FREE MOVEMENT OF CAPITAL AND THIRD COUNTRIES

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The scope of this article is to expand and explain the presentation and give a more detailed analysis of the recent advancements in the cases on free movement of capital and third countries. On that basis, the article will touch on the history and the fundamentals of the topic proceeding on the comparability of the intra-EU inbound and outbound dividend cases with extra-EU and then present the main arguments of the Advocate General in the recent *Fidium Finanz*[2] case.

Free movement of capital is the principle on which modern economic systems are based. As it constitutes one of the cornerstones of the European Economy it has also become one of the fundamental freedoms of the EC Treaty. The main characteristic that makes this freedom distinct is its extension to third countries. Article 56 EC applies to capital flows into and out of the European Union.

Although it reflects modern economy trends, it had not always been welcome. In fact, in the early 1930s and until the middle of the century, free movement of capital, because it was based on the liberalisation of markets, was regarded as a menace to national economic systems as it entails easy capital flows into and out of a state.

Strict measures such as exchange controls and exit taxes were, and are still, in

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1 Presentation at Queen Mary, University of London EC Tax Conference – 17th May 2006 – The presentation was the joint work of Simone Malby (Simone.Malby@halliburton.com), Gerry O' Callaghan (gerry.o'callaghan@csfb.com) and Fokion Vounatsos (droid@hol.gr) students on the EC Tax Course of the 2005/6 Intercollegiate LLM Programme at Queen Mary, University of London. This article has been expanded by Fokion Vounatsos. The author wishes to thank Tom O'Shea, Lecturer in Tax Law at CCLS, Queen Mary, University of London for comments on drafts of this paper.

2 Case C-452/04 *Fidium Finanz AG v Bundesanstalt fur Finanzdienstleistungsaufsicht*. The case was pending, although the AG's Opinion had been issued. [Judgment was given on 3rd October 2006.]

some cases being used to deter easy movement of capital. However, the scenery changed after the Second World War. Until 1958, when the first European Treaty was signed, there was broader acceptance of the liberalisation of markets and capital movements. Therefore, article 67 of the 1958 Treaty was a first for the free movement of capital. However article 67, contrary to the other freedoms, lacked direct effect.

Direct effect, that is the ability of a European citizen – natural person or legal entity – to base a claim on the free movement of capital provisions, did not come until later. To that effect, directive 88/361 EEC became the legal basis for claims on free movement of capital[3]. This directive was accompanied by an Annex, which contained an extensive but not exhaustive list of transactions that are regarded as capital movements.

The situation changed after the Maastricht Treaty in 1992, when article 56 EC (the renumbered article 67), as we know it today became equal with the other fundamental freedoms and was equipped with direct effect. In the textbooks there are various explanations about the scope of this article and the reason why it was included in the Treaty but the most interesting is that it was put there possibly to ensure international mobility and use of the Euro currency[4].

The outline of article 56(1) EC

In the Treaty, free movement of capital is defined in article 56(1) EC:

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

Such a strong bond between a fundamental freedom and third countries is not found elsewhere in the Treaty. Moreover, the wording of article 56(1) EC, in opposition to views to the contrary[5], does not allow us to draw different conclusions besides that it applies to situations between Member States and

3 *Bordessa* (joint cases C-258/93 and C-416/93) for instance is one of the cases that verify the direct applicability of the freedom, through the directive.

4 See Kristina Stahl, "Free movement of capital between Member States and third countries", EC Tax Review, 2, 2004, p.52 referring to U. Bernitz and A. Kiellgren "Europarattens Grunder" Kluwer Law, 1999 p.219.

5 See the analysis of the different opinions in Pistone, "The impact of European Law on the relations with Third Countries in the field of direct taxation", Intertax, volume 34, Issue 5, p.234.

Member States and third countries indistinctly – that is, it has an "erga omnes" effect. From this aspect article 56 is unique and the possibility of becoming the sole basis on which third country nationals will claim their rights in the European Union is examinable.

