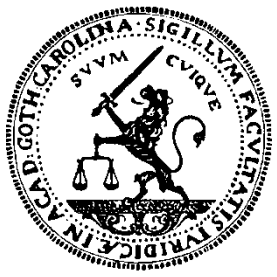


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# The free movement of capital and the freedom of establishment

A study regarding their interrelationship in the field of direct taxes

JURM02 Graduate Thesis

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# Contents

# Summary

Since its inception, the EU has had a pivotal role in integrating the MS between each other and also has had an increasing influence on the national legislation of these states. Moreover, this process has naturally led to legal concerns on how to interpret the EU law and how to impose it to secure its integration for the future. Furthermore, in order to impede and hinder MS from protecting and benefiting its own nationals at the expense of other MS persons the EU has inserted four fundamental freedoms in its major treaties which the MS may not restrict.

Two of these freedoms are the free *movement of capital* and *the freedom of establishment*, which will hinder MS to impose restrictions to establishments and capital movements. Moreover, the provisions of these two freedoms frequently overlap each other. Furthermore, because third parties may also litigate under the free movement of capital while the freedom of establishment may only be invoked by MS parties it is of decisive importance to examine how these freedoms interact and if there is a dividing line between these two freedoms.

Concerning direct taxes, this distinction has been of vital importance creating a heated debate on this subject and the reach of the free movement of capital. Moreover, the ECJ has implemented various different and rules for when and how to apply the two freedoms and how they interrelate. However, the case law from the ECJ in this field has historically been marked by vagueness, complicatedness and inconsistency.[1] Moreover, this has provided uncertainty in which extent third parties may benefit from the inner market and under which circumstances only parties from within the EU may invoke the fundamental freedoms. Consequently, this inconsistency has also caused national courts in different MS to render decisions that directly contravene each other.

In the fall of 2012 the ECJ rendered a landmark decision in this field, the *FII (II)* judgment, which has further sparked debate, but also created what scholars observe to be a more easily interpreted and consistent case-law. However, there has been debate on the extent of the principles enshrined in this decision and the impact it will have on future case-law. Furthermore, some debaters have implies that the *FII (II)* judgment decision have extended the scope of the free movement of capital too far and now almost any third party can benefit from the inner market. On the other hand, the decision has also been welcomed by other scholars and some of them even argue that the scope of the free movement of capital should be extended further since that is what the TFEU states and that it would also benefit the European economy.

[1] See supplement A for an overview of this inconsistency.

# Sammanfattning

Sedan EU bildades har unionen haft en central roll för att integrera medlemsstaterna och har också som en effekt av detta haft ett ökande inflytande på medlemsstaternas nationella lagstiftning. Dessutom har denna utveckling lett till juridiska överväganden avseende hur EU:s författningar ska tolkas och verkställas och hur denna integration ska kunna säkerställas. Det finns fyra friheter i EU-fördragen som ska motverka att de enskilda medlemsstaterna förfördelar personer från andra EU-länder med syfte att skydda och gynna personer från den egna staten.

Två av dessa friheter är den fria rörligheten för kapital och etableringsfriheten, vilka motverkar att medlemsstaterna inför hinder för kapitalrörelser och etableringar. Eftersom personer från tredje land kan åberopa den fria rörligheten för kapital men inte etableringsfriheten är det av stor vikt att utreda hur dessa två friheter förhåller sig till varandra och hur gränsen mellan dem ska dras.

Vad gäller direkta skatter har denna gränsdragning varit av stor vikt i rättsutvecklingen och skapat en livlig debatt bland praktiker, främst vad gäller räckvidden av den fria rörligheten för kapital. Dessutom har EU-domstolen infört många regler och riktlinjer som ska underlätta tolkningen avseende när den fria rörligheten för kapital respektive etableringsfriheten kan åberopas och hur de två friheterna påverkar varandra. Denna praxis har dock genomsyrats av inkonsekvens, komplexitet och otydligheter.[2] Detta har i sin tur lett till osäkerhet om i vilken grad tredje parter kan vara en del av den inre marknaden och när dessa parter inte kan väcka talan mot diskriminerande lagstiftning från medlemsstaterna. Denna osäkerhet har också lett till att olika nationella domstolar har tolkat den relevanta EU-rätten på fundamentalt olika sätt.

Hösten 2012 kom den avgörande *FII (II)*-domen från EU-domstolen, vilken ytterligare har eldat på den hätska debatten inom ämnet. Den har även skapat vad många praktiker anser vara en mer sammanhängande och lättförstådd praxis inom ämnet. Dessutom har det också i anslutning till denna dom förekommit en debatt om hur långt de principerna som kommer till uttryck i domen sträcker sig och vilket inflytande domen kommer att ha på framtida praxis. Utöver detta antyder vissa praktiker att *FII (II)*-domen enligt har ökat tillämpningsområdet för den fria rörligheten för kapital i den grad att nästan alla tredje parter nu kan ta del av den inre marknaden vad gäller direkt beskattning. Det finns emellertid forskare som välkomnar domen och dessutom hävdar att tillämpningsområdet för den fria rörligheten för kapital borde utökas ännu mer då det vore i enlighet med EU-fördragen och hade haft positiva effekter på europeisk ekonomi.

[2] See supplement A for an overview of this inconsistency.

# Preface

Foremost, I want to express my sincere gratitude to Professor Christina Moëll for being a most helpful supervisor and providing valuable advice and ideas for this thesis. Furthermore, I want to extend my gratitude to Shannon Dunn for proofreading and editing this thesis.

# Abbreviations

| | |
|---|---|
| AG | Advocate General |
| CFC | Controlled Foreign Company |
| ECJ | European Court of Justice |
| EEA | European Economic Area |
| EFTA | European Free Trade Association |
| EU | European Union |
| IL | Inkomstskattelag |
| MS | Member State (of the European Union) |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| WTO | World Trade Organization |

# 1 Introduction

## 1.1 Introduction

The European Union has had great importance on the legislation of the MS and has created an unprecedented integration between European countries. Furthermore, this has demanded that the states in the internal market give up significant legislative power to the Union. Moreover, to make certain that the integration will proceed successfully, the Union has been forced to come up with measures to prevent MS to impede the legal integration and here the four freedoms have pivotal importance. However, the four freedoms have different reaches since the free movement of capital also covers third parties and therefore it has created a legal uncertainty as how to distinguish the freedoms from each other.

This thesis's focus is on the difference between the free movement of capital and the freedom of establishment.[3] As Snell observes in 2011, the extension of the free movement of capital to also cover third parties is a largely unexplored issue and this issue is characterized by political sensitivity, lack of judicial expertise, complexity and possible significant financial losses for MS because it allows third parties to benefit from the inner market. Moreover, as such the ECJ in its case-law has been characterized by its caution and inconsistency in this field and that the Court does not apply the same rules as it does in other fields.[4] However, this is changing since the ECJ with the *FII (II)* judgment has extended the free movement of capital. Nonetheless, the ECJ is still not releasing the potential scope of the free movement of capital (see below 3.3). Furthermore, this recent change in case-law has been a hot potato in the legal jurisprudence. Moreover, the actuality of the topic is also shown by that the last year[5] there were more than 10 cases decided or pending in the ECJ regarding the reach of the free movement of capital.[6]

## 1.2 Aim and purpose

The aim of this thesis is to examine if there is a clear distinction and dividing line between the free movement of capital and the freedom of establishment. If there is such a distinction, this thesis will clarify the difference and emphasize important factors in which the two concepts are distinct. Furthermore, the aim of this thesis is also to examine how these two freedoms interrelate, if one of them has priority and if they

[3] Hereinafter, occasionally I will refer to these freedoms as *the two freedoms*.
[4] Snell *Free movement of capital: evolution as a non-linear process* (hereinafter Snell (2011) p. 573 f.
[5] 2013.
[6] Sheppard *Pending Cases in the ECJ: Article 63 TFEU Expands Its Reach* (hereinafter Sheppard (2013) p. 22 ff.

may be applied simultaneously. Moreover, as a consequence of the above the purpose of the thesis is as well to analyze if the ECJ applies certain rules or guidelines when deciding how the two freedoms interrelate and how they are distinguished from each other. If this is the case, such rules will also be thoroughly analyzed. Furthermore, the purpose is not only to examine the current legal position of the matter concerned but also the legal position in the past to assess if there are any patterns in the judgments from the ECJ. The reason for analyzing the development of the Court's case-law would be to see if it can give leads to as how to interpret the current legal position of the difference between the free movement of capital and the freedom of establishment. Furthermore, I will also examine clauses that may have great importance on this subject, such as the grandfather clause in the TFEU[7] and ostensible anti-abuse clauses in certain ECJ judgments and assess to what extent they might have effect on this subject.

The scopes of the free movement of capital and the freedom of establishment often overlap each other, therefore creating necessity in distinguishing the difference between them. Moreover, the difference between the free movement of services, persons and goods is, in principle, purely academic since they all have the same reach and there is no difference if certain legislation falls under the scope of one or another of those freedoms. However, since the free movement of capital, in contrast to the other freedoms, extends its reach to third states it is crucial to include it in the analysis. Moreover, I will in this thesis also briefly examine how this third party aspect affects the free movement of capital and if this aspect might produce any negative consequences.

In 2012 the ECJ delivered a landmark decision (the *FII (II)* judgment, see below 5.2) in this field and as such I will examine that judgment more thoughtfully and its impact, scope and influence on future case-law. To illustrate how this topic has been dealt with in different contexts I will also briefly examine how it has been treated in various national courts and in one instance how the European Commission has chosen to take action against potential discriminating legislation in this field.

Even if most cases in this field concern taxation of dividends this thesis will aim for the big picture and also contain other kinds of direct taxation such as exit taxes, taxation of dividends and group taxation and to examine if all these different kinds of taxes should be examined in the same way. This is, as mentioned, to try to assess if there is a general view of how to distinguish between the freedoms and if the difference varies according to the particular circumstances.

[7] TFEU art. 64, see also below 2.3.2.

## 1.3 Method and materials

The method I have chosen is to first examine the pertaining case-law, articles, literature and legislation in view of the aim and purpose of this thesis and finally analyze to the result of the findings and draw my own conclusions.

The aim and purpose of this thesis concern EU tax law and therefore different kinds of EU legal acts will have great importance when examining the topic relevant to this thesis, such as the treaties and directives concerning the fundamental freedoms. Furthermore, national court judgments and certain national legal documents will also have importance when examining the aim and purpose of this thesis. However, the EU legal acts do not in depth provide how to differentiate and distinguish the two freedoms from each other and as such this thesis will rely heavily on ECJ judgments and scholarly opinions.

Naturally, a significant number of cases involving restrictions of the four freedoms also discuss which freedoms apply. Stemming from this and the lack of TFEU provisions on this topic, the inconsistency of the ECJ case-law, the wide scope of the free movement of capital and the aim to provide a greater picture there is a significant number of Court cases on this topic that I will refer to. Furthermore, these include the absolute majority of court cases from 2007 and onwards that discuss the topic relevant to this thesis. However, because of the large amount of judgments, some of these cases may seem superfluous or outdated but for the general understanding I have still decided to include them. Moreover, in a few cases when I have considered it relevant to the purpose of this thesis I have included opinions of different AG's. However, I have not examined ECJ judgments when the Commission has taken actions against the legislation of a MS since naturally in these cases there are no factual circumstances for the Court to consider and as such it gives less room for different interpretations and use of the *facts of the case-rule* (see below 4.2).

