



**C-452/04 Fidium Finanz AG v Bundesanstalt für  
Finanzdienstleistungsaufsicht, judgment of 3.10.2006**

**Freedom of movement / Internal market – Relationship between freedom to provide services and freedom of movement of capital, activities of an undertaking established in a non-member country**

The Swiss undertaking, Fidium, granted credit, on a commercial basis, mainly to customers established in Germany. In 2003, since it did not have the authorisation required to operate in Germany, the BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht) prohibited Fidium Finanz from carrying on lending activities in Germany. Considering that that decision constituted a restriction on the free movement of capital, Fidium Finanz brought an action before the Verwaltungsgericht (German Administrative Court), which applied to the Court for a preliminary ruling to determine whether the activity of granting credit on a commercial basis constituted a provision of services or whether it fell within the free movement of capital.

These issues are important because the Treaty provisions on the freedom to provide services (Article 49) cannot be invoked by providers of services who are citizens of a non-member country and are established outside the European Union, unlike the provisions concerning the free movement of capital (Article 56)<sup>1</sup>.

In its analysis of the relationship between these two freedoms, the Court observed that, although closely linked, those provisions were designed to regulate different situations and they each have their own field of application. The Court stated clearly that there was no order of priority between them and rejected the theory that the provisions concerning the freedom to provide services had less weight than those governing the free movement of capital.

The main point was to what extent, where a national measure relates to the freedom to provide services and the free movement of capital at the same time, the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevailed over the other. While it is possible in certain cases for a national provision to impede the exercise of both freedoms at once, the Court held that the national measure should be examined in relation to only one of the two freedoms.

In this case, the Court observes that the activity of granting credit on a commercial basis concerns, in principle, both the freedom to provide services within the meaning of Articles 49 EC et seq. and the free movement of capital within the meaning of Article 56 EC et seq. With respect to services, the Treaty provisions could not be relied on by an undertaking established in a non-member country, such as Fidium Finanz. As regards the free movement of capital, while it was possible that the national regime had the effect of reducing cross-border financial traffic relating to credit services, that was merely "an unavoidable consequence of the restriction on the freedom to provide services". In the circumstances of the case the predominant consideration was freedom to provide services rather than the free movement of capital.

The Court concluded that there were no grounds for examining the compatibility of the national rules with the free movement of capital.

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<sup>1</sup> In this case, international law does not change the situation given that the agreement between the European Community and its Member States, on the one hand, and the Swiss Confederation, on the other, on the free movement of persons, which concerns in particular the provision of services on the territory of the contracting parties, had not yet come into force at the time of these facts.