The following articles of the Treaty provide grounds on which restrictions of this fundamental freedom can be justified. These restrictions can be imposed either at the Member State or the Community level. By reading the articles it becomes obvious that the Community reserves for itself the right to impose general and pre-emptive restrictions and then special sanctions against third countries. A Member State, however can impose general restrictions, targeted at Community and third country nationals and can impose restrictive measures on third countries only when under the threat of grave danger.

Measures at the Community Level

Articles 57(1), 57(2), 59 and 60 EC define permissible restrictions in a manner that climaxes from the least to the most urgent and severe measures.

First of all article 57(1) ensures that existing measures prior to 1994 at the Community level that restrict movement of capital in the areas of direct investment, real estate, establishment provision of financial services or the admission of securities to capital markets are permitted. Moreover, article 57(2) allows the Council by qualified majority to adopt specific measures on the above areas. In case the proposed measures are more restrictive than the existing Community framework the decision has to be unanimous. The Council is also, under article 59 EC, permitted to take "safeguard measures" against third countries, after proposal by the Commission and consultation with the European Central Bank. Such measures may only be imposed under "exceptional circumstances", for as long as they are necessary without exceeding a maximum, six-month period. Ultimately, the Community, following the procedure of article 301 EC[6] may take urgent measures.

Under the above articles, the Community has the ability to adopt harmonious measures that apply to its relations with third countries. Via other procedures it may, by exercising its external competence, enter into agreements with third-

6 Article 301 EC: "Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission."

countries and organisation.

Member State Level

A Member State may not adopt unilateral restrictions against third countries, except for urgent measures in the absence of a similar Community initiative under article 60(1) EC. But under article 60(2) EC such measures are subject to prior notification requirements towards the Commission and the other Member States. The Commission in conjunction with the Council may decide on the abolition or amendment of such measures.

But the real interest lies within the provisions of articles 57(1) and 58. In article 57(1) EC there are similar limitations for measures prior to 1994 that apply at the Community level. Article 58(1a) EC allows taxation restrictions which distinguish between taxpayers who are not in the same situation in respect of residence or the place where their capital is invested. Moreover in article 58(1)(b) EC such measures are justified if they prevent infringements of national tax legislation and supervision of financial institutions. Also, such measures are justified if they impose administrative or statistical information, or are based on grounds of public policy or security. Finally, paragraph 2 establishes a link with articles 43-48 EC (freedom of establishment) which triggers an issue on whether one freedom takes precedence over the other.

But such permission is not a "Carte Blanche". Paragraph 3 of article 58 EC will render any measure void if found to constitute means of arbitrary discrimination or disguised restriction. From the above legislation several issues arise. The basic issues are what is capital and what is the relationship between article 56 and the freedom of establishment and an assumption of which measures imposed by Member States may fall within articles 57 and 58 of the Treaty and which would be regarded as discriminatory.

What is capital under the Treaty?

A definition of capital movements was never included in the Treaty. This was realised as soon as the Directive 88/361[7] was implemented and therefore in its Annex I a Nomenclature was included that provided an extensive but not exhaustive list of what would be regarded as a movement of capital. Bearing in mind that the directive was adopted in order to empower the freedom with direct effect and now is not in force because such powers are, after the Maastricht Treaty

7 Official Journal of the European Community No L/178/8 – 12 (8.7.1988).

inherent in article 56 EC, one might argue that this list is not part of the Community legislation governing the free movement of capital. To the surprise of many, the Court has decided that the Nomenclature of the Annex remains a good guide for the definition of what is a movement of capital.[8]

Although the categories are many, the basic capital movements can be summarised into direct investments, real estate investments, collective investments, securities, sureties, guarantees, deposit accounts and financial institutions, financial loans and credit, credits for commercial transactions/services, personal capital movements, physical import/export of financial assets.

The open-ended nature of the nomenclature has allowed for more transactions to be regarded as a movement of capital by the ECJ, but in some cases the mere inclusion of a transaction in the list does not render it immune from the Court's examination, under the light of the peculiarities of each case.