Even though the aim of this thesis is to examine the difference between the free movement of capital and the freedom of establishment I will also in some cases examine case-law and articles concerning the difference between the other freedoms. This is the case if I am of the opinion that they are relevant to the purpose of this thesis and will strengthen my argument. Because of my limited knowledge of European languages I will in some cases refer to secondary sources that refer to national court judgments as well as referring directly to the judgments.

The facts mentioned above in this section in combination with the importance of this subject because of the third party aspect have produced a hectic debate among legal scholars on this topic. However, because of the volatile and ever-changing ECJ case-law, not all writings are up-to-date. I have been using articles and parts of articles that I deem

are still relevant and useful even if some of them are several years old. However, the absolute majority of literature and articles quoted in this thesis have been published in 2009 or later.

A substantial number of the authors that I refer to in this thesis all well renowned scholars from European Universities. The most quoted author in this thesis is Hemels who is a professor at the Erasmus University Rotterdam. She wrote an article in European taxation that carefully and meticulously examined the EU case law in this field until 2009. Another author that I have quoted extensivley is Terra who has written lenghtly about EU law and as such his book contains numerous remarks that have been valuable for this topic. Furthermore, Nijkeuter who is active at the Erasmus University of Rotherdam is also frequently quoted. The author Sheppard is a columnist at Tax Notes International and in that position her articles apparently are not always balanced and her language is in my opinion sometimes a bit sensational but I have still chosen to incorporate her in this thesis in order to include a wide array of views and opinions. Moreover, in order to balance the views of certain scholars I have chosen to include an additional wide variety of articles and literature.

## 1.4 Delimitations

As the free movement of capital extends its reach to cover third state relations I will thoughtfully examine those relations. However, I will not focus on how the free movement of capital affects relations with MS' associated and dependent territories, by way of for example the Finnish Åland islands or the Portuguese Azores islands.[8] Furthermore, I will not put great focus on MS restrictions of the separate freedoms but I will examine the differences between the freedoms and only focus on the restrictions when this is deemed relevant. Nonetheless, although I will in some cases examine restrictions to the four freedoms I will not examine *justifications* of those restrictions and what effect third party aspect may have on those justifications. Furthermore, I will not examine the rule of reason doctrine and what effects it may have on this topic. In the provisions on the free movement of capital in the TFEU it is stated that under *exceptional circumstances*[9] the European Council may bar third parties from invoking the free movement of capital.[10] However, these provisions will not be discussed because of the extraordinary circumstances in which they will apply.

Although taxation of dividends is the most frequent form of taxation in the ECJ case-law relevant to this thesis, any aspects of the parent subsidiary directive will not be examined.[11] Finally, discussions on

[8] Terra et al. (2012) p. 81 ff.
[9] TFEU art. 66.
[10] TFEU art. 65 (4), art. 66.
[11] Directive 90/435/EEC. For a discussion on these matters see Englisch *Taxation of Cross-Border Dividends and EC Fundamental Freedoms* (hereinafter Englisch (2010) p. 201.

double taxation issues occurring as a result of aspects related to this thesis will not be examined as well as anti-abuse exceptions to the principles and legislation assessed.[12] However, this does not include the *safety/anti-abuse clauses*[13] in the *Fidium Finanz, FII (II) Itelcar and DFA* judgments (see below 3.2, 5.1.1, 5.2, 5.3) since they have great relevance to this thesis and might compensate other parts of the judgments and their target may not always be to prevent abuse.

## 1.5 Disposition

I will begin this thesis by explaining the fundamental EU law relevant to this topic and give a succinct background to the concerned topic. Moreover, I will also give a brief account of how the topic relevant to this thesis has been interpreted and executed in some of the MS. Furthermore, in the third chapter by referring to ECJ case-law, articles and literature, I will thoughtfully examine different methods on how to differentiate the free movement of capital from the freedom of establishment and how the ECJ case-law historically and currently has decided on this matter. In this chapter I will also examine if there is a general order of priority between the two freedoms and the interrelationship of the freedoms. In the fourth chapter I will assess the different ways of establishing *definite influence* (see below 3.4), that is the deciding factor between the free movement of capital and the freedom of establishment. Moreover, in the following chapter I will examine the recent trend of the ECJ to extend the reach of the free movement of capital. Here great focus will be put to the landmark *FII (II)* case since this judgment has had great impact on the later ECJ case-law and the legal debate in this field. Moreover, in the end of the third fourth and fifth chapters I will draw my own conclusions of the matters discussed in each chapter.

In the sixth and final chapter I will, based on the findings in previous chapters, draw my conclusions of matters that could not, because they are analyzed on the basis of all concerned chapters together, be analyzed in the previous chapters. However, because of this and to make this thesis easily understood, well structured and organized the conclusion in the sixth chapter will not reflect the same pattern of organization as the thesis as a whole. Moreover, I will also conclude the sixth chapter with my final remarks where I will briefly explain my findings in light of the

[12] See Englisch (2010) for discussions regarding double taxation and the dividing line between the fundamental freedoms and Smit *EU Freedoms, Non-EU Countries and Company Taxation: An Overview and Future Prospect* (hereinafter Smit (2012) p. 242 for a discussion regarding the topics relevant to this thesis and anti-abuse measures.
[13] Hereinafter I will refer to these clauses as safety clauses because I think this name serves the purpose of this clause right (see below 5.2.3, 5.5.3). It must be pointed out that this wording is solely the one of me and I have not encountered it elsewhere. Moreover, Nijkeuter refers to this clause as the anti abuse-clause (Nijkeuter (2013) p. 254.).

aim and purpose of this thesis and clarify the current legal position of the concerned topic.

Furthermore, every chapter in this thesis will begin with an introduction to the concerned chapter and its disposition. Moreover, to make the large number of ECJ cases in this thesis more easily understood a graph of them and an accumulation of summarized circumstances examined in those cases will be found in the supplement.[14] However, because of the complexness of some cases all relevant circumstances in every case might not be put forward in the graph but it will nevertheless provide the reader with a general overview.

Explanations and discussions on certain terminology important to this thesis will be held where I have considered it relevant.[15] The judgments and opinions from the ECJ have been placed where they are relevant and not in one specific chapter. Sometimes a certain case has relevance to several aspects interesting to the topic of this thesis. Moreover, in those cases I have considered where they are mostly relevant and summarized the cases under that section. By way of example some cases that are relevant both to chapter three and four have been placed under chapter three since they pertain to specific topics concerning the relevance of the *dominance* and definite influence-rule (see below 3.3 and 3.4). Finally, case-law from November 2012[16] and forward has been placed under the fifth chapter. The only exception is the *Felixstowe* case that has been placed in the third section because it in a high degree concerns legal uncertainties about groups of companies (see below 3.4.3).

Generally in this thesis, comments and observations by scholars will be placed where I deem relevant and not in a certain chapter or under particular headlines. However numerous observations by scholars will be found under the headlines containing the word *criticism* in the third and fourth chapters. Furthermore, criticism of the dominance rule (see below 3.3.2) is often based on that more considerations should be moved to justifications, which is an area outside of this thesis, and as such will be briefly explained in footnotes.

[14] Supplement A.
[15] For example has the terms *generic legislation* and *groups of companies* been discussed below in 3.4.2 and 3.4.3 and not in the second chapter where terms pertaining to the TFEU are explained.
[16] When the *FII (II)* decision was rendered.

# 2 Background

## 2.1 General remarks

The aim of this thesis is to examine the difference of the free movement of capital and the freedom of establishment. Furthermore, the ECJ has rendered a significant number of much debated decisions relevant to the purpose of this thesis. However, the EU Treaties and second directives are the most important legal sources in this field since the ECJ case-law is based on these sources. Consequently, I will begin this thesis by explaining the fundamental freedoms and later examining the definition of the two freedoms relevant to this thesis based on the TFEU. Furthermore, in the section that concerns the free movement of capital I will also thoroughly examine the *grandfather clause* (see below 2.3.2) since it may restrict and have great impact on the recent trend of the ECJ to extend the free movement of capital. Furthermore, even if it is partly outside the aim of this thesis, the essential function of the fundamental freedoms is to prevent restrictions of European integration. Moreover, as such I will provide understanding of the topic while also briefly give an explanation of the meaning of the concept of *restriction*. Later in this chapter, since essentially the difference between the free movement of capital and the freedom of establishment is basically also the difference between MS parties and third parties, I will explain who those parties are. Finally, because much interpretation of EU law is done by national courts I will examine how these courts have interpreted the ECJ case-law in this field.

## 2.2 Basic EU-law

The Union law has precedence over national law[17]; nonetheless the EU only has competence on areas exerted upon it in the two treaties, which is the case concerning indirect taxation.[18] However, these treaties give the Union, with a few exceptions, no competence in the field of direct taxation which makes the MS sovereign in this respect of law.[19] Nonetheless, this competence of the MS must be exercised in compliance with EU-law.[20] Moreover, national law cannot restrict the fundamental freedoms of the EU law: the free movement of goods, persons, services and capital. Furthermore, the freedom of establishment

[17] See C-6/64 *Costa v. ENEL*, C-26/62 *van Gend and Loos*.
[18] TEU and TFEU.
[19] See TFEU art. 5 & art. 110, Terra et al (2012) p. 9 f. & p. 35 ff., Pelin (2011) p. 131 ff.
[20] C-80/94 *Wielockx* p. 16. The MS direct tax legislation is therefore subject of *negative integration*, contrary to the usual *positive integration* of MS law (Terra et al. (2012) p. 36 ff. & p. 876).

is included under the free movement of persons.[21] However, generally regarding the topics examined in this thesis there is no difference concerning which freedom a specific situation falls under. This is with exception to the free movement of capital that, contrary to the other freedoms, also covers situations involving third parties.[22]

## 2.3 The free movement of capital

### 2.3.1 The definition and scope of free movement of capital

The free movement of capital prohibits all restrictions of capital between MS and between MS and third states.[23] According to Schaper the free movement of capital is the most cited freedom and cases concerning the free movement of capital decided by the ECJ to a large extent concern taxation of dividends. He further observes that as of April 2014 out of 267 direct tax cases where the ECJ has rendered decisions, 83 have contained references to the free movement of capital and that the ECJ has not been clear on the scope of this freedom.[24]

A directive[25] from 1988 contains a non-exhaustive *nomenclature* of situations which is subordinated to the term *movement of capital*. Paragraph I in the annex of the directive reads as follows:[26]

*1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.*

*2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.*

*3. Long-term loans with a view to establishing or maintaining lasting economic links.*

*4. Reinvestment of profits with a view to maintaining lasting economic links.*[27]

According to this list the term movement of capital also includes, *inter alia*, investments in property, collective investments, securities, credits related to commercial transactions and other financial loans and credits.

