CASE LAW GUIDE

of the European Court of Justice on articles 63 *et seq.* TFEU

FREE MOVEMENT OF CAPITAL

EUROPEAN COMMISSION

1 FOREWORD

The free movement of capital case law guide is part of a series of guides concerning the case law of the European Court of Justice. To date, this series includes guides on Articles 49 *et seq.* TFEU (freedom of establishment), Articles 56 *et seq.* TFEU (freedom to provide services) and Articles 63 *et seq.* (freedom of capital movements).

These guides have been drafted by two European Commission Directorates, namely Directorate-General for Financial Stability, Financial Services and Capital Markets Union and Directorate-General for Growth.

The present guide concerns Articles 63 *et seq.* of the Treaty on the Functioning of the European Union and its aim is to explain the meaning and the scope of the rules on free movement of capital through the wording of the European Court of Justice. It does not strove to be a comprehensive collection of jurisprudence on capital movements, but only a practical orientation tool at the service of academics and practitioners of the topic.

Although it is possible to follow the hyperlink to consult the complete text of the judgements, the guide presents the landmark decisions in a practical way as it gathers together the essential passages of the judgements organising them by topic

In order to show the essential passages of the judgement, without ignoring their context, the reasoning of the European Court of Justice is given without alteration; however, the key words are highlighted in bold. Moreover, to the extent necessary to clarify the meaning of certain sentences, some worlds in brackets might be added. It must be pointed out that this method of presentation does not commit the European Court of Justice, only the editors.

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4 CAPITAL MOVEMENTS AND PAYMENTS DEFINITIONS

4.1 GENERAL DEFINITION OF CAPITAL MOVEMENTS

Although **the Treaty does not define the terms 'movements of capital' and 'payments'**, it is settled case-law that **Directive 88/361, together with the nomenclature annexed to it, may be used** for the purposes of defining what constitutes a capital movement (Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraphs 20 and 21).

C-483/99 - Commission v France, § 36

However, inasmuch as Article 73b of the EC Treaty substantially reproduces the contents of Article 1 of Directive 88/361, and even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which have since been replaced by Article 73b et seq. of the EC Treaty, the **nomenclature** in respect of movements of capital **annexed to Directive 88/361** 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., subject to the qualification, contained in the introduction to the nomenclature, that th**e list set out therein is not exhaustive**.

C-222/97 - Trummer and Mayer, § 21.

It is also clear from the system of the Treaty that **the physical transfer of assets falls** not **under** Articles 30 and 59 but under **Article 67 and the directive implementing that provision**.

C-358/93 - Bordessa and Others, § 13.

However, **the physical export of means of payment cannot itself be regarded as a capital movement involving direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets**.

C-163/94 - Sanz de Lera and Others, § 33.

4.2 GENERAL DEFINITION OF PAYMENTS

[…] [C]urrent **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**. For that reason movements of capital may themselves give rise to current payments, as is implied by Articles 67 (2) and 106 (1).

The physical transfer of bank notes may not therefore be classified as a movement of capital where the transfer in question corresponds to an obligation to pay arising from a transaction involving the movement of goods or services.

Joined Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro, § 21-22.

Like Article 106 of the EEC Treaty, **Article 56(2) EC is intended to enable a person liable to pay a sum of money in the context of a supply of goods or services to discharge that contractual obligation voluntarily without undue restriction and to enable the creditor freely to receive such a payment**. However, that provision is not applicable to the procedural rules which govern an action by a creditor seeking payment of a sum of money from a recalcitrant debtor.

C-412/97 – ED, § 17.

4.3 EXAMPLES OF CAPITAL MOVEMENTS

4.3.1 DIRECT INVESTMENTS

Movements of capital for the purposes of Article 56(1) EC thus include in particular **direct 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 ('direct' investments) and 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 ('portfolio' investments)** (see, to that effect, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21; *Commission v France*, paragraphs 36 and 37, and *Commission v United Kingdom*, paragraphs 39 and 40).

C-282/04 - Commission v Netherlands, § 19.

Points I and III in the nomenclature set out in Annex I to Directive 88/361, and the explanatory notes appearing in that annex, indicate that **direct investment in the form of participation in an undertaking by means of a shareholding or the acquisition of securities on the capital market constitute capital movements** within the meaning of Article 73b of the Treaty. The explanatory notes state that direct investment is characterised, in particular, by the possibility of participating effectively in the management of a company or in its control.

C-367/98 - Commission v Portugal, § 38.

Although that article [56 EC] does not define the concept of 'capital movements', **direct cross-frontier investment** falls within that concept by virtue of the nomenclature annexed to Directive 88/361. **It is characterised, in particular, by the possibility of taking an effective part in the management and control of a company. The acquisition of holdings and the full exercise of voting rights attached to such holdings are therefore covered by the concept of 'capital movements'**.

C-174/04- Commission v Italy, § 12.

4.3.2 INVESTMENTS IN REAL ESTATE

[…][C]apital movements include **investments in real estate** on the territory of a Member State by non-residents. […]

C-370/05 - Festersen, § 23.

The abovementioned Annex XII [of the Agreement on the European Economic Area of 2 May 1992] declares applicable to the European Economic Area (the EEA) Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5). Annex I to that directive, […] states that **that concept covers transactions by which non-residents make investments in real estate on national territory**.

C-452/01- Ospelt and Schlössle Weissenberg, § 7.

[…][**T]he right to acquire, use or dispose of immovable property on the territory of another Member State**, which is the corollary of freedom of establishment (Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 22), **generates capital movements when it is exercised**.

C-515/99 - Reisch and Others, § 29.

It is not disputed that the foundation, whose seat is in Italy, has commercial property in Munich which it lets. Among the capital movements listed in Annex I to Directive 88/361, under heading II entitled 'Investments in real estate', are investments in real estate on national territory by non-residents.

It follows that **free movement of capital covers both the ownership and administration of such property** and it is not therefore necessary to consider whether the foundation acts as a provider of services.

C-386/04 - Centro di Musicologia Walter Stauffer, § 23-24.

4.3.3 OPERATIONS IN SECURITIES

A **resale of shares to the issuing company** such as that made by Ms Bouanich constitutes a capital movement as referred to in Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) and in the nomenclature of capital movements set out in Annex I to that directive. […]

C-265/04 - Bouanich, § 29.

In the light of the foregoing, the answer to the first question must be that **bonds denominated in national currency for a term of one year from their issue, dealt in and quoted on a stock exchange, issued by a bank established in a Member State and belonging to that State**, fall within List B, Item IV A of Annex I to the First Directive [Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty].

C-329/03 - Trapeza tis Ellados, § 34.

Moreover, since, in the main proceedings, the company distributing dividends has its seat in a Member State other than the Kingdom of the Netherlands and is quoted on the stock exchange, **receipt of dividends on shares** in that company by a Netherlands national may also be linked to 'Acquisition by residents of foreign securities dealt in on a stock exchange' as referred to in Heading III.A(2) of the nomenclature annexed to Directive

88/361, as Mr Verkooijen, the United Kingdom Government and the Commission contend. **Such an operation is thus indissociable from a capital movement**.

C-35/98 - Verkooijen, § 29.

4.3.4 OPERATIONS TO LIQUIDATE OR ASSIGN ASSETS BUILT UP

According to the fourth indent of the second paragraph of Annex I to Directive 88/361, the free movement of capital covers operations to liquidate or assign assets built up.

Thus, **the sale of holdings in resident companies by non-resident investors constitutes a capital movement** within the meaning of Article 1 of that directive and of the nomenclature of capital movements set out in Annex I to that directive.

Consequently, although **the acquisition by a resident of shares in a resident company from a non-resident shareholder** is not expressly mentioned […] in the nomenclature of capital movements set out in Annex I to Directive 88/361, that transaction **constitutes a capital movement** within the meaning of Article 1 of that directive and falls within the scope of the Community rules on the free movement of capital.

C-182/08 - Glaxo Wellcome, § 42-44.

4.3.5 FINANCIAL LOANS AND CREDITS

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**'. According to the explanatory notes of that annex, that category **includes consumer credit**, inter alia.

C-452/04 - Fidium Finanz, § 42.

[…][I]t should be noted at the outset that **financial loans and credits granted by non-residents to residents** constitute movements of capital for the purposes of that provision, as has been stated, moreover, under heading VIII of the nomenclature set out in Annex I to Council Directive 88/361/EEC […].

C-282/12 - Itelcar, § 14.

It follows that, as the Advocate General pointed out in point 31 of her Opinion, **the cross-border lending of a vehicle free of charge constitutes a capital movement** within the meaning of Article 56 EC.

C-578/10 - van Putten and Others, § 36.

4.3.6 OPERATION IN UNITS OF COLLECTIVE INVESTMENT UNDERTAKINGS

First of all, it is common ground that **the acquisition of units of an investment fund constitutes a direct investment in the form of participation in a financial undertaking by means of a shareholding and, consequently, a movement of capital** for the purposes of Article 63 TFEU, as has been, moreover, stated in point IV of the nomenclature set out

in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [Article repealed by the Treaty of Amsterdam] (OJ 1988 L 178, p. 5) and in the explanatory notes appearing in that annex (see, with regard to the ownership of shares and the acquisition of securities, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 37, and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, paragraph 38).

C-39/11- VBV - Vorsorgekasse, § 21.

4.3.7 SURETIES AND OTHER GUARANTEES

A mortgage of the kind at issue in the main proceedings [**mortgage denominated in German marks**] is inextricably linked to a capital movement - **in the present case, the liquidation of an investment in real property**. In addition, it is included within point IX of the nomenclature of capital movements annexed to Directive 88/361. Consequently, it **is covered by Article 73b of the Treaty**.

Moreover, mortgages represent the classic method of securing a loan linked to a sale of real property, which is a transaction covered by the nomenclature. In those circumstances, **a mortgage must be regarded as constituting an 'other guarantee' within the meaning of point IX of the nomenclature, headed 'Sureties, other guarantees and rights of pledge**.

C-222/97 - Trummer and Mayer, § 24 and 34.

Secondly, **the obligation to establish a guarantee with a credit institution having its registered office or a branch office on Italian territory**, as follows from Article 2(2)(c) of Law No 196/97, **is a restriction on capital movements** within the meaning of Article 56(1) EC, **in so far as it impedes an undertaking wishing to carry on the business of providing temporary labour in Italy from putting forward, in order to obtain the licence required for that purpose, a guarantee established with a credit institution established in another Member State**.

C-279/00 - Commission v Italy, § 37.

4.3.8 GIFTS AND ENDOWMENTS

Gifts and endowments are listed under Heading XI, entitled 'Personal capital movements' in Annex I to Directive 88/361.

Where a taxpayer of a Member State seeks the deduction for tax purposes of a sum reflecting the value of gifts to third persons resident in another Member State, **it does not matter**, in order to determine whether the national legislation in question is covered by the Treaty provisions on the movement of capital, **whether the underlying gifts were made in money or in kind**.

C-318/07 - Persche, § 24-25

4.3.9 INHERITANCES

Inheritances appear under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements'. […]

An inheritance consists of the transfer to one or more persons of the estate left by a deceased person or, in other words, a transfer to the deceased's heirs of the ownership of the various assets, rights, etc., of which that estate is composed.

It follows that **an inheritance is a movement of capital** within the meaning of Article 73b of the Treaty (see to that effect, also, Case C‑364/01 *Barbier* [2003] ECR I‑15013, paragraph 58), **except in cases where its constituent elements are confined within a single Member State**.

C-513/03 - van Hilten-van der Heijden, § 40-42.

4.3.10 TAXATION

Like the tax levied on inheritances, **the tax treatment of gifts in money or in kind therefore comes within the compass of the Treaty provisions on the movement of capital, except in cases where the constituent elements of the transactions concerned are confined within a single Member State** (see, to that effect, *Eckelkamp*, paragraph 39 and the case-law cited).

C-318/07 - Persche, § 27.

5 TERRITORIAL SCOPE OF ARTICLE 63 TFEU

5.1 GENERAL PRINCIPLE

First of all, the prohibition in **Article 73b(l)** of the Treaty **covers all restrictions on movements of capital between Member States and between Member States and non-Member States**.

C-439/97 – Sandoz, § 18.

5.2 INTER-STATE MOVEMENTS OF CAPITAL

Article 73b of the Treaty lays down a **general prohibition on restrictions on the movement of capital between Member States**. That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.

C-483/99 - Commission v France, § 40.

A situation in which a person resident in Germany at the date of death leaves to another person also resident in that Member State capital claims against a financial

institution in Spain on which inheritance tax is levied both in Germany and in Spain is certainly **not a situation purely internal to a Member State**.

C-67/08 - Block, § 21.

5.3 MOVEMENT BETWEEN EU MEMBER STATE AND A THIRD COUNTRY

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

C-101/05 - A, § 31.

By contrast, it is apparent from Articles 63 TFEU and 64(1) TFEU that **any restriction on the movement of capital involving the provision of financial services is in principle prohibited between Member States and third countries**, unless such a restriction existed, under national or EU law, on 31 December 1993 or, as the case may be, 31 December 1999.

C-560/13 - Wagner-Raith, § 37.

Contrary to what the claimants in the main proceedings contend, **the restrictions on capital movements involving direct investment or establishment within the meaning of Article 57(1) EC 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**.

C-446/04 - Test Claimants in the FII Group Litigation, § 183.

In the light of the foregoing, the answer to the first question is that **Article 63 TFEU on the free movement of capital applies in a situation**, such as that at issue in the main proceedings, **where**, under national tax legislation, **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**.

C-190/12 - Emerging Markets Series of DFA Investment Trust Company, § 35.

6 DIRECT EFFECT OF ARTICLE 63 TFEU

6.1 VERTICAL DIRECT EFFECT

Article 73b(1) of the Treaty lays down a **clear and unconditional prohibition for which no implementing measure is needed**.

