THE THIRD COUNTRY RIGHTS AND THE ECJ "PREVAILING FREEDOM" PRINCIPLE: IMPLICATIONS IN DIRECT TAX MATTERS

Gauthier Cruysmans

1. Introduction

Although direct taxation does not as such fall within the purview of the European Union ("EU"), the European Court of Justice ("ECJ") has frequently upheld that the powers retained by Member States must nevertheless be exercised consistently with EU law[1].

In this respect, the Member States have agreed to abolish any legislative, administrative or procedural obstacles to the exercise of the four fundamental freedoms: free movement of goods[2], free movement rights of persons (free movement of workers[3] and freedom of establishment[4]), free movement of services[5] and free movement of capital[6]. The freedoms are actually a more specific expression of the general "non-discrimination on ground of nationality"[7], covering all aspects of the economy, including direct taxation matters.

1 Inter alia ECJ, 14 February 1995, C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker,* [1995] ECR I-00225*;* ECJ, 11 August 1995, C-80/94, *G. H. E. J. Wielockx v Inspecteur der Directe Belastingen,* [1995] ECR I-02493; ECJ, 14 September 1999, C-391/97, *Frans Gschwind v Finanzamt Aachen-Außenstadt,* [1999] ECR I-05451; ECJ, 26 October 1999, C-294/97, *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna,* [1999] ECR I-07447.

2 EC Treaty, Art. 23 (Now TFEU, Art. 28)

3 EC Treaty, Art. 39 (Now TFEU, Art. 45)

4 EC Treaty, Art. 43 (Now TFEU, Art. 49)

5 EC Treaty, Art. 49 (Now TFEU, Art. 56)

6 EC Treaty, Art. 56 (Now TFEU, Art. 63)

7 EC Treaty, Art. 12 (Now TFEU, Art. 18)

The freedoms being directly applicable[8], the EU institutions play a significant role in ensuring that they are complied with by the Member States exercising their retained competence. On the one hand, the EU Commission has the competence to bring infringement proceedings against Member States who have failed to fulfil their EU obligations[9] and, on the other hand, the ECJ has the competence to interpret and apply EU law by ensuring that Member State rules comply with EU law in cases which come before it.

The main task of the ECJ is therefore to place the EU provisions in their context and to interpret them in the light of the EU objectives and their present state of development. In its interpretation role, the ECJ has developed rules and principles by using teleological and contextual approaches to confirm interpretations suggested by the EU provisions wording, but also to clarify certain ambiguity.

In this respect, a question has arisen to what extent the ECJ has the power to use such interpretation approaches. In other words, should the ECJ be limited to a judicial protection role of the EU law or should the ECJ have to also make some judicial activism in order to fill in gaps in the EU legal framework and to compensate the absence of political answers to some issues? The ECJ influence in the third country rights area since the *Fidium Finanz* case[10] and in subsequent direct tax cases is a significant illustration of its controversial judicial activism role.

2. Free movement of capital and third countries rights

While the three other fundamental freedoms were already recognized as having direct effect in the Treaty of Rome, the free movement of capital did initially not have any direct effect.[11] It was not until the late 1980s that the free movement of capital became significantly liberalized as result of the enactment of Directive 88/361/EEC[12] establishing the legal obligation for Member States to eliminate barriers to free movement of capital.

The Treaty of Maastricht transposed the key provisions of the Directive 88/361/EEC directly into the EC Treaty ("EC") liberalizing capital movements within EU, but

8 ECJ, 12 April 1994, C-1/93, *Halliburton Services BV v Staatssecretaris van Financiën*, [1994] ECR I-01137.

9 EC Treaty, Art. 226 (Now TFEU, Art. 258).

10 ECJ, 3 October 2006, C-452/04, *Fidium Finanz AG v. Bundesanstalt fur Finanzdienstleistungsaufsicht*, [2006] ECR I-09521

11 C. Peeters, J. Gooijer, The free Movement of Capital and Third Countries: Some Observations, *ET* 2005, n°11, 475-476

12 Council Directive 88/361/EEC for the implementation of Article 67 of the EEC Treaty.

also in relation to third countries, with direct effect from January 1, 1994.[13] Individuals and companies could, therefore, invoke the right to the free movement of capital to challenge national measures in the Member States courts, with access to the ECJ preliminary ruling process.

Since the Treaty of Amsterdam, the free movement of capital is enshrined in Articles 56 EC[14] et seq. and Article 56 EC is the fundamental basis prohibiting any restriction on the movement of capital and payments and applies on an equal footing[15] in both an intra-EU and a third country dimension. Articles 57 to 60 EC limit the effect of the latter article by enabling the Member States to introduce and apply national rules despite the fact that they hinder free movement of capital, if certain conditions are met.

In this respect, there are three main restrictions concerning the application of the free movement of capital in a third country dimension. Firstly, the standstill clause included in Article 57 (1) EC ensures that the Member States have the right to retain any national restrictions that were in force on December 31, 1993 under national or EU law and that were adopted in respect of the movement of capital to or from third countries involving direct investment, establishment, the provision of financial services or the admission of securities to the market. The exact scope of the Article 57 (1) EC being unclear, the ECJ case-law[16] has given some guidance on the scope of application ratione materiae and ratione temporis of the standstill clause.[17]

---

13 ECJ, 23 February 1995, C-358/93 and C-416/93, *Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre*, [1995] ECR I-00361*;* ECJ, 14 December 1995, C-163/94, C-165/94 and C-250/94, *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Diaz Jimenez and Figen Kapanoglu*, [1995] ECR I-04821.

14 Now TFEU, Art. 63 et seq.

15 C. Panayi, The Fundamental Freedoms and Third Countries: Recent Perspectives, *ET* 2008, n°11, 573

16 ECJ, 12 December 2006, C-446/04, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue,* [2006] ECR I-11753*;* ECJ, 18 December 2007, C-101/05, *Skatteverket contre A*, [2007] ECR I-11531; ECJ, 24 May 2007, C-157/05, *Winfried L. Holböck v. Finanzamt Salzburg-Land,* [2007] ECR I-04051; ECJ, 20 May 2008, C-194/06, *Staatssecretaris van Financien v.Orange European Smallcap Fund NV*, [2008] ECR I-03747.