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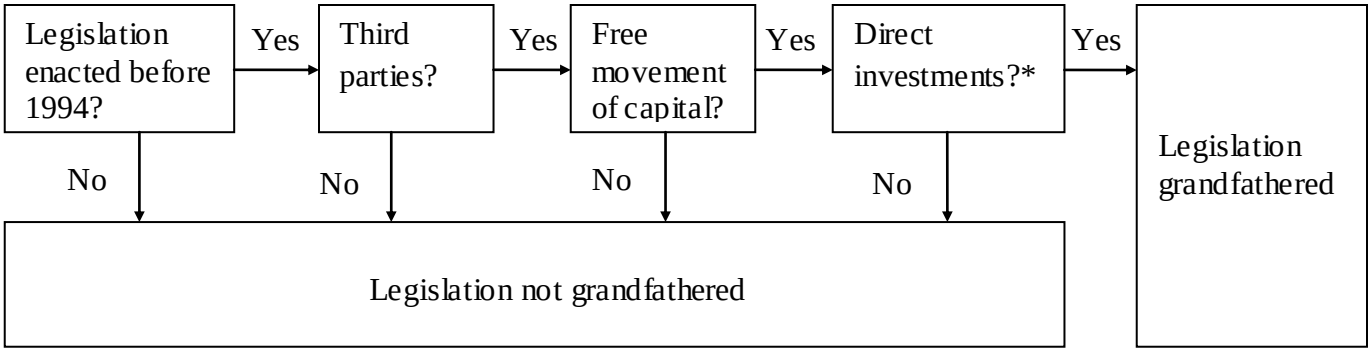
[21] See TFEU art. 26 (2), art. 28 (*goods*), art. 45 (*workers*), art. 49 (establishment), art. 56 (*services*), art. 63 (capital).
[22] TFEU art. 63 (1), Hemels et al. (2010) p. 20, Ståhl et al. (2011) p. 138.
[23] TFEU art. 63 – art. 66.
[24] Schaper *30 Years of Direct Tax Litigation before the Court of Justice of the European Union: An Empirical Survey* (hereinafter Schaper (2014) p. 236, p. 242 ff & p. 263.
[25] Directive 88/361/EEG.
[26] C-35/98 *Verkooijen* p. 27.
[27] Directive 88/361/EEG Annex I, Paragraph I.

The ECJ has observed that this list will provide reference for the definition of capital movements and that it is presupposed that dividends are included in these definitions.[28]

## 2.3.2 The grandfather clause

In the TFEU provisions on the free movement of capital there is also the *grandfather clause*[29] which states that laws that were enacted prior to 1994 still may restrict the movement of capital involving *direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital* markets concerning third parties. The graph below also explains when the grandfather clause is applicable:




The term *directs investments* are thoroughly explained in a 1988 directive[30] and the explanation is summarized in the *Holböck* judgment (see below 4.3.1):

*[Direct] investments concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity*.[31]

This provides that the grandfather clause does not cover portfolio investments and Nijkeuter observes that its contents and purpose probably are not *majority interests in companies limited by shares held for portfolio investment purposes*[32]. Nijkeuter further comments that in order for a factual holding to be regarded as a direct investment *decisive influence* [33]is one criterion, the purpose of the investment the other criterion. Moreover, Schaper observes that it is the *facts of the case*-rule

[28] C-35/98 *Verkooijen* p. 27 f., C-222/97 *Trummer and Mayer* p. 7.
[29] TFEU art. 64 (1), also called the *standstill clause* (Terra et al. (2012) p. 73).
* Determined by the use of the facts of the case-rule (see below 4.2).
[30] Directive 88/361/EEC Annex I headline *Direct investments*.
[31] C-157/05 *Holböck* p. 34.
[32] Nijkeuter *FII 2 and the Applicable Freedoms of Movement in Third Country Situations* (hereinafter Nijkeuter (2013) p. 256.
[33] Nijkeuter (2013) p. 256.

(see below 4.2) that shall be applied when determining if the grandfather clause will apply and that out of the 267 direct tax cases brought before the ECJ, five have contained references to the grandfather clause.[34] However, Nijkeuter observes that the *grandfather* clause and the distinction between different kinds of investments will be important in the future. [35]

Smit observes the grandfather clause provides progressive liberalization and that the reason behind the clause was that MS were afraid of the lack of reciprocity and wanted to preserve sovereignty as regards the free movement of capital when third parties are involved. Furthermore, other reasons were to prevent major and undesirable acquisitions of MS parties by third persons, preserve existing OECD and EU legislation, and that *erga omnes* liberalization would hurt the EU's external and international relations. Smit concludes that, despite the ECJ case-law on this field no circumstances indicate that the purpose of the clause was to maintain tax sovereignty as regards to corporate income tax and that it aims at relatively major third person investments.[36] The grandfather clause also applies to legislation that has been amended after 1994 but without loosing its original meaning.[37]

### 2.3.3 The free movement of capital and third relations

In inter-EU relations there is mostly a symbolic difference between the free movement of capital and the freedom of establishment. However, while the freedom of establishment only applies to subjects in MS third parties are covered by the scope of the free movement of capital as long as the discriminated undertakings are located in a MS.[38]

The ECJ has once acknowledged that third parties are not a part of the EU, its laws and obligations and are in a *different legal context*[39] and as such some few third situations may not be comparable (see below 2.5). However this is in regards to special circumstances and the ECJ in that case and later cases firmly rejected arguments pertaining to that there is a lack of reciprocal rights and that extending capital movements would impair the free trade negotiations with third states and hurt the tax base of the MS. Moreover, this is because, according to the ECJ, concerning capital movements third parties are almost always in comparable situations and the MS parties themselves extended capital movements to

[34] Of these five cases, three are examined in this thesis, see below C-446/04 *FII (I)* 4.2.1, C-157/05 *Holböck*, C-436/08 & C-437/08 *Haribo* & *Salinen 4.3.1*.
[35] Schaper (2014) p. 236, p. 242 & p. 245, Nijkeuter et al. (2013) p. 256.
[36] Smit (2012) p. 244 f.
[37] C-446/04 *FII (I)* p. 192.
[38] Cordewener *Free movement of Capital between EU member states and Third Countries: How Far Has the Door Been Closed?* (hereinafter Cordewener (2009) p. 261.
[39] C-101/05 *A* p. 36 f., see also Terra et el. (2012) p. 73 ff.

also comprise third parties.[40] However, Lang observes that in third country situations different rules may apply and in the future the ECJ may find that some third parties are not in a comparable situation due to lack of reciprocal rights.[41]

Terra observes that the ECJ is restricting the free movement of capital by applying the dominance rule (see below 3.3.1). This is to avoid that third parties, by using the free movement of capital, enters the internal market through the *back door*[42]. Terra further observes that establishments usually include movements of capital but that it is more seldom that capital movement includes establishments. Furthermore, if the scope of the movement of capital would be too wide it would unilaterally grant third parties access to the internal market and that is obviously not the original intention of the MS and would yield improper results. For example, the EU would have an unfavorable negotiating position in the WTO.[43]

## 2.4 The freedom of establishment

The rules regarding the freedom of establishment are wide and prohibit any restriction for a person in one MS to set up an establishment in another MS.[44] The prohibition also covers any restriction of MS to restrict persons from other MS to set up agencies, branches or subsidies by persons from other MS. [45] Moreover, Schaper observes that as of April 2014 out of 267 direct tax cases handled by the ECJ 82 have contained a reference to the freedom of establishment.[46]

The freedom of establishment both covers taking-up and pursuing activities including *primary* and *secondary* establishment. Primary establishment is when a person establishes a new person in another MS or when a judicial person in its entirety is moved from one MS to another. Moreover, the term secondary establishment refers to when a subsidiary or similar is established in another MS. Furthermore, for the right of secondary establishment it is required that the person setting up the establishment is a European Union citizen and that the person already is established in a MS. According to TFEU persons who are formed in accordance with the law in a MS and have their central

[40] C-101/05 *A* p. 29 – p. 31 & p. 36 f., C-436/08 & C-437/08 *Haribo & Salinen* p.129 ff. see also C-72/09 *Rimbaud*, Terra et al. (2012) p. 73 ff. The court has also in these cases observed that restrictions to third parties may in under some circumstances be justified in a higher extent. However, this falls outside the scope of this thesis, see nonetheless this thesis foot. 82, foot. 87, foot. 125, foot. 188 & foot. 226.
[41] Lang et al. (2013) p. 69.
[42] Terra et al. (2012) p. 79, see also 5.2.2.
[43] See Terra et al. (2012) p. 79.
[44] TFEU art. 49 – art. 55, see also below 3.4 for how the ECJ examines if the Free movement of capital will apply.
[45] *Gebhard* C-55/94 p. 25.
[46] Schaper et al. (2014) p. 236 & p. 242.

administration, registered office or principal base of business within the Union shall be treated in the same way as European Union citizens.[47]

Hindrance to the freedom of establishment may appear both in *the state of establishment* and in *the state of residence*. The state of establishment is the place where a person set up an establishment and uses his/her right of freedom of establishment. The state of residence is a person's country of origin.[48] In 1994 the ECJ observed that the purpose of freedom of establishment is just to ensure the right for, legal and natural, persons in the inner market to establish themselves in other MS. Moreover, this further emphasizes that the freedom of establishment only applies in strict inner market situations.[49]

## 2.5 Restrictions to the fundamental freedoms

A national legislation is restricting persons of other MS or third parties if the legislation constitutes a differential adverse treatment and persons not subjected to the adverse treatment and the discriminated parties are in comparable situations.[50] Moreover, tax restrictions to the fundamental freedoms can appear both in the resident and non-resident state and the ECJ does not, in principle, differentiate between these situations. Furthermore, at least in the direct tax field, the assessment if it exists a restriction is the same regardless of freedom, including the treatment between MS parties and third parties.[51]

## 2.6 The difference between MS parties and third parties

Since the free movement of capital, in contrast to the freedom of establishment, also covers third parties it is essential to define what a third party is. The MS are mentioned in the TFEU[52] and countries not mentioned in the treaty will by way of analogy be considered as third states. Moreover, it is in the jurisdiction of the MS to determine, while not opposing EU-law, what persons will be considered nationals of that MS.[53]

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[47] TFEU art. 54, Ståhl et al. (2011) p. 100 f., *Gebhard* C-55/94 p. 25 & p. 32.
[48] Ståhl et al. (2011) p. 103.
[49] Opinion 1/94 p. 81.
[50] The assessment if the parties are in comparable situations must focus on the concerned legislation and not the parties (Ståhl et al. (2011) p. 135 f. & p. 146, C-512/03 *Blanckaert*, C-376/03 *D.*
[51] Ståhl et al. (2011) p. 134 f., p. 140 & p. 146, C-513/04 *Kerckhaert and Morres* p. 16 & p. 29.
C-279/93 *Schumacker*.
[52] TFEU article 52 (1).
[53] C-369/90 *Micheletti* p. 10, C-210/06 *Cartesio* p. 110, Smit (2012) p. 236. As for associated and dependent territories; this aspect falls outside the scope of this thesis.