It follows that that exception [provided for in Article 73c(1) of the Treaty] cannot preclude Article 73b(1) of the Treaty from c**onferring on individuals rights which they can rely on before the courts**.

C-163/94 - Sanz de Lera and Others, § 41 and 47.

It follows that, as regards the movement of capital between Member and non-member States, **Article 56(1) EC, in conjunction with Articles 57 EC and 58 EC, may be relied on before national courts and may render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question**.

C-101/05 - A, § 27.

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**.

C-358/93 - Bordessa and Others, § 33.

6.2 CASES WITH A PRIVATE INDIVIDUAL AS A DEFENDANT

Those questions have been raised in proceedings brought by Westdeutsche Landesbank Girozentrale, a German bank, against Mr Stefan, a notary, in which it complains that he registered a mortgage denominated in German marks at a time when Austrian law required mortgages to be registered in the national currency.

C-464/98 - Stefan, § 2.

The reference was made in an action brought by Mr Burtscher, the owner of a dwelling and land situated in the municipality of Sonntag, to obtain the eviction of Mr Stauderer, who holds a long lease on that immovable property and claims a right to acquire title to it.

C-213/04 - Burtscher, § 2.

7 DEFINITION OF RESTRICTIONS

7.1 GENERAL DEFINITION OF RESTRICTIONS

It must be recalled at the outset that Article 73b(1) of the Treaty gives effect to free movement of capital between Member States and between Member States and third countries. To that end it provides, within the framework of the provisions of the chapter headed 'Capital and payments', that **all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited**.

C-483/99 - Commission v France, § 35.

Article 73b of the Treaty lays down a **general prohibition on restrictions on the movement of capital between Member States**. **That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality**, as between operators on the financial markets.

C-483/99 - Commission v France, § 40.

Measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of that provision (see, to that effect, Case C-484/93 *Svensson and Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, paragraph 10, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 26, and Case C-439/97 *Sandoz* v *Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* [1999] ECR I-7041, paragraph 19), **as do measures which make a direct foreign investment subject to prior authorisation** (Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 24 and 25, and Case C-54/99 *Église de Scientologie de Paris* v *Prime Minister* [2000] ECR I-0000, paragraph 14).

C-478/98 - Commission v Belgium, § 18.

Concerning those two forms of investment [direct and portfolio investments], the Court has stated that national measures must be regarded as '**restrictions'** within the meaning of Article 56(1) EC **if they are likely to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing in their capital** (see to that effect, in particular, *Commission v France*, paragraph 41; Case C-174/04 *Commission v Italy* [2005] ECR I-4933, paragraphs 30 and 31; and Case C-265/04 *Bouanich* [2006] ECR I-923, paragraphs 34 and 35).

In the present case, the Court finds that the special shares at issue constitute restrictions on the free movement of capital provided for in Article 56(1) EC.

C-282/04 - Commission v Netherlands, § 20-21.

It follows that, in so far as the two Council directives for the implementation of Article 67 of the Treaty were intended to ensure the complete liberalization of certain capital movements, **their purpose includes the elimination of administrative obstacles which**, although not taking the form of exchange authorizations or affecting the acquisition of foreign securities, **none the less constitute a hindrance to 'the widest liberalization' of capital movements**, which, according to the preamble to the First Directive, is necessary for the attainment of the objectives of the Community.

C-157/85 - Brugnoni and Ruffinengo v Cassa di risparmio di Genova e Imperia, § 22.

In this regard, it must be pointed out that th**e Community has no express power to impose restrictions on the movement of capital and payments**. However, **Article 58 EC allows the Member States to adopt measures having such an effect to the extent to which this is, and remains, justified** in order to achieve the objectives set out in the article, in particular, on grounds of public policy or public security […]. […].

T-315/01 - Kadi v Council and Commission, § 110.

Article 56 EC draws no distinction between discriminatory and non-discriminatory measures or between public and private undertakings.

C-174/04 - Commission v Italy, § 12.

7.2 RESTRICTIONS ACCORDING TO THEIR EFFECTS

7.2.1 DIRECTLY DISCRIMINATORY MEASURES

It is also settled law that dis**crimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations**.

C-279/93 - Finanzamt Köln-Altstadt v Schumacker, § 30.

As regards **the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings,** it is common ground - and, moreover, not disputed by the Portuguese Government - that this **involves unequal treatment of nationals of other Member States and restricts the free movement of capital**. […]

C-367/98 - Commission v Portugal, § 40.

Section 10(2) of the **TGVG** 1993, **which exempts only Austrian nationals from having to obtain authorisation before acquiring a plot of land** which is built on and thus from having to demonstrate, to that end, that the planned acquisition will not be used to establish a secondary residence, **creates a discriminatory restriction against nationals of other Member States** in respect of capital movements between Member States.

C-302/97 - Konle, § 23.

In so far as it exempts only Italian nationals from the requirement of obtaining an authorisation to buy a property in certain parts of the national territory, Article 18 of Law No 898/76 imposes on nationals of the other Member States a discriminatory restriction on capital movements between Member States (to that effect, see *Konle,* paragraph 23).

C-423/98 - Albore, § 16.

7.2.2 INDIRECTLY DISCRIMINATORY MEASURES

The Court has consistently held that the **rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result** (Case 153/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, paragraph 11).

C-279/93 - Finanzamt Köln-Altstadt v Schumacker, § 26.

In that regard, it follows from the case-law that the measures prohibited by Article 73b(1) of the Treaty, as being restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents to do so in other States or, in the case of inheritances, those 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 (see to that effect Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10; *Trummer and Mayer*, paragraph 26; Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19; and *Barbier*, paragraph 62).

C-513/03 - van Hilten-van der Heijden, § 44.

Although the Danish legislation on agriculture does not discriminate between Danish nationals and nationals of the other Member States of the European Union or the European Economic Area the fact nevertheless remains that **the residence requirement which it imposes and which may be waived only with the authorisation of the minister responsible for agriculture restricts the free movement of capital**.

C-370/05 - Festersen, § 25.

Where those rules make the deductibility of certain debts secured on the immovable property in question dependent on the place where, at the time of death, the person whose estate is being administered was residing, **the greater tax burden to which the inheritance of non-residents is consequently subject constitutes a restriction on the free movement of capital**.

C-11/07 - Eckelkamp, § 46.

Thus, under Article 43(2) of the CIRS **the amount of capital gains realised by residents when transferring immovable property situated in Portugal is to be taken into account as to only 50% of its amount. By contrast, for non-residents, the CIRS provides that the full amount of capital gains realised in the case of the transfer of that property is subject to tax**.

In those circumstances, it must be found that **the laying down of 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 constitutes a restriction** on the movement of capital prohibited by Article 56 EC.

C-443/06 – Hollmann, § 36 and 40.

7.2.3 NON-DISCRIMINATORY RESTRICTIONS

Rules which limit the acquisition of shareholdings in the way that Article 40 of BAA's Articles of Association does, **or which restrict in some other way the scope for participating effectively in the management of a company or in its control**, as is the case of the system of prior approval provided for in Article 10(2) of the Articles, **constitute a restriction** on the free movement of capital.

In this instance, **although the relevant restrictions on investment operations apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus**

liable to deter investors from other Member States from making such investments and, consequently, affect access to the market (see, also, the judgment of today's date in Case C-463/00 *Commission* v *Spain* [2003] ECR I-4579, paragraph 61).

C-98/01 - Commission v United Kingdom, § 44 and 47.

In the light of those considerations, it is necessary to consider whether the rules deriving from Law 5/1995 and Royal Decrees Nos 3/1996, 8/1997, 40/1998, 552/1998 and 929/1998 constitute a restriction on the movement of capital between Member States: **those rules submit to the prior approval of the national authorities decisions of commercial undertakings** relating to:

- the undertaking's winding-up, demerger or merger;
- the disposal or charging of the assets or shareholdings necessary for the attainment of the undertaking's object;
- a change in the undertaking's object;
- dealings in the share capital which result in the State's shareholding being reduced by a percentage equal to or greater than 10%;
- a share purchase resulting in a holding of at least 10% of the share capital,

where the State's shareholding in the undertaking has been reduced by at least 10% and has fallen below 50% or where the holding has been reduced to less than 15% of the share capital.

In this instance, **although the relevant restrictions on investment operations apply without distinction to both residents and non-residents, it must none the less be held that they affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market** (see, also, the judgment of today's date in Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, paragraph 47).

C-463/00 - Commission v Spain, § 54 and 61.

Second, it is necessary to consider whether **the fact that a Member State refuses to exempt its taxpayers who receive dividends on shares in a company whose seat is in another Member State from liability to tax on those dividends** constitutes a restriction of capital movements within the meaning of Article 1 of Directive 88/361.

A legislative provision such as the one at issue in the main proceedings **has the effect of dissuading nationals of a Member State residing in the Netherlands from investing their capital in companies which have their seat in another Member State**. It is also clear from the legislative history of that provision that the exemption of dividends, accompanied by the limitation of that exemption to dividends on shares in companies which have their seat in the Netherlands, was intended specifically to promote investments by individuals in companies so established in the Netherlands in order to increase their equity capital.

Such a provision also has a restrictive effect as regards companies established in other Member States: it **constitutes an obstacle to the raising of capital in the Netherlands since the dividends which such companies pay to Netherlands residents receive less favourable tax treatment than dividends distributed by a company established in the Netherlands, so that their shares are less attractive to investors**

residing in the Netherlands than shares in companies which have their seat in that Member State.

C-35/98 - Verkooijen, § 31 and 34-35.

In the light of those considerations, it is necessary to consider whether the **legislation** in issue, **which (a) prohibits the acquisition by investors from other Member States of more than a given number of shares in certain Portuguese undertakings and (b) requires the grant by the Portuguese Republic of prior authorisation for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level**, constitute a restriction on the movement of capital between Member States.

Even though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. **They are therefore liable, as a result, to render the free movement of capital illusory** (see, in that regard, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 25, and Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 44).

In those circumstances, **the rules in issue must be regarded as a restriction** on the movement of capital within the meaning of Article 73b of the Treaty.

C-367/98 - Commission v Portugal, § 39 and 45-46.

In the light of those considerations, it is necessary to consider whether the rules vesting in the French Republic a **'golden share'** in Société Nationale Elf-Aquitaine, **whereby any holding of shares or voting rights which exceeds certain limits must be authorised in advance by France and a decision to transfer or use as security the majority of the capital of four subsidiaries of that company may be opposed**, constitute a restriction on the movement of capital between Member States.

Even though **the rules** in issue may not give rise to unequal treatment, they **are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. They are therefore liable, as a result, to render the free movement of capital illusory** (see, in that regard, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 25, and Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 44).

C-483/99 - Commission v France, § 38 and 41.

8 TYPES OF RESTRICTIVE MEASURES DIVIDED BY SECTOR

8.1 DIRECT INVESTMENTS

8.1.1 GOLDEN SHARES

In the present case, the Court finds that the **special shares at issue constitute restrictions** on the free movement of capital provided for in Article 56(1) EC.

The Court further finds that the special shares at issue **are likely to deter investors of other Member States from investing** in KPN and TPG.

By virtue of those special shares, **a series of very important management decisions** of the organs of KPN and TPG, concerning both the activities of those two companies and their very structure (in particular questions of merger, demerger and dissolution), **depend on prior approval by the Netherlands State**. Thus, in the first place, as the Commission has rightly pointed out, those special shares confer on the Netherlands State an influence over the management of KPN and TPG which is not justified by the size of its investment and is significantly greater than that which its ordinary shareholding in those companies would normally allow it to obtain. Moreover, those shares limit the influence of other shareholders in relation to the size of their holding in KPN and TPG.

Furthermore, tho**se special shares can be withdrawn only with the consent of the Netherlands State**.

Similarly, the special shares at issue may have a **deterrent effect on portfolio investments** in KPN and TPG. A possible refusal by the Netherlands State to approve an important decision, proposed by the organs of the company concerned as being in the company's interests, would be capable of depressing the (stock market) value of the shares of that company and thus reduces the attractiveness of an investment in such shares.

C-282/04 - Commission v Netherlands, § 21, 23-25 and 27.

Paragraph 4(3) of the VW Law thus creates **an instrument enabling the Federal and State authorities to procure for themselves a blocking minority allowing them to oppose important resolutions**, on the basis of a lower level of investment than would be required under general company law.

By **capping voting rights** at the same level of 20%, Paragraph 2(1) of the VW Law supplements a legal framework which enables the Federal and State authorities to exercise considerable influence on the basis of such a reduced investment.

By limiting the possibility for other shareholders to participate in the company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, this situation is liable to deter direct investors from other Member States.

As the Commission has argued, the restrictions on the free movement of capital which form the subject-matter of these proceedings relate to direct investments in the capital of Volkswagen, rather than portfolio investments made solely with the intention of making a financial investment (see C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 19) and which are not relevant to the present action. As regards direct investors, it must be pointed out that, by creating an instrument liable to limit the ability of such investors to participate in a company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, Paragraphs 2(1) and 4(3) of the VW Law diminish the interest in acquiring a stake in the capital of Volkswagen.

It must therefore be held that th**e combination of Paragraphs 2(1) and 4(3) of the VW Law constitutes a restriction** on the movement of capital within the meaning of Article 56(1) EC.

Under Paragraph 4(1) of the VW Law, **the Federal State and the Land of Lower Saxony are each entitled, on condition that they are shareholders in the company, to**

appoint two representatives as members of the supervisory board of Volkswagen, that is, a total of four persons.

By restricting the possibility for other shareholders to participate in the company with a view to establishing or maintaining lasting and direct economic links with it such as to enable them to participate effectively in the management of that company or in its control, **Paragraph 4(1) of the VW Law is liable to deter direct investors from other Member States from investing in the company's capital**.

C-112/05 - Commission v Germany, § 50-52, 54, 56, 59 and 61.