17 For a more detailed analysis on the ECJ interpretation of the standstill clause, see L. JANSSENS, Pays tiers: quelle est la portée exacte de la disposition 'standstill'?, *Fiscologue (I.)* 2007, n°286, 4-7 ; D. SMIT, Capital movements and third countries: the significance of the standstill-clause ex-Article 57(1) of the EC Treaty in the field of direct taxation, *EC Tax* 2006, n°4, 203-214; C. Panayi, *Op. Cit.*, 577-578; M. O'Brien, Taxation and the third country dimension of free movement of capital in EU law: The ECJ's rulings and unresolved issues, *BTR* 2008,n°6, 657-661.

Secondly, the free movement of capital in a third country dimension is also restricted according to Article 58 EC which basically applies to movements of capital both in an EU context and in a third country context. Accordingly, national rules granting certain advantages to residents but not to non-residents may be still compatible with EU law if those two categories of taxpayer are not in a comparable situation[18] or if those rules are justified by overriding requirements of public interest such as the desire to safeguard the cohesion of the tax system, the prevention of tax evasion and the effectiveness of fiscal supervision.[19]

In this respect, the ECJ has considered that free movement of capital between Member States takes place in a different legal context from that in an intra-EU context[20] because of inter alia the Member States' obligation to exchange information under the Mutual assistance Directive[21] and the Savings Directive[22] or the enforcement of tax judgments intra-EU.[23] It has, therefore, appeared in the ECJ case-law[24] that some justifications to restriction which have been rejected in intra-EU cases have been however considered as valid in third country cases.[25] In other words, a restriction affecting third country nationals may be justified more easily than a restriction affecting Community nationals.[26] It should also be noted that the nature of the third country may also be relevant when the ECJ examines the justifications for national rules restricting on one of the fundamental freedoms.[27] The nature of a third country can indeed be divided into various categories such as for

18 See ECJ *Schumacker*, Par. 34.

19 ECJ, 21 November 2002, C-436/00, *X, Y v. Riksskatteverket*, [2002] ECR I-10829, Par. 51.

20 See *A*, Par .60; ECJ, 4 June 2009, C-439 and C-499/07, *Belgische Staat contre KBC Bank NV, et Beleggen, Risicokapitaal, Beheer NV contre Belgische Staat*, [2009], Par. 72.

21 Council Directive 2004/56/EC of 21 April 2004 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxation of insurance premiums.

22 Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

23 C. Panayi, *Op. Cit.*, 82.

24 See inter alia *A*; *Test Claimants in the FII Group Litigation.*

25 See *Test Claimants in the FII Group Litigation*, Par. 171.

26 For a more detailed analysis on this issue ECJ, see L. Janssens, Pays tiers: mêmes restrictions, autres motifs de justification?, *Fiscologue (I.)* 2008, n°289, 6-9; C. Panayi, *Op. Cit.*, 579-582; M. O'BRIEN, *Op. Cit.*, 662-666; P. Pistone, The Impact of European Law on the Relations with Third Countries in the Field of Direct Taxation, *Intertax* 2006, n°34, 234-244

27 See inter alia: ECJ, 19 November 2009, *Commission of the European Communities v Italian Republic*, [2009]

example EEA third countries (Iceland, Liechtenstein and Norway), third countries which have concluded a partnership agreement with EU, third countries having a special relationship with EU such as Switzerland or the United States, third countries considered as tax havens,... [28]

The third restriction is finally related to the problem of overlapping freedoms and will be analyzed in the next section.

3. Free movement of capital in relation to other fundamental freedoms

The notion of 'capital movements' is not defined in the Treaty. However, according to the ECJ settled case-law[29], inasmuch as Articles 56 EC et seq. essentially reproduce the contents of Article 1 of Directive 88/361, the nomenclature in respect of 'movements of capital' annexed to that directive still has the same indicative value, for the purposes of defining the notion of capital movements[30].

Based on the definition provided by the Annex I to Directive 88/361, the ECJ case-law has demonstrated that in a very broad range of circumstances, a national rule may also impact ratione materiae one (or two more) freedom(s).[31] This possibility of freedoms overlap is expressly acknowledged in the wording of some of the fundamental freedoms. For example, from Articles 43(2) EC and 58 (2) EC, it appears clearly that the drafters of the Treaty were aware that a transaction could come to be cover by both the freedom of establishment and the free movement of capital.[32]

---

28 P. Pistone, *Op. Cit.*

29 ECJ, 16 March 1999, Case C-222/97, *Manfred Trummer and Peter Mayer,* [1999] ECR I-01661, par 21; ECJ, 5 March 2002, C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Hans Reisch and Others*, [2002] ECR I-02157, par 30; ECJ, 23 February 2006, Case C-513/03, *Heirs of M. E. A. van Hilten-van der Heijden v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, [2006] ECR I-01957, par 3.

30 See *Fidium Finanz*, Par. 41.

31 See *Fidium Finanz* ; ECJ, 12 September 2006, C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue,* [2006] ECR I-07995*;* ECJ, March 2007, C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, [2007] ECR I-02107; ECJ, 28 January 1992, C-204/90, *Bachmann v Belgian State*, [1992] ECR I-00249

32 K. STAHL, Free movement of capital between Member States and third countries, *EC Tax* 2004, n°2, 48; D. Smit, The relationship between the free movement of capital and the other EC Treaty freedoms in third country relationships in the field of direct taxation: a question of exclusivity, parallelism or causality?, *EC Tax* 2007, n°6, 256-267.