## 2.7 The fundamental freedoms and the national situation

MS must interpret their law in conformity with EU-law.[54] Moreover, if national courts make a ruling that in some way concerns EU law they can rule, without first referring the case to the ECJ, if they are certain in their way of applying the EU legislation and are convinced that other national courts would be certain in the same way, ie. it must be an *acte clair*.[55]

The national case-law in this field has been characterized by inconsistencies and courts have often ruled in this area of tax law without first referring the case to the ECJ. However, these inconsistencies might be the result of conflicting and not always clear ECJ case-law regarding the differences between the four freedoms.[56] French and German courts have in 2008 and 2009 ruled in accordance with the *purpose of the legislation-rule* (see below 4.3).[57] However, the Dutch Supreme Court ruled in favor of the facts of the case-rule (see below 4.2) in three cases, even after the judgments in the other national courts.[58] Hemels observed that these rulings are problematic in that the national courts seem to interpret the concerned ECJ case-law as an acte clair and that more cases needs to be referred to the ECJ. [59] Furthermore, Cordewener 2009 observes that

*legal practice in twenty-seven* [MS] *urgently needs clear guidelines regarding the obligations flowing from Article 56(1) EC* [TFEU art. 63]*, in particular, as they have to handle not only foreign investments of their own inhabitants and corporations but also capital flows streaming into the EU from the rest of the world.*[60]

The recently enacted Swedish thin cap rules have been the subject of scrutiny by the European Commission. These thin cap rules concern

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However, they have sometimes been referred to as MS (Smit (2012) p. 237, Smit (2012) p. 237 foot. 39 – foot. 44). For a discussion if persons indirectly held by third parties are considered third parties see above 2.4, below 3.4.3.

[54] C-14/83 *Von Colson*, C-106/89 *Marleasing*, Ståhl et al. (2011) p. 36 ff.

[55] TFEU art. 267, C-283/81 *CILFIT* p. 15 ff., Hemels et al. *Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority? Conflicting visions of national courts and the ECJ* (hereinafter Hemels (2010) p. 19, Ståhl et al. (2011) p. 29 f.

[56] See below supplement A for a graph that shows the inconsistency in the older ECJ case law in this field.

[57] See Bundesfinanzhof, *I R 7/08*, *I R 95/05*, Cour administrative d'appel de Nancy *No. 07NC00783* , *No.07VE00529*.

[58] Hoge Raad *No. 43339 BNB 2009/24*, *No. 43338 BNB 2009/23*, *No. 43629 VN 2009/24.11*.

[59] Hemels et al. p. 28 ff., Boer *Freedom of Establishment versus Free Movement of Capital: Ongoing Confusion at the ECJ and in the National Courts?* (hereinafter Boer (2010) p. 256 f.

[60] Cordewener (2009) p. 263.

companies that share a commonality of interests and might be applied on holdings as low as just below 50 percent according to the Swedish government, 18 percent according to similar Swedish legislation and 10 percent according to the Swedish Tax Agency. However, the Commission applied the freedom of establishment when it took action against these regulations that might involve third parties. Nonetheless, Ohlsson observes that these rules might fall under the scope of the free movement capital. Moreover, this is since Ohlsson observes that the threshold for when legislation confers definite influence (see below 3.4.1) is between 10 and 25 percent. [61]

[61] IL 24:10 a- f §§, Terenius Jilkén, Carina, *Väsentligt inflytande och under huvudsak gemensam ledning – luddiga begrepp på drift?*,esp. p.499 & 506, EU PILOT 4437/13 TAXU Sweden, Prop. 2012/13:1 p. 239, Skatteverkets ställningstagande den 25 februari 2013 *Några frågor vid tillämpningen av ränteavdragsbegränsningsreglerna gällande väsentligt inflytande, undantaget från 10 %-regeln och ventilen*, Ohlsson *Även solen har sina fläckar EU-rättsliga frågetecken kring flera svenska skatteregler* (hereinafter Ohlsson (2013) p. 11 – p. 24.

# 3 The interrelationship between the freedoms

## 3.1 General remarks

In the previous chapter I examined the EU law relevant to this thesis and discussed the definitions of the fundamental freedoms relevant to this thesis. However, the TFEU and other provisions did not provide much information on the interrelationship between the two freedoms. Below, I will first, based on the TFEU and older ECJ case law, give a general understanding of the interrelationship between the freedoms. After this, I will examine if several freedoms may be applied simultaneously and what rules and guidelines the ECJ applies when deciding which freedom or freedoms will apply. Furthermore, I will also examine the scholarly debate and analyze the prominence of these rules through the recent ECJ case-law and legal debate. Moreover, I will based on these findings analyze these rules and provide my own opinions on their use. However, since the interpretation of the *definite influence-rule* (see below 3.4) is influenced by most parts of this thesis a more thorough discussion on when this rule applies will be found in the sixth chapter (see below 6.2).

## 3.2 Background

The TFEU and other EU legislation define the four freedoms and it is stated in the TFEU that the provisions regarding the free movement of capital *shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties*[62]. However, except this the EU law does not set up rules on the interrelationship of the four freedoms, and more specifically how to differentiate from them and if there is an order of priority between the fundamental freedoms.[63] However, this question only has greater relevance in cases which may fall into the ambit of both the free movement of capital and another freedom since the free movement of capital is the only freedom that also protects third parties from restrictions from MS. Nonetheless, Ståhl observes that the definition of movement of capital is broad which leads to circumstances that will fall under the scope of more than one freedom.[64]

Many scholars observe that the ECJ has not been consistent in its ruling in this area and that the difference between the two freedoms is an

[62] TFEU art. 65 (2).
[63] See TFEU, C-452/04 *Fidium Finanz* p. 32 f.
[64] Ståhl et al. (2011) p. 138.

utterly sensitive political issue that affects many law practitioners.[65] Moreover, Schaper observes that the difference between the free movement of capital and the freedom of establishment is complicated to analyze and also has great importance, particularly since the free movement of capital extends its reach to third parties. Furthermore, Schaper also comments that as of April 2014 out of 267 direct tax judgments rendered by the ECJ, 14 of them have referred to both the freedom of establishment and the free movement of capital. Finally, Schaper notes that the ECJ has not been consistent in its reasoning regarding which fundamental freedoms to apply.[66]

In the end of 2012[67] Smit observes that the ECJ apparently, for unclear reasons, interprets the free movement of capital in a strict manner which widens the scope of the freedom of establishment when it exists factual definite influence. Moreover, Smit observes that nothing indicated that the ECJ would adopt different methods in strict intra-EU circumstances and situations involving third parties in this field.[68]

In older case-law prior to the ECJ had formulated the principles examined later in this chapter the Court chose a different approach compared to the more current case-law, these older cases will be explained below. In the *Bachmann* case from 1992 the ECJ started to develop its case-law regarding the interrelationship of the fundamental freedoms and put relevance to all freedoms that the referring court brought up but without finding one of them being predominant.[69] Moreover, in the following *Konle* judgment from 1999 the ECJ observed that the concerned national tax regulations fell under the scope of both the free movement of capital and the freedom of establishment.[70] However, the Court only examined the latter freedom and vaguely commented that because of the purpose of the legislation (see below 4.1) the free movement of capital would apply.[71] That same year the ECJ ruled in the *X and Y* case and commented that a factual holding of 90 percent fell under the scope of freedom of establishment and that it was not necessary to assess the free movement of capital without clearly giving precedence to one freedom.[72] In the later *Baars* case (see below 3.4.1) the Court only examined the freedom of establishment[73] and after finding that it was applicable did not assess the free movement of capital.[74]

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[65] See Cordewener (2009) p. 263, Schaper (2014) p. 244 f., Fontana *Direct Investments and Third Countries: Things are Finally Moving ... in the Wrong Direction* (hereinafter Fontana (2007) p. 431, Boer (2010) p. 250 f.
[66] Schaper (2014) p. 244.
[67] However, seemingly prior to the C-35/11 *FII (II)* judgment (see below 5.2.1).
[68] Smit (2012) p. 238 f.
[69] C-204/90 *Bachmann*.
[70] C-302/97 *Konle* p. 22.
[71] C-302/97 *Konle* p. 39, see also C-275/92 *Schindler* p. 22, Hemels et al. (2010) p. 20.
[72] C-200/98 *X and Y* p. 4, 24, 28 & 30, see also Hemels et al. (2010) p. 20.
[73] The first freedom mentioned by the referring court (C-251/98 *Baars* p.1).
[74] C-251/98 *Baars* p. 19 ff., see also Hemels et al. (2010) p. 20.

## 3.3 The dominance of one freedom

### 3.3.1 Background

The so called dominance rule has no ground in the TFEU and it provides that the ECJ, if there is a restriction to one freedom that freedom will prevail and the Court does not continue to also examine another freedom.[75] The EFTA Court in 2000 started to develop the dominance rule and found that the free movement of capital was *predominant*[76] and found that it could not apply the freedom to provide services and that those two freedoms could not be applied simultaneously. [77] Moreover, the dominance rule was more specifically formulated in the *Canal Satélite Digital* case from year 2002 where the ECJ observed that if national tax legislation is contrary to two freedoms, the Court will only examine the concerned regulation in view of one freedom if the other freedom is *entirely secondary*[78].[79]

The most important case for the establishment of the dominance rule was the non-tax case *Fidium Finanz* from 2006 and it was ruled in Grand Chamber which indicates its principal importance. Moreover, in this judgment the ECJ observed that if both the freedom of services and the free movement of capital might be affected, one of them will prevail over the other. Furthermore, if the relevant tax legislation also falls under the scope of the subordinate freedom, this is an *unavoidable consequence*[80]of the superior freedom. Which freedom will be preponderant must be decided on a case-by-case basis in light of the purpose of the relevant tax regulations.[81] Furthermore, the free movement of capital can hence not be implemented alternatively to the freedom to provide services and this is even the case regarding persons from third countries who will then be unable to invoke any freedom if the free movement of capital is not the superior freedom. By way of example, if the activities of a third party both falls under the free movement of capital and the freedom of establishment she can only invoke the free movement of capital if it is the most relevant freedom in

[75] Hemels et al. (2010) p. 21 f, TFEU.
[76] E-1/00 *Islandsbanki*, esp. p. 32.
[77] Hemels et al. (2010) p. 22 f., see also C-275/92 *Schindler* p. 22, C-302/97, *Konle* p. 39.
[78] C-390/99 *Canal Satélite digital* p. 31. This wording has been used extensively in later cases, see, inter alia, *Fidium Finanz* C-452/04 p. 34, C-182/08 *Glaxo Wellcome* p. 37.
[79] C-390/99 *Canal Satélite Digital* p. 31.
[80] C-452/04 *Fidium Finanz* p. 48, see also C-36/02 *Omega* p. 27, C-196/04 *Cadbury Schweppes* p. 33 for similar wordings. This term originated from the AG's opinion in the *Thin Cap* case where he observed that effects to the free movement of capital was purely an indirect consequence of establishments (C-524/04 *Thin Cap* opinion p. 36), see also C-204/90 *Bachmann* p. 34.
[81] C-452/04 *Fidium Finanz*, esp. p. 45.