In the light of the foregoing, it must be held that th**e Portuguese State's holding of golden shares, in conjunction with the special rights which such shares confer on their holder, constitutes a restriction on the free movement of capital** within he terms of Article 56(1) EC.

C-212/09 - Commission v Portugal, § 69.

In the light of those considerations, it is necessary to consider whether the legislation in issue, which (a) prohibits the acquisition by investors from other Member States of more than a given number of shares in certain Portuguese undertakings and (b) requires the grant by the Portuguese Republic of prior authorisation for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, constitute a restriction on the movement of capital between Member States.

Consequently, **as regards the prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings, non-compliance with Article 73b of the Treaty is established**.

As regards the obligation to obtain prior authorisation from the Portuguese Republic for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, the Portuguese Government concedes in principle that the restrictions arising from the rules in issue fall within the scope of the free movement of capital but argues that the rules apply without distinction to national shareholders and to shareholders who are nationals of other Member States. They do not therefore involve any discriminatory or particularly restrictive treatment of nationals of other Member States.

Even though the rules in issue may not give rise to unequal treatment, they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings. **They are therefore liable, as a result, to render the free movement of capital illusory** (see, in that regard, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 25, and Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 44).

C-367/98 - Commission v Portugal, § 39, 42-43 and 45.

It must therefore be held that, by maintaining in force the provisions limiting the possibility of acquiring voting shares in BAA as well as the procedure requiring consent to the disposal of the company's assets, to control of its subsidiaries and to winding-up, the United Kingdom has failed to fulfil its obligations under Article 56 EC.

C-98/01 - Commission v United Kingdom, § 50.

In the light of those considerations, it is necessary to examine whether Decree-Law No 192/2001, which provides for the automatic suspension of voting rights attaching to holdings exceeding 2% of the capital of undertakings operating in the electricity and gas sectors, where such holdings are acquired by public undertakings that are not quoted on regulated financial markets and hold a dominant position, constitutes a restriction on capital movements between Member States

In that connection, it must be pointed out that the suspension of voting rights, as provided for in Decree-Law No 192/2001, means that the category of public undertakings concerned is precluded from participating effectively in the management and control of Italian undertakings operating in the electricity and gas markets. Since the objective pursued by Decree-Law No 192/2001 is to avoid 'anti-competitive attacks by public entities operating in the same sector in other Member States', it has the effect of dissuading public undertakings established in other Member States, in particular, from acquiring shares in Italian undertakings operating in the energy sector.

It follows that the suspension of voting rights provided for by Decree-Law No 192/2001 constitutes a restriction on the free movement of capital prohibited, in principle, by Article 56 EC.

C-174/04 - Commission v Italy, § 29-31.

8.1.2 AUTHORISATION REQUIREMENT

A provision of national law which makes a direct foreign investment subject to prior authorisation constitutes a restriction on the movement of capital within the meaning of Article 73b(1) of the Treaty (see, to this effect, Joined Cases C-163/94,C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 24and 25).

C-54/99 - Église de scientologie, § 14.

8.1.3 QUALIFICATION REQUIREMENT

Here, **the national legislation provides that the members of companies and firms operating pharmacies can only be pharmacists. That legislation thus prevents investors from other Member States who are not pharmacists from acquiring stakes in companies and firms of that kind**.

Consequently, the national legislation imposes restrictions within the meaning of Articles 43 EC and 56(1) EC.

C-531/06 - Commission v Italy, § 47-48.

8.2 INVESTMENTS IN REAL ESTATE

8.2.1 AUTHORISATION REQUIREMENT

Accordingly, a procedure of **prior authorisation**, such as that under the TGVG 1996, **which entails, by its very purpose, a restriction on the free movement of capital, can be regarded as compatible with Article 56 EC only on certain conditions**.

C-302/97 - Konle, § 39.

In the light of all the foregoing considerations, the answer to the first three questions is that **Article 56 EC must be interpreted as precluding national legislation** such as that at issue in the main proceedings, **which makes the exercise of cross-frontier activities of institutions** approved under Article 70(1) of the Housing Law in relation to housing matters **subject to prior administrative authorisation, in so far as such legislation is not based on objective, non-discriminatory criteria which are known in advance** and which are capable of adequately circumscribing the exercise by the national authorities of their discretion, a matter which falls to be determined by the national court.

C-567/07 - Woningstichting Sint Servatius, § 39.

In the cases in the main proceedings, it is common ground that Book 5 of the Flemish Decree provides for **such a prior authorisation procedure to verify the existence of a 'sufficient connection' between the prospective buyer or tenant of immovable property and the target commune** in question.

It must thus be held that **the obligation to submit to such a procedure is likely to discourage non-residents from making investments in immovable property** in one of the target communes in the Flemish Region and that, there**fore, such an obligation constitutes a restriction** of the free movement of capital under Article 63 TFEU.

C-197/11 - Libert and Others, § 46-47.

8.2.2 RESIDENCE REQUIREMENT

Although the Danish legislation on agriculture does not discriminate between Danish nationals and nationals of the other Member States of the European Union or the European Economic Area the fact nevertheless remains that **the residence requirement which it imposes and which may be waived only with the authorisation of the minister responsible for agriculture restricts the free movement of capital**.

The answer to the first question must therefore be that **Article 56 EC precludes national legislation such as that at issue in the main proceedings from laying down as a condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property**.

C-370/05 - Festersen, § 25 and 48.

8.3 OPERATIONS IN SECURITIES

In that regard, it is apparent from the Court's case-law that **the Treaties do not preclude, as a general rule, either the nationalisation of undertakings** (see, to that effect, Case 6/64 *Costa* [1964] ECR 585, at 598) **or their privatisation** (see, to that effect, Case C-244/11 *Commission* v *Greece* [2012] ECR, paragraph 17).

C-105/12 - Essent and Others, § 30.

8.3.1 OPEN PENSION FUNDS: LIMITATION ON THE INVESTMENT OF CAPITAL ASSETS OUTSIDE THE MEMBER STATE CONCERNED

It is common ground that Article 143 of the Law on pension funds, first, limits foreign investments by the OPFs to 5% of the value of the assets of the OPF concerned, and, second, sets out a list of possible foreign investments which is less extensive than that for possible investments within Poland pursuant to Article 141(1) of that Law. In doing so, **Article 143 of the Law on pension funds imposes both quantitative and qualitative restrictions on OPFs with regard to investments made outside national territory, and in particular in other Member States**.

Such a provision also has a restrictive effect in relation to companies established in other Member States in that it constitutes an obstacle to the raising, by such companies, of capital in Poland since the acquisition of, inter alia, shares in joint investment bodies is restricted (see, by analogy, Case C‑242/03 *Weidert and Paulus* [2004] ECR I‑7379, paragraph 14).

C-271/09 - Commission v Poland, § 51-52.

8.4 OPERATION IN UNITS OF COLLECTIVE INVESTMENT UNDERTAKINGS

8.4.1 AUTHORISATION REQUIREMENT

Secondly, the legislation at issue in the main proceedings, inter alia Paragraph 30(2)(5)(a) and (b) of the BMSVG, by the reference made to Chapters I and III of the InvFG, makes the investment of assets of severance funds in units of investment funds based in both non-member countries and Member States subject to the condition that those investment funds have obtained authorisation to market their units within the national territory and, under Paragraph 43 of the BMSVG, the failure to observe that condition exposes those severance funds to the payment of interest.

Such legislation obliges investment funds established in other Member States to undergo an authorisation procedure in Austria, while those funds, lawfully established and approved in the Member State in which they have their seat, hope to be able legitimately to attract capital from other Member States. **That requirement therefore constitutes an impediment to cross-border movements of capital.**

C-39/11- VBV - Vorsorgekasse, § 22 and 27.

8.5 SURETIES AND OTHER GUARANTEES

8.5.1 PROHIBITION ON THE CREATION OF A MORTGAGE IN A FOREIGN CURRENCY

The effect of national rules such as those at issue in the main proceedings **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. Consequently, **those rules are liable to dissuade the parties concerned from denominating a debt in the currency of another Member State**, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments (see, in relation to Article 106(1) of the EEC Treaty, Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, paragraph 28, and Case 308/86 *Lambert* [1988] ECR 4369, paragraph 16).

Furthermore, the rules at issue may well cause the contracting parties to **incur additional costs**, by requiring them, purely for the purposes of registering the mortgage, to value the debt in the national currency and, as the case may be, formally to record that currency conversion.

In those circumstances, **an obligation to have recourse to the national currency for the purposes of creating a mortgage must be regarded, in principle, as a restriction** on the movement of capital within the meaning of Article 73b of the Treaty.

C-222/97- Trummer and Mayer, § 26-28.

8.6 FINANCIAL LOANS AND CREDITS

8.6.1 ESTABLISHMENT REQUIREMENT

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.

C-484/93 - Svensson and Gustavsson v Ministre du Logement and de l'Urbanisme, § 10.

8.6.2 RESIDENCE REQUIREMENT

It follows that **that provision discriminates according to the place where the loan is contracted**. Discrimination of that nature 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 within the meaning of Article 73b(l) of the Treaty.

C-439/97 - Sandoz, § 31.

8.6.3 PROHIBITION OF THE ACQUISITION BY PERSONS RESIDENT IN A MEMBER STATE OF SECURITIES OF A LOAN ISSUED ABROAD

The Commission submits, in support of its application, that **the outright prohibition by the Royal Decree of the acquisition by Belgian residents of securities of a loan on the Eurobond market (hereinafter 'the contested measure') impairs the free movement of capital** laid down in Article 73b of the Treaty […].

The second paragraph of Article 3 of the Royal Decree, **by excluding the possibility of Belgian residents subscribing to the loan in question, goes well beyond a measure which is intended to dissuade residents of a Member State from subscribing to a loan issued abroad or which imposes the requirement of prior authorisation, and thus all the more constitutes a restriction of the free movement of capital** within the meaning of Article 73b of the Treaty.

C-478/98 - Commission v Belgium, § 15 and 19.

8.7 TAXATION

In relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable.

The position is different, however, in a case such as this one where the non-resident receives no significant income in the State of his residence and obtains the major part of his taxable income from an activity performed in the State of employment , with the result that the State of his residence is not in a position to grant him the benefits resulting from the taking into account of his personal and family circumstances.

There is no objective difference between the situations of such a non-resident and a resident engaged in comparable employment, such as to justify different treatment as regards the taking into account for taxation purposes of the taxpayer's personal and family circumstances.

C-279/93 - Finanzamt Köln-Altstadt v Schumacker, § 31 and 36-37.

With regard to income tax, the Court has held that **the situation of a resident is different from that of a non-resident in so far as the major part of his income is normally concentrated in the State of residence**. Moreover, that State generally has available all the information needed to assess the taxpayer's overall ability to pay, taking account of his personal and family circumstances (*Schumacker*, paragraph 33).

C-376/03 - D., § 27.

8.7.1 TAXATION OF PROFITS MADE FROM THE SALE OF SHARES IN LIMITED COMPANIES

As is apparent from the order for reference, in 2001, **the profits from sales of shares in foreign limited companies were taxable as soon as the shareholding in the company capital amounted to 1%. For that same year, on the contrary, and in identical circumstances furthermore, the profits from sales of shares in limited companies**

governed by national law were taxable only when that shareholding amounted to 10%.

Such a difference in treatment on the basis of the place of investment of the capital **has the effect of discouraging a shareholder from investing his capital in a company established in another State and also has a restrictive effect on companies established in other States in that it constitutes an obstacle** to their raising capital in Germany (see, to that effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 166).

C-436/06 – Grønfeldt, § 13-14.

8.7.2 TAXATION OF DIVIDENDS

A legislative provision such as the one at issue in the main proceedings **has the effect of dissuading nationals of a Member State residing in the Netherlands from investing their capital in companies which have their seat in another Member State**. It is also clear from the legislative history of that provision that the exemption of dividends, accompanied by the limitation of that exemption to dividends on shares in companies which have their seat in the Netherlands, was intended specifically to promote investments by individuals in companies so established in the Netherlands in order to increase their equity capital.

Such a provision also has a restrictive effect as regards companies established in other Member States: it **constitutes an obstacle to the raising of capital in the Netherlands since the dividends which such companies pay to Netherlands residents receive less favourable tax treatment than dividends distributed by a company established in the Netherlands, so that their shares are less attractive to investors residing in the Netherlands than shares in companies which have their seat in that Member State**.

It follows that **to make the grant of a tax advantage, such as the dividend exemption, relating to taxation of the income of natural persons who are shareholders subject to the condition that the dividends are paid by companies established within national territory constitutes a restriction** on capital movements prohibited by Article 1 of Directive 88/361.

C-35/98 - Verkooijen, § 34-36.

In the light of the foregoing, the answer to Question 1(a) must be that A**rticles 56 EC and 58 EC do not preclude legislation of a Member State**, such as the legislation at issue in the main proceedings, **which grants a concession to fiscal investment enterprises established in that Member State on account of tax deducted at source in another Member State from dividends received by those enterprises, and restricts that concession to the amount which a natural person resident in the first Member State could have had credited, on account of similar deductions, on the basis of a double taxation convention concluded with that other Member State**.

C-194/06 - Orange European Smallcap Fund, § 65.

In the light of all those considerations, the answer to the question referred must be that **Article 73b(1) of the Treaty does not preclude legislation of a Member State**, such as Belgian tax legislation, **which, in the context of tax on income, makes dividends from**

shares in companies established in the territory of that State and dividends from shares in companies established in another Member State subject to the same uniform rate of taxation, without providing for the possibility of setting off tax levied by deduction at source in that other Member State.

C-513/04 - Kerckhaert and Morres, § 24.