Therefore, in order to prevent the examination of any possible restriction of the free movement two (or more) times,[33] the ECJ has developed the "prevailing freedom" principle[34]. Accordingly, where a national rule relates to more than one freedom at the same time, the ECJ will in principle examine the rule in dispute in relation to only one of those freedoms if it appears, in the circumstances of the case, that one or more of them are entirely secondary in relation to one other and may be considered together with it. In this respect, it is necessary to examine to what extent the exercise of the fundamental freedoms is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other(s).[35] If it appears that a freedom prevails over the other(s), the ECJ will in principle state that the restrictive effects on the national rule on the indirectly affected freedom(s) are merely an inevitable consequence of the restriction imposed on the directly affected freedom and that it is no need or no justification to consider whether the rules are compatible with indirectly affected freedom(s).[36] However, the ECJ has stated that when it could be difficult to determine generally which freedom prevails over the other(s), all the freedoms affected in the main proceedings are examined simultaneously.[37]

The "prevailing freedom" principle basically developed by the ECJ for practical reasons had not had significant implications insofar as third country nationals had been concerned. Since the legal principles governing the ECJ examination of the different freedoms in terms of restriction and justification have by and large converged, the practical outcome for the parties in ECJ cases has indeed not been usually a function of which freedom was relied on in an intra-EU dimension. In intra-EU dimension, the ECJ had consequently never selected only one of two (or more) affected freedoms against which to judge the compatibility of a national measure in circumstances where it could change the practical result of the case.[38]

---

33 D. Weber, *Fidium Finanz AG v Bundsanstalt fur Finanzdienstleistungsaufsicht*: the ECJ gives the wrong answer about the applicability of the free movement of capital between the EC Member States and non-member countries, *BTR* 2007, 6, 672

34 ECJ, 24 March 1994, C-275/92, *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler*, [1994] ECR I-01039, par 22; ECJ, 22 January 2002, C-390/99, *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*, [2002] ECR I-00607, par 31; ECJ, 25 March 2004, C-71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH*, [2004] ECR I-03025, par 46; ECJ, 14 October 2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-09609, par 26; ECJ, 26 May 2005, C-20/03, *Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong*, [2005] ECR I-4133, par 35.

35 See *Karner*,Par. 47; *Omega*, Par. 27.

36 See *Omega*, Par. 27; see *Cadbury Schweppes*, par 33; *Bachmann*, Par. 34.

37 See *Canal satéllite Digital*, Par. 32-33; ECJ, 30 April 1974, *Giuseppe Sacchi*, C-155/73, [1974] ECR 00409, Par. 5-7.

38 M. O'Brien, *Op. Cit.*, 652.

However, in the *Fidium Finanz* case, the circumstances concerned both free movement of capital and freedom to provide services and, according to its "prevailing freedom" principle, the ECJ excluded consideration of the free movement of capital, which was actually the only freedom available to *Fidium Finanz* as a third country national.

4. Overlapping freedoms: the *Fidium Finanz* case

- Facts

Fidium Finanz is a Swiss company which granted credits, on a commercial basis, mainly to customers established in Germany. The credits were offered from Switzerland by an internet website or by means of credit intermediaries operating in Germany. The German legislation required financial services providers to obtain an official authorization in order to offer such services to German residents, unless they were established in an EU-EEA Member State. Providing financial services in Germany, *Fidium Finanz* was therefore required to obtain an official authorization in order to grant credits.

However, *Fidium Finanz* claimed that the German legislation was incompatible with the free movement of capital and took the case to the administrative Court of Frankfurt.

The administrative Court of Frankfurt introduced a preliminary ruling to the ECJ, asking whether *an undertaking having its registered office in a country outside the European Union, in this case Switzerland, rely on the free movement of capital under Article 56 EC in respect of the commercial grant of credit to residents of a Member State of the European Union, in this case the Federal Republic of Germany, as against that Member State and the measures taken by its authorities or courts, or are the preparation, provision and performance of such financial services covered solely by the freedom to provide services under Article 49 et seq. EC?*[39]

In other words, the administrative Court of Frankfurt asked whether granting credits on a commercial basis falls under the freedom to provide services or within the free movement of capital.

- Preliminary comments

At the time of the facts in the main proceedings, international law did not change the situation given that the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the

39 See *Fidium Finanz*, Par. 20.1.

free movement of persons[40] to facilitate the provision of services in the territory of the Contracting Parties, was not yet entered into force.

- *Main submissions of the parties*

  - Position of *Fidium Finanz* and of the EU Commission

    The EU Commission agreed with the position of *Fidium Finanz* taking the view that the grant of credits comes within the scope of the free movement of capital. Reference was made in this respect to Heading VIII of Annex I to Directive 88/361, entitled 'Financial loans and credits' and according to the explanatory notes of that Annex, that category includes consumer credit, inter alia.

    It was also contended that while, in the case at hand, there was a link between the grant of credits and the freedom to provide services, this did not however preclude the applicability of Article 56 EC, since the overwhelming case-law of the Court in the field of financial services showed that the two fundamental freedoms could apply in parallel. [41]

  - Position of the German authorities

    By contrast, the German authorities argued that the free movement of capital was not applicable in the main proceedings, because the grant of credits on a commercial basis constitutes a service within the meaning of the first paragraph of Article 50 EC. Moreover, reference was made to the Annex I of Directive 2000/12[42] according which the regulation of activity of granting loans, inter alia, falls into the scope of both the freedom of establishment and the freedom to provide financial services.

    The German authorities also conceded that the activity of granting loans may have an indirect effect on capital movements, i.e. the payment of the loan amount but, according to the *Bachman* case[43], the Article 56 EC did not prohibit restrictions on movements of capital which merely result indirectly

40 Signed in Luxembourg on 21 June 1999.

41 ECJ, 14 November 1995, C-484/93, *Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme*, [1995] ECR I-03955, Par 10 and seq ; ECJ, 9 July 1997, C-222/95, *Société civile immobilière Parodi v Banque H. Albert de Bary et Cie*, [1997] ECR I-03899, Par. 14 and 17.

42 See *Fidium Finanz*, Par. 39.

43 See *Bachman*, Par. 34.

from restrictions on other fundamental freedoms, in this particular case the freedom to provide services.

- The Opinion of Advocate General Stix-Hackl[44]

On the one hand, the Advocate General Stix-Hackl confirmed that the activity of granting credits to a resident of a Member State concerns both the freedom to provide services and the free movement of capital. On the other hand, because the freedom to provide services was not applicable ratione personae to *Fidium Finanz,* as a third-country company, she took the view to focus her examination of the case on the free movement of capital[45] and highlighted following main points:

a) Relevant ECJ's case-law[46]

Firstly, the Advocate General noted that the ECJ's existing jurisprudence did not exclude consideration of the measure as a restriction of free movement of capital[47], except maybe in the *Bachman* case[48]. She based her argumentation primarily on the *Svensson and Gustavsson* case[49] according which both free movement of capital and freedom to provide services were considered equally applicable.[50] In the *Bachman* case, the ECJ stated that Article 56 EC does not prohibit restrictions on movements of capital which merely result indirectly from restrictions on other fundamental freedoms[51], in the case at hand the freedom to provide services.

