite remarkable. This provision stated that

> Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

It was only shortly after the Bordessu judgment, and on the basis of very similar factual circumstances and national procedures,\textsuperscript{10} that the ECJ had the opportunity to interpret the scope of the new Art. 73b(1) of the EC Treaty. In its Sanz de Lera decision of December 1995, the ECJ took two important steps. First, the ECJ simply transferred its interpretation of Art. 1(1) of Directive 88/361/EEC to Art. 73b(1) of the EC Treaty and stated that the latter provision stated that

> gave effect to the liberalisation of capital movements between Member States and between Member States and non-member countries.

Second, the ECJ responded to the explicit questions referred to it by the national court and added, in rather clear words, that due to the new EC Treaty rule, all restrictions on the movement of capital between Member States and non-member countries are to be prohibited.\textsuperscript{11}

Against this background, and with the key provisions on the free movement of capital having been re-numbered into Art. 56 to Art. 60 of the EC Treaty but otherwise left unchanged by the EC Treaty revision effected by the Amsterdam Treaty, it is hardly surprising that the direct application and the broad scope of Art. 56(1) (previously, Art. 73b(1)) has never really been questioned in situations between Member States. On the contrary, it can be stated that the free movement of capital has fully joined the “convergence process” of all of the fundamental freedoms\textsuperscript{12} and that its strong influence on national regulation has been recognized by the ECI in consistent jurisprudence with regard to all legal areas,\textsuperscript{13} including, in particular, direct taxation.\textsuperscript{14} In so far it can be said,
within the European Union, the EC Treaty objective of "an internal market characterized by the abolition between Member States of obstacles to the free movement of goods, persons, services and capital" is pursued in a uniform and homogeneous manner.

Astonishing, however, is the fact that, for almost a decade, the third country perspective was widely neglected, even though the ECI had clearly opened that door in Sanz de Lera. Until recently, neither outside nor within the direct tax sector have any relevant cases been decided by the ECJ. Still, it has been obvious for some time that an increasing number of cases are being brought before the domestic courts of various Member States, remembering that the cases reaching the ECI can only be regarded as the tip of the iceberg. It is, in particular, the area of direct taxation in which a considerable number of cases are now pending before the ECJ and where the Court has started to discover the unknown realms of third country relationships. Many of these cases carry problems across the European Union's external borders on which the ECI has already ruled in an intra-EU context, whereas others arrive at the Court for the first time, but immediately cover both intra-EU and third country relationships.

Based on the foregoing, this article provides a survey of the dogmatic and practical issues that have been raised in legal doctrine and by the ECJ with regard to Art. 56 of the EC Treaty and their relevance to capital movements between Member States and third countries.

2. Scope of Application of Art. 56(1) in Third Country Relationships

2.1. Introductory remarks

Whilst the temporal scope of application of Art. 56(1) of the EC Treaty has not yet raised specific problems, the primary issue to be resolved is the substantial scope of the application of Art. 56(1) regarding the protection of movements of capital between Member States and third countries. Art. 56(1) of the EC Treaty states that "all restrictions on the movement of capital between Member States and third countries shall be prohibited" (emphasis added). Two limitations follow this basic principle of free movement, i.e. a grandfather clause relating to third country-directed restrictions and an exceptions clause. Art. 59 and Art. 60 of the EC Treaty also state that the free movement of capital in relation to third countries may be subjected to restrictions. As for the personal scope of Art. 56(1) of the EC Treaty, the persons invoking the free movement of capital need not be nationals of a Member State. Whilst the old Art. 67 of the EEC Treaty had merely required residence in, not nationality of, a Member State, the text of Art. 56 of the EC Treaty is even wider, referring only to the movement of capital between Member States. This breadth can be seen in cases such as Svensson and Gustavsson and Bordessi, in both of which citizens of third countries invoked this freedom. Finally, the most interesting and unique feature of Art. 56 of the EC Treaty is its extra-community dimension, as, according

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1. Art. 3(l) lit. c EC Treaty.

2. See, for instance, first, with regard to the German thin capitalization rules ECI, 12 December 2002, Case C-324/00, Lankhorst-Hoofhorst GmbH v. Finanzamt Steinfurt [2002] ECR I-11779, concerning the freedom of establishment between Germany and the Netherlands, and, second, ECJ, Pending Case C-484/06, Lasertec Geleedzaaf für Staatszwecken mbH (formerly Laser Bandstabschlitste GmbH) v. Finanzamt Emmendingen, Official Journal, 2005, C 31/11, concerning the free movement of capital between Germany and Switzerland. After ECJ, 18 September 2003, Case C-168/01, Bosal Holding BV v. Staatssecretaris van Financiën [2003] ECR I-9409, concerning Art. 43 of the EC Treaty and the Netherlands rules on cost deductions in connection with the affiliation privilege for participations in EU-subsidaries, various cases are still pending before the Netherlands courts with regard to non-EU subsidiaries and the effect of Art. 56(1) of the EC Treaty.