By its first question, the national court is asking, in essence, whether Articles 56 EC and 58 EC preclude **legislation** of a Member State **which**, where the minimum threshold for the parent company's shareholdings in the share capital of the subsidiary set out in Article 5(1) of Directive 90/435 is not reached, **provides for a withholding tax on dividends distributed by a company established in that Member State to a company established in another Member State, while exempting from that tax the dividends paid to a company liable to corporation tax in the first Member State or which has a permanent establishment in the first Member State which owns shares in the company paying the dividends**.

In the present case, for the purposes of exempting dividend tax from withholding tax, Articles 4 and 4a of the Wet DB, together with Article 13 of the Wet Vpb, introduce a **difference of treatment** between, on the one hand, companies receiving dividends with their seat in the Netherlands or having a permanent establishment there which holds shares in the distributing company and, on the other, companies receiving dividends which are not established in the Netherlands.

Treating dividends paid to companies established in another Member State less favourably than dividends paid to companies established in the Netherlands is liable to deter companies established in another Member State from investing in the Netherlands and thus constitutes a restriction on the free movement of capital prohibited, in principle, by Article 56 EC.

C-379/05 - Amurta, § 15, 25 and 28.

In the present case, Paragraph 16 of Chapter 42 of the Law grants taxpayers living in Sweden an **exemption from tax in respect of dividends distributed in the form of shares in a subsidiary by a limited liability company established in Sweden or in another State within the EEA but refuses to grant them that exemption where such a distribution is made by a company established in third country outside the EEA**, unless that country has concluded a convention providing for the exchange of information with the Kingdom of Sweden.

The effect of such legislation is to **discourage taxpayers residing in Sweden from investing their capital in companies established outside the EEA**. Since the dividends which such companies pay to Swedish residents receive less favourable tax treatment than dividends distributed by a company established in an EEA Member State, the shares of such companies are less attractive to investors residing in Sweden than shares in companies established in such a State (see, to that effect, Verkooijen, paragraphs 34 and 35, and Manninen, paragraphs 22 and 23, and, with regard to movement of capital between Member States and third countries, Test Claimants in the FII Group Litigation, paragraph 166).

Legislation such as that at issue in the main proceedings therefore entails a **restriction** of the movement of capital **between Member States and third countries** which, in principle, is prohibited by Article 56(1) EC.

C-101/05 - A, § 41-43.

8.7.3 TAX ON INCOME FROM SAVINGS AND INVESTMENTS

Under Article 2.7(2) of the IB Law, **reductions in contributions in respect of national insurance, which, where appropriate, are deducted from the tax due on income in the year concerned** – of which income from property investments is part – **are allowed only to taxpayers who are insured under the Netherlands social security system**.

The **criterion of insurance chosen** by the Netherlands legislation **favours**, in the majority of cases, persons **resident in that Member State. Taxpayers who are not insured under that system are more often than not non-residents**.

Less favourable tax treatment for non-residents only might deter the latter from investing in property in the Netherlands. That legislation is therefore capable of hindering the free movement of capital.

C-512/03, Blanckaert, § 37-39.

8.7.4 CORPORATE TAX

As pointed out by the national court, **where a resident taxpayer has acquired shares in a resident capital company from a non-resident shareholder, the effect of the legislation at issue in the main proceedings is that the reduction in value of those shares resulting from a distribution of dividends does not affect the acquirer's basis of assessment, whereas, had such shares been acquired from a resident shareholder, that reduction in value would have reduced the acquirer's basis of assessment**.

That restriction on taking into account the reduction in value of the shares resulting from the dividend distribution applies as from the year of their acquisition and for the next nine years, and concerns only the reductions in profits resulting from a distribution or from the transfer of profits pursuant to a special control agreement, and as long as the reductions in profits do not exceed a certain amount, known as a 'blocked amount'.

That blocked amount, which is equal to the difference between the acquisition price paid by the resident shareholder and the nominal value of the shares, thus applies to the shares acquired from a non-resident, effectively annulling the effects of the partial reduction in value of the shares resulting from the distribution of the profits.

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.

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.

It follows **that legislation** such as that at issue in the main proceedings **constitutes a restriction on the free movement of capital** which is prohibited, in principle, by Article 73b of the Treaty.

C-182/08 - Glaxo Wellcome, § 53-59.

The answer to Question 1 must therefore be that Articles 43 EC and 56 EC must be interpreted as meaning that, **where a Member State has a system for preventing or mitigating the imposition of a series of charges to tax or economic double taxation as regards dividends paid to residents by resident companies, it must treat dividends paid to residents by non-resident companies in the same way**.

Articles 43 EC and 56 EC do not preclude legislation of a Member State which exempts from corporation tax dividends which a resident company receives from another resident company, when that State imposes corporation tax on dividends which a resident company receives from a non-resident company in which the resident company holds at least 10% of the voting rights, while at the same time granting a tax credit in the latter case for the tax actually paid by the company making the distribution in the Member State in which it is resident, provided that the rate of tax applied to foreign-sourced dividends is no higher than the rate of tax applied to nationally-sourced dividends and that the tax credit is at least equal to the amount paid in the Member State of the company making the distribution, up to the limit of the amount of the tax charged in the Member State of the company receiving the distribution.

Article 56 EC precludes legislation of a Member State which exempts from corporation tax dividends which a resident company receives from another resident company, where that State levies corporation tax on dividends which a resident company receives from a non-resident company in which it holds less than 10% of the voting rights, without granting the company receiving the dividends a tax credit for the tax actually paid by the company making the distribution in the State in which the latter is resident.

C-446/04 - Test Claimants in the FII Group Litigation, § 72-74.

As regards the main action, it is apparent from the order for reference that, in 2001, **a resident company could not deduct from its taxable revenue reductions in profit resulting from the partial write-down of holdings in non-resident companies. By contrast, in the same year and, moreover, in identical circumstances, a resident company could deduct such reductions in profit from its taxable revenue where they related to holdings in resident companies**.

As the referring court found, resident companies holding depreciated shares in non-resident companies were, in 2001, in a less favourable situation than those holding such shares in resident companies.

However, such a difference in treatment, depending on where capital was invested, as was introduced by the KStG (new version) prior to the tax assessment period in which that legislation became applicable was liable to discourage a shareholder from investing in a company established in a State other than the Federal Republic of Germany and also to have a restrictive effect in relation to companies established in other States, representing, as far as the latter are concerned, an obstacle to the raising of capital in Germany.

C-377/07 - STEKO Industriemontage, § 25-27.

8.7.5 DIFFERENCE IN TREATMENT BETWEEN DIFFERENT CATEGORIES OF REVENUE FROM CAPITAL

In this case**, the tax legislation at issue has the effect of deterring taxpayers living in Austria from investing their capital in companies established in another Member State**. **The legislation allows such a taxpayer**, in respect of the taxation of his domestic revenue from capital, **to choose between definitive taxation at the fixed rate of 25% and ordinary income tax at a rate reduced by half, whereas his revenue from capital originating in another Member State is subject to the application of ordinary income tax, the rate of which may be as much as 50%**.

That legislation also produces a restrictive effect in relation to companies established in other Member States, inasmuch as **it constitutes an obstacle to their raising capital in Austria**. To the extent that revenue from capital originating in another Member State receives less favourable tax treatment than revenue from capital of Austrian origin, the shares of companies established in other Member States are, for investors living in Austria, less attractive than the shares of companies established in that Member State (see, to that effect, *Verkooijen*, paragraph 35, and *Commission* v *France*, paragraph 24).

It follows from **the above that legislation** such as that at issue in the main proceedings **constitutes a restriction** on the free movement of capital which is, in principle, prohibited by Article 73b(1) of the Treaty.

C-315/02 - Lenz, § 20-23.

8.7.6 EXEMPTION OF INCOME FROM CAPITAL AND MOVABLE PROPERTY

In the present case, it is common ground that **the Belgian legislation makes subject to withholding tax dividends and interest distributed by a company established in Belgium to both investment companies which are resident in Belgium and investment companies which have their seat in another Member State**. **However, as regards dividends and interest distributed to investment companies established in Belgium, they are exempt from corporation tax as income from capital and movable property**, pursuant to Article 185a of the ITC 1992. Moreover, under the second subparagraph of Article 304(2) of the ITC 1992, it is possible to set off the withholding tax against the corporation tax payable by those investment companies, or even to receive the difference between the amount of the withholding tax retained at source and the tax actually payable provided that that difference is equal to or greater than EUR 2.50. The same applies under the fifth subparagraph of Article 304(2) of the ITC 1992 as regards non-resident investment companies, but which are subject to the tax on non-residents in accordance with Article 233 of the ITC 1992, namely those non-resident investment companies which have a permanent establishment in Belgium. It follows that **resident investment companies are liable not to be subject to the tax burden stemming from the withholding tax on income from capital and movable property that they receive from Belgian companies**.

Whilst it is true that **the right to exemption and to set off** available to resident investment companies is subject to certain conditions and limitations, in particular those laid down in Articles 281 and 282 of the ITC 1992, the fact remains that such an option **is not available to non-resident investment companies with no permanent establishment in Belgium** and that, consequently, the tax withheld at source on income from capital and movable property that such companies receive from Belgian companies in which they have invested constitutes definitive taxation pursuant to Article 248 of the ITC 1992.

Consequently, it must be stated **that Belgian tax legislation establishes 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**.

C-387/11 - Commission v Belgium, § 38-40.

8.7.7 EXCLUSION FROM CONCESSION TO FOREIGN FISCAL INVESTMENT ENTERPRISES

By excluding from the concession (relating to the taxation at source of dividends received abroad) dividends originating in certain Member States, legislation such as that at issue in the main proceedings **makes investment in those Member States less appealing** than investment in the Member States in which the taxation at source of those dividends gives rise to that concession. Su**ch legislation is therefore liable to deter a collective investment enterprise from investing in the Member States in which the taxation of dividends does not give rise to the concession and accordingly constitutes a restriction** on the free movement of capital prohibited in principle by Article 56 EC.

C-194/06 - Orange European Smallcap Fund, § 56.

8.7.8 DIFFERENT BASIS OF ASSESSMENT FOR CAPITAL GAINS ON IMMOVABLE PROPERTY

In that regard, it should be pointed out that the combined provisions of the CIRS lay down, **in the case of capital gains realised when transferring for valuable consideration immovable property situated in Portugal, tax rules which differ depending on whether the taxable persons reside in that Member State or not**.

Thus, under Article 43(2) of the CIRS the amount of capital gains realised by residents when transferring immovable property situated in Portugal is to be taken into account as to only 50% of its amount. By contrast, for non-residents, the CIRS provides that the full amount of capital gains realised in the case of the transfer of that property is subject to tax.

In those circumstances, it must be found that the **laying down of 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 constitutes a restriction** on the movement of capital prohibited by Article 56 EC.

C-443/06 - Hollmann, § 35-36 and 39.

8.8 PHYSICAL IMPORT AND EXPORT OF FINANCIAL ASSETS

8.8.1 AUTHORISATION AND DECLARATION REQUIREMENTS

It is in the light of those considerations that i**t should be determined whether the requirement laid down by the authorities of a Member State of a prior declaration or authorization for the transfer of coins, banknotes or bearer cheques is to be regarded as a requisite measure** within the meaning of the first paragraph of Article 4 of the Directive.

[…] [**A]uthorization** h**as 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 (see Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paragraph 34). It might have the effect of impeding capital movements carried out in accordance with Community law, contrary to the second paragraph of Article 4 of the Directive.

A prior declaration, on the other hand, **may be one of the requisite measures which Member States are permitted to take** since, unlike prior authorization, 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.

Consequently, it should be stated in reply to the third question that Articles 1 and 4 of the Directive preclude the export of coins, banknotes or bearer cheques being made conditional on prior authorization but do not by contrast preclude transactions of that nature being made conditional on a prior declaration.

C-358/93 - Bordessa and Others, § 23-25, 27 and 31.

8.9 INHERITANCES

8.9.1 INHERITANCE TAX

As for the existence of a 'restriction' within the meaning of Article 1(1) of Directive 88/361, **national provisions** such as those at issue in the main proceedings, **which determine the value of immovable property for the purposes of assessing the amount of tax due when it is acquired through inheritance, are such as to discourage the purchase of immovable property situated in the Member State concerned and the transfer of financial ownership of such property to another person by a resident of another Member State**. They also have the effect of reducing the value of the estate of a resident of a Member State other than that in which the property is situated who is in the same position as Mr Barbier.

Accordingly, **the national provisions at issue in the main proceedings have the effect of restricting the movement of capital**.

C-364/01 – Barbier, § 62-63.

National legislation such as that in question in the main proceedings, **which provides that the estate of a national of a Member State who dies within 10 years of ceasing to reside in that Member State is to be taxed as if that national had continued to reside in that Member State, while providing for relief in respect of the taxes levied in the State to which the deceased transferred his residence, does not constitute a restriction** on the movement of capital.

C-513/03 - van Hilten-van der Heijden, § 45.

8.9.2 INHERITANCE TAX ON REGISTERED SHARES

It follows from all the foregoing that the answer to the question referred is that **Article 63 TFEU must be interpreted as precluding legislation of a Member State** such as that at issue in the main proceedings **which provides, as regards inheritance tax, for a limitation period of 10 years for the valuation of registered shares in a company in which the deceased was a shareholder and whose centre of effective management is established in another Member State, while the same limitation period is 2 years when the company's centre of effective management is in the first Member State**.

C-132/10 – Halley, § 40.

8.9.3 LACK OF DEDUCTION OF OVERENDOWMENT DEBTS WHEN ASSESSING INHERITANCE DUTIES

It follows that, on account of **the progressive nature of the tax bands provided for under the Netherlands rules – which**, as the Commission pointed out at the hearing, **is not in itself improper – national rules such as those at issue in the main proceedings could make the inheritance of a non-resident subject to a higher overall tax burden**.

[…] **[T]he failure to take into account the underendowment claims of the other heirs of such a non-resident person could lead to a greater tax burden**, in view of the fact that the transfer duties are levied solely on the surviving spouse.