However, the Advocate General refuted the *Bachman* argument stating that "*for the purposes of deciding under which fundamental freedom a situation should be classified, the criterion of indirect adverse effect or indirect*

---

44 Opinion of Advocate General Stix-Hackl delivered on 16 March 2006, C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht,* [2006] ECR I-09521.

45 See Opinion Advocate General *Fidium Finanz,* Par. 44.

46 See Opinion Advocate General *Fidium Finanz,* Par. 53-63.

47 See inter alia *Svensson and Gustavsson* ; *Parodi* ; ECJ, 28 April 1998, C-118/96, *Jessica Safir v Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län,* [1998] ECR I-01897; ECJ, 1 December 1998, C- 410/96, *Criminal proceedings against André Ambry,* [1998] ECR I-07875.

48 See *Bachmann.*

49 See *Svensson and Gustavsson.*

50 See Opinion of Advocate General Kokott delivered on 14 July 2005, C-265/04, *Margaretha Bouanich v Skatteverket,* [2006] ECR I-00923, Par. 16; Opinion of Advocate General Kokott delivered on 12 September 2006, C-231/05, *OY AA,* [2007] ECR I-06373, Par. 71.

51 See *Bachmann,* Par. 34.

infringement is not sufficiently clear-cut and is too vague"[52] and "*even the case-law of the Court no longer requires that that criterion be used, the Court not having relied on it since the judgment in Bachmann. The same is true, moreover, of the 'principal aspect' criterion, which is used for the same purpose*".[53]

b) The priority rule of Article 50 (1) EC[54]

In addition, the Advocate General referred to Article 50 (1) EC according which "*services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons*". She interpreted this article as a priority rule stipulating that the "services" fall into the scope ratione materiae of the free movement of services according to Article 49 EC, provided that that they are not covered by other freedoms.

c) Effects of the measure[55]

Furthermore, The Advocate General argued that the free movement of capital should remain applicable when the important factor is not the objective pursued, but the effect produced by the national measure. Since the effect of granting credits would have a greater impact on the movement of capital than on the provisions of services, the matter was to be interpreted as a capital transaction.[56]

d) Article 57 (1) EC[57]

Finally, the Advocate General highlighted the fact that the standstill clause applies inter alia to "provision of financial services"[58] suggests that the free

52 See *Bachmann*, Par. 61.

53 *Ibidem.*

54 See Opinion Advocate General *Fidium Finanz*, Par. 70.

55 See Opinion Advocate General *Fidium Finanz*, Par. 72

56 T. Falcao, Third-Country Relations with the European Community: A Growing Snowball. An analysis of the Recent Developments in the European Court of Justice's Jurisprudence, *Intertax* 2009, n°5, 317

57 See Opinion Advocate General *Fidium Finanz*, Par. 74

58 Art. 57 (1) EC

> movement of capital in a third country dimension and in connection with financial services falls within the Article 56 EC.[59] Otherwise, the right conferred to the Member States according to the Article 57(1) EC to retain any national restrictions that were in force on December 31, 1993 under national or EU law would be meaningless.

Based on this argumentation, the Advocate General concluded that *Fidium Finanz* could rely on the free movement of capital for the purposes of granting credits to residents of a Member State[60], but interestingly, stated that in the case at hand, the requirement of official authorization by the German authorities was justified proportionally under Article 58(1)(b) EC.[61]

- ECJ Decision

The ECJ acknowledged that the activity of granting credits on a commercial basis concerns in principle both the freedom to provide services and the free movement of capital[62], but rejected the interpretation of the Article 50 (1) as a priority rule by the Advocate General. Indeed, it interpreted the latter article by stating that "*the notion of services covers services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms*".[63]

Furthermore, the ECJ upheld its settled case-law according which where a national measure is related to both freedoms at the same time, it is necessary to determine whether one of the freedoms prevails over the other one and whether one of them is entirely secondary in relation to the other and may be considered together with it[64]. Consequently, the ECJ examined the purpose of the German rules in the main proceedings to determine to what extent both freedoms were affected.[65]

It concluded that since the purpose of the German legislation was to impede the access to the German financial market for companies established in third country states, the predominant consideration is freedom to provide services.[66] Moreover, it

---

59 See Opinion Advocate General *Fidium Finanz,* Par. 74

60 See Opinion Advocate General *Fidium Finanz,* Par. 75

61 See Opinion Advocate General *Fidium Finanz,* Par. 185 and 186

62 See *Fidium Finanz,* Par. 43

63 See *Fidium Finanz,* Par. 32

64 See *Fidium Finanz,* Par. 34

65 See *Fidium Finanz,* Par. 44

66 See *Fidium Finanz,* Par. 49

determined that it was also possible that the German rules effectively reduced cross-border financial traffic relating to those services by making financial services offered by companies established in non-member countries less accessible for clients established in Germany, but that restrictive effect on the free movement of capital was merely an unavoidable consequence of the restriction imposed as regards the provision of services. [67]

Therefore, in such circumstances, the ECJ stated that it was not necessary to examine the compatibility of those rules with the provisions of the EU provisions governing the free movement of capital[68] and because the freedom to provide services applies only to resident of Member States, *Fidium Finanz*, being from Switzerland, could neither rely on this provision.[69]