3. This is, in particular, applies to a number of UK group litigation cases. For instance, the ECJ, 12 December 2006, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue, not yet reported, and ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, not yet reported. In addition, see ECJ, Advocate General Geelhoed’s Opinion, 10 April 2006, Case C-512/04, Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue, not yet reported, and ECJ, Pending Case C-201/05, The Test Claimants in the CFC and Dividend Group Litigation v. Commissioners of Inland Revenue, Official Journal, 2005, C 182/27. See, in general, also S. Whitehead, The Next Round - Third Countries and the EU, The Tax Journal (23 May 2005), p. 9 et seq. Compare furthermore, ECJ, Pending Case C-414/06, Lidl Belgium GmbH & Co. KG (or M + T) v. Finanzamt Heilbronn, Official Journal, 2006, C 326/26 and ECJ, Pending Case C-415/06, Stahlwerk Ergte Westig GmbH v. Finanzamt Düsseldorf-Mettmann, Official Journal, 2006, C 326/26, both concerning dividend payments dating back to the 1970s. Some specific, however, mostly irrelevant (see 3. and also ECJ, 6 June 2000, Case C-35/98, Staatssecretaris van Financiën v. B.G.M. Verkooyen [2000] ECR I-4071, Para. 38), timing issues for intra-EU situations surround Art. 58(1) lit. a of the EC Treaty, as it had been agreed in Declaration No 7 annexed to the Maastricht Treaty that this provision applies only in respect of national tax law provisions that existed at the end of 1993, and only insofar as capital movements between Member States are concerned. Annex IV of the 2003 Act of Accession, Official Journal, 2003, L 236/33, 797, also contains a specific provision for Estonia to apply Art. 58(1) lit. a of the EC Treaty to provisions that existed on 31 December 1999 and affect capital movements between Member States, whereas as a general rule for the other acceding Member States at the end of 1993 is decisive.


6. See, for example, ECJ, Advocate General Geelhoed’s Opinion, 10 April 2003, Case C-452/01, Margaretha Ospelt v. Finanzamt Stadtbredimus [2003] ECR I-9743, Para. 35.


to its wording, it appears to cover third country elements without limitation. It also extends to capital movements into and out of the Community, as well as within it. Whilst, however, Art. 56(1) of the EC Treaty deals with external capital movements in the same broad terms that are used for intra-Community capital movements, the existence of Art. 57, Art. 59 and Art. 60 clearly creates a less liberalized framework.

As can be derived from the wording of Art. 56(1) of the EC Treaty (see 1.), the mere language of the provision does not distinguish between the prohibition of restrictions on the movement of capital “between Member States”, on the one hand, and “between Member States and third countries”, on the other. This remarkable feature of Art. 56(1) of the EC Treaty, which appears to grant identical protection to scenarios involving third countries compared to situations of capital movements within the European Union, has already been noted by many authors. Likewise, Art. 58(1) of the EC Treaty, which grants a number of exceptions to Art. 56, in particular in respect of the field of taxation, does not differentiate between places of residence or places of investment within the European Union and in third countries. Taken literally, cross-border capital investments between Member States and third countries, therefore, appear to enjoy full protection under the EC Treaty, especially regarding tax matters. Accordingly, a large number of decisions of national courts can be identified that, without referring questions for further clarification to the ECJ, did not hesitate to extend the substantive scope of Art. 56(1) of the EC Treaty to third country scenarios. These decisions, which are generally without limitation at this stage, assume that EC law protection is available both in “outbound” situations, i.e. investment from the European Union in a third country, and in “inbound” situations, i.e. investment from a third country in the European Union.

With reference to the telos and the systematic context of Art. 56(1) of the EC Treaty, some authors, however, question whether or not this provision should be interpreted in such a broad way. Initially, differences between cases involving Member States only and those involving third countries can be identified. One difference is the missing reciprocity in the third country context. Another is the lack of a common objective corresponding to the establishment of the Single Market. It has, therefore, been argued that the purpose of the free movement of capital in respect of third countries is without doubt more limited. Similarly, the lack of harmonizing powers of the EU institutions outside the Community leads to a substantially different starting point. The absence of this objective to achieve a Single Market in the third country makes it tempting to choose a rather narrow interpretation. Accordingly, one author has suggested that the rationale behind the inclusion of third country scenarios in the free movement of capital is merely to ensure uniform borders to non-EU territories. In other words, both entrance to and exit out of the European Union should be governed by the same principles. Accordingly, the provisions to and from third countries should be interpreted in the light of their own purpose, which may differ from the one established regarding capital movements between Member States. Against this general background several attempts to limit the substantive scope of Art. 56(1) of the EC Treaty are possible.

2.2. Potential delimitation of the substantive scope of application of Art. 56(1)

2.2.1. No direct application in third country relationships?

A rather drastic approach would be to deny the direct application of Art. 56(1) of the EC Treaty in situations “between Member States and third countries”. This approach could find its theoretical basis in the ECJ’s jurisprudence on bilateral or “mixed agreements” with non-Member States, in respect of which the Court has stated that:

It is clear from that case-law that the extension of the interpretation of a provision in the Treaty to a comparably, similar or even identically worded provision of an agreement concluded by the Community with a non-member country depends, inter alia, on the aim pursued by each provision in its particular context and that a comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard.


26. It should be noted that this discussion concerns the scope of the application of the prohibition in Art. 56(1) of the EC Treaty. Most of the ECJ decisions referred to here, in fact, tried to reduce the effect of the free movement of capital at a later stage, i.e. either at the level of Art. 58 (see 3.) or at the level of Art. 57(1) (see 4.) of the EC Treaty.


28. With regard to Germany, see, for example, Bundesfinanzhof, 26 May 2004, I R 54/03, Bundessteuerblatt 2004, Part II, p. 770 (Russia–Germany).

29. Stähli, note 24; Schön, note 24, p. 503; and Schnitger, note 24.

30. The same is true for the objective of a functioning Monetary Union. See, for example, C. Peters and I. Gooijer, “The Free Movement of Capital and Third Countries: Some Observations”, 45 European Taxation 11 (2005), p. 476.