This view is aligned with the Court's case law. In *Verkooijen,* it was stated that

> "*… although receipt of dividends is not expressly mentioned in the nomenclature annexed to Directive 88/361 as 'capital movements, it necessarily presupposes participation in new or existing undertakings referred to in Heading I(2) of the nomenclature …*"[9]

In the recent case *Fidium Finanz*[10], the Advocate General agrees that the provision of credit, in spite of the fact that the Nomenclature (interpreted under the preamble of the directive) refers to repayments of loans, includes the granting of loans because granting and repayment of loans are part of a single economic process[11]. This interpretation of the Nomenclature implies that an enlargement of the scope of the term capital is possible.

However the Court in its judgment in "*van Hilten*", an eagerly awaited case, defined another aspect of the fundamental freedom, referring to the meaning of "movement" of capital rather than capital itself. In that case, a Netherlands

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8 Case C-251/98 *Baars*, AG opinion, paragraph 49.

9 See case C-35/98, *Verkooijen*, paragraph 28.

10 See case C-452/04 *Fidium Finanz AG v Bundesanstalt fur Finanzdienstleistungsaufsicht* AG Opinion.

11 *Fidium Finanz* (C-452/04) AG Opinion, paragraph 50: "However, it follows from the different wording in Heading VIII(A) that, at least as far as loans are concerned, the Community legislature did not intend to split an economic process for the purposes of its legal definition."

national moved to a third country. Under Dutch law he would be deemed resident in the Netherlands for ten years after had moved out. Unfortunately, she died within the designated period and her heirs were obliged to pay inheritance tax in the Netherlands. On a claim that the change of residence which would have effect on the place of the inheritance constituted a movement of capital that was restricted by the Dutch rules, the Court found that it did not fall under article 56 EC because the freedom entails capital *movements*, in other words economic transactions, which did not happen in this case.[12]

From the above case law appears that there is no specific rule specifying exactly what falls within the scope of capital movements. On the contrary, a thorough examination of the facts of each case and the situations under which they appear should reveal whether a transaction is movement of capital or not. The only safe conclusion is that the capital, at least as defined in the Nomenclature of the directive does not serve for the purpose of the freedom unless it is applied within the context of financial transactions and has an economic purpose.

Relationship of article 56 with freedom of establishment

But cases are rarely argued on only one legal ground. Claims in relation to the free movement of capital are often accompanied by another freedom, usually the freedom of establishment. The relationship of article 56(1) EC with article 43 EC is somehow obscure in the way that is stated in article 58(2) EC. The wording of article 43 also refers to article 56 and the free movement of capital. From the wording, it is not fully clear if article 56 complements article 43 or if the relationship between these two is equal.

From the settled case-law a "safe" conclusion can be drawn that the Court follows its own reasoning. On a case-by-case examination, in *Commission v UK*[13] it is obvious that when an infringement has been found, there is no obligation to examine the other freedom, whereas in *Konle*[14], it was ruled that the restriction should comply both with freedom of establishment for nationals of Member States and the free movement of capital in order not to be discriminatory. The AG in

12 See case C-513/03, Heirs of M.E.A. *van Hilten* - van der Heidjen v Inspecteur van de Belastingdienst/Particulieren/ Ondernemingen buitenland te Heerlen.

13 See Case C-98/01 *Commission v UK* "…consequently, since an infringement of Article 56 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."

14 Case C-302/97, Klaus *Konle* v Republic of Austria (paragraph 22): "…must comply with the provisions on the Treaty on freedom of establishment for nationals of Member States and the free movement of capital."

Baars (C-251/98) came to verify that opinion by denying an argument that the fundamental freedoms are mutually exclusive. Therefore, as Stahl and Mitroyanni conclude[15], the Court does not give precedence to one freedom over the other. It examines the case under each freedom and stops when an infringement is found. Of course this holds true for any freedom except where the Treaty explicitly reads to the contrary (i.e. the relationship of article 56 EC with article 49 EC – see also *Fidium Finanz* AG Opinion on the first point).

The application and interpretation of article 56 EC to the Court and its case law

In spite of the liberalisation in this area, Member States have tended to expand their prohibitive measures to deter uncontrolled capital movements. Several old-fashioned measures are still being used, whereas new ones have been introduced, in order to prevent destabilisation of the fiscal unity of a state. By a quick perusal of the trends of the OECD one would clearly spot Transfer Pricing, Thin capitalisation and CFC rules, that impose restrictions on cross border transactions.