It must also be noted that, in circumstances such as those of the case before the referring court, **the impact of the restriction** resulting from the fact that the surviving spouse is required to pay transfer duty on the full value of the immovable property without the overendowment debts being taken into account **is exacerbated by the fact that** – as is apparent from paragraph 12 of the present judgment and the written observations submitted to the Court by the Commission – **the transfer duty is assessed not only on the basis of the value of the acquisition but also by taking account of the link between the taxpayer and the deceased**. According to the Commission, the exemption for surviving spouses is normally substantial, unlike the exemption for children.

C-43/07 - Arens-Sikken, § 40 and 47-48.

8.9.4 INDIRECT DISCRIMINATION ON TAXING AN INHERITED IMMOVABLE PROPERTY

Where national legislation places the heirs of a person who, at the time of death, had the status of resident and those of a person who, at the time of death, had the status of non-resident on the same footing for the purposes of taxing an inherited immovable property which is situated in the Member State concerned, that legislation cannot, without giving rise to discrimination, treat those heirs differently in the taxation of that property so far as concerns the deductibility of charges secured on it. **By treating the inheritances of those two categories of persons in the same way** (except in relation to the deduction of debts) **for the purposes of taxing their inheritance, the national legislature has in fact admitted that there is no objective difference between them in regard to the detailed rules and conditions relating to that taxation which could justify different treatment** (see, by analogy, in relation to the right of establishment, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 20, and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 35; and, in relation to the free movement of capital and inheritance duties, Case C-43/07 *Arens-Sikken* [2008] ECR I-0000, paragraph 57).

C-11/07 – Eckelkamp, § 63.

8.9.5 TAX ON AN INHERITANCE CONSISTING OF ASSETS SITUATED IN THAT STATE AND AGRICULTURAL LAND AND FORESTRY SITUATED IN ANOTHER MEMBER STATE

In the present case, the national provisions in issue in the main proceedings, in so far as they result in an **inheritance** consisting of agricultural land and forestry situated in another Member State **being subject, in Germany, to inheritance tax that is higher than that which would be payable if the assets inherited were situated exclusively within the territory of that Member State, have the effect of restricting the movement of capital by reducing the value of an inheritance consisting of such an asset situated outside Germany**.

C-256/06 – Jäger, § 32.

9 EXCEPTIONS TO THE FREE MOVEMENT OF CAPITAL

9.1 ARTICLE 64 TFEU (GRANDFATHER CLAUSE)

9.1.1 GENERAL DEFINITIONS

[…] [A]ll the provisions introduced in the Treaty in the chapter concerning capital and payments show that, in order to take account of the fact that the objective and the legal context of the liberalisation of the movement of capital differ according to whether relations between the Member States and third countries or the free movement of capital between the **Member States** is in issue, the latter **considered it necessary to provide**

safeguard clauses and derogations which apply specifically to the movement of capital to or from third countries.

C-101/05 - A, § 32.

It should be remembered that, **under that provision [Article 57(1) EC], Article 56 EC is to be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets**.

In that regard, it must be observed that **Article 57(1) EC**, which sets out a restrictive list of movements of capital to which Article 56(1) EC may not apply, **does not mention inheritances**. **Such a provision, in so far as it is an exception to the fundamental principle of the free movement of capital, must be interpreted strictly** (see, by analogy, Eckelkamp and Others, paragraph 57).

C-181/12 - Welte, § 28-29.

[…] **[I]t 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**.

[…][T]he restrictions on capital movements involving direct investment or establishment within the meaning of **Article 57(1) EC 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**.

C-446/04- Test Claimants in the FII Group Litigation, § 171 and 183.

Any measure adopted after the date of accession is not, by that fact alone, automatically excluded from the derogation laid down in Article 70 of the Act of Accession. Thus, if it is, in substance, identical to the previous legislation or if it 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.

On the other hand, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the time of accession.

C-302/97 - Konle, § 52-53.

9.1.2 PARTICULAR CASES

9.1.2.1 AUTHORISATION REQUIREMENT WHEN BUYING IMMOVABLE PROPERTY

The answer to the second question is, therefore, that **Article 64(1) TFEU must be interpreted as meaning that the provisions** of the WrAuslGEG, **which require foreign**

nationals, within the meaning of that law, **when acquiring immovable property** situated in the province of Vienna, **to obtain authorisation** in respect of that acquisition or else to produce a confirmation that the conditions laid down in that law for exemption from that requirement are satisfied, **constitute a restriction** on the free movement of capital which is **permitted with regard to the Swiss Confederation as a third country**.

C-541/08 - Fokus Invest, § 49.

9.1.2.2 RELATIONS BETWEEN EU MEMBER STATES AND EEA STATES

[…][T]he rules laid down in them prohibiting restrictions on the movement of capital and discrimination, so far as concerns **relations between the States party to the EEA** Agreement, **irrespective of whether they are members of the Community or members of EFTA, are identical to those under Community law with regard to relations between the Member States**. National measures governing the acquisition of agricultural and forestry plots are therefore no more exempt from the abovementioned rules than under Community law.

It would run counter to that objective as to uniformity of application of the rules relating to free movement of capital within the EEA for a State such as the Republic of Austria, which is a party to that Agreement, which entered into force on 1 January 1994, to be able, after its accession to the European Union on 1 January 1995, to maintain legislation which restricts that freedom vis-à-vis another State party to that Agreement by basing itself on Article 73c of the Treaty.

Thus, **since 1 May 1995**, the date on which the EEA Agreement entered into force in respect of the Principality of Liechtenstein, and in the sectors covered thereby, **Member States may no longer invoke Article 73c vis-à-vis the Principality of Liechtenstein**. Consequently, contrary to the arguments advanced by the Austrian Government, it is not for the Court to examine, pursuant to that provision, whether the restrictions on the movement of capital between Austria and Liechtenstein as a consequence of the VGVG were already substantively in force on 31 December 1993 and thus whether they could be maintained by virtue of the same article.

C-452/01 - Ospelt and Schlössle Weissenberg, § 28 and 30-31.

9.2 ARTICLE 65 TFEU (EXCEPTION CLAUSE)

9.2.1 ARTICLE 65(1)(A) TFEU: TAX DIFFERENTIATION

In that respect, it should be noted that, under Article 73d(1)(a) of the Treaty, '… Article 73b shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to … the place where their capital is invested'.

That stated, **Article 73d(1)(a)** of the Treaty, in so far as it is a derogation from the fundamental principle of the free movement of capital, **must be interpreted strictly**. That provision cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on their place of residence or the Member State in which they invest their capital is automatically compatible with the Treaty.

C-256/06 – Jäger, § 37 and 40.

However, **unequal treatment permitted under Article 58(1)(a) EC must be distinguished from arbitrary discrimination prohibited under Article 58(3) EC**.

C-443/06 – Hollmann, § 44.

In addition, the possibility granted to the Member States by Article 73d(1)(a) of the Treaty of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested has already been upheld by the Court. According to that case-law, before the entry into force of Article 73d(1)(a) of the Treaty, **national tax provisions of the kind to which that article refers, in so far as they establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were not objectively comparable** (see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225) **or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system** (Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305).

C-35/98 - Verkooijen, § 43.

In relation to direct taxes, the situations of residents and of non-residents are not, as a rule, comparable.

C-279/93 - Finanzamt Köln-Altstadt v Schumacker, § 31.

In any event, having regard to Article 58(1)(a) EC, **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 the categories of dividends concerned by that difference in treatment share the same objective situation**.

C-319/02 – Manninen, § 39.

A **distinction** must therefore be made **between unequal treatment which is permitted under Article 58(1)(a) EC and arbitrary discrimination which is prohibited by Article 58(3)**. In that respect, the case-law shows that, **for national tax legislation** like that at issue, **which**, in relation to a fully taxable person in the Member State concerned **makes a distinction between revenue from national dividends and that from foreign dividends**, to be capable of being regarded as compatible with the Treaty provisions on the free movement of capital, **the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest, such as the need to safeguard the coherence of the tax system** (*Verkooijen*, paragraph 43). In order to be justified, moreover, the difference in treatment between different categories of dividends must not go beyond what is necessary in order to attain the objective of the legislation.

C-319/02 – Manninen, § 29.

As regards the need to safeguard the financial interest of the Portuguese Republic, it must be recalled that, **save in so far as they may fall within the ambit of the reasons set**

out in Article 73d(1) of the Treaty, which relate in particular to tax law, the general financial interests of a Member State cannot constitute adequate justification. It is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty (see, as regards the free movement of goods, Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 62, and, in relation to freedom to provide services, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23). That reasoning is equally applicable to the economic policy objectives reflected in Article 3 of Law No 11/90 and the objectives mentioned by the Portuguese Government in the present proceedings, namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production. Such interests cannot constitute a valid justification for restrictions on the fundamental freedom concerned.

C-367/98 - Commission v Portugal, § 52.

Since Community law does not detract from the power of the Member States to organise their own social security systems (Case C-385/99 Müller-Fauré andVan Riet [2003] ECR I-4509, paragraph 100), in the absence of harmonisation at Community level **it is for the legislation of the Member State concerned to determine the range of insured persons and the level of contributions payable by insured persons to the national social security system and the respective reductions**. Further, it falls within the internal process of such a system to allow entitlement to reductions in contributions only to persons liable to pay them, that is to say, persons insured under that system.

It follows that **a national rule** such as that at issue in the main **proceedings can be justified, in the light of Article 58(1)(a) EC, 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**.

C-512/03, Blanckaert, § 49-50.

It follows that **a taxpayer who holds only a minor part of his wealth in a Member State other than the State where he is resident is not, as a rule, in a situation comparable to that of residents of that other Member State and the refusal of the authorities concerned to grant him the allowance to which residents are entitled does not discriminate against him**.

C-376/03 - D., § 38.

In that regard, **the difference in treatment between companies receiving income from capital, established by the tax legislation at issue in the main proceedings, consisting in the application of different taxation arrangements to companies established in Belgium and to those established in another Member State, relates to situations which are not objectively comparable**.

C-282/07 - Truck Center, § 41.

9.2.2 ARTICLE 65(1)(B) TFEU: PRUDENTIAL MEASURES/PUBLIC POLICY/PUBLIC SECURITY

9.2.2.1 FIELD OF TAXATION AND PRUDENTIAL SUPERVISION OF FINANCIAL INSTITUTIONS

As the Court has already held in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 21 and 22, and *Sanz de Lera*, paragraph 22, the requisite measures to prevent certain infringements **in the field of taxation** referred to in Article 73d(1)(b) of the Treaty **include measures intended to ensure effective fiscal supervision and to combat illegal activities such as tax evasion**.

As appears from Case C-28/95 *Leur-Bloem* v *Inspecteur der Belastingsdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, paragraph 44, **a general presumption of tax evasion or tax fraud cannot justify a fiscal measure** which compromises the objectives of a directive. That applies all the more in the present case, where the contested measure consists in an outright prohibition on the exercise of a fundamental freedom guaranteed by Article 73b of the Treaty.

C-478/98 - Commission v Belgium, § 38 and 45.

9.2.2.2 PUBLIC POLICY AND PUBLIC SECURITY

It should be observed, first, that while Member States are still, in principle, free to determine **the requirements of public policy and public security** in the light of their national needs, those grounds **must**, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, **be interpreted strictly**, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, to this effect, Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, paragraphs 26 and 27). Thus, **public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society** (see, to this effect, *Rutili*, cited above, paragraph 28, and Case C-348/96 *Calfa* [1999]ECR I-11, paragraph 21). **Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends** (to this effect, see *Rutili*, paragraph 30). **Further, any person affected by a restrictive measure based on such a derogation must have access to legal redress** (see, to this effect, Case 222/86 *Unectef* v *Heylensand Others* [1987] ECR 4097, paragraphs 14 and 15).

C-54/99 - Église de scientology, § 14.

In this regard, it must be pointed out that **the Community has no express power to impose restrictions on the movement of capital and payments. However, Article 58 EC allows the Member States to adopt measures having such an effect to the extent to which this is, and remains, justified in order to achieve the objectives set out in the article, in particular, on grounds of public policy or public security** (see, by analogy with Article 30 EC, Case C-367/89 *Richardt* [1991] ECR I-4621, paragraph 19, and the decision cited therein). The concept of public security covering both the State's internal and external security, the Member States are therefore as a rule entitled to adopt under Article 58(1)(b) EC measures of the kind laid down by the contested regulation. In so far

as those measures are in keeping with Article 58(3) EC and do not go beyond what is necessary in order to attain the objective pursued, they are compatible with the rules on free movement of capital and payments and with the rules on free competition laid down by the EC Treaty.

T-315/01 - Kadi v Council and Commission, § 110.

The first paragraph of Article 4 of the Directive [88/361/EEC] expressly **refers to the requisite measures to prevent infringements of the laws and regulations of Member States, *'inter alia'* in the field of taxation and the prudential supervision of financial institutions**. It follows 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**.

That interpretation is confirmed moreover by the insertion in the Treaty establishing the European Community of Article 73d, paragraph (l)(b) of which essentially reproduces the first paragraph of Article 4 of the Directive but also provides that Member States have the right to take measures which are justified on grounds of **public policy or public security**.

C-358/93 - Bordessa and Others, § 21-22.

The national court seeks essentially to ascertain whether the provisions of the Treaty concerning prohibition of discrimination on grounds on nationality, freedom of establishment and free movement of capital preclude **national legislation of a Member State which releases the nationals of that Member State, and only them, from the obligation to seek an administrative authorisation for any purchase of real property** in an area of the country designated as being of military importance.

[…] [I]t is clear from the object of the legislation at issue that **the contested measure may be regarded as having been adopted in relation to public security, a concept which, within the meaning of the Treaty, includes the external security of a Member State** (see Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 22).