31. Stähli, note 24, p. 50.

32. Schön, note 24, p. 506.

33. Stähli, note 24, p. 52 et seq.
In this respect, referring to Art. 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties, the ECJ requires that provisions in an agreement must not only be unconditional and sufficiently precise, but must also be interpreted in good faith in accordance with their ordinary meaning in their context and in the light of their object and purpose.\(^3\) It could, in fact, be argued that the same cautious approach should, a fortiori, apply to Art. 56(1) of the EC Treaty in relation to third countries, as this provision does not even form part of a bilateral agreement with mutual obligations, but is, instead, only a unilateral (self-imposed) obligation on the Member States.

Yet, it appears difficult to maintain such a distinction between the two clauses in Art. 56(1) of the EC Treaty regarding capital movements "between Member States", on the one hand, and those "between Member States and third countries", on the other. Not only the wording but also the context of the provision puts the obligations prescribed by both clauses on equal footing. In addition, it is obvious that the Member States enforced their own obligations towards third countries by introducing the second clause directly into the EC Treaty. This stands in a clear contrast to the previous situation, in which Art. 70 of the EEC Treaty only provided for "Council measures for the progressive coordination of the exchange policies of Member States in respect of the movement of capital between those States and third countries" and where Art. 7(1) of Directive 88/361/EEC merely contained a non-binding declaration of intent to liberalize third country relations.\(^35\) In fact, it must be noted that the ECJ did not only refuse to pay attention to the considerations previously referred to in its early Sanz de Lera\(^36\) decision, but also completely avoided the issue in its recent judgments in Van Hilten-van der Heijden\(^37\) and FII Group Litigation.\(^38\) In particular in the latter two cases, the ECJ was concerned with the questions of whether or not there was a restriction and whether or not Art. 57(1) and Art. 58 of the EC Treaty could be relied on. This results in the conclusion that implicitly the full direct application of Art. 56(1) of the EC Treaty in third country relationships was accepted by the ECJ. Along these lines, the ECJ has now made its position clear in the FII Group Litigation judgment and has held that, outside Art. 57(1) of the EC Treaty, a restriction on capital movements prohibited by Article 56 EC could not be applied, even in relations with non-member countries.\(^39\)

This broad wording and the ECJ's indifference toward protection of "capital movements to or from non-member countries"\(^40\) also strongly implies a rejection of the idea of a partial denial of the direct application of Art. 56 of the EC Treaty, insofar as the relevant movement of capital concerns an inbound activity from a third country to a Member State.\(^41\)

2.2.2. Partial reduction of the substantive scope of application in third country relationships?

Even if the direct application of Art. 56(1) of the EC Treaty to capital movements involving non-Member States is, in principle, accepted by most authors, there is still a whole range of approaches to reduce the broad scope of the provision. One approach could be to limit its subjective scope of application to citizens or residents of a Member State, taking the narrow view that only the latter should enjoy the privileges granted by the EC Treaty and its fundamental freedoms.\(^42\) In addition to the fact that Art. 56(1) of the EC Treaty neither requires citizenship nor residence as an EU nexus, the free movement of capital covers both the investor and the investee.\(^43\) Accordingly, there should always be (at least) one party to the transaction resident in the European Union. Consequently, this limitation would not have material consequences. Most authors, however, deny such a limitation of the personal scope of Art. 56 of the EC Treaty a limine,\(^44\) and case law also clearly suggests the opposite.\(^45\)

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\(^3\) See ECJ, 1 July 1993, Case C-312/91, Procedural issue relating to a seizure of goods belonging to Metalsa Srl [1993] ECR I-3751, Para. 10 et seq., regarding the free trade agreement concluded with Austria in 1972.

\(^34\) See also ECJ, Advocate General Kokott’s Opinion, 12 February 2004, Case C-242/03, Ministre des Finances v Jean-Claude Weidert and Elisabeth Pauthe [2004] ECR I-7379, Para. 21 et seq.

\(^35\) Stahl, note 24, p. 47.

\(^36\) For arguments supporting this, see Schön, note 24, p. 496.

\(^37\) It has, in fact, been suggested quite generally by German authors that all the fundamental freedoms should be restricted in their personal scope and only open to EU citizens. See T. Kingreen and B. Størmer, “Die subjektive Rechte des primären Gemeinschaftsrechts” , Europarecht (1998), p. 274 et seq. and T. Kingreen, „Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts“ (Berlin: Duncker & Humboldt, 1999), p. 78 et seq.

\(^38\) See also ECJ, Advocate General Kokott’s Opinion, 12 February 2004, Case C-242/03, Ministre des Finances v Jean-Claude Weidert and Elisabeth Pauthe [2004] ECR I-7379, Para. 21 et seq.

\(^39\) See also ECJ, Advocate General Kokott’s Opinion, 12 February 2004, Case C-242/03, Ministre des Finances v Jean-Claude Weidert and Elisabeth Pauthe [2004] ECR I-7379, Para. 21 et seq.


\(^41\) Stahl, note 24, p. 47.

\(^42\) Stahl, note 24, p. 47.

\(^43\) Stahl, note 24, p. 47.

\(^44\) ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, not yet reported, Para. 186. See also ECJ, Advocate General Kokott’s Opinion, 12 February 2004, Case C-242/03, Ministre des Finances v Jean-Claude Weidert and Elisabeth Pauthe [2004] ECR I-7379, Para. 21 et seq.