Not surprisingly, traditional International Tax law principles impose restrictions on the free movement of capital. "Most favoured nation treatment" and "Limitation on benefits" clauses do not allow free capital flows not only between EU and non-EU countries but also between Member States. On the one hand as non-MFN treatment has been found compatible with the Treaty, there is little to discuss from a possible third country aspect. LOB clauses on the other hand were thoroughly discussed in the earlier article on Double Tax Treaties and Community law[16].

Moreover, from the area of EC Competition law there are cases that show a high level of state protectionism over certain industries that are "important" for the Member States, in the form of veto or "special" shareholder rights. Such rights named a series of cases, known as *"Golden Share*s" and were found in most cases to be restrictions of article 56 EC.[17]

15 Stahl, see note 4, page 48 and Mitroyanni, "Exploring the scope of the free movement of capital in direct taxation", EC Tax journal EC Tax Journal, 2005, 1-17 and also note Stahl pointing at the contra argument M. Peters ,"Capital movements and taxation in the EC" EC Tax Review 1998 p.6.

16 See previous article in this publication by Christian Koch about the relation between Double Taxation Conventions and Community law.

17 Commission v UK (C-98/01): Special Shares in B.A.A. Similar restrictions in Comm. v Italy (C-58/99 ENI, Telecom Italia) and France (C-483/99 – Elf). See also analysis in European Economy 2003:
http://ec.europa.eu/internal_market/capital/docs/europeaneconomy_en.pdf

It is also argued that the shadow of recent but unexplored Community legislation such as the Prospectus directive (voted on 31st December 2003) might impact on portfolio investments and other capital movements[18].

In the national tax field, authorisation requirements for certain transactions are obviously a major restriction for the movement of capital and third countries.

The aforementioned issues provide an indicative short proof that state protectionism still exists and that it might be incompatible with the E.C. Treaty. Incompatibility is seldom cured by self-compliance by the Member States. On the contrary, individuals usually file claims based, among other legal grounds on article 56 EC. Cases are ultimately referred by the national court, or brought by the litigants to the ECJ which applies a legal process that does not differ from the process applied to other area of law. The function of the European Court of Justice (ECJ) is identical for all types of cases.[19] Consequently, the Court examines if a national measure constitutes a discrimination against non-nationals or if it imposes a restriction on a non-national's right to exercise the freedom. If such a test is positive then the Court examines whether the Member State has justified its rules. Certain justifications are permitted – some are provided in the EC Treaty others have been determined to exist by the Court in its jurisprudence. Any such justifications must comply with the principle of proportionality and the Court examines if these measures are "necessary and suitable" in other words proportional to the attainment of the objective. From the Court's decisions both Governments and individuals may predict the outcome of similar claims or the fate of similar legislation if it is challenged in the Court. States therefore tend to alter their laws in order to comply with the Court interpretation of Community legislation. This is the essence of "negative integration" that stems from the ECJ rulings[20].

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18 For an overview of the Prospectus directive see Appelt and Thomas (Allen and Overy LLP), "The EU prospectus directive – an overview of the unified prospectus regime" parts 1 and 2 in Butterworth's Journal of International Banking and Financial Law – November – December 2004, also Reinhardt, "The new EU Prospectus Directive: Does it display suitable measures to harmonise EU securities market ?", Journal of International Banking Regulation, vol.5 no.2, p.153 and proposals made by the London Stock Exchange.

19 This process, known as the *Gebhard* formula, was named after the case (1995 ECR I-4165).

20 For a brief overview see Terra and Wattel, "European Tax Law", Kluwer Law International, Fourth Edition, 2005, page 27.

Direct tax cases on outbound and inbound investment

Despite the variety of issues that arise from Member State measures affecting free movement of capital, the main discussion focuses in the area of the intra-EU dividend cases from their movement of capital aspect and their comparison with possible and existing extra-EU situations. The findings will be related to the recent *Fidium Finanz* AG opinion in an effort to find whether similar holdings can be reassured in similar situations. At the end other pending cases will be examined.