the case.[82] This considerably curbs the scope of the free movement of capital and limits the possibility for third country companies to take action against discriminatory laws in the MS.[83] The dominance rule has since been applied in a vast number of later cases and is always applied in the current case-law.[84]

In the *Fidium Finanz* judgment the ECJ also observed that the German tax legislation required operators to have permission to enter the German financial market and provide financial services, ie. an obligation to establish itself in the German market. Here a third company could hardly invoke the free movement of capital to circumvent the strict German regulation that meticulously regulated the conditions for entering the German market. This was since for access to the German market in this respect the freedom of capital clearly was not the most relevant freedom.[85]

### 3.3.2 Potential demise of the dominance rule and criticism

Cordewener observes that it has been widely acknowledged that the TFEU does not impede the idea that the freedoms could be applied simultaneously and especially that the other freedoms may not push away the free movement of capital.[86] Furthermore, many scholars have provided similar criticism.[87] Dahlberg has criticized the dominance rule by observing that if the freedom of establishment would be dominant it would undermine the material scope of potential situations in which the free movement of capital can be applied. Moreover, only in situations where the freedom of establishment and the free movement of capital would both not be applicable can the free movement of capital be invoked in third state-relations.[88] Cordewener observes that the ECJ by not applying two freedoms simultaneously has chosen to restrict the

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[82] The dominance rule has been criticized by some scholars who argues that there is not support in the TFEU for this method and that considerations for opening up the EU too much to third markets should be restricted in the justifications instead (see Cordewener p. 172 foot. 17, see also this thesis foot. 40, foot. 87, foot. 125, foot. 188 & foot. 226).
[83] C-452/04 *Fidium Finanz*, esp. p. 46 ff., see also C-439/07 *KBC*.
[84] See, inter alia, *Fidium Finanz* C-452/04 p. 34, C-182/08 *Glaxo Wellcome* p. 37, C-282/12 Itelcar, C-35/11 *FII (II)*, C-80/12 Felixstowe, C-190/12 *DFA*, Hemels et al. (2010) p. 21. See also supplement A for an overview of the current case-law, where it is shown that the dominance rule is currently consistently applied.
[85] C-452/04 *Fidium Finanz* p. 46 ff.
[86] Cordewener et al. *Free Movement of Capital and Third Countries: Exploring the Outer Boundaries with Lasertec, A and B and Holböck* (hereinafter Cordewener (2007) p. 372 f., Cordewener (2009) p. 253.
[87] See Boer (2010) p. 252, Fontana (2007) p. 431 ff., Dahlberg (2012) p. 398 f, Cordewener (2009) p. 256, Boer acknowledges that if third parties can invoke the free movement of capital without restrictions it would provide potential hazards but that these considerations should be made in the justifications, which is a topic that is outside of the scope of this thesis (Boer (2010) p. 252), see also this thesis foot. 40, foot. 82, foot. 125, foot. 188 & foot. 226.
[88] Dahlberg (2012) p. 398 f.

scope of the free movement of capital under circumstances where other freedoms are primarily affected and making the free movement of capital merely an *unavoidable consequence* of the other freedoms. Moreover, Cordewener comments that this approach is remarkable and *unsatisfactory*[89] since the TFEU allows certain overlapping of the fundamental freedoms.

The cases discussed below in this section only contained MS parties and are with one exception[90] the only cases in the ECJ case law from 2007 and onwards in this field where the Court deviated from the dominance rule and examined more than one freedom.[91] The *Columbus Containers* case from the end of 2007 concerned *generic* (see below 3.4.2) Belgian tax legislation and factual definite influence (see below 4.2) and the Court initially observed that definite influence (see below 3.4.1) existed and thus the freedom of establishment applied. However, since the Court also examined the free movement of capital (the national court asked the ECJ to assess both freedoms) it is apparent that it also applied the purpose of the legislation-rule (see below 4.3.1). The following *Lammers* case from the beginning of 2008 concerned generic measures and did not involve third parties. Moreover, in the case the ECJ examined the circumstances and found that first the freedom of establishment should be examined. Moreover, after that the ECJ commented that since the Belgian tax legislation was not in compliance with the freedom of establishment there was no need to examine the free movement of capital.[92]

In the *Truck Center* case from December 2008 the national legislation required a holding of 25 percent to apply but the concerned company owned 48 percent of the shares in the subsidiary.[93] The ECJ observed that a holding of that magnitude and the concerned legislation conferred definite influence and that the freedom of establishment should be examined but later commented that regarding the free movement of capital it was enough to state that the conclusion in the previous paragraphs also to an equal extent applies to the free movement of capital.[94] The *Gaz de France* judgment from October 2009 concerned a French law that applied on holdings of more than 25 percent and a factual situation where there was a wholly owned subsidiary. In this case the ECJ first concluded that the concerned French tax legislation constituted a restriction to the freedom of establishment but continued and observed that the concerned conclusion also could be applied on the free movement of capital.[95]

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[89] Cordewener (2009) p. 256.
[90] C-157/05 *Holböck*, see below 4.3.1.
[91] See supplement A for an overview of which cases in the ECJ case-law the Court examined or applied both freedoms.
[92] C-298/05 *Columbus Containers*, esp. p. 29 – p. 32, C-105/07 *Lammers*.
[93] C-282/07 *Truck Center* p. 10 ff.
[94] C-282/07 *Truck Center* p. 29 f. & p. 51, The ECJ in p. 51 referred to C-446/04 *FII (I)* p. 60 & C-298/05 *Columbus Containers* p. 56, see also Hemels et al. (2010) p. 25.
[95] C- 247/8 *Gaz de France*.

The *Accor* judgment from 2011 concerned taxation of dividends. Furthermore, the ECJ observed in this case that the purpose of the legislation was pivotal and commented that a legislation that applies on holdings of 10 percent does not confer definite influence. However, the Court noted that the factual circumstances were unclear and therefore the concerned legislation had to be examined in regards of the two freedoms.[96]

## 3.4 The definite influence-rule

### 3.4.1 Background

The *Baars* case from 2000 was groundbreaking and established the term *definite influence*[97] which has later been applied in most ECJ judgments concerning the relationship between the four freedoms.[98] The Court observed in *Baars* that if a shareholder has definite influence over a subsidiary then the freedom of establishment will be relied upon. In this case, the Dutch law applied if there was a holding of more than 33, 33 percent and Baars fully owned the subsidiary. Furthermore, ECJ found that this factual ownership gave the concerned person *definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment*.[99] Therefore, the freedom of establishment was the dominant freedom.[100]

In the *Überseering* Case from 2002 the question only was if a provision was under the scope of the freedom of establishment and not about the relationship between the different freedoms in the TFEU. In the case the ECJ referred to the *Baars* case and wrote that as a *general rule*[101] citizens of MS that acquired a MS company will be subject to the free movement of capital unless the shareholdings exert definite influence.[102] Moreover, in its following decisions the Court continued to apply the definite influence-rule and have done in most cases since then.[103] However, below (3.4.4) those few cases where the Court might not have applied the definite influence-rule will be discussed.

### 3.4.2 Generic measures

A generic measure is legislation which covers circumstances that both confers and does not confer definite influence. Consequently, this is

[96] C-310/09 *Accor* p. 29 – p. 38.
[97] Also referred to as the *Baars criterion* and the *definite influence-test* (Nijkeuter (2013) p. 252, Terra et al. (2012) p. 78).
[98] Nijkeuter (2013) p. 252, Terra et al. (2012) p. 78.
[99] C-251/98 *Baars* p. 22.
[100] C-251/98 *Baars*, esp. p. 22.
[101] C-208/00 *Überseering* p. 77.
[102] C-208/00 *Überseering*, esp. p. 77, see also C-436/00 *X and Y*.
[103] See C-200/98 *X and Y*, C-196/04 *Cadbury Schweppes*. See also newer cases below 5.2, 5.3 where the ECJ has consequently applied the definite influence-rule.

often regulations that apply irrespective of the extent of a holding in a company. Considering that the ECJ case law regarding what measures exert definite influence is volatile so is the term generic measures. Moreover, the opposite of a generic measure is a *specific measure* that applies when the national tax regulations only confer definite influence or do not exert such influence.[104] Furthermore, according to the current case-law all legislation that does not only confer definite influence and involves third parties will fall under the scope of the free movement of capital (see below chapter 5).

### 3.4.3 Groups of companies

Legislation concerning *groups of companies*, such as legislation covering *thin cap*, CFC, *group loss relief*, *transfer pricing* etc. is often deemed as exerting definite influence since the very nature of a group of company is often that the companies within this group confer definite influence.[105] This kind of legislation has been examined by the ECJ on numerous occasions where the Court has observed that it falls under the freedom of establishment, by way of example in the *Thin Cap* case (see below 4.2) where the ECJ observed that

*Legislation […] targeted only at relations within a* ***group of companies****, primarily affects freedom of establishment ad should, accordingly, be considered in the light of article 43*(emphasis added).[106]

Similar wordings have been found in numerous ECJ judgments such as the *FII (I)* and *Burda* cases (see below 4.2.1). Moreover, Hilling and Ståhl also observe that national legislation concerning groups of companies falls under the scope of the freedom of establishment.[107] However, there have also been borderline cases. The recent *Itelcar* case (see below 5.2 for a discussion on this case) from last year[108] concerned the Portuguese thin cap legislation that the ECJ observed fell under the free movement of capital.[109] The *Felixstowe* case from April 2014 was ruled in Grand Chamber which indicates its principal importance. It concerned a legislation covering group taxation in the form of group relief applied on consortiums where 75 percent of the holdings must be held by the consortium members and each holding need to be of the extent from 5 to 75 percent of the parent company. Moreover, in this case the companies were directly owned by MS parties and indirectly owned by third MS parties.

[104] Hemels et al. (2010) p. 24.
[105] See also Terra et al. (2012) p. 79.
[106] C-524/04 *Thin Cap* p. 33.
[107] Hilling et al. *Aktuellt om EU-domstolens praxis - direkt beskattning* (2013) p. 210, Ståhl et al. (2011) p. 139.
[108] 2013.
[109] C-282/12 *Itelcar*.