In that regard, **a mere reference to the requirements of defence of the national territory**, where the situation of the Member State concerned does not fall within the scope of Article 224 of the EC Treaty (now Article 297 EC), **cannot suffice to justify discrimination on grounds of nationality** against nationals of other Member States regarding access to immovable property on all or part of the national territory of the first State.

The position would be different only if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

C-423/98 - Albore, § 12, 18, 21 and 22.

It may be noted that the criteria at issue apply to common interests concerning, in particular, **the minimum supply of energy resources and goods essential to the public as a whole, the continuity of public service, national defence, the protection of public policy and public security and health emergencies**. **The pursuit of such interests may, subject to observance of the principle of proportionality, warrant certain restrictions**

of the exercise of fundamental freedoms (see, inter alia, judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 38).

C-326/07 - Commission v Italy, § 40 and 45.

9.2.3 ARTICLE 65(3) TFEU (UNIVERSALITY)

[…]. The derogation in Article 73d(1) of the Treaty is itself limited by **Article 73d(3)** of the Treaty, which **provides that the national provisions referred to in Article 73d(1) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b'**.

C-315/02 - Lenz, § 26.

A **distinction** must therefore be made **between the unequal treatment permitted** under Article 73d(1)(a) of the Treaty **and arbitrary discrimination prohibited** under Article 73d(3). According to the case-law, in order for national tax legislation such as that at issue in the main proceedings, which, for the purposes of calculating inheritance tax, distinguishes between assets situated in another Member State and those situated in Germany, to be considered compatible with the provisions of the Treaty on the free movement of capital, **the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest** (see *Verkooijen*, paragraph 43, *Manninen*, paragraph 29, and Case C-443/06 *Hollmann* [2007] ECR I-0000, paragraph 45).

C-256/06 – Jäger, § 42.

In any event, Article 73d(3) of the Treaty states specifically that the **national provisions referred to by Article 73d(1)(a) are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments**, as defined in Article 73b.

Furthermore, the argument that 'the measures and procedures' referred to in Article 73 (d) (3) of the Treaty do not relate to Article 73 (d) (1)(a), in which the term 'provisions' is used, is irrelevant. Apart from the fact that it is difficult to distinguish between 'measures' and 'provisions', **the term 'measures and procedures' does not appear at all in paragraph 2 even though Article 73d(3) refers expressly to that paragraph**.

C-35/98 - Verkooijen, § 44-45.

In addition, the possibility granted to the Member States by Article 73d(1)(a) of the Treaty of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested has already been upheld by the Court. According to that case-law, before the entry into force of Article 73d(1)(a) of the Treaty, national tax provisions of the kind to which that article refers, in so far as they establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were not objectively comparable (see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225) or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system (Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305).

C-35/98 - Verkooijen, § 43.

9.3 CASE LAW JUSTIFICATIONS (EMERGENCY BREAK)

Next, as regards justification for the restrictions on free movement of the capital in question, the Court has repeatedly held that **the free movement of capital may be limited by national legislation only if this is justified by one of the reasons mentioned in Article 58 EC or by overriding reasons in the public interest within the meaning of the Court's case-law** (see, to that effect, judgment of 14 February 2008 in Case C-274/06 *Commission* v *Spain*, paragraph 35 and the case-law cited). […]

C-271/09 - Commission v Poland, § 55.

The free movement of capital may, however, be restricted by national measures justified on the grounds set out in Article 58 EC or by overriding reasons in the general interest (see, to that effect, Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 29), **to the extent that there are no Community harmonising measures providing for measures necessary to ensure the protection of those interests** (see, to that effect, in the context of the freedom to provide services, Case C‑255/04 *Commission v France* [2006] ECR I-0000, paragraph 43, and case-law cited).

In the absence of such Community harmonisation, **it is in principle for the Member States to decide on the degree of protection which they wish to afford to such legitimate interests and on the way in which that protection is to be achieved**. They may do so, however, only **within the limits set by the Treaty and must, in particular, observe the principle of proportionality**, which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it (see, to that effect, Case C‑503/99 C*ommission v Belgium* [2002] ECR I-4809, paragraph 45).

C-282/04- Commission v Netherlands,§ 32-33.

[…] It is settled case-law that **economic grounds can never serve as justification for obstacles prohibited by the Treaty** (see, as regards the free movement of goods, Case C-265/95*Commission* v *France* [1997] ECR I-6959, paragraph 62, and, in relation to freedom to provide services, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23). That reasoning is equally applicable to the economic policy objectives reflected in Article 3 of Law No 11/90 and the objectives mentioned by the Portuguese Government in the present proceedings, namely choosing a strategic partner, stre**ngthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production**. Such interests **cannot constitute a valid justification** for restrictions on the fundamental freedom concerned.

C-367/98 - Commission v Portugal, § 52.

9.3.1 DIRECT INVESTMENTS

In that regard, the Court acknowledges that **the guarantee of a service of general interest, such as universal postal service, may constitute an overriding reason in the general interest capable of justifying an obstacle to the free movement of capital** (see,

by analogy, Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 44).

C-282/04- Commission v Netherlands, § 38.

9.3.2 TAXATION SECTOR

In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 52 … or 73b of the … Treaty preclude legislation of a Member State which, in the framework of a national imputation system for corporation tax, excludes the reduction in value of shares as a result of a distribution of dividends from the basis of assessment for that tax when a taxpayer who is entitled to a corporation tax credit has acquired shares in a capital company which is fully taxable from a shareholder who is not entitled to such a tax credit whereas, had the shares been acquired from a shareholder who was entitled to a tax credit, such a reduction in value would have reduced the acquirer's basis of assessment?'

It follows that **legislation** such as that at issue **in the main proceedings can be justified by the need to maintain a balanced allocation of the power to impose taxes between the Member States**.

C-182/08 - Glaxo Wellcome, § 31 and 88.

In those circumstances, the Tribunal Central Administrativo Sul decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Do Articles 63 [TFEU] and 65 [TFEU] (formerly Articles 56 [EC] and 58 [EC]) preclude legislation of a Member State, such as Article 61 of the CIRC … which, in connection with the overall debt of a taxable person residing in Portugal to an entity of a non-member country with which it maintains special relations within the meaning of Article 58(4) of the CIRC, does not allow interest borne and paid by that taxable person on the part of its overall debt regarded as excessive under Article 61(3) of the CIRC to be set off against tax on the same basis as interest borne and paid by a taxable person residing in Portugal who is found to be excessively indebted to an entity residing in Portugal with which it maintains special relations?'

By providing that certain interest paid by a resident company to a company established in a non-member country, with which it has special relations, is not to be deductible for the purposes of determining the taxable profit of that resident company, rules such as those at issue in the main proceedings are capable of preventing practices the sole purpose of which is to avoid the tax that would normally be payable on profits generated by activities undertaken in the national territory. It follows that **such rules are an appropriate means of attaining the objective of combatting tax evasion and avoidance** (see, by analogy, Case C‑524/04 *Test Claimants in the Thin Cap Group Litigation*, paragraph 77).

C-282/12 - Itelcar, § 12 and 35.

The Court has, on many occasions, held that **effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of the fundamental freedoms** guaranteed by the Treaty (see,

inter alia, Case 120/78 *Rewe-Zentral* (‘*Cassis de Dijon*’) [1979] ECR 649, paragraph 8, and Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31).

C-386/04 - Centro di Musicologia Walter Stauffer, § 47.

[…] [T]he Cour Administrative decided to stay the proceedings and refer the following question to the Court for a preliminary ruling :

‘Is Article 129c of the Income Tax Law of 4 December 1967, as amended, in the version applicable to the 2000 tax year, which, subject to certain conditions and limits, grants tax relief to taxpayers who are natural persons and acquire shares representing cash contributions in fully-taxable resident capital companies, compatible with the principle of the free movement of capital within the European Community as laid down by Article 56(1) of the EC Treaty, taking account of the restrictions on that principle laid down, inter alia, by Article 58(1)(a) of the EC Treaty?’

In that regard, while it is true that **the need to safeguard the cohesion of the tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty** (*Bachmann*, paragraph 28, and Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraph 21), **such an exception to the fundamental principle of the free movement of capital must none the less be construed strictly and subject to the limitations of the doctrine of proportionality**. In the cases which led to the two judgments referred to above, there was a **direct link between the deductibility of the contributions and the taxation of sums payable by insurers under pension and life insurance contracts, and that link had to be maintained to preserve the cohesion of the tax system concerned** (see, inter alia, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 24, and Case C‑436/00 *X and Y* [2002] ECR I-10829, paragraph 52).

Where there is no such direct link, the argument based on the cohesion of the tax system cannot be relied upon (see Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 40, and Case C-168/01 *Bosal* [2003] ECR I-0000, paragraph 30).

There is in the main proceedings no direct link between the tax advantage in question, namely the tax relief granted to a taxpayer resident in Luxembourg for the acquisition of shares in companies established in that Member State, and an offsetting fiscal levy.

C-242/03 - Weidert and Paulus, § 10 and 20-22.

In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 56 EC preclude a provision of a Member State according to which a prohibition on the deduction of reductions in profit in connection with the holding of a capital company in another capital company enters into force earlier with regard to foreign holdings than with regard to domestic (German) holdings?’

However, **even if a transitional system**, such as that at issue in the main proceedings, **can be justified by a legitimate concern to ensure a seamless transition from the earlier system to its replacement**, and even though the German Government’s arguments explain why the new half-income system was introduced only with effect from 2002 for companies holding shares in resident companies, **those arguments cannot justify a difference in treatment to the detriment of companies holding shares in non-resident companies**, as is the case in the main proceedings.

C-377/07 - STEKO Industriemontage, § 22 and 50.

As the Court has already held, overriding reasons in the public interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty include both the need to guarantee the **effectiveness of fiscal supervision** (see, to that effect, judgments in C‑101/05 *A*, EU:C:2007:804, paragraph 55; C‑155/08 and C‑157/08 X-*van Schoot and Passenheim*, EU:C:2009:368, paragraph 55; C‑262/09 *Meilicke*, EU:C:2011:438, paragraph 41, and C‑318/10 *SIAT*, EU:C:2012:415, paragraph 36) and the **need to ensure effective collection of tax** (see, to that effect, judgments in C‑269/09 *Commission v Spain* EU:C:2012:439, paragraph 64; C‑498/10 *X*, EU:C:2012:635, paragraph 39, and C‑53/13 and C‑80/13 *Strojírny Prostějov et ACO Industries Tábor*, EU:C:2014:2011, paragraph 46).

It is inherent in the principle of the fiscal autonomy of Member States that they determine the evidence that must be provided and the formal and material conditions which must be respected to enable the tax authorities to establish correctly the tax owed on the income earned from investment funds (see, by analogy, judgment in *Meilicke and Others*, EU:C:2011:438, paragraph 37).

C-326/12 - van Caster, § 46-47.

In paragraph 28 of the judgment in *Bachmann* and paragraph 21 of the judgment in *Commission* v *Belgium*, in which the Court acknowledged that **the need to preserve the coherence of a tax system** might justify a restriction on the exercise of fundamental freedoms guaranteed by the Treaty, it is important to note that there was a direct link between the deductibility of contributions and the taxation of sums payable by insurers under pension and life assurance contracts, and that link had to be maintained to preserve the cohesion of the tax system in question (see, in particular, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 24; *X and Y*, paragraph 52).

C-315/02 - Lenz, § 35.

9.3.3 INVESTMENT IN REAL ESTATE

By its second question, the referring court asks whether Articles 6, 73b to 73d, 73f and 73g of the Treaty preclude a system of **prior authorisation** such as that established by the VGVG for transactions involving agricultural land.

Secondly, so far as concerns the condition as to the aims of the national measure in issue, there is no doubt that the VGVG pursues public-interest objectives which are such as to justify restrictions on the free movement of capital.

First, **preserving agricultural communities, maintaining a distribution of land ownership** which allows the development of viable farms and sympathetic management of green spaces and the countryside **as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives**.

Indeed, the objective of **sustaining and developing viable agriculture** on the basis of social and land planning considerations entails keeping land intended for agriculture in such use and continuing to make use of it under appropriate conditions. In that context, prior supervision by the competent authorities does not merely reflect a need for information but is intended to ensure that the transfer of agricultural land will not lead to

their ceasing to be used as intended or to a use which might be incompatible with their long-term agricultural use.

C-452/01 - Ospelt and Schlössle Weissenberg, § 33, 38-39 and 44.

As regards the first requirement, it is apparent from paragraph 40 of the *Konle* judgment, cited above, that **restrictions on the establishment of secondary residences in a specific geographical area, which a Member State imposes in order to maintain, for regional planning purposes, a permanent population and an economic activity independent of the tourist sector, may be regarded as contributing to an objective in the public interest**. That finding can only be strengthened by the other concerns which may underly those same measures, such as protection of the environment. Moreover, it is apparent from the provisions of the SGVG that they do not discriminate between Austrian acquirers of title and persons resident in other Member States who exercise the freedoms guaranteed by the Treaty.

C-515/99 - Reisch and Others, § 34.

By its first question, the national court seeks essentially to ascertain whether the freedom of establishment and free movement of capital guaranteed by the Treaty are ensured by schemes, such as those under the two national laws at issue in the main proceedings, which make acquisition of land subject to **prior administrative authorisation** and which, in the case of one of those laws, exempt only nationals of the Member State concerned from the authorisation otherwise required.

Accordingly, a procedure of **prior authorisation**, such as that under the TGVG 1996, **which entails, by its very purpose, a restriction on the free movement of capital, can be regarded as compatible with Article 56 EC only on certain conditions**.

In that regard, to the extent that a Member State can justify its requirement of prior authorisation by relying on a **town and country planning objective** such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions, **the restrictive measure inherent in such a requirement can be accepted only if it is not applied in a discriminatory manner and if the same result cannot be achieved by other less restrictive procedures**.

C-302/97 - Konle, § 21 and 39-40.