- Analysis of the *Fidium Finanz* Case

In addition to Articles 57(1) and 58 EC, the "prevailing freedom" principle developed by the ECJ is another significant limit of the possibilities for the third countries to benefit from the free movement of capital in a similar way than in an intra-EU dimension[70]. This "prevailing freedom" principle applying by the ECJ when a national measure has the effect to restrict more than one of the fundamental freedoms has been criticized since the *Fidium Finanz* case by several legal commentators[71]. For example, according to Dr. Christiana Panayi, *"in this case, the ECJ very conveniently disposed of the question of the rights of third country nationals. Since in none of the other freedoms were third country nationals protected, such an interpretation effectively curbed their rights"*.[72] For Professor Dennis Weber, the *Fidium Finanz* case is incorrect and illogical and agreed in some way with the Advocate General Stick-Hackl Opinion, arguing that because the freedom to provide services was not applicable in this case, the ECJ had to proceed to the question whether there is a restriction in the light of the free movement of capital provisions and, if so, whether that restriction is justified by imperative reasons in the public interest".[73]

---

67 See *Fidium Finanz*, Par. 48

68 See *Fidium Finanz*, Par. 49

69 See *Fidium Finanz*, Par. 50

70 M. O'Brien, *Op. Cit.*, 651

71 Inter alia D. Weber, *Op. Cit.;* R. Fontana, Direct Investments and Third Countries: Things are Finally Moving ... in the Wrong Direction, *ET* 2007, n°10, 435

72 C. Panayi, *Op. Cit.*, 573-574

73 D. Weber, *Op. Cit.*, 670

In my opinion, it should be firstly pointed out that ECJ decision in *Fidium Finanz* was theoretically and formally correct. Indeed, the ECJ applied the "prevailing freedom" principle it has developed in its settled case-law and as long as it will follow this principle in case of overlapping freedoms, the third country rights set out in the Article 56 EC are fully respected.[74] The *Fidium Finanz* case simply clarified that free movement of services has never been granted to third-country nationals by the EC Treaty and if they wish to avail of such rights, they need to establish an EU subsidiary in the EU territory of a Member State that generates an economic link with the EU[75], i.e. Germany in the case at hand.

In *Fidium Finanz*, it appeared clearly from the main proceedings that the purpose of the German rules first and primarily concerned the selling of financial service in Germany by third country companies rather than the investment of capital in Germany by third country companies. Reference can be made here to the *Luisi and Carbone* case[76] according which the ECJ took the same view in an intra-EU dimension. Consequently, the ECJ decision appears to be defensive to the extent that it prevented third country investors from gaining indirectly and illegitimately other free movement rights by invoking the free movement of capital.

However, if the *Fidium Finanz* decision seemed to be theoretically correct, the application of the ECJ "prevailing freedom" principle has created a controversial issue regarding third country rights which has instituted an area of profound judicial instability and legal uncertainty.[77] It should be firstly pointed out that in a case such as *Fidium Finanz*, the respective positions taken by the EU Commission, by the Advocate General and by the ECJ were significantly opposite and reflected the absence of a common position among EU institutions in this area.

Moreover, legal commentators have also disagreed in a significant way on the position to be taken by the ECJ in the case of overlapping freedoms. Some have indeed defended the exclusivity approach[78], others have supported the adoption of the parallel approach[79] and finally the "effet utile" approach[80] or the causality

---

74 T. O'Shea, *Thin Cap GLO* and Third-Country Rights: Which Freedom Applies, *Tax Notes Int'l* 2007, April 23, 2007, 371

75 See for example *Halliburton.*

76 ECJ, 31 January 1984, C- 286/82 and C-26/83, *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro,* [1984] ECR 00377

77 T. Falcao, *Op. Cit.*, 311

78 J. Ghosh QC, Principles of Internal Market and Direct Taxation, Key Haven Publications PLC, 2007, 38 cited by T. FALCAO, *Op. Cit.*, 311

79 K. Stahl, *Op. Cit.*, 49

80 A. Cordewener, G. Kofler and C. Schindler, Free Movement of Capital, Third Country Relationship and National Tax Law: An Emerging Issue before the ECJ, *ET* 2007, n°3, 112

approach[81] has also been highlighted.

In addition, the ECJ has not always been totally coherent in its decisions. While it has generally applied its "prevailing freedom" principle in the case of freedoms overlap, it has also established in several cases that when it is difficult to determine which freedom should take priority, it is content to analyze the situation under more than one freedom.[82]

Finally, the legal uncertainty existing in this area can also be illustrated by the subsequent ECJ decisions in direct tax matters.

5. Implications of the *Fidium Finanz* decision in direct tax matters

- Introduction

It should be firstly pointed out that while the *Fidium Finanz* case dealt with the interaction between the free movement of capital and the free movement of services, the direct tax cases involving third country dimension concern mainly the interaction between the freedom of capital and the freedom of establishment.

In this respect and according to its settled case-law, the ECJ has stated that in order to ascertain whether a national measure falls within the free movement of capital or the free movement of establishment, the purpose of the legislation at issue must be taken into consideration[83]. In addition, it has generally applied the "definitive influence and control test" established in the *Baars*[84] case to determine which freedom prevails over the other. Accordingly, national measures relating to holdings giving the holder a definite influence on the decisions of the company concerned and allowing him to determine its activities come within the material scope of the Treaty provisions on freedom of establishment.[85]

---

81 D. SMIT, The relationship between the free movement of capital and the other EC Treaty freedoms in third country relationships in the field of direct taxation: a question of exclusivity, parallelism or causality?, *EC TaxRrev.* 2007, n°6, 252-267

82 See *Canal satéllite Digital*, Par. 32-33; *Sacchi*, Par. 5-7 ; *Schindler ; Holböck*

83 See *Cadbury Schweppes*, Par. 31 to 33; *Fidium Finanz*, par 34 and 44 to 49; ECJ, 12 December 2006, C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenu,* [2006] ECR I-11673, Par. 37 and 38*; Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, Par. 36; *Test Claimants in the Thin Cap Group Litigation*, Par. 26 to 34

84 ECJ, 13 April 2000, C-251/98, *C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem*, [2000] ECR I-02787

85 See *Baars*, Par. 22; *Cadbury Schweppes*, Par. 31; *Test Claimants in the Thin Cap Group Litigation*, Par. 27

- Test Claimants in the *Thin Cap Group Litigation case*[86]

The *Thin cap GLO* case dealt with UK thin capitalization rules and concerned their application to loans to UK subsidiaries which were at least 75% owned directly or indirectly by two third country companies. It was claimed in this case that UK thin capitalization rules were incompatible with the free movement of capital, the freedom of establishment and the freedom to provide services.