The AG commented that in this case the legislation concerned could hypothetically cover a consortium with 20 companies each holding a 5 percent stake, a situation which would not confer definite influence. Nonetheless, the AG referred to the *FII (II)* judgment (see below 5.2) and observed that in intra-EU situations, the facts of the case-rule (see below 4.2) would still apply. Furthermore, the AG observed that since the holdings were indirectly held by the third company through holding companies inside the inner market, the concerned companies could still invoke the freedom of establishment.[110]

The ECJ did not discuss which freedom was the applicable freedom and applied the freedom of establishment, which was the same freedom the question of the referring courts contained. The ECJ further observed that the concerned parties were considered MS parties since it was not the concerned company but instead the ultimate parent that was a third party and the TFEU did not contain any provision that stated the contrary (see above 2.4 since this view is supported by the provisions on the freedom of establishment).[111]

### 3.4.4 Potential demise of the definite influence-rule and criticism

The definite influence-rule has been the focus of much debate and has not always been applied consistently by the ECJ.[112] Smit observes that from an international tax point of view the definite influence-rule is not optimal. Furthermore he comments that putting significant focus to the strict standard of definite influence is to not acknowledge genuine economic movement. Moreover, these movements stem, according to Smit, from the *freedom of investment* and its pivotal importance in the territory of a MS through an establishment including a satisfactory amount of independence and management and control within the concerned area. Moreover, if this economic movement is performed in an activity involving definite influence it should not, according to Smit, be material because the only difference between definite influence and direct investment (see above 2.3.2) is the amount of influence. However, there is no substantial difference because under both circumstances genuine economic links are required. Smit concludes that it is from this point of view hard to justify that those investments that confer definite influence are excluded from the scope of the free movement of capital and this opposes the international principle of tax neutrality.[113]

Cordewener observes that the definite influence-rule is not a proper guideline to determine if the freedom of establishment applies. Furthermore, this is because the standard definite influence is in

[110] C-80/12 *Felixstowe* opinion, the AG here also referred to C-1/93 *Halliburton Services*.
[111] C-80/12 *Felixstowe*, esp. p. 38 ff.
[112] See Cordewener (2009) p. 263, Schaper (2014) p. 244.
[113] Smit (2012) p. 238 f.

principle the same as according to EU-law the free movement of capital will apply when there is *possibility of participating effectively in the management and control*[114].[115]

Hemels observes that in 2009 several AG's began to question the definite influence-rule. Moreover, the HSBC case only involved MS parties and in the opinion the AG observed that obstacles *on* [the] *freedom of establishment would be a direct consequence of obstacles placed in the way of the free movement of capital*.[116] Hemels draws the conclusions that the meaning of the AG would be to first assess the free movement of capital and later to examine only the freedom of establishment if there is no restriction to the first mentioned freedom. Moreover, as such the AG disregards the definite influence-rule according to Hemels. However, the AG also observed that if an intra-EU cross-border acquisition guarantees definite influence the freedom of establishment might be applied. In the same case, the ECJ did not examine the fundamental freedoms in the TFEU at all.[117]

In the *Glaxo Wellcome* case the shareholder wholly owned the subsidiary and the relevant German tax legislation was generic and concerned dividends. The ECJ mentioned the definite influence-rule but observed that because the aim and spirit of the legislation was to prohibit non-residents with the sole purpose of obtaining a favorable taxing compared to residents and therefore the free movement of capital would prevail. Moreover, the ECJ also commented that any restriction to the freedom of establishment was an unavoidable consequence of the capital movements. The Court further observed that the reach of the free movement of capital covers shareholdings which are taking effective participation in management and control. Moreover, the AG's opinion was similar to the judgment but he observed that the opinion was only relevant in circumstances solely concerning parties from within the Union, an observation not found in the ECJ judgment in the same case.[118]

Hemels regards this as a new alternative rule for determining predominance that disregards the definite influence-rule since the reason for applying the free movement of capital was not the lack of definite influence.[119] Cordewener observes that the AG in the *Glaxo Wellcome* case is, through the opinion, expressing his dissatisfaction with the at that time vague and inconsistent ECJ case-law in the field.[120]

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[114] Cordewener (2009) p. 263.
[115] Cordewener (2009) p. 263.
[116] C-569/07 *HSBC* opinion p. 57.
[117] C-569/07 *HSBC* opinion, esp. p. 57, Hemels et al. (2010) & C-569/07 *HSBC*.
[118] C-182/08 *Glaxo Wellcome* p. 37 f., p. 51 & p. 83, C-182/08 *Glaxo Wellcome* opinion p. 90.
[119] Hemels et al. (2010) p. 27.
[120] Cordewener (2009) p. 262, see also below 4.1 for similar considerations about the *SGI* opinion by another AG).

## 3.5 Conclusions

### 3.5.1 The dominance rule

Since the beginning of the year 2000 the dominance rule has been crucial in the ECJ case-law that is relevant to the topic of this thesis and has been regularly applied by the ECJ. However, in the *Columbus containers* and *Lammers* cases the Court examined both freedoms while in the *Truck Center, Gaz de France, and Accor* cases it applied both freedoms simultaneously, which shows that the Court went back to reasoning similar to that in the *Bachman, Konle* and *X and Y* cases.[121] This might be an effect of non consenting judges and the vague and inconsistent case law of the time. Moreover, these cases did not involve third parties and as such applying these did not have any effect on the outcome and did not provide potential controversial judgments.[122] Furthermore, in many of these cases the factual circumstances were less clear and as such the ECJ may have to chosen both freedoms since the factual circumstances may have conferred definite influence.[123]

However, the judgments might have also been the effect of that the dominance rule has no support in the TFEU and as such the judges decided that there was no obstacle in applying both rules simultaneously. Furthermore, the cases show that the dominance rule should not be taken for granted, even if it has been consistently applied in the current case law of the ECJ (see below 5.2, 5.3).

The dominance rule in itself severely curbs the leeway for third parties to take action against discriminating national legislation in the MS since such parties may only invoke the free movement of capital when that freedom is preponderant. If then the Court finds that a freedom other than the free movement of capital is more relevant than that third party may in no way take action against a discriminating MS legislation. However, since 2010 and particularly after the *FII (II)* case (see below 5.2) in 2012 the free movement of capital has greatly extended its reach. However, this should not be the reason why the Court since 2012 and onwards consistently applies the dominance rule (and hence curbing the free movement of capital) since third parties were only involved in one case where the ECJ deviated from the dominance rule and this case was grandfathered (see below 4.3.1).

A considerable number of scholars have criticized the dominance rule on the grounds that it is not supported in the TFEU. Moreover, I agree on

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[121] See also the C-311/08 *SGI* opinion below 4.2.1.
[122] However, in the *Holböck* case also the two freedoms were both examined and that case involved third parties (see below 4.3.1, see also Supplement A for an overview of cases involving third parties), nonetheless the legislation in this case was grandfather.
[123] Except for above 3.3.2, see also Supplement A for an overview of the unclear circumstances in these cases.

the fact that it has no support in the TFEU and that it is a problem that the ECJ does not base its opinions in the TFEU. However, I still am of the opinion that it makes judgments of the ECJ that are not always easily understood more comprehensible since then we know that the Court will only apply one freedom. Moreover, this is instead of simultaneously examining two or more freedoms, an action that would further complicate judgments on this matter.[124] Cordewener and Dahlberg also criticize the dominance rule for undermining the scope of the free movement of capital. However, while this was the case in earlier case law the current trend of the ECJ has since the *FII (II)* case been to extend the free movement of capital to apply on more and more circumstances. Moreover, in view of the latest case law the free movement of capital can hardly be described as curbed and now the ECJ often observes that the freedom of establishment is merely an avoidable consequence of the free movement of capital and not vice verse. Furthermore, as stated above in this chapter the room for simultaneously applying the free movement of capital and the freedom of establishment decreased since the free movement of capital, in cases involving third parties, applies when national legislation is generic.

### 3.5.2 The definite influence-rule

The term definite influence has been used consequently in the ECJ case law since the *Baars* case and is today without exception used in all cases where it is relevant.[125]

Furthermore, when Hemels observes that the definite influence-rule is not applied in a judgment or an opinion it is clear that she means her definition of the definite influence-rule and that the Court and the AG seemed to value other criterions when determining which freedom to apply. I do agree with Hemels that the ECJ in *Glaxo Wellcome* and the AG in the *HSBC* case were unclear on what circumstances will determine what fundamental freedom will be relevant. Moreover, this might be a symptom of a generally unclear case law of that time where it is hard to find a clear line in some judgments. Furthermore, these cases, as did most the cases when the ECJ deviated from the dominance rule, did not involve third parties. Consequently, it seems that the ECJ has been more eager to deviate from its own rules when the choice of freedom will not have any importance on the outcome of the case. It is somewhat surprising that Hemels does not point out this fact.

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[124] If the ECJ would discontinue applying the dominance rule it would certainly not allow third parties to unrestricted access the inner market. Moreover, instead the ECJ would increase the use of justifications on third parties which would lead to not only that the Court would need to examine several freedoms but also would the ECJ often apply justifications. This would undoubtedly make the ECJ judgments more complicated and complex. See also this thesis foot. 40, foot. 82, foot. 87, foot. 188 & foot. 226.

[125] Section 3.4.3 and chapter 5 contains discussion on the most recent case-law and there it can be seen that the definite influence-rule is applied without exception in the current case-law.

I agree with Cordewener that the wordings in the provisions on when the free movement of capital apply ostensibly appears to have the same scope as the term definite influence. However, since the ECJ has made, although not always clear, distinctions between these wordings I do not see it as problematic that the wordings sounds similar as long as they are differentiated in practice. Furthermore, it would be hard to draw a different line between the two freedoms if capital movements would also include holdings with substantial influence since then the freedom of establishment would seldom apply. However, of course this would not be a problem if the ECJ stopped to apply the dominance rule. Smit's criticism regarding the definite influence-rule is mainly from an economic and not legal perspective and this should be the responsibility of the lawmakers. However, his criticism has also similarities with the criticism of the dominance rule and the facts of the case-rule (see below 4.2.2).

I do not see the definite influence-rule as problematic since it is natural that if a person establishes herself in another MS then also that person must have a large amount of influence in the establishment. However, it is more problematic what kind of legislation or circumstances do confer definite influence and that will be discussed below (see below 4 and 6.2).

# 4 How to establish definite influence

## 4.1 General remarks

In chapter three I examined that the dominance rule (see above 3.3) provides that two or more freedoms cannot be applied simultaneously. Furthermore, in that chapter I also examined that the definite influence-rule decides if the freedom of establishment will be the relevant freedom. However, in that chapter I did not examine if the ECJ assesses the factual circumstances of a case (the facts of the case-rule, see below 4.2) or the spirit and the aim of the concerned legislation (the purpose of the legislation-rule, see below 4.3) when determining if definite influence exists. Consequently, this will be examined below. Finally, in the end of this chapter I will draw my own conclusions of these rules and their applicability.

In the ECJ case-law in this field the purpose of the legislation-rule has always been applied to determine if the concerned national legislation is a specific measure, ie. if the regulations only apply at portfolio investments or circumstances only conferring definite influence. Moreover, if the legislation is judged as not constituting a specific measure then the purpose of the legislation-rule or the facts of the case-rule will determine which freedom is relevant.[126]

Nijkeuter observes that the ECJ has not commented on the reason behind the different rules discussed in this chapter and when they apply when legislation has been generic. Furthermore, Nijkeuter observes that this has lead to unclear ECJ case law regarding to in which extent EU-law may be applied on third parties.[127]

## 4.2 The facts of the case-rule

### 4.2.1 Background and case law

The facts of the case-rule is when the ECJ examines if the factual circumstances in a case, when the concerned legislation constitutes a generic measure, confer definite influence. This rule has often been applied if the aim and spirit of the legislation does not provide which of the two freedoms will predominant. According to the current case-law (see below chapter 5), in contrast to older case-law, the facts of the case-rule will never apply in cases involving third parties as this rule will

[126] See, inter alia, C-446/04 *FII (I)* p. 36, p. 80 & p. 142, C-157/05 *Holböck* p. 23 f., C-35/11 *FII (II)* p. 89 ff.
[127] Nijkeuter et al. (2013) p. 252.

often lead to that third parties may not take part of the internal market.[128] Below, I will examine scholarly opinions of this rule and cases where the facts of the case-rule has been prevalent.[129]

Schaper observes that the ECJ has never applied the facts of the case-rule in order to bar third parties from invoking the free movement of capital in circumstances where the national legislation not only confers definite influence. Moreover, this conversely means that the purpose of the legislation-rule has always been the relevant rule concerning third parties and that this is confirmed by the *FII (II)* judgment (see below 5.2).[130] However some authors disagree and observe that the issue has been characterized by inconsistency.[131]

The *ACT* and *FII (I)* judgments from the end of 2006 stemmed from a group of litigations and as such contained a number of different factual circumstances. Moreover, the cases concerned tax on dividends that applied irrespective of the size of a holding. Furthermore, in some of the factual circumstances referred in the cases the subsidiaries were fully owned, in some circumstances they were not and in some circumstances there was little factual information.