In the dividend case area, in *Verkooijen*, a dividend distribution constituted movement of capital. The Court in that case eventually held that unequal treatment of dividends coming from another Member State "*constitutes an obstacle to the raising of capital in the Netherlands since the dividends which such companies pay to Netherlands residents receive less favourable treatment…*". [21] The same concept is visible in *Lenz*[22] where the court found that "a*rticles 73b and 73d(1) and (3) of the EC Treaty preclude legislation which allows only the recipients of revenue from capital of Austrian origin to choose between a tax with discharging effect and ordinary income tax […], while providing that revenue from capital originating in another Member State must be subject to ordinary income tax without any reduction in the rate.*"

Another extended interpretation of article 56 EC was conducted in *Manninen*[23], where the Court, once more, verified its established line of thinking. What is more important is that in *Manninen* the Court looked into the laws of the other country, to decide if a relief should be granted. Moreover, to Finland's arguments that there is limited knowledge of the actual tax system AG Kokott in the Opinion issued on 18 March 2004 argued that this is not the case (between Member States) but ends her argument proposing "that article 56(1) EC does not lay down a binding requirement that corporation tax paid in third countries be offset in the same way as in situations involving two Member States"[24]. However, in the conclusion of the same argument made by the AG it is clear that "even in respect to third countries the rule is that when the situations are comparable, equal treatment is required". Unfortunately, the Court in its decision did not discuss the third country aspect. On the contrary it focused on the refusal of the tax credit in a Member State to Member State situation.

21 see Case C-35/98 *Verkooijen*, paragraph 35.

22 see Case C-315/02 *Anneliese Lenz v Finanzlandesdirektion fur Tirol*.

23 see Case C-319/02 *Petri Mikael Manninen*.

24 see *Manninen*, paragraph 79.

On the other side lies *Fokus Bank*, an outbound dividend case decided by the EFTA Court[25]. The case involved the denial of the domestic imputation credit to foreign shareholders. The EEA Agreement has a provision similar to article 56 EC[26] that allows unrestricted capital movements within the EEA (and the EU) area. An argument was raised, based on the source state's primary right to impose tax, which is dominant in every bilateral tax treaty based on the OECD model. The Court in paragraph 31 of its decision held that "permitting derogations from principles of free movement of capital laid down in article 40 EEA […] would amount to giving bilateral tax agreements preference over EEA law" and finally ruled in favour of the appellant.

The nature of the EEA Agreement that inevitably restricts the effects of the *Fokus Bank* judgment only to "contracting states" raises questions whether similar treatment would be possible in dividends distributed to non-EU shareholders by a company inside the EU. This is the issue in the *ACT GLO*[27] where one of the questions referred touches on the distribution of dividends outside the EU.

Besides the MFN and LOB issues in the case, the outbound dividend issues become more complex. Only for the granting of the imputation credit by the source state, and while the AG talks about the intra-EU situations, brings forth the justification of "dislocation of taxing rights"[28]. However, the AG's proposals do not follow the *Gebhard* formula. They do not go beyond the justification level. To the contrary, in *Marks and Spencer*, although such justification was initially accepted (C-446/03 paragraphs 46 and 55), it failed the proportionality test. The Court, while examining the laws of the origin state (UK) accepted that the host/source state (state of the subsidiary) had the primary right to provide tax relief and that M&S could claim relief from the origin state (parent company state – UK) when no such option existed in the host state. It is clear that the balance of taxing rights in the Community is not as axiomatic as in International law. It is subject to the same proportionality test as all justifications.

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25 Case E-1/04 Fokus Bank ASA v The Norwegian State.

26 Agreement on the European Economic Area (signed on 2nd May 1992. O.J. L 001, 03/01/1994) –Article 40 reads: "*Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.*"