The ECJ started its analysis by determining which freedom applied in the main proceedings. In this respect, it noted that the UK thin capitalization rules targeted only loans between members of controlled groups of companies and that the level of control involved allowed the third country companies to influence the financing decisions of their UK subsidiaries, i.e. to determine whether those companies should be financed by loans or equity. Applying its *Baars* test, the ECJ concluded that the UK rules primarily affected the freedom of establishment, whereas the restrictive effects on the free movement of capital and on the freedom to provide services were merely an unavoidable consequence of the restriction on freedom of establishment.[87] Consequently, it was not justified for the ECJ to answer the questions referred in the light of the latter two freedoms provisions[88] and as the scope of application ratione personae of the freedom of establishment does not extend to third country situations, the UK thin capitalization rules could not be affected in the main proceedings under EU law.

- *Lasertec case*[89]

The ECJ followed *Thin Cap GLO* in making its Order in *Lasertec.* This latter case dealt with the German thin capitalization rules and concerned their application to loans extended by a Swiss parent company to its German subsidiary. The German rules at issue applied to circumstances in which the non-resident lending company had a substantial holding in the nominal capital of the resident borrowing company. Accordingly, a substantial holding meant namely a holding of over 25%, but also a lesser holding which nevertheless conferred a dominant influence over the company. Therefore, applying its *Baars* test, the ECJ established that the purpose of the German rules concerned every holding, irrespective of a precise threshold, giving the lending company a definite influence on the decisions of the borrowing company

86 See *Test Claimants in the Thin Cap Group Litigation*

87 See *Test Claimants in the Thin Cap Group Litigation*, Par. 33 and 34

88 See *Test Claimants in the Thin Cap Group Litigation*, Par. 34

89 ECJ, Order, 10 May 2007, C-492/04, *Lasertec Gesellschaft fur Stanzformen mbH v. Finanzamt Emmendingen*, [2007] ECR I-03775
It should be pointed out that the *Lasertec* case corresponds to the following intra-EU case: ECJ, C-324/00, 12 December 2002, *Lankhorst-Hohorst GmbH v Finanzamt Steinfurt*, [2002] ECR I-11779.

and allowing the former company to determine the activities of the latter company. Moreover, it should be pointed out from the circumstances of this case that the Swiss company held two thirds of the nominal capital in the German company.
In this respect, the ECJ concluded that the German legislation concerned solely the freedom of establishment[90], whereas the restrictive effect on the free movement of capital was merely an unavoidable consequence of the restriction on freedom of establishment.[91] Consequently, it was considered that there was no need to answer the questions referred in the light of the Treaty provisions relating to the free movement of capital[92] and as the scope of application ratione personae of the freedom of establishment does not extend to third country situations, the Swiss company was ultimately unprotected under EU law.

- *A&B case*[93]

The ECJ followed *Thin Cap GLO* and *Lasertec* in making its Order in *A&B*. This latter case dealt with outbound dividends and concerned the question of whether or not circumstances related to a Russian permanent establishment of a Swedish company must be taken into account in determining the dividend tax exemption on the shareholder level. More specifically, Swedish national tax rules on closely-held companies led to less favourable taxation of dividends for shareholders of a Swedish company due to the fact that the company had a permanent establishment in a third country, namely Russia.

If it was claimed in the main proceedings that Swedish rules were incompatible with the free movement of capital, the ECJ considered that the purpose of the Swedish rules mainly discouraged the creation of branches outside of the Union and, therefore, concerned solely the freedom of establishment[94]. The ECJ also stated that the restrictive effects of the Swedish rules on the free movements of capital were merely an unavoidable consequence of the restriction on freedom of establishment.[95] Consequently, it was considered that there was no need to answer the questions referred in the light of the Treaty provisions relating to the free movement of capital[96] and as the scope of application ratione personae of the freedom of establishment does not extend to third country situations, no protection could,

90 See *Lasertec,* Par. 24

91 See *Lasertec,* Par. 25

92 See *Lasertec,* Par. 26

93 ECJ, Order, 10 May 2007, C-102/05, *Skatteverket v A and B,* [2007] ECR I-03871.

94 See *A&B*, Par. 26

95 See *A&B*, Par. 27

96 See *A&B*, Par. 28

therefore, be offered to the Swedish company operating a Russian permanent establishment.

- *Stahlwerk case*[97]

The ECJ followed *Thin Cap GLO*, *Lasertec* and *A&B* in making its Order in *Stahlwerk*. This latter case dealt with the fact that the German tax authorities did not allow a German company to deduct its US branch losses, as a consequence of the German-US Treaty provision exempting the US branch profits from German tax.
While it was claimed in the main proceedings that German rules were incompatible with the free movement of capital, the ECJ stated that the provision of the German-US Treaty applied to permanent establishment and therefore only to situations where the parent company exercises a definite influence on the decisions of its subsidiaries and allowing the former company to determine the activities of the latter companies.[98] Applying its *Baars* test, the Court concluded that only the freedom of establishment was applicable in this case and that the restrictive effects on the free movement of capital was merely an unavoidable consequence of the restriction on freedom of establishment.[99]

Consequently, it was considered that there was no need to answer the questions referred in the light of the Treaty provisions relating to the free movement of capital and, as the scope of application ratione personae of the freedom of establishment does not extend to third country situations, the German rules concerning US branches of a German company could not be affected in this case under EU law.

- *Holböck case*[100]

The *Holböck* case dealt with outbound dividends and concerned the less favourable treatment under Austrian dividend taxation rules of dividends from a Swiss company by comparison with domestic dividends. It should be pointed out from the circumstances of this case that the Austrian national held two-thirds of the shares of the Swiss company.

---

97 ECJ, Order, 6 November 2007, C-415/06, *Stahlwerk Ergste Westig GmbH v. Finanzamt Dusseldorf-Mettmann*, [2007] ECR I-00151.
It should be noted that the *Stahlwerk* case corresponds to the following intra-EU case: ECJ, 14 February 2008, C-414/06, *Lidl Belgium GmbH & Co. KG v Finanzamt Heilbronn*, [2008] ECR I-03601.