In the *ACT* case the ECJ first observed that in cases with factual definite influence the freedom of establishment would apply. Moreover, in other cases where there was less factual information the Court used the purpose of the legislation-rule.[132] In these *ACT* case, as well as in the *FII (I)* case the ECJ first observed that in some cases with factual definite influence the freedom of establishment would apply and in cases with less information about the factual circumstances the purpose of the legislation-rule would apply. However, later when the ECJ examined other questions from the referring court the ECJ commented that both the facts of the case-rule and the purpose of the legislation-rule should be applied without explaining why. Nonetheless, when answering another question from the referring court the ECJ made several comments that implied that the ECJ applied the purpose of the legislation-rule when deciding that the freedom of establishment would be the relevant freedom. Finally the Court also observed that since the concerned legislation concerned a group of companies it fell under the scope of the freedom of establishment and in a later paragraph the ECJ commented[133]

> *As regards the Treaty provisions relating to the freedoms of movement, since the legislation at issue applies to payments of dividends to resident companies irrespective*

[128] See also supplement A for an overview of when the ECJ has applied the different rules relevant to this chapter.
[129] The facts of the case-rule is also examined in judgments in other sections of this thesis, see supplement A.
[130] Schaper (2014) p. 244 f.
[131] Notably Nijkeuter (2013) p. 252, Cordewener (2009) p. 263.
[132] C-374/04 *ACT*, esp. p. 35 ff.
[133] C-446/04 *FII (I)*, esp. p. 36 ff., p. 80 f., p. 98, p. 188 f. & p. 143.

> *of the size of their holding, it is capable of coming within the scope of both Article 43 EC on freedom of establishment and Article 56 EC on the free movement of capital.* [134]

The ECJ in the *FII* (I) judgment also observed that the grandfather clause did not apply since the concerned provisions only regarded capital movements involving direct investments and that the purpose of the holdings were not establishments, control and lasting economic links.[135]

Some authors argue, partly because the two cases were group litigation cases that covered many different circumstances, that the *ACT* and *FII (I)* judgments are vague. [136] Hemels further observes that these cases may be interpreted as that the freedom of establishment does not have an absolute predominance over the free movement of capital that some thought it had at that time. Moreover, this is mainly because of the ECJ in most of the cases analyzed both freedoms without regard of controlling interest. Furthermore, Hemels argues that the *ACT* and *FII (I)* cases prove that the deciding point of which freedom to apply lies on the relevant legislation and not the facts of the case. Hemels further observes that the difference between the facts of the case-rule and the purpose of the legislation-rule sometimes can become blurred and that this is highlighted in these cases.[137]

The *Burda* case from June 2008 concerned dividends distributed within the EU and involved a directive[138] that required 25 percent holding to apply. Moreover, in this case the ECJ observed that if national tax legislation solely applies to groups of companies, those provisions primarily falls under the scope of the freedom of establishment. Moreover, the ECJ also observed that generic legislation may fall into the ambit of both freedoms. Nonetheless, the Court observed that the non resident company owned 50 percent of the shares in the resident German subsidiary and that such an ownership created *definite and decisive influence*[139] over the resident company and therefore the circumstances fell under the scope of the freedom of establishment. The ECJ then continued and observed that restrictive effects on the free movement of capital were just an unavoidable consequence and as such there was no need to assess the free movement of capital.[140]

The *KBC bank* case from June 2009 was a court order and concerned dividends distributed from a Swiss company and generic legislation. Moreover, the ECJ observed that the purpose of the legislation-rule was

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[134] C-446/04 *FII (I)* p. 142.
[135] C-446/04 *FII (I)* p. 196.
[136] Hemels et al. (2010) p. 22 f., Cordewener (2007) p. 113.
[137] Hemels et al. (2010) p. 22 f.
[138] Directive 90/435/EEC.
[139] C-284/06 *Burda* p. 70.
[140] C-284/06 *Burda*, *esp.* p. 68 ff. & p. 73 f.

important but found that the freedom of establishment applied because the shareholder's holdings conferred definite influence. Hemels observes that this is surprising since the facts of the case-rule (see below 4.2.1) ) can only lead to one result and what is then the purpose of also considering the purpose of the legislation-rule?[141]

The *Aberdeen property* case was also ruled in the summer of 2009 and concerned dividends distributed within the EU. Moreover in this case the national tax legislation only applied on holdings that exceeded 20 percent and the subsidiary was wholly owned by the parent company.[142] The ECJ observed that like in previous cases [143] the circumstances in the judgment solely related to a subsidiary that distributed dividends to non-resident companies who had definite influence in the subsidiary. Moreover, if then the relevant national tax provisions is an obstacle to the free movement of capital those effects would be an unavoidable consequence of restrictions to the freedom of establishment.[144] This judgment has striking similarities with the *Burda* case and I interpret this judgment as that the Court applied the facts of the case-rule in the *Aberdeen case*, a conclusion that Hemels agrees on.[145]

The *SGI* case from the beginning of 2010 concerned generic thin cap legislation that also applied on cases not conferring definite influence and in the case the shareholder owned 64 percent of the subsidiary and was also a board member in it. Moreover, in this case the AG in her opinion first commented that definite influence only exists in group relations and factors such as interdependence, size of holdings, relationships and the group's technologies should be considered if definite influence existed, as it did in this case. However, The AG did not observe that a freedom was dominant and questioned if the cases *Burda* and Aberdeen property should be interpreted as that the freedom of establishment was dominant over the free movement of capital when the facts of the case fell under the freedom of establishment and referred to the *Glaxo Wellcome* case (see above 3.4.4).[146] Hemels comments that the AG apparently doubted the facts of the case-rule without providing an alternative.[147] The ECJ in the SGI case first observed the important role of the purpose of the legislation-rule and concluded that the legislation did not confer definite influence. However, the ECJ later commented that it existed factual definite influence because of the shareholdings in the case and ties on management level between the concerned companies and ruled that the freedom of establishment was

[141] C-439/07 *KBC*, esp. p. 67 ff., Hemels et al. (2010) p. 26.
[142] C-303/07 *Aberdeen Property* p. 31 f.
[143] C-446/04 *FII (I)* p. 38, C-284/*06 Burda* p. 72.
[144] The ECJ here referred to a number of cases, C-196/04 *Cadbury Schweppes* p. 31, C-374/04 *ACT* p. 39, C-524/04 *Thin Cap* p. 27, C-231/05 *OY AA* p. 20 & C-286/06 *Burda* p. 69.
[145] Hemels et al. (2010) p. 26.
[146] C-311/08 *SGI* opinion, esp. P. 26 – p. 38.
[147] Hemels et al. (2010) p. 26.

the applicable freedom.[148] Finally, Cordewener observes that the reason of the formulations by the AG in the SGI case might, like the opinion in the *Glaxo Wellcome* case was dissatisfaction with the unclear and inconsistent ECJ case law prevalent at that time.[149]

### 4.2.2 Criticism of the facts of the case-rule

Boer observes that he views the facts of the case-rule as more problematic than the purpose of the legislation-rule and subsequently comments that the first mentioned rule might lead to undesirable and erratic results. He gives the following example of such unsatisfactory outcomes: [150]

> *For example, distributions of dividends by Company A, resident in [MS] X, are exempt from withholding tax if these payments, irrespective of the size of the shareholding in Company A, are made to a company which is also resident in [MS] X, whereas distributions made by Company A to a company resident in another [MS] are subject to withholding tax in [MS] X, irrespective of the size of the shareholding of the recipient. If a resident of a third country holds 100% of the shares (that is, has definite influence) in Company A, it may not invoke the free movement of capital, as it has definite influence over Company A. However, if this third country resident held a small (for example, 10%) equity interest (that is, no definite influence) in Company A, it would be able to rely on the free movement of capital.*[151]

Many scholars put forward similar criticism and, in summary, observe that the facts of the case-rule provides that a person with no active management and control in its holdings in a third country has more protection than a managerial holder. Moreover, they comment that it is hard to grasp why an investor will obtain less protection the more she invests.[152]

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[148] C-311/08 *SGI*, esp. p. 23 – p. 37.
[149] Cordewener (2009) p. 262.
[150] Boer (2010) p. 255.
[151] Boer (2010) p. 255.
[152] Hemels et al. (2010) p. 31, Cordewener (2009) p. 263, Smit (2012) p. 238 f., Snell (2011) p. 572, Hemels et al. (2010) p. 31, Fontana (2007) p. 24 f., Englisch (2010) p. 197 ff., Terra et al. (2012) p. 79.

## 4.3 The purpose of the legislation-rule

### 4.3.1 Background and case law

In contrast to the facts of the case-rule the purpose of the legislation-rule examines the aim and spirit of the concerned national legislation and not the factual circumstances in a case. It is uncommon that the ECJ examines both freedoms when they apply the purpose of the legislation-rule before it determines which freedom to apply.[153] Furthermore, below I will examine ECJ case law where the purpose of the legislation-rule has had an important role and scholarly opinions of this rule. [154]

The *Thin Cap* case from March 2007 concerned a part of the British thin cap legislation that only applied to interest payments to non-UK lenders. In this case a non- British parent company had loaned money to its UK subsidiary which it owned 75 percent of the shares in. The ECJ found that the main object of the UK thin cap legislation was to apply on groups of companies and covered situations where the lender company was subject of a certain degree of control by the borrower. Thus, the UK tax provisions relied on the freedom of establishment and not the free movement of capital since it required the parent company to have definite influence on the subsidiary's decisions and be able to determine the subsidiary's actions.[155]

A few months later in May 2007 the ECJ rendered its decision in the *Lasertec* case that concerned the question if the German thin cap legislation was restricting to any or several of the fundamental freedoms. In this case the concerned company owned two thirds of the shares in the subsidiary and the relevant German legislation applied when there was a holding of more than 25 percent, *a substantial holding*[156] in the words of the ECJ.[157] In this judgment the Court referred to older case law[158] and then stated that when judging which freedom a legislation falls under the purpose of the legislation must be regarded.[159] Furthermore, the ECJ ruled that the tax legislation relied upon the freedom of establishment since it related to shareholdings exerting the shareholder definite influence. However, the ECJ also noted that factual definite influence after all existed in the case.[160]

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[153] See supplement A for an overview of when the ECJ has applied the purpose of the legislation rule and which freedom was deemed the most relevant freedom in those cases.
[154] However, since the purpose of the legislation-rule is prevalent, in different degrees, in all cases from year 2007 and onwards in the field relevant to this thesis many cases involving this rule is discussed elsewhere, see supplement A.
[155] C-524/04 *Thin Cap* p. 26 – p. 33, Hemels et al. (2010) p. 23.
[156] C-492/04 *Lasertec* p. 21.
[157] C-492/04 *Lasertec* p. 21.
[158] C-524/04 *Thin Cap*, C-446/04 *FII (I)*, C-374/04 *ACT*, C-452/04, *Fidium Finanz*, C-196/04 *Cadburry Schweppes*.
[159] C-492/04 *Lasertec* p. 19.
[160] C-492/04 *Lasertec*, esp. p. 20, p. 23 & p. 28.