9.3.4 SYSTEM OF PROPERTY OWNERSHIP

It must also be observed that **the objective of guaranteeing adequate investment in the electricity and gas distribution systems** is designed to ensure, inter alia, security of energy supply, an objective which the Court **has also recognised as being an overriding reason in the public interest** (Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraphs 34 and 35; Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, paragraph 46; and Case C-174/04 *Commission* v *Italy*, paragraph 40).

C-105/12 - Essent and Others, § 59.

9.3.5 OPERATION IN UNITS OF COLLECTIVE INVESTMENT UNDERTAKINGS

In the light of those considerations, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a provision which permits a severance fund to invest assets allocated to an undertaking for collective investment only in units of investment funds which are authorised to sell in Austria compatible with the freedom of movement of capital set out in Article 63 TFEU et seq.?'

So far as concerns, third, the alleged justification in terms of overriding reasons in the public interest, it is necessary to recognise 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** which is capable of justifying restrictions on the free movement of capital (see, by analogy, with regard to pension funds, *Commission* v *Poland*, paragraph 57).

C-39/11 - VBV - Vorsorgekasse, § 18 and 31.

9.3.6 HOUSING POLICY

By its first three questions, which it is appropriate to examine together, the referring court asks, in essence, whether the fact that a Member State requires an institution such as Servatius, which is approved for the purposes of Article 70(1) of the Housing Law as an institution active in the housing sector, to obtain prior authorisation in order to invest in construction projects in another Member State constitutes a restriction on the free movement of capital within the meaning of Article 56 EC. If that question is answered in the affirmative, the referring court wishes to know (i) whether, by virtue of a derogation expressly granted by Article 58 EC or an overriding reason in the public interest recognised by the case-law of the Court, a restriction of that type can be justified on grounds relating to the interests of public housing policy in the Member State concerned and to the financing thereof, and (ii) whether such a restriction is a necessary and proportionate means of attaining of the objective pursued.

Thus, by analogy, it should be held that **requirements related to public housing policy in a Member State and to the financing of that policy can also constitute overriding reasons in the public interest** and therefore justify restrictions such as that established by the national legislation at issue in the main proceedings. As the Netherlands Government has rightly pointed out, such considerations can only acquire greater significance in the light of certain features specific to the situation on the national market in question in the main action, such as a structural shortage of accommodation and a particularly high population density.

C-567/07 - Woningstichting Sint Servatius, § 19 and 30.

9.3.7 GIFTS AND ENDOWMENTS

As regards, secondly, the argument that there is an overriding reason in the public interest, while the Court indeed held in Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 23, that **the promotion of research and development** may constitute

such a reason, it nevertheless considered that national legislation reserving the benefit of a tax credit solely to research carried out in the Member State concerned was directly contrary to the objective of European Union policy in the field of research and technical development. In accordance with Article 163(2) EC, that policy aims in particular to remove the fiscal obstacles to cooperation in the field of research, and cannot therefore be implemented by the promotion of research and development at national level. The same is true of the tax rules concerning gifts at issue in the present case, in so far as the Republic of Austria relies on that objective to limit the deductibility of gifts to Austrian research establishments and universities.

C-10/10 - Commission v Austria, § 37.

9.4 PROPORTIONALITY (SUITABILITY AND NECESSITY)

It is therefore **necessary to consider whether the requirement** of an authorization or a prior declaration for the export of coins, banknotes or bearer cheques **is necessary** in order to uphold the objectives pursued **and whether those objectives might be attained by measures less restrictive of the free movement of capital**.

C-163/94 - Sanz de Lera and Others, § 23.

The free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in Article 73d(1) of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, **in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality** (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 23, and Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 18).

C-503/99 - Commission v Belgium, § 45.

Furthermore, even in the spheres that have been harmonised, **the principle of proportionality applies to those cases in which the Community legislature has left the Member States some discretion**.

C-326/07 - Commission v Italy, § 43.

9.4.1 DISPROPORTIONATE MEASURES IN THE FIELDS OF DIRECT INVESTMENT

9.4.1.1 GOLDEN SHARES

By its actions, the Commission of the European Communities asks the Court to hold that, by maintaining in the memorandum and articles of association of Koninklijke KPN NV and TPG NV certain provisions providing that the capital of those companies is to include a special share held by the Netherlands State, which confers on the latter special rights to approve certain decisions of the competent organs of those companies, the

Kingdom of the Netherlands has failed to fulfil its obligations under Articles 56 EC and 43 EC.

However, the special share at issue goes beyond what is necessary in order to safeguard the solvency and continuity of the provider of the universal postal service.

C-282/04- Commission v Netherlands, § 1 and 39.

9.4.1.2 PRIOR DECLARATION

In the case of direct foreign investments, the difficulty in identifying and blocking capital once it has entered a Member State may make it necessary to prevent, at the outset, transactions which would adversely affect public policy or public security. It follows that, in the case of direct foreign investments which constitute a genuine and sufficiently serious threat to public policy and public security, **a system of prior declaration may prove to be inadequate** to counter such a threat.

C-54/99 - Église de scientologie, § 20.

9.4.2 DISPROPORTIONATE MEASURES: MORTGAGE IN NATIONAL CURRENCY

[…] But **even assuming that rules such as those in issue are in fact designed to attain that objective, it appears that those rules enable lower-ranking creditors to establish the precise amount of prior-ranking debts, and thus to assess the value of the security offered to them, only at the price of a lack of security for creditors whose debts are denominated in foreign currencies**.

In the light of the foregoing considerations, the answer to be given to the national court must be that **Article 73b** of the Treaty **precludes the application of national rules** such as those at issue in the main proceedings, **requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency**.

C-222/97 - Trummer and Mayer, § 31 and 34.

9.4.3 DISPROPORTIONATE MEASURES: RESIDENCE REQUIREMENT FOR ACQUIRING AGRICULTURAL PROPERTY

Even supposing that that requirement is recognised as a measure necessary for meeting the objective sought on the ground that it would produce, by itself, positive effects on the property market (in the light of the constraints involved in any change of residence which in turn discourage property speculation), it must be pointed out that **by coupling that requirement with a condition that residence be maintained for at least eight years, such an additional condition clearly goes beyond that which could be regarded as necessary**, in particular as it implies a long-term suspension of the exercise of the fundamental freedom to choose one's place of residence.

The answer to the first question must therefore be that **Article 56 EC precludes national legislation** such as that at issue in the main proceedings **from laying down as a**

condition for acquiring an agricultural property the requirement that the acquirer take up fixed residence on that property.

C-370/05 - Festersen, § 41 and 48.

9.4.4 DISPROPORTIONATE MEASURES: PRIOR AUTHORISATION RELATING TO PRIVATISED UNDERTAKINGS

As regards a scheme of **prior administrative authorisation** of the kind at issue in the present case, the Court has previously held that such a scheme **must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations *ex post facto*** (see, to that effect, *Sanz de Lera*, paragraphs 23 to 28; *Konle*, paragraph 44; and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 35). Such a scheme must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and **all persons affected by a restrictive measure of that type must have a legal remedy available to them** (*Analir*, cited above, paragraph 38).

Consequently, as regards the obligation to obtain prior authorisation from the Portuguese Republic for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, **non-compliance with Article 73b of the Treaty is established**.

C-367/98 - Commission v Portugal, § 50 and 53.

9.4.5 DISPROPORTIONATE MEASURES: EXEMPTION FROM CORPORATION TAX BASED ON RESIDENCE REQUIREMENT

By its question, the Bundesfinanzhof asks, in essence, whether the provisions of the EC Treaty relating to the right of establishment, the freedom to provide services and/or the free movement of capital preclude a Member State, which exempts from corporation tax rental income received in its territory by charitable foundations with, in principle, unlimited liability to tax if they are established in that Member State, from refusing to grant the same exemption to a charitable foundation governed by private law in respect of similar income on the basis that, as it is established in another Member State, it has only limited liability to tax in its territory.

Even if, by granting a tax exemption only to charitable foundations that are established in its territory, the authorities of a Member State seek to combat crime, the fact remains that the fact that a foundation is established in another Member State cannot give rise to a general assumption of criminal activity. Moreover, to preclude such foundations from entitlement to a tax exemption when a number of measures are available to monitor their accounts and activities may be considered to be a measure which goes beyond what is necessary to combat crime (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 74).

C-386/04 - Centro di Musicologia Walter Stauffer, § 14 and 61.

9.4.6 DISPROPORTIONATE PRIOR ADMINISTRATIVE AUTHORISATION

As regards a scheme of **prior administrative authorisation** of the kind at issue in the present case, the Court has previously held that **such a scheme must be proportionate to the aim pursued, inasmuch as the same objective could not be attained by less restrictive measures, in particular a system of declarations *ex post facto*** (see, to that effect, *Sanz de Lera*, paragraphs 23 to 28; *Konle*, paragraph 44; and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 35). Such a scheme must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, and all persons affected by a restrictive measure of that type must have a legal remedy available to them (*Analir*, cited above, paragraph 38).

C-367/98 - Commission v Portugal, § 50.

9.5 ARTICLE 66 TFEU (RESTRICTIVE MEASURES AGAINST THIRD COUNTRIES JUSTIFIED BY ECONOMIC REASONS)

In addition to the exception provided for in Article 57(1) EC for certain restrictions on the movement of capital to or from third countries which existed on 31 December 1993 under national or Community law, **Article 59 EC confers upon the Council, in exceptional circumstances where such movements of capital cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the power to take safeguard measures**. […]

C-101/05 - A, § 33.

9.6 ARTICLE 75 TFEU (FREEZING OF FUNDS TO PREVENT AND COMBAT TERRORISM)

[…] Article 60(1)EC authorises the Council to take the necessary urgent measures as regards third countries if, in the case envisaged in Article 301 EC, action by the Community is deemed necessary. Lastly, Article 60(2) EC provides for the possibility for a Member State, for serious political reasons and on grounds of urgency, as long as the Council has not exercised the power conferred upon it by Article 60(1) EC, to take unilateral measures against a third country with regard, inter alia, to capital movements.

C-101/05 - A, § 33.

With regard to the first kind of matter, it is to be borne in mind that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC and 301 EC, consistent with a common position adopted on the basis of the common foreign and security policy ('the CFSP'). Because the Community judicature may not, in particular, substitute its assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court must, therefore, be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of

appropriateness on which such measures are based (see, by analogy, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II–4665, paragraph 159).

C-246/08 - Commission v Finland, § 45.

Lastly, with respect to the safeguard relating to the right to effective judicial protection, this is effectively ensured by the right the parties concerned have to bring an action before the Court against a decision to freeze their funds, pursuant to the fourth paragraph of Article 230 EC (see, to that effect, Eur. Court H.R., *Bosphorus* v *Ireland*, judgment of 30 June 2005, No 45036/98, not yet published in the Reports of Judgments and Decisions, § 165, and decision in *Segi and Others and Gestoras pro Amnistía* v *The 15 Member States of the European Union*, judgment of 23 May 2002, Nos 6422/02 and 9916/02, Reports of Judgments and Decisions, 2002-V).

[…] That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based, as the Council expressly recognised in its written pleadings in the case giving rise to the judgment in *Yusuf*, paragraph 29 above (paragraph 225). The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.

T-228/02 - Organisation des Modjahedines du peuple d'Iran v Council, § 152 and 154.

10 RELATIONSHIP WITH OTHER TREATY ARTICLES

10.1 ARTICLE 49 TFEU: FREEDOM OF ESTABLISHMENT

[…] Thus the free movement of capital constitutes, alongside that of persons and services, one of the fundamental freedoms of the Community. Furthermore, **freedom to move certain types of capital is**, in practice, a **pre- condition for the effective exercise of** other freedoms guaranteed by the Treaty, in particular **the right of establishment**.

C-203/80 - Casati, § 8.

It must consequently be declared that, by maintaining in PT special rights, such as those provided for in its articles of association for the State and other public sector bodies, allocated in connection with the **State's golden shares** in PT, the Portuguese Republic has **failed to fulfil its obligations under Article 56 EC**.

In that regard, it is sufficient to note that, in accordance with settled case-law, **in so far as the national measures at issue entail restrictions on freedom of establishment**, such restrictions are **a direct consequence of the obstacles to the free movement of capital** considered above, to which they are **inextricably linked**. Consequently, since an infringement of Article 56(1) EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment (see, inter alia, *Commission* v *Netherlands*, paragraph 43).

C-171/08 - Commission v Portugal, § 78 and 80.

As regards the question whether n**ational legislation falls within the ambit of one or other of those freedoms** [freedom of establishment/free movement of capital], it is clear from well‑established case-law that th**e purpose of the legislation concerned must be taken into consideration** (see, to that effect, Case C‑157/05 *Holböck* [2007] ECR I‑4051, paragraph 22, and case-law cited).

Provisions of national law which apply to **the possession by nationals of one 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 activities fall within the ambit ratione materiae of the provisions of the EC Treaty on freedom of establishment** (see, to that effect, in particular, Case C‑251/98 *Baars* [2000] ECR I‑2787, paragraph 22, and Case C‑112/05 *Commission v Germany* [2007] ECR I‑8995, paragraph 13).

Direct investments, that is to say, 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 undertakings to which that capital is made available in order to carry out an economic activity fall within the ambit of Article 56 EC on the free movement of capital. That object presupposes that the shares held by the shareholder enable him to participate effectively in the management of that company or in its control (*Commission v Germany*, paragraph 18, and case-law cited).

National legislation not intended to apply only to those shareholdings which enable **the holder to have a definite influence on a company's decisions and to determine its activities but which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Article 43 EC and Article 56 EC** (see, to that effect, *Holböck*, paragraphs 23 and 24). Contrary to what the Italian Republic maintains, Cadbury Schweppes and Cadbury Schweppes Overseas does not support the conclusion that in such a case only Article 43 EC is of relevance. That judgment, as its paragraph 32 makes clear, concerns only a situation in which a company holds shareholdings giving it control of other companies (see Case C‑207/07 *Commission v Spain* [2008] ECR I‑0000, paragraph 36).