\(^45\) Stahl, note 24, p. 47.
Another approach to limit the effects of Art. 56(1) of the EC Treaty on capital movements in relation to third countries focuses on the objective scope of application. The argument is that only the technical (or even physical) cross-border transfer of capital should enjoy protection and that only those national measures should be caught by the prohibition that specifically catches such transfers with an effect equivalent to customs duties, whereas ordinary income or property taxes levied on the earnings or the substance of capital once invested should not be caught. It has also been suggested that, in third country settings, tax provisions should be completely removed from the scope of the free movement of capital. This reasoning is, however, neither shared by several national courts nor the prevailing opinion in legal scholarship. The ECJ has not only rejected these contentions in the recent FII Group Litigation case, but has also extended the broad substantial scope of Art. 56 of the EC Treaty as developed in its prior case law on intra-EU situations to third country situations. This conclusion is strongly implied by the ECJ’s discussion of Art. 57(1) of the EC Treaty, as the restrictions on capital movements involving direct investment or establishment within the meaning of Article 57(1) of the EC Treaty extend not only to national measures which, in their application to capital movements to or from non-member countries, restrict investment or establishment, but also to those measures which restrict payments of dividends deriving from them.

Recently, however, another potential limitation on the scope of Art. 56(1) of the EC Treaty has attracted attention. This development is all the more surprising, as it is not specifically linked with the general teleological arguments advanced to reduce a potential *erga omnes* effect of this provision. Instead, such a reduction could simply result from a mere non-application of the free movement of capital in situations simultaneously covered by another fundamental freedom. The concept behind this limitation is that the scope of a fundamental freedom, for example the freedom of establishment, that does not cover third country scenarios should not be “extended” beyond Community borders via the application of the free movement of capital. Whether or not the various fundamental freedoms can complement each other is a tricky question. It is fair to say that, in legal writing, a whole scale of opinions, ranging from the ‘exclusivity approach’ to the ‘*effet utile* approach’ can be observed. According to the latter, which appears to be predominant, several freedoms can apply to a single case simultaneously. On this basis, various national courts and scholars have suggested that such complementary protection under the free movement of capital will become exclusive in third country situations if a specific economic activity would, in substance, also be covered by, for example, the freedom of establishment, which, however, does not apply for territorial reasons in the case in question. Accordingly, Art. 56 of the EC Treaty has been invoked not only to counter discriminations of inbound dividends flowing from majority investments in third country companies, but also regarding the loss utilization of foreign permanent establishments (PE) or the *Bosal* type deductibility of financing costs of third country subsidiaries. Recently, however, first sources suggest that the pendulum has swung back. Both the older jurisprudence of the ECJ and the opinions of various Advocates General lack a consistent approach. Nevertheless, lately and along the lines already suggested by Advocate General Alber’s Opinion in Baars, the ECJ has tended to create a system of priority amongst the fundamental freedoms, depending on the national measure in question and its effects on the freedoms potentially affected, i.e.: 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

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47. Dissenting and with further references, see Stuhl, note 24, p. 54 et seq.
50. ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, not yet reported, para. 183.
52. See Schon, note 24, p. 500 et seq.; Hohenwarter, note 49, p. 227; Schnitger, note 24, p. 503; and Staringer, note 49, p. 18.
57. For an overview see ECJ, Advocate General Stix Hackl’s Opinion, 16 March 2006, Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungsaufsicht, not yet reported. Para. 41 et seq.
the main proceedings, one of those prevails over the other. The Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it.59

In the non-tax Fidium Finanz60 case, which concerned the provision of financial services by a third country service provider, the ECJ acknowledged that both the freedom to provide services and the free movement of capital were affected by the national measure at issue. The ECJ, however, regarded the former freedom, which does not extend protection to third country citizens, as ‘primarily’ affected and, therefore, did not enter into a discussion as to whether or not the third country situation was protected by Art. 56 of the EC Treaty. In the tax area, there has been a recent focus on tax issues related to third country subsidiaries and, therefore, on the question of whether or not protection under Art. 56 of the EC Treaty is available if such investment would, but for its territorial aspect, be protected under Art. 43 and Art. 48. In this respect, Cadbury Schweppes61 implies that the ECJ gives primary weight to the freedom of establishment and would, therefore, not allow protection under Art. 56 of the EC Treaty if, for example, domestic controlled foreign companies (CFC) rules target third country subsidiaries, i.e.:

In this case, the legislation on CFCs concerns the taxation, under certain conditions, of the profits of subsidiaries established outside the United Kingdom in which a resident company has a controlling holding. It must therefore be examined in the light of Articles 43 EC and 48 EC. If, as submitted by the applicants in the main proceedings and Ireland, that legislation has restrictive effects on the free movement of services and the free movement of capital, such effects are an unavoidable consequence of any restriction on freedom of establishment and do not justify, in any event, an independent examination of that legislation in the light of Articles 49 EC and 56 EC.62

The FII Group Litigation case is, however, less clear in this respect. Whilst parts of the judgment appear to imply that application of the freedom of establishment and the free movement of capital are mutually exclusive in respect of the taxation of inbound-dividend flows from foreign companies, depending on the degree of participation in the foreign company,63 other parts of the judgment appear to suggest that discriminatory taxation of dividends from third country subsidiaries could infringe Art. 56 of the EC Treaty.64

Given this tendency in Fidium Finanz and Cadbury Schweppes to differentiate according to which fundamental freedom is ‘primarily’ affected, it could be wondered how Art. 57(1) of the EC Treaty would fit in. This provision grandfathers third country restrictions that existed by the end of 1993 and were adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.65