27 See *Group Litigation Order Class IV*, Case C-374/ 04 (ACT GLO).

28 See paragraph 59 of the *ACT GLO* AG Opinion.

In an outbound dividend situation, where the facts are reversed, it is questionable whether the source state primary right to tax should be accepted without the proportionality test. Comparing *Fokus Bank* with *Marks and Spencer* as an example, from the perspective of the shareholder, Norway was the host country (where the shareholders investment was made – host State) whereas Germany and the UK the origin states (where the shareholders resided). It should be noted that from the distributing company's perspective, Norway is the Origin State.But regardless of which perspective we focus on, the outbound dividend situation regards the laws of the *source state,* where dividends originate. In *Marks and Spencer* the entire international law concept of "primary right to tax" was placed under Community law analysis (principle of proportionality) and under the EU-wide cohesion[29] which was introduced in *Manninen*[30]. In an outbound dividend case, the sole fact that we are looking at the rules of the country, which, under International Law, has the primary right to tax should not rule out Community law. Otherwise the source state rules might always be cleared based on its primary right to tax. Back to the *Fokus Bank* case, the EFTA Court backs up this thinking by placing the Treaty above double tax conventions[31]. The question is whether in a third-country situation, under similar circumstances, the ECJ would rule in favour of a third country appellant.

The question of comparability is better placed under a pending inbound dividend case[32] that involves third county company distributing capital to its Austrian shareholders. This case, as Patrick Plansky, our guest panellist from Wirtshaftsuniversitat in Vienna, pointed out in the conference is a carbon copy of the intra-EU Lenz case. The facts in *Lenz* involved the same tax provisions (beneficial tax treatment for domestic dividends than dividends originating cross border) but it was confined to an intra-EU situation. In this case the issues of comparability will be brought forth and *Manninen's* "take into account the other country's tax rule" argument will be tested. Will the extra-EU situation be treated differently and which would be the role of comparability (or better strong similarity) on the judgment?

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29 Argued and analysed by Tom O' Shea in "Marks and Spencer v Halsey: Restriction, Justification and Proportionality", [2006] EC Tax Review, 2, 66-82.

30 The Court in *Manninen*, as mentioned, actually looked at the Swedish tax rules to determine its ruling.

31 See paragraph 31 in *Fokus Bank* "...permitting derogations from principle of free movement of capital laid down in art 40 EEA [...] would amount to giving bilateral tax agreements preference over EEA law."

32 See pending case *Holbock* (Case C-157/05).

Fidium Finanz – one step forward

In spite of the comparisons between intra and extra-EU cases, the case law in the area of third countries is still limited. The first of the pending decisions in the area of capital and third countries will probably be the *Fidium Finanz* case (C-452/04). Although the case is still pending, the opinion of Advocate General Stix-Hackl (delivered on 16 March 2006) is apocalyptic. An examiner however should never forget that Opinions of AGs are often overturned. In spite of the interest of the case for Banking and Internet Law, this case is the first that poses significant questions on the tax treatment of capital arising outside the EU and (as the AG argues) grants rights to a third-country national to rely on article 56 EC.

In this case, a Swiss institution provided via its website on the Internet low-value loans targeting solely German residents. Because of the low cost of the loans and the fact that the bank operated outside Switzerland, Fidium Finanz was not subject to any kind of Bank regulation. German authorities denied authorisation for such loans and the case was finally referred to the ECJ for a preliminary ruling.

The initial questions regarded the ability of a company, established outside the EU to rely on article 56 EC and furthermore the ability to rely on freedom of capital when, if it was a company established in the EU, it would have relied on article 49 EC (freedom of services).

As far as the right of a third-country company to rely on article 56 is concerned, the AG is clear that as "it follows from the wording of Article 56(1) EC […] even an undertaking established outside the Community can rely on the free movement of capital." Subsequently, the AG reaffirms the line of decisions that refer to the applicability of the Directive 88/361 (paragraph 45), which, however, refers only to operations to repay loans and credits. But since the granting and repaying of loans is a "single economic process" (para.48) the AG is in support of the view that it falls under article 56 EC (paragraph 50)

The second aspect regarded the balance between the freedom to provide services and the free movement of capital. The AG argues that the conflict that appears in decided cases[33] is only phenomenal; as all of them explicitly or implicitly show that article 49 EC does not preclude the applicability of article 56 EC. Furthermore article 50 EC grants precedence to free movement of capital (56 EC) over article 49.