98 See *Stahlwerk*, Par. 14

99 See *Stahlwerk*, Par. 16

100 ECJ, 24 May 2007, C-157/05, *Winfried L. Holböck v. Finanzamt Salzburg-Land*, [2007] ECR I-04051
It should be noted that the *Holböck* case corresponds to the following intra-EU case: ECJ, 15 July 2004, C-315/02, *Anneliese Lenz v Finanzlandesdirektion für Tirol*, [2004] ECR I-07063.

In contrast with the previous direct tax cases, the ECJ determined that the Austrian rules at issues had to be measured against both freedom of establishment and free movement of capital. Actually, it considered that although the Austrian national had a definitive influence over the Swiss company in the main proceedings, the Austrian rules at issue applied generally to dividends, irrespective of the extent of the holding which the shareholder has in the company making the distribution.[101] Nevertheless, the ECJ confirmed that as the scope of application ratione personae of the freedom of establishment does not extend to third country situations, the Swiss company was ultimately unprotected under EU law.[102] In addition, the ECJ noted that the free movement of capital would neither apply by the application of the standstill clause according to Article 57 (1) EC.[103]

- *KBC case*[104]

The *KBC* case dealt with the Belgian participation exemption and concerned inter alia the less favourable treatment of dividends from third country companies by comparison with intra-EU dividends. The Belgian participation exemption regime applies if the Belgian parent company has a holding percentage of at least 10% in the capital of its subsidiary or an investment value of at least EUR 2,5 million[105] in its capital. This regime is available in an equal footing for dividends from both EU companies and third country companies, except the fact that dividends from third country companies in a loss position were only partially exempted while dividends from EU companies in the same position were totally exempted.

It was claimed therefore that Belgian rules were incompatible with the free movement of capital because third country dividends were less favourable treated than EU dividends. Surprisingly, the ECJ did not take any decision on the compatibility of the Belgian participation exemption regime with Article 56 EC in a third country situation, but referred the question back to the national Court which will have to decide whether or not the free movement of capital applies taking account of the facts of the case. [106]

---

101 See *Holböck*, Par. 24

102 See *Holböck*, Par. 28-29

103 See *Holböck*, Par. 30 and 31

104 ECJ, 4 June 2009, C-439 and C-499/07, *Belgische Staat contre KBC Bank NV, et Beleggen, Risicokapitaal, Beheer NV contre Belgische Staat*, [2009] ECR I-0000.

105 Before 1 January 2010, the minimum acquisition value was EUR 1,2 million

106 See *KBC*, Par. 61 et seq.

In this respect, the ECJ provided the national Court with some guidance according which both the purpose of the national legislation[107] and the individual factual circumstances concerning holding relationships[108] has to be considered in order to determine whether Article 56 EC is applicable.

- *Glaxo Wellcome case*[109]

The *Glaxo Wellcome* case dealt with German rules which allowed a deduction for a reduction in value for shares as result of a dividend distribution where the shares were acquired from another resident, but not where they were acquired from a non-resident. It should be pointed out from the circumstances of this case that 100% of the German company shares were acquired by two non-resident companies within a group of companies. However, the application of the German rules was not depending on the size of the holdings acquired from the non-resident shareholder. In other words, the application of the German rules at issue was not limited to situations in which the shareholder can exercise a definite influence on the decisions of the company concerned and determine its activities.[110]

It was claimed in the main proceedings that the German rules were incompatible with the free movement of capital and the freedom of establishment. In this respect, the ECJ firstly repeated its settled case-law stating that national provisions that apply to holding giving definitive influence on a company's decision fall within the scope ratione materiae of the freedom of establishment. However, the ECJ clarified that the scope ratione materiae of the free movement of capital includes inter alia "*direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of participating effectively 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)*".[111]

Therefore, even though the non-resident shareholder held a controlling interest in the circumstances of the present case, the free movement of capital was applied by the ECJ arguing that "*since the purpose of the legislation at issue in the main proceedings is to prevent non-resident shareholders from obtaining an undue tax advantage directly through the sale of shares with the sole objective of obtaining*

107 See *KBC*, Par. 68 and 74

108 See *KBC*, Par. 70 and 74

109 ECJ, 17 September 2009, C-182/08, *Glaxo Wellcome GmbH & Co. KG*, [2009] ECR I-0000.

110 See *Glaxo Wellcome*, Par. 49

111 See *Glaxo Wellcome*, Par. 50; ECJ, 28 September 2006, C-282/04 and C-283/04, *Commission v Netherlands (Golden Share)*, [2006] ECR I-09141.

that advantage, and not with the objective of exercising the freedom of establishment or as a result of exercising that freedom, it must be held that the free movement of capital aspect of that legislation prevails over that of the freedom of establishment."[112] Consequently, it was considered that the restrictive effects of the legislation on the freedom of establishment were the unavoidable consequence of any restriction on the free movement of capital and did not justify an independent examination.[113]

- *Analysis of the direct taxation cases following the Fidium Finanz case*

The ECJ's position in *Fidium Finanz* has solidified in the subsequent direct taxation cases in which the ECJ decisions have had a significant impact on the EU third country rights. Applying its "prevailing freedom" principle, the ECJ position has strictly prevented third country investors from gaining indirectly and illegitimately other free movement rights by invoking the free movement of capital[114], but this position has been criticized as curbing or limiting the EU third country rights by many legal commentators.