There is broad agreement that the items referred to in Art. 57(1) of the EC Treaty generally coincide with activities that would be protected by either the freedom of establishment or the freedom to provide services in intra-EU settings.66 Accordingly, the financial services in question in the Fidium Finanz case constitute the “provision of financial services” within the meaning of Art. 57(1) of the EC Treaty67 and the creation of or investment in a third country corporation at issue in Cadbury Schweppes and FII Group Litigation falls within the meaning of “direct investment”, as referred to in Art. 57(1).68 If, however, such economic activities were only protected under the ‘primarily’ applicable Art. 49 or Art. 43 and Art. 48 of the EC Treaty, respectively, and the protection did not, therefore, extend beyond Community borders, why would Art. 57(1) grandfather restrictions regarding these activities in third country settings?69 This apparent paradox can obviously not be eliminated by a differentiated interpretation of Art. 56 of the EC Treaty, on the one hand, and Art. 57(1), on the other. In this respect, for example, Advocate General Geelhoed appears to suggest that there is some scope of direct investment under Art. 57(1) of the EC Treaty that is not simultaneously covered by the freedom of establishment under Art. 43.70 Such reasoning would, however, result in a differentiated and probably counterintuitive framework of legal protection. Whilst portfolio investments in third country corporations would be fully covered by Art. 56 of the EC Treaty, restrictions on direct investments that do not confer a definite influence over the decisions of a company or allow it to determine its activities could be grandfathered under Art. 57(1); conversely, investments that amount to an exercise of the freedom of establishment because they confer such

59. ECJ, 3 October 2006, Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungs aufsicht, not yet reported, Para. 34.
60. ECJ, 3 October 2006, Case C-452/04, Fidium Finanz AG v. Bundesanstalt für Finanzdienstleistungs aufsicht, not yet reported.
61. ECJ, 12 September 2006, Case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, not yet reported, Para. 32 et seq.
62. Id.
63. ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, not yet reported, Para. 33 et seq.
64. Id., Para. 165.
65. See 4.
68. ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, not yet reported, Para. 177 et seq.
70. ECJ, Advocate General Geelhoed’s Opinion, 6 April 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, not yet reported, Para. 119.
71. For a recent test of application of the freedom of establishment see, for example, ECJ, 13 April 2000, Case C-251/98, C. Baar v. Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem [2000] ECR I-2787, Paras. 21 and 22; ECJ, 21 November 2002, Case C-436/00, X. v. Rikkhattakverken [2002] ECR I-10829, Paras. 37 and 66 to 68; ECJ, 12 September 2006, Case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, not yet reported, Para. 31; ECJ, 12 December 2006, Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue, not yet reported, Para. 39 and, ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, not yet reported, Para. 58.
influence would receive no Community law protection at all, as Art. 43 and Art. 48 would take priority over Art. 56, but do not extend to third countries. This in turn poses the question of why Community law protection of a third country investment should be inversely proportional to the size of such investment.72

One way to avoid this apparent paradox is to focus on the specific national measure in question. If the specific rule applies to all investments irrespective of their size, then Art. 56 of the EC Treaty would cover these restrictions regardless of whether or not Art. 43 also applied if the specific investment in question confers a definite influence over the decisions of a company or allow it to determine its activities.73 Conversely, national measures that specifically envisage only situations in which the taxpayer has such an influence would only be covered by the freedom of establishment under Art. 43 of the EC Treaty. Examples of the former can be seen in cases of dividend taxation, such as Manninen74 and FII Group Litigation.75 Examples of the latter can be seen in the cases involving CFC rules, group relief provisions or thin capitalization rules that employ a control threshold, such as in Cadbury Schweppes,76 Marks & Spencer77 and Test Claimants in the Thin Cap Group Litigation.78


Together with the broad prohibition of restrictions on capital movements under Art. 56(1) (previously, Art. 73b(1)) of the EC Treaty, different escape clauses were inserted into the Maastricht Treaty. In this respect, Art. 58(1) (previously, Art. 73d(1)) of the EC Treaty states that:

The provisions of Article 56 shall be without prejudice to the right of Member States

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation ...79

Despite early comments in legal doctrine, which suggested that these clauses would seriously hamper further liberalization and deprive Art. 56(1) of the EC Treaty of any effect,79 subsequent developments in the ECJ’s jurisprudence have shown that this is not the case. Both clauses were interpreted as essentially being a codification of case law, developed in connection with the other EC Treaty freedoms, regarding the possibility to justify restrictions on different free movement guarantees.80 Art. 58(1) lit. b of the EC Treaty even had an explicit predecessor in Art. 4 of Directive 88/361/EEC, which had already partly been interpreted in Bordess.81 The primary reason why Art. 58(1) of the EC Treaty does not grant the Member States carte blanche to act as they like in the area of taxation was that the ECJ subjected their activities to close scrutiny on the basis of Art. 58(3) (previously, Art. 73d(3)), which states that:

The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.