The second issue is the question of abuse of rights but it falls under the

33 Indicative cases that involved both freedom of services and freedom of capital: Svenson and Gustavson C-484/93, *Parodi* C-222/95, *Safir* C-118/96, *Sandoz* C-439/97.

competence of the national courts to decide it. The next significant question is that which refers to the justification based on authorisation requirements. Although it would be a good exercise of comparability, unfortunately, Fidium Finanz's operations do not fall under the Consolidation Banking Directive[34] so that a direct comparison with the community framework could not be applicable. Since Fidium Finanz operates outside of the scope of the Directive, the Member State's restriction of "prior authorisation" falls under the regular scrutiny of the Court, in other words it must be justified and be proportional to the goal it pursues. The AG supports that this situation can be broadened in order for the Consolidation Banking Directive to cover institutions that grant only loans. It is doubtful if such thinking would survive in the final decision, especially where the other justifications brought forth by the Member States seem sufficient. From our line of thinking in *Manninen* and *Fokus Bank* it would be interesting to see the response of the Court where similar authorisation requirements applied to Switzerland and if an effective exchange of information mechanism (or a mutual assistance agreement) was in place. Would only these measures, without any further link (like with the EEA agreement) be enough to grant different treatment?

Another significant aspect of *Fidium Finanz* is that although authorisation requirements, as far as capital movement is concerned were held to be disproportional in personal capital movements[35] to the effect that a notification system would be more appropriate; in the area of credit transactions the AG argues that such practice is not sufficient. Because there are other risks involved that demand the imposition of heavier restrictions, authorisation requirements are a proportionate means of effective fiscal supervision.

Issues of abuse of law and derivatives of the authorisation requirements were still argued in the case but were handled in the process of the Court's ordinary proceedings. In the bottom line, what should be clear from the case is that third-country nationals can rely on article 56 EC to attack restrictive legislation of a Member State.

Even more cases have arisen in the area of capital in third countries, on which no Opinion has been issued yet. *Lasertec* (C-492/04) involves the taxation of interest payments to a non-EU loan provider. Moreover *Sweden v A*. (C-11/05) the taxing the shareholder on distributions of a company established outside the EU where no DTC is in place is argued. Reports of a UK case, which has not been referred yet

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34 For an overview of the European consolidation banking directive see, inter alia Argyriadis Argyris, "The European Consolidation Banking Directive (2000/12/EC) and beyond", Nomiki Bibliothiki Publishing Group, Athens 2005.

35 See criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu. Joined cases C-163/94, C-165/94 and C-250/94.

to the ECJ is *NEC Semiconductors Limited v CIR* (2004) which explores a claim made by a non-EU based multinational that the UK imputation system offended the non discrimination provisions of double tax conventions and European law.

As the ECJ legislation in the area of third countries evolves, an increasing amount of cases will inevitably arise. Problems – especially when the Thin Capitalisation, MFN and LOB and GLO cases are considered – become increasingly complex. It is in the Court's powers to provide clear answers as to which criteria apply to third countries, what is the role of the EU-third entities agreements and whether article 56 EC expands comparability and cross-border cohesion outside the EU.

The fundamental issue remains under which prism will article 56 be construed by the ECJ. A literal analysis that extends unconditionally the concepts and effects of article 56 to third countries does not seem convincing. Besides, from the foregoing analysis it is obvious that differentiation exists. Moving towards a purposive interpretation of the freedom could be a safer ground for conclusions. Under this perspective an examination of the underlying purpose of free movement of capital is necessary. If under article 3(1) EC, article 56 EC has the purpose of creating the Single Market, what is the purpose of extending those rules third countries?

And besides that, the Court shall refine the scope of the several bilateral and multilateral agreements of the Community with third countries. What will the Court rule when cases involve agreements such as agreements with accession states, the WTO, the GATS, etc? Shall each case be examined under the different gravity that has each agreement for the Community? Or shall Europe, by harmonising the Single Market area, adopt a common policy towards third countries? The latter argument derives also from article 307 EC which actually obliges Member States to change their laws gradually for the achievement of a common goal.

In a short article like this, it is difficult to analyse all the concepts concerning free movement of capital. The complexity of the matters and the new legal concepts that arise in the Community require separate and in length, topic-by-topic examination. In our opinion, it is time to move from general literature on article 56 EC to more detailed and perhaps technical analysis of the different issues.