It is clear from the above analyzed ECJ decisions that the purpose of the relevant national legislation is the key point for the ECJ to determine whether national rules fall in the scope ratione materiae of one or other of the freedoms of movement. [115] In this respect, the ECJ has regularly upheld that national rules which only apply to holdings by shareholders in the capital of a company giving them definite influence on the company's decision and allowing them to determine its activities come solely within the scope ratione materiae of the freedom of establishment.[116] Consequently, the ECJ found not justified[117] or not necessary[118] to examine any restriction in the light of the free movement of capital provisions, as being an unavoidable consequence of the restriction on freedom of establishment.[119] In addition, the *Holböck* and *Glaxo Wellcome* decisions have highlighted the fact that general tax

112 See *Glaxo Wellcome*, Par. 50

113 See *Glaxo Wellcome*, Par. 51

114 T. O'Shea, *Thin Cap GLO* and Third-Country Rights: Which Freedom Applies, *Op. Cit.*, 371-375

115 T. O'Shea, *Holböck:* Austrian Dividend Tax Rules Found Compatible With the EC Treaty, *Tax Notes Int'l* 2007, June 11, 2007, 1131

116 See *Test Claimants in the Thin Cap Group Litigation; Lasertec* and *Stahlwerk*

117 See *Test Claimants in the Thin Cap Group Litigation*

118 See *Lasertec; A&B, Stahlwerk*

119 A. Cordewener, Free Movement of Capital between EU Member States and Third Countries: How Far Has the Door Been Closed?, *EC Tax Rev.* 2009, n°6, 262

measures that are not limited to shareholdings which enable the holder to have a definite influence on a company's decision and to determine its activities are not necessarily excluded from examination under Article 56 EC.[120] The ECJ stated indeed in the *Holböck* case that both freedom of establishment and free movement of capital were applicable, while only the free movement of capital applied in the *Glaxo Wellcome* case regarding the purpose of the national rules.

Consequently, national rules such as CFC rules[121], thin capitalization rules[122], group loss relief[123] or transfer pricing rules[124] which, to be triggered, require in principle a control threshold to be reached would only be protected in the light of the Treaty provisions relating to the freedom of establishment.[125] Such a position[126] has also been confirmed in the 2007 Commission Communication[127] on the application of anti abuse measures in the area of direct taxation within the European Union and in relation to third countries. Accordingly, the Commission confirmed that the centre of gravity in respect of some anti-abuse rules, for example CFC and thin capitalization rules, lies clearly within the freedom of establishment, which does not cover third-country situation.

The ECJ formal approach which refers to the purpose of the national rules at issue in order to determine the prevailing freedom has surprisingly not been clearly confirmed in some recent ECJ decisions. In the *Burda*[128] and *Aberdeen*[129] (intra-EU)

---

120 N. Bammens, Excédents de RDT pour dividendes non-UE: pas de clarté après KBC, *Fiscologue (I)* 2009, 306

121 See *Cadbury Schweppes.*

122 See *Test Claimants in the Thin Cap Group Litigation; Lasertec*

123 See *Stahlwerk*

124 ECJ, 21 January 2010, C-311/08, *Société de Gestion Industrielle (SGI) v Belgian State*, [2009]

125 M. O'Brien, *Op. Cit*., 654-655; A. Cordewener, G. Kofler and C. Schindler, Free Movement of Capital and Third Countries: Exploring the Outer Boundaries with *Lasertec*, *A and B* and *Holböck, European Taxation* 8/9 (2007), 374

126 See also *Test Claimants in the FII Group Litigation*, Par. 36, 80 and 142 et seq.; *Test Claimants in Class IV of the ACT Group Litigation*, Par. 37 et seq.

127 Commission Communication of 10 December 2007 to the Council, the European Parliament and the European Economic and Social Committee entitled "The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries"

128 ECJ, 26 June 2008, C-284/06, *Finanzamt Hamburg-Am Tierpark v Burda GmbH*, [2009] ECR I-0000, Par. 71-74

129 ECJ, 18 June 2009, C-303/07, *Aberdeen Property Fininvest Alpha Oy*, [2009] ECR I-0000, Par. 33

cases, the ECJ has indeed adopted a more substantial approach, by considering the individual factual circumstances and the extent of the shareholder investment to determine the applicable freedom. It should be pointed out that the national rules applied in both cases regardless of the extent of the size of shareholders holding. This approach has also been confirmed by the Advocate General Bot in its Opinion concerning the Glaxo Wellcome case.[130]

In the *KBC* case[131], the ECJ provided some guidance to the national Court which, again, did not follow its previous position but which referred to a cumulative application of both formal and substantial approaches. Indeed, the ECJ confirmed the importance of the purpose of the national rules in order to distinguish the free movement of capital and the freedom of establishment, but also concluded that an economic actor could still be excluded from protection under Article 56 EC if according to the individual factual circumstances and the extent of the investment, he/she has obtained a shareholding that gives him/her definite influence over the decisions of a company and allow him/her to determine its activities.

The confusion arisen from the unclear ECJ position taken by the ECJ is finally also expressed in the *CFC and Dividend* case[132] in which the ECJ has oscillated undecidedly between the relevance of the national legislation and concrete facts of the case.

6. Conclusion

The extent of the EU third country rights in the Article 56 EC is a political and highly sensitive issue in the framework of the worldwide liberalization and, in my opinion, the EU should adopt a coherent position to give third country nationals some legal certainty concerning the protection of their activities and investments on the EU territory. On the contrary, the "prevailing freedom" principle developed by the ECJ has created an area of confusion and legal uncertainty for the third countries in the exercise of their EU rights.

This uncertainty appeared in the framework of the *Fidium Finanz* case and was reflected by the different positions taken by legal actors. Subsequently, this legal uncertainty has been illustrated in the direct tax case-law mainly by the unclear ECJ interpretation of the notion "to have a definite influence on a company's decision

130 Opinion of Advocate General Bot delivered on 9 July 2009, C-182/04, *Glaxo Wellcome GmbH & Co. KG*, [2009] ECR I-0000, Par. 86 et seq.

131 See *KBC*, Par. 66 et seq.

132 ECJ, 23 April 2008, C-201/05, *The Test Claimants in the CFC and Dividend Group Litigation v Commissioners of Inland revenu*, [2008] ECR I-02875.

and to determine its activities" and has been recently highlighted by the Advocate General Kokott in its *SGI* case Opinion.[133]

In a perfect world, those issues should be solved by political decisions either by updating the freedom definitions in order to define the exact borderline between treaty freedoms, or by establishing one overall rule solving in details the freedoms overlap issues. However it is more than likely than in absence of political clarification, the ECJ will have to fill in gaps again in the EU legal framework and try to provide the Member State national courts with, hopefully, clearer guidance and more legal certainty in order to solve those sensitive and political issues related to the EU third country rights.

133 Opinion of Advocate General Kokott delivered on 10 September 2009, C-311/08, *Société de Gestion Industrielle (SGI) v Belgian State,* [2009] ECR I-0000, Par. 36 with Fn. 12