The ECJ has read this provision as a specific expression of the general EC law principle of proportionality and, consequently, has set very high standards in this respect, at least when Art. 58 of the EC Treaty is applied in relation to restrictions on free movement of capital within the European Union.82 In this respect, it is settled case law that unequal treatment, which places cross-border situations at a disadvantage, in order to be compatible with Art. 56(1) of the EC Treaty, must concern situations which are not objectively comparable or [can] be justified by overriding reasons in the general interest, such as the need to safeguard the cohesion of the tax system, the fight against tax avoidance and the effectiveness of fiscal supervision or [and] the difference in treatment ... [and] must not go beyond what is necessary in order to attain the objective of the legislation.83

It is, however, questionable whether or not these strict standards must also be applied to national (tax) measures restricting capital movements “between Member States and third countries”.84

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72. For such a critical position, see, for example, Schön, note 24, p. 501 et seq. and Rehm and Nagler, note 35. Conversely, the question could also be raised as to whether or not Art. 58(2) of the EC Treaty could be read as preventing market participants from escaping territorial limitations of the other fundamental freedoms by evoking parallel protection under Art. 58.


75. ECJ, 12 December 2006. Case C-446/04. Test Claimants in the FII Group Litigation v. Commissioner of Inland Revenue, not yet reported.

76. ECJ, 12 September 2006. Case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, not yet reported.


78. See ECJ, Advocate General Geelhoed’s Opinion, 29 June 2006, Case C-324/06, Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue, not yet reported.


83. Stahl, note 24 p. 47.

It is well established that discrimination can arise from the application of different rules to comparable situations or from the application of the same rule to different situations. This definition is not limited to the unequal treatment of non-residents in “inbound” situations, but also covers unfavourable treatment of residents in cross-border “outbound” situations. Against this background it could be asked whether or not cross-border activities in relation to third countries are really objectively comparable to equivalent activities within Member States (or even “between Member States”). In this respect, Advocate General Kokott raised the fundamental question in Manninen of whether or not taxpayers in a third country scenario are in a different situation to taxpayers in a mere EU transaction. A leading scholar has also discussed the issue of whether or not the effective tax burden is to be determined on a cross-border basis. He supports this approach in the context of tax havens. Accordingly, if the tax burden in the third country is below the EU standard, the situations should be deemed to be different, so that a different treatment of those situations is permissible. The ECJ’s position is not entirely clear. Although the ECJ has recently acknowledged that a third country investment is not necessarily comparable to a domestic one, it arrived at this conclusion with reference to the non-application of the Mutual Assistance Directive in third country situations, i.e.:

For several reasons, legal writing differentiates at the level of possible justifications. Some argue that generally the lack of reciprocity cannot lead to the requirement that the country vis-à-vis acts equally liberally. According to this opinion, it would be more convincing to decide on a case-by-case basis whether or not justifications should be interpreted differently in relation to third countries. Others, however, take a broader approach and support different grounds of justification to be the general rule. Such an approach was also adopted by a Swedish tax court. Along these lines, the ECJ recently followed Advocate General Geelhoed’s approach and held that it may be that a Member State will be able to demonstrate that a restriction on capital movements to or from non-member countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.

Again there could be recourse to the ECJ’s case law regarding mixed agreements with non-Member States. In this respect, the ECJ has made it clear that, for example, the interpretation of the EC Treaty rules on the free movement of goods (Art. 28 and Art. 30, previously, Art. 30 and Art. 36 of the E(EC) Treaty) cannot be applied to similar rules in a mere free trade agreement, which does not have the purpose of establishing a Single Market. Accordingly, in the specific context of such an agreement, “restrictions on trade in goods may be considered to be justified... in a situation in which their justification would not be possible within the Community”. The ECJ supported this distinction with the argument that it was all the more necessary inasmuch as the instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the Common Market have no equivalent in the context of the relations between the Community [and a particular third country].

What about the various justifications? Within the Community, the ECJ’s acceptance of unwritten grounds of justification was rather limited. In accordance with settled case law, the diminution of tax receipts cannot be regarded as a matter of overriding general interest that may be relied on to justify a measure that is, in principle, contrary to a fundamental freedom. Accordingly, a simple loss of receipts suffered by a Member State because a taxpayer has moved his tax residence to another Member State cannot, in itself, justify a restriction on the right of establishment or any other freedom. Arguments related to the lack of harmonization in a certain area, compensatory effects resulting from advantages in other areas, treaty obligations, budgetary or economic policy objectives and administrative or legislative...
difficulties have all been rejected by the ECJ.110 This might, however, be different in a third country scenario. First, justification based on a “prevention of tax abuse or tax avoidance” has only been accepted in abstracto so far. In ICI101 and subsequent decisions,102 the ECJ has held that it accepts anti-abuse measures only to prevent purely artificial arrangements. Consequently, the Member States must comply with the principle of proportionality. Standardized anti-abuse presumptions automatically excluding certain categories of operations from a tax advantage violate primary EC law, as the latter requires a case-by-case analysis. “Tax abuse or tax avoidance” is closely linked to the concept of the “effectiveness of fiscal supervision”, which was first raised in Cassis de Dijon,103 but which is of rather limited scope since the ECJ refers the Member States to the Mutual Assistance Directive104 to obtain the necessary information.105,106 Accordingly, in intra-EU situations, the ECJ has frequently rejected justifications based on this ground by referring the Member States to the means of the Mutual Assistance Directive and has held that the Member States should provide each other with mutual assistance to overcome such difficulties. It is generally expected that the ECJ would apply the same line of reasoning with regard to the recovery of tax claims, as, in this field, the 2001 amendment to the Recovery of Claims Directive107 now requires the Member States to provide mutual assistance also in collecting direct tax claims.108 Conversely, such a justification could have enhanced importance in the third country context. The most important reason being that these Directives do not apply in territories outside the European Union.109 If this concept is accepted, differentiation between states with a tax treaty with the Member State providing for the exchange of information could be considered.110 It, however, appears to be doubtful as to whether or not tax avoidance would be of great relevance in respect of capital movements, as passive investments are also covered by the scope of the free movement of capital.111 Another author has even argued that even standardized anti-abuse presumptions could be permissible in third country scenarios.112 Second, the need to protect the tax base and prevent the reduction of revenue has not been accepted as a justification in an intra-EU setting. From a policy and from a legal perspective, this situation differs in relation to third countries. It has already been argued that the Community interest to secure the free movement of capital does not carry as much weight in this area as in respect of capital movements within the European Union.113 Specifically, the absence of an objective corresponding to the Single Market and the lack of power to implement harmonized rules, is a strong argument that, for example, the reduction in tax receipts could be accepted by the ECJ.114 Although the validity of such a broad view is questionable, as it would overdeliver the protection guaranteed by Art. 56 of the EC Treaty in third country situations, the concept may nevertheless provide some guidance, especially with regard to the taxation of foreign-source dividends. On several occasions, the ECJ has held in substance that it is sufficient to pay tax once in the European Union, regardless of which Member State collects the revenue.115 Consequently, according to the recent Manninen judgment, a Member State must grant an imputation credit, based on the underlying foreign tax, to resident shareholders, regardless of whether or not the distributing company has been taxed by that Member State or by another Member State. Accordingly, it appears that the ECJ urges the Member States to treat taxation in other Member States not as being ‘foreign’ in the traditional sense of international taxation. Such a policy concept, which is clearly derived from the objectives of the Internal Market, does not, however, apply equally to third countries, although the FII Group Litigation case might imply otherwise with regard to the taxation of inbound dividends.116 In any event, it should not be ruled out that the need to protect the tax base and