In this case, a distinction must be drawn, depending on whether the criteria are applied to the State's powers to oppose the acquisition of shareholdings and the conclusion of contracts by shareholders representing a certain proportion of voting rights or are applied to the power to veto certain company resolutions.

C-326/07 - Commission v Italy, § 33-37.

It is to be recalled that, **if** the **legislation** under examination **concerns a stake which gives its holder definite influence over the decisions of the company concerned and allows him to determine its activities, it is the provisions relating to freedom of establishment which are applicable** (Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 21 and 22, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 37 and 66 to 68). **However, if that legislation is not intended to apply only to stakes which enable the holder to have a definite influence on a company's decisions and to determine the company's activities, it should be examined in relation to both Article 43 EC and Article 56 EC** (see, to this effect, Case C‑446/04 Te*st Claimants in the FII Group Litigation* [2006] ECR I‑11753, paragraphs 36 and 38, and Case C-157/05 *Holböck* [2007] ECR I‑4051, paragraphs 23 and 25).

C-531/06 - Commission v Italy, § 40.

According to consistent case-law, **in a case concerning a shareholding which gives its holder definite influence over the company's decisions and allows that holder to determine the company's activities, it is the provisions of the EC Treaty on the freedom of establishment that are to be applied** (Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 21 and 22; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 37 and 66 to 68; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 31; and *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 39).

C-231/05 - Oy AA, § 20

Furthermore, in accordance with the first paragraph of Article 50 EC, the provisions of the Treaty concerning freedom to supply services apply only if those relating to the right of establishment do not apply. Therefore Article 49 EC is also not relevant in the present proceedings. The construction of roadside service stations by the legal persons referred to in Article 48 EC necessarily implies that they have access to the territory of the host Member State with a view to a stable and continuous participation in the economic life of that State, in particular by the setting up of agencies, branches or subsidiaries (see, by way of analogy, *Gebhard*, paragraphs 22 to 26, and Case C‑171/02 *Commission v Portugal* [2004] ECR I‑5645, paragraphs 24 and 25).

Furthermore, **even if the legislation at issue in the main proceedings were to have restrictive effects on free movement of capital, it follows from the case-law that those effects would be the unavoidable consequence of an obstacle to freedom of establishment and would not therefore justify an independent examination of that legislation from the point of view of Article 56 EC** (see, by way of analogy, Case C‑196/04 *Cadbury* Schweppes and Cadbury Schweppes Overseas [2006] ECR I‑7995, paragraph 33; Case C‑231/05 Oy AA [2007] ECR I‑6373, paragraph 24; and Case C‑284/06 Burda [2008] ECR I‑4571, paragraph 74).

C-384/08 - Attanasio Group, § 39-40.

As regards the question whether the national legislation at issue in the main proceedings falls within the scope of Article 43 EC on freedom of establishment or Article 56 EC on free movement of capital, it must be noted that the question referred concerns national **measures relating to the taxation of dividends**, in terms of which, irrespective of the extent of the holding of the shareholder receiving the dividend, a resident company receiving dividends from another resident company is granted a tax credit, whereas, for a non-resident company receiving such dividends, the grant of a tax credit is dependent on the provisions of such DTC, if any, as the United Kingdom may have concluded with the State in which that company is resident. Under some DTCs, such as that concluded with the Kingdom of the Netherlands, the amount of the tax credit varies depending on the extent of the holding of the shareholder in the company making the distribution.

It follows that the measures at issue may fall within the scope of **both Article 43 EC and Article 56 EC**.

C-374/04 - Test Claimants in Class IV of the ACT Group Litigation, § 37-38.

Even if it were to be accepted that the tax regime at issue in the main proceedings [not allowing a resident company to deduct losses incurred in another Member State by a permanent establishment belonging to it] has restrictive effects on the free movement of capital, **such effects would have to be seen as an unavoidable consequence of any restriction on freedom of establishment and they do not justify an examination of that**

regime in the light of Article 56 EC (see, to that effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 33; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 48 and 49; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 34).

C-414/06 - Lidl Belgium, §16.

10.2 ARTICLE 56 TFEU: FREEDOM TO PROVIDE SERVICES

As regards the question **whether national legislation falls within the scope of one or other of the freedoms of movement**, it is clear from what is now well established case-law that **the purpose of the legislation concerned must be taken into consideration** (see, to that effect, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 31 to 33; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 34 and 44 to 49; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-0000, paragraphs 37 and 38; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-0000, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-0000, paragraphs 26 to 34).

C−157/05 - Holböck, § 22

However, it is apparent from the case-law that **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 main proceedings, **that one of them is entirely secondary in relation to the other and may be considered together with it** (Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34; see also, by analogy, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-0000, paragraph 37).

C-233/09 - Dijkman and Dijkman-Lavaleije, §33.

As to whether Article 56 EC is applicable, it must be noted that any restrictive effects which the national legislation at issue in the main proceedings might have on the free movement of capital and payments would be no more than the inevitable consequence of any restrictions on the freedom to provide services. **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, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it** (see, to that effect, Case C-452/04 *Fidium Finanz* [2006] ECR I‑9521, paragraph 34 and case-law cited).

C-42/07 - Liga Portuguesa de Futebol Profissional and Bwin International, § 47.

In that regard, it is apparent from the wording of Article 49 EC and Article 56 EC, and the position which they occupy in two different chapters of Title III of the Treaty, that, although closely linked, those provisions were designed to regulate different situations and they each have their own field of application.

That is confirmed, in particular, by Article 51(2) EC, which distinguishes between banking and insurance services connected with movements of capital and the free movement of capital, and which provides that the free movement of those services must be achieved ‘in step with the liberalisation of movement of capital’.

Admittedly, it is possible, in certain specific cases in which a national provision concerns both the freedom to provide services and the free movement of capital, that that provision may simultaneously hinder the exercise of both of those freedoms.

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 (see by analogy Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 47; Case C‑36/02 *Omega* [2004] ECR I-9609, paragraph 27; and the judgment of the EFTA Court in Case E-1/00 State *Management Debt Agency/Islandsbanki-FBA* [2000] EFTA Court Report 2000-2001, p. 8, paragraph 32). 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 (see by analogy Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 31; *Karner*, paragraph 46; *Omega*, paragraph 26; and Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paragraph 35).

It follows that **the activity of granting credit** on a commercial basis **concerns**, in principle, **both the freedom to provide services** within the meaning of Article 49 EC et seq. **and the free movement of capital** within the meaning of Article 56 EC et seq.

C-452/04 - Fidium Finanz, § 28-30, 34 and 43.

It must therefore be stated in reply to the national court that the provisions of the Treaty **on the free movement of capital and the freedom to provide services** must be interpreted as not precluding legislation of a Member State which prohibits a broadcasting organization established in that State from investing in a broadcasting company established or to be established in another Member State and from providing that company with a bank guarantee or drawing up a business plan and giving legal advice to a television company to be set up in another Member State, where those activities are directed towards the establishment of a commercial television station whose broadcasts are intended to be received, in particular, in the territory of the first Member State and those prohibitions are necessary in order to ensure the pluralistic and non-commercial character of the audio-visual system introduced by that legislation.

C-148/91 - Veronica Omroep Organisatie v Commissariaat voor de Media, §15.

Those articles require the abolition of all restrictions on the free movement of the provision of services, as thus defined, subject nevertheless to the provisions of Article 61 and those of Articles 55 and 56 to which Article 66 refers. Although those provisions are not at issue in these proceedings, the Italian Government has made the observation that, according to Article 61 (2), the liberalization of insurance services connected with movements of capital must be effected in step with the progressive liberalization of the movement of capital. In that respect it should however be pointed out that the First Council Directive **for the implementation of Article 67** of the Treaty of 11 May 1960 (Official Journal, English Special Edition 1959-1962, p. 49) already provided that **Member States were to grant all foreign exchange authorizations required for capital movements in respect of transfers in performance of insurance contracts as and when freedom of movement in respect of services was extended to those contracts in implementation of Article 59 et seq. of the Treaty**.

Although the rules on movements of capital are therefore not of such a nature as to restrict the freedom to conclude insurance contracts in the context of the provision of services under Articles 59 and 60, it is, however, necessary to determine the scope of those articles in relation to the provisions of the Treaty on the right of establishment.

C-205/84 - Commission v Germany, § 19-20.

By virtue of Article 59 of the Treaty, restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established. Whilst the former case is expressly mentioned in the third paragraph of Article 60, which permits the person providing the service to pursue his activity temporarily in the Member State where the service is provided, the latter case is the necessary corollary thereof, which **fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital**.

Joined Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro, § 10.

10.3 ARTICLE 344 TFEU: EXCLUSIVE JURISDICTION CLAUSE

It thus appears that **Ireland submitted instruments of Community law to the Arbitral Tribunal** for purposes of their interpretation and application in the context of proceedings seeking a declaration that the United Kingdom had breached the provisions of those instruments.

That is at variance with the obligation imposed on Member States by Articles 292 EC and 193 EA to **respect the exclusive nature of the Court's jurisdiction to resolve disputes concerning the interpretation and application of provisions of Community law**, in particular by having recourse to the procedures set out in Articles 227 EC and 142 EA for the purpose of obtaining a declaration that another Member State has breached those provisions.

Therefore, as some of the measures in question come within the scope of the EC Treaty and others within the scope of the EAEC Treaty, it must be held that **there has been a breach of Articles 292 EC and 193 EA**.

It must also be pointed out that **the institution and pursuit of proceedings before the Arbitral Tribunal**, in the circumstances indicated in paragraphs 146 to 150 of the present judgment, **involve a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected.**

C-459/03 - Commission v Ireland, § 151-154.

10.4 ARTICLE 345 TFEU: (PRINCIPLE OF THE NEUTRALITY OF THE TREATIES IN RELATION TO THE RULES IN MEMBER STATES GOVERNING THE SYSTEM OF PROPERTY OWNERSHIP)

By its first and second questions, which may be examined together, the referring court seeks, in essence, to ascertain whether Article 345 TFEU must be interpreted as covering rules entailing the prohibition of privatisation, such as those at issue in the main proceedings, which have the effect that shares held in an electricity or gas distribution system operator active in the Netherlands must be held, directly or indirectly, by the public authorities identified by the national legislation. If the answer is that it does, the referring court asks whether the consequence of that interpretation is that Article 63 TFEU ceases to apply to national provisions, such as those at issue in the main proceedings, which prohibit, first, any ownership or control links between companies which are members of the same group as an electricity or gas distribution system operator active in the Netherlands and companies which are members of the same group as an undertaking which generates/produces, supplies or trades in electricity or gas in the Netherlands and, secondly, the engagement by such an operator and by the group of which it is a member in transactions or activities which 'may adversely affect the operation of the system' concerned.

Article 345 TFEU is an expression of the principle of the neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership.

However, Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia, the prohibition of discrimination, freedom of establishment and the free movement of capital (see, to that effect, Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7; Case C‑302/97 *Konle* [1999] ECR I‑3099, paragraph 38; Case C‑452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I‑9743, paragraph 24; Case C‑171/08 *Commission v Portugal* [2010] ECR I‑6817, paragraph 64; Case C‑271/09 *Commission v Poland* [2011] ECR I‑13613, paragraph 44; and *Commission v Greece*, paragraph 16).

Consequently, the fact that the Kingdom of the Netherlands has established, in the sector of electricity or gas distribution system operators active in its territory, a body of rules relating to public ownership covered by Article 345 TFEU does not mean that that Member State is free to disregard, in that sector, the rules relating to the free movement of capital (see, by analogy, *Commission v Poland*, paragraph 44 and the case‑law cited).

C-105/12 - Essent and Others, § 28-29 and 36-37.

10.5 ARTICLE 351 TFEU: (OBLIGATION FOR MEMBER STATES TO ABOLISH ALL PREVIOUS PROVISIONS INCOMPATIBLE WITH THE TREATIES)

It is true that **the provisions of the Treaty to which this action brought by the Commission relate give the Council the power to restrict, in certain circumstances, movements of capital and payments between Member States and third countries, which include the movements covered by the transfer clauses at issue**.

The relevant provisions, which appear in Articles 57(2) EC, 59 EC and 60(1) EC introduce exceptions to the principle of free movement of capital and payments between

Member States and third countries, with a view to protecting the general Community interest and enabling the Community to comply, as appropriate, with its international obligations and with those of the Member States.

However, **the second paragraph of Article 307 EC obliges the Member States to take all appropriate steps to eliminate incompatibilities with Community law which have been established in agreements concluded prior to their accession**. Under that provision, the Member States are required, where appropriate, to assist each other to that end and, where appropriate, to adopt a common attitude.

The provisions of Articles 57(2) EC, 59 EC and 60(1) EC confer on the Council the power to restrict, in certain specific circumstances, movements of capital and payments between the Member States and third countries.

In order to ensure the effectiveness of those provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately with regard to the States to which they relate.

Accordingly, as the Court held in Case C-205/06 *Commission v Austria* [2009] ECR I-0000, paragraph 37, and Case C-249/06 *Commission v Sweden* [2009] ECR I-0000, paragraph 38, **those powers of the Council**, which consist in the unilateral adoption of restrictive measures with regard to third countries on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, **reveal an incompatibility with that agreement where, first, the agreement does not contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community and, second, there is also no international-law mechanism which makes that possible**.

As regards the abovementioned agreement, **the Republic of Finland, does not put forward any mechanism which would enable it to fulfil its Community obligations**. Furthermore, in any event, the possibility, relied on by the States intervening, of taking other steps made available under international law such as the suspension or the denunciation of the agreement at issue or of certain provisions of that agreement is too uncertain in its effects to guarantee that the measures adopted by the Council could be effectively applied within the prescribed period.

C-118/07 - Commission v Finland, § 21-22 and 28-32.

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