106. Schindler, note 100, p. 52.
109. Schmitz, note 24, p. 494 and Stähli, note 24, p. 54 et seq.
111. See Schön, note 24, p. 517 et seq.
113. Stähli, note 24, p. 54.
114. See Stähli, note 24, p. 54 et seq. and Schön, note 24, p. 515 et seq. Doubts are raised by, for example, Schmitz, note 24, p. 494.
117. ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, not yet reported, Para. 172.
prevent the reduction of revenue may, at least in some cases, be regarded as an overriding requirement of public interest, which may justify tax discrimination towards third countries.

Third, the countering of competition distortions could have some relevance in relation to third countries in situations in which national rules are intended to avoid the economic double taxation of distributed corporate income. Although this issue was (unsuccessfully) raised in Lenz by the referring Austrian Supreme Administrative Court (Verwaltungsgerichtshof) in an intra-EU context, the Commission has shown some sympathy for this argument in third country situations. It has been reported that the Commission has taken the position that a different tax treatment should be capable of being justified as a means of countering the distortion of competition, but only provided that the state of residence of the distribution company is a no or low-tax jurisdiction and the restricting domestic provision is in line with the unwritten principle of proportionality. It, therefore, appears that the Member States should be able to protect themselves against capital outflows to “tax havens”, remembering that foreign low or non-taxation would effectively distort competition to the disadvantage of domestic companies.

Finally, the “coherence of a tax system” in a third country setting could require another focus other than within the European Union. According to Bachmann, this justification requires a direct link between a fiscal advantage and a corresponding disadvantage of a fiscal levy, both of which must relate to the same taxpayer and the same tax. Whilst the diminishing (in concreto) acceptance of coherence in the jurisprudence appeared to erode this justification, a more abstract approach to strengthen this concept has been taken in academic writing. Due to the recent Manninen decision, coherence again appears to have acquired a practical relevance. Especially with regard to tax havens, which are typically outside the treaty network of the Member States, this development could be even more important. Indeed, another author has related this issue to the lack of reciprocity regarding the third country.

4. Grandfather Clause in Art. 57(1)

4.1. Introductory remarks

An important exception to the protection of cross-border capital movements in third country scenarios is the grandfather clause in Art. 57(1) of the EC Treaty. This reads as follows:

The provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

The interpretation of this provision raises numerous issues, some of which have recently been clarified by or are pending before the ECJ. These are briefly considered in 4.2. and 4.3.127

4.2. Temporal scope of application

How should the criterion “which exist on 31 December 1993” be interpreted? In this respect, several issues must be distinguished. First, there is broad agreement in legal scholarship128 that the legislation in question had to apply on “31 December 1993”, as the provision potentially grandfathered “restrictions” and these may only be derived from the rules already applying on this date, irrespective of their date of enactment. This issue is currently pending before the ECJ in Lasertecc. Second, specific issues arise if a restriction was undisputedly in existence before “31 December 1993”, but was effectively disapproved by another rule that was subsequently repealed after that date, thereby reviving the pre-existing restriction. This issue is currently pending before the ECJ in Stahlwerke Erste Westg GmbH.130 Third, some

125. Schnitger, note 24, p. 495.
126. The term “standstill clause” is also used.
127. For a recent and detailed analysis, see Smit, note 66.
129. This case (C-492/04) concerns the German thin capitalization rules that were adopted on 13 September 1993, entered into force on 18 September 1993, but did not apply before 1 January 1994. Although a pending matter, this is probably quite a rare question due to the specific timing issues of the case. The request for a preliminary ruling was issued by FG Baden-Württemberg, 14 October 2004, 3 K 62/99, Internationales Steuerrecht (2005), p. 275. For further information on this case see, for example, H. Rehm and J. Nagler, “Ist § 8a KStG f. weltweit nicht mehr anwendbar?”, Internationales Steuerrecht (2005), p. 261 et seq. and Schnitger, note 24, p. 502 et seq.
130. This case (C-415/06) was referred to the ECJ by the Bundesfinanzhof, 22 August 2006. R 116/04, Bundessteuerblatt (2006), Part II, p. 864 et seq., and concerns the judicially created prohibition of the utilization of the losses of foreign PEs in respect of a tax treaty exemption, whilst until 1998 such a prohibition was disappplied by a unilateral rule of German domestic law.
commentators have raised the question as to the temporal limitation of “31 December 1993” in respect of Member States that acceded to the European Union after that date. The present authors submit that the stated date is relevant, irrespective of the time of accession, as Art. 57 of the EC Treaty, unlike, for example, Art. 307, does not contain a specific clause considering subsequent accession dates.  

Finally, and most importantly, amendments to provisions “which existed on 31 December 1993” raise several issues. Specifically, it has been suggested that as long as the amendment does not affect the overall nature of the provision or even mitigates a hindrance to a treaty freedom, the amendments should not hinder the application of the grandfather clause. Based on its case law on comparable issues under other “standstill clauses”, the ECJ has recently affirmed this position:

> While it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by a Community measure, the Court held in that case that it is for the Court of Justice to provide guidance on interpreting the Community concept which constitutes the basis of a derogation from Community rules for national legislation ‘existing’ on a particular date. As the Court stated in Konle, any national measure adopted after a date laid down in that way is not, by that fact alone, automatically excluded from the derogation laid down in the Community measure in question. If the provision is, in substance, identical to the previous legislation or is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation. By contrast, legislation based on an approach which is different from that of the previous law and establishes new procedures cannot be regarded as legislation existing at the date set down by the Community measure in question.

Although such a conclusion could result in practical difficulties, as each amendment of a given set of rules would require a case-by-case analysis, the denial of the grandfathering benefit as a consequence of the slightest amendment, would, of course, be easy to deal with, but inconsistent with the probable objective of the provision. It should, however, be noted that this line of case law appears to be inconsistent with the approach taken by the ECJ in the area of pre-existing international treaties of the Member States under Art. 307 of the EC Treaty.

### 4.3. Substantive scope of application

The timing issue is supplemented by the interesting question of how to interpret the categories of capital movements covered by Art. 57 of the EC Treaty, i.e. direct investments, establishments, the provision of financial services and the admission of securities to capital markets. In this respect, the FII Group Litigation case again gives interesting insight. First, it appears that the ECJ does not require any specificity of rules to be potentially grandfathered under Art. 57 of the EC Treaty. Accordingly, the scope of Art. 57 of the EC Treaty is not restricted to provisions exclusively focused on capital movements to and from third countries and, therefore, also covers general rules in respect of their application to third country situations. Second, and in line with the interpretation of Art. 56 of the EC Treaty itself, the ECJ has recourse to concepts defined in Community law in the nomenclature of the capital movements set out in Annex I to Council Directive 88/361/EEC to interpret terms used in Art. 57. Finally, the ECJ has ended speculation that Art. 57 of the EC Treaty could be interpreted strictly as only grandfathering direct restrictions of certain investments without extending to payments flowing from such an investment. Rather, the ECJ has held that:

> it is clear from Article 57(1) EC that a Member State may, in its relations with non-member countries, apply restrictions on capital movements which come within the substantive scope of that provision, even though they contravene the principle of the free movement of capital laid down under Article 56 EC, provided that those restrictions already existed on 31 December 1993.

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132. See Schönh, note 24, p. 494 with further references. Similarly, see Schnitger, note 24, p. 503, Koller and Toöfl, note 27, p. 239 et seq.; and Smit, note 66, p. 209 et seq. See also ECJ, Advocate General Geelhoed’s Opinion, 10 April 2003, Case C-452/01, Margarethe Ospelt and, Schlosle Weissennberg Familienstiftung [2003] I-9743, Para. 52.


134. ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, not yet reported, Para. 191.


136. See, for example, Peters and Gooijer, note 30, p. 477.

137. ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, not yet reported, Para. 174 et seq.

138. See, for example, Peters and Gooijer, note 30, p. 478 et seq., who discusses the different views taken by Netherlands courts in this respect.

139. For a different position see Smit, note 66, p. 210 et seq. and references.

140. For a detailed analysis see Smit, note 66, p. 205 et seq.

141. For a discussion of this position see ECJ, Advocate General Geelhoed’s Opinion, 6 April 2006, Case C-464/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, not yet reported, Para. 116.

142. ECJ, 12 December 2006, Case C-446/04, Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue, not yet reported, Para. 187.
5. Conclusions

The free movement of capital guaranteed by Art. 56 of the EC Treaty is of predominant relevance for taxpayers, as its scope includes capital movements with third countries. The exact scope of this freedom is, however, all but clear. The primary question arising in this context is whether or not in third country scenarios the free movement of capital applies in the same way as within the European Union. This includes the question of whether or not the various freedoms supplement or exclude each other. Due to the fact that, for example, the freedom of establishment does not apply vis-à-vis third countries, the importance of this question is obvious. The EC Treaty also contains provisions limiting the scope of Art. 56, which similarly raise many difficulties with regard to their interpretation. Currently, several cases are pending before the ECJ that might shed some light in the dark. Consequently, it is anticipated with great interest if and in which situations taxpayers may be able to claim Community law protection in third country scenarios under the free movement of capital.