In the *Lasertec* case the ECJ referred to the *ACT* and *FII (I)* cases in its judgment and Hemels observes that it is surprising that the Court refers to the *FII* and *ACT* cases since it is unclear if the Court took the purpose of the legislation into account in those judgments.[161] However, the *Lasertec* case was the first time the ECJ ruled on a decision on the relationship and priority between the freedom of establishment and the free movement of capital in a situation which involved third parties and the cases which the ECJ refers to in the judgment did not involve third parties.[162] Moreover, Hemels points out that since the ECJ also observed that the shareholder had definite influence[163] it thus showed some regard to the facts of the case-rule.[164] Cordewener observes that the threshold in *Lasertec* for a legislation to exert definite influence is a holding of 25 percent. He further comments that an even smaller holding would suffice to confer definite influence if other related shareholdings are also taken into account.[165]

The *Holböck* decision was rendered in May 2007 and concerned generic legislation and dividends distributed from a third party to its MS holder. In this case the Court observed that the concerned national legislation fell under both the free movement of capital and the freedom of establishment. Furthermore, the ECJ commented that the freedom of establishment could not be invoked because the case involved third parties. However the Court observed that national legislation did constitute a restriction under the free movement of capital.[166] Moreover, in this case it is certain that the Court did not apply the facts of the case-rule since *Holböck* owned two thirds of the shares in the concerned company. The *Holböck* case it is the only case in the ECJ case law from 2007 and onwards that involved third parties and where the two freedoms were both examined.[167]

Nonetheless, The ECJ observed in *Holböck* that the grandfather clause was applicable since the holding of two thirds of the shares in the company allowed the holder *to participate effectively in the management of that company or in its control*[168] and that the concerned national legislation that provided *a less favorable tax treatment*[169]for holdings which enabled the holder control and establishment.[170] However, Terra

[161] Hemels et al. (2010) p. 23.
[162] Metzler (2008) p. 43.
[163] C-492/04 *Lasertec*, p 21 – 23.
[164] Hemels et al. (2010) p. 23.
[165] Cordewener et al. (2007) p. 374, see also C-492/04 *Lasertec* p. 4 & p. 22, C-157/05 *Holböck* p. 23 f.
[167] C-157/05 *Holböck* p. 22 – p. 30, in my view the *Holböck* case does not go contrary to the dominance rule since the freedom of establishment was first examined, and when found that it did not apply the Court continued and observed the free movement of capital, see supplement A for a overview of cases where both freedoms have been applied.
[168] C-157/05 *Holböck* p. 35, see also C-446/04 *FII (I)* p. 182.
[169] C-157/05 *Holböck* p. 37.
[170] C-157/05 *Holböck* p. 30 – p. 39.

argues that the true meaning of the ECJ was that even if the free movement of capital would have applied the claimant would still not succeed because the relevant Austrian legislation was grandfathered. [171]

The *OY AA* case from the summer of 2007 was ruled in the Grand Chamber and concerned national regulations that concerned a group of companies and factual definite influence. Moreover, in this case the ECJ did a similar assessment as in the *Lasertec* case but in an opposite order, it first examined if definite influence existed in regard to the factual circumstances in the case and later analyzed the national regulations according to the purpose of the legislation-rule and observed that since the national tax regulations only covered groups of companies they conferred definite influence.[172]

The *Idryma Typou* case concerned unclear factual circumstances and a Greek legislation on maximum shareholdings in media companies by journalists that in some cases applied on holdings of more than 25 percent and in some cases of holdings of more than 2, 5 percent. In this case the ECJ observed that the purpose of the legislation shall determine which freedom to apply and generic measures like the concerned regulations may fall under the scope of both the free movement of capital and the freedom of establishment. In this case the Court observed that a legislation requiring 25 percent ownership may constitute definite influence depending on the circumstances and in particular on how the 75 percent of the other shares are owned and as such the Greek legislation would be viewed in light of the freedom of establishment. Conversely, the ECJ commented that holdings of 2, 5 percent may fall under the free movement of capital. Moreover, the ECJ commented that even if a journalist can have the purpose of influencing a company a mere 2, 5 percent does not suffice to establish definite influence and even if the legislation is directed towards journalists the shareholders may not be journalists. Consequently the Greek legislation should also be viewed in the light of the free movement of capital.[173]

The joint *Haribo* and *Salinen* cases concerned taxations of dividends and the ECJ first observed that the ECJ will only extract information that the national court, the tribunal and main proceedings provide the ECJ with to apply in its judgment. The ECJ continued and commented that the purpose of the legislation is decisive when determining which freedom is relevant in a particular case. Moreover, in this case the ECJ found that the national regulations should be viewed only in the light of the free movement of capital since the national tax law only applied on holdings of less than 10 percent.[174]

[171] Terra et al. (2012) p. 78.
[172] C-231/05 *OY AA*, esp. p. 23, Hemels et al. (2010) p. 23.
[173] C-81/09 *Idryma Typou* p. 47 – p. 53 & p. 66.
[174] C-436/08 & C-437/08 *Haribo & Salinen* p. 31 – p. 38.

However, in this judgment the ECJ also observed that the concerned provisions did not fall into the ambit of the grandfather clause. This was because the clause did not apply on national regulations regarding capital movements that involved direct investments. Furthermore, the concerned holdings were not acquired with the purpose of establishment with lasting economic links and the holding did not provide the shareholder with management and control. Furthermore, the ECJ observed that the concerned legislation only applied on holdings of less than 10 percent and as such it was not possible that the factual circumstances constituted direct investments.[175]

The *Scheunemann* case from the summer of 2012 involved third parties and the national legislation concerned inheritance tax and company holdings. Moreover, the ECJ in this case observed that the purpose of the legislation should determine which freedom to apply and that the concerned national legislation applied on ownerships exceeding 25 percent. Furthermore, a requirement of that extent conferred definite influence according to the Court but at the end of the judgment it also observed that after all there was a 100 percent factual ownership that also conferred definite influence.[176]

### 4.3.2 Criticism of the purpose of legislation-rule

Boer finds the purpose of the legislation as a more rational rule compared to the facts of the case-rule but observes that neither the purpose of the legislation-rule is free from problems and gives an example:[177]

> *where legislation is aimed purely at corporate groups, such as CFC legislation, or rules governing the transfer of losses or profits within a group, such legislation may not be permitted in intra-EU situations, but would nevertheless be permitted in situations involving third countries, despite its (indirect) discriminatory effect. Although such legislation would, in principle, fall within the scope of the free movement of capital, due to the 'definite influence' concept, the free movement of capital is regarded as an unavoidable consequence of any restriction on the freedom of establishment and an examination on the basis of the free movement of capital is not allowed*.[178]

[175] C-436/08 & C-437/08 *Haribo & Salinen* p. 134 ff.
[176] C-31/11 *Scheunemann* p. 23 – p. 31.
[177] However, it must be noted that Boer prefers a system where both freedoms may be applied simultaneously, see this thesis foot. 86, Boer (2010) p. 256.
[178] Boer (2010) p. 256.

## 4.4 Conclusions

### 4.4.1 General conclusions

Since the ECJ started to use the definite influence-rule it also started to apply the purpose of the legislation-rule and the facts of the case-rule. Sometimes the ECJ has only applied the purpose of the legislation-rule and sometimes it has applied both. Prior to 2010 the facts of the case-rule was more frequently applied in cases concerning generic legislation, but sometimes the purpose of the legislation-rule was applied, by way of example in the *Glaxo Wellcome* and *Holböck* cases. Moreover, it is in this area that the ECJ case law has been greatly inconsistent prior to the *FII (II)* judgment (see below 5.1) as there seems to have been no rule as to whether to use the facts of the case-rule of the purpose of the legislation-rule concerning generic measures. Moreover, in some cases such as the *FII (I)* case it has sometimes been hard to distinguish which rule has been applied and as Hemels observes the difference is sometimes blurred. Furthermore, since the facts of the case-rule still applies when third parties are not involved these inconsistencies may continue in those cases (see above 3.4.3, below 4.4.3.2).

### 4.4.2 The practical difference between the two rules

In a number of ECJ judgments referred to in this thesis there has been no practical difference between the facts of the case-rule and the purpose of the legislation-rule. In several cases that were ruled according to the purpose of the legislation- rule the facts of the case-rule would have lead to the same freedom being applied. By way of example the *Thin cap*, *OY AA* and *Lasertec* cases and as such it has not been problematic for the ECJ to mention both rules under these circumstances. In these cases both the concerned national legislation and the factual circumstances exerted definite influence. Conversely, naturally if both rules do not confer definite influence the free movement of capital will apply.

However, if the purpose of the legislation does not exert definite influence but the factual circumstances confer such influence there will be different outcomes depending on which rule will be applied. In the *Holböck*, *Glaxo Wellcome*, *FII (II)* (see below 5.2) cases among others it existed a factual definite influence but still the free movement of capital applied. In contrast in other cases concerning generic legislation the facts of the case-rule was applied and consequently the freedom of establishment was found to be the relevant freedom, such as in the *Burda*, *KBC*, *Aberdeen* and SGI cases. However, in the *Aberdeen* case the legislation required a holding of 20 percent to apply and there was factual definite influence. In this case it is hard to determine the impact of the legislation but considering the current case law it is not impossible that a legislation conferring 20 percent would exert definite influence

(see below 6.2). Moreover, similar considerations most be drawn in relationship to the *Burda* case where the involved directive required a 25 percent holding. Moreover, if the purpose of the legislation requires a holding of more than 20 percent it is, naturally, likely that the factual circumstances will exert definite influence since then the parties covered by the legislation would have substantial holdings in each other.

Finally, thus the only circumstances where the outcome might be different depending on the choice of rule are when the aim and spirit of the legislation does no confer definite influence but when the factual circumstances confer such an influence.

## 4.4.3 The facts of the case-rule

### 4.4.3.1 General considerations

The facts of the case-rule is rarely applied on its own and as such seems to be applied when the purpose of the legislation cannot alone provide which freedom to apply. Moreover, After the *FII (II)* case (see below 5.2), in contrast to earlier case-law (see below 4.4.3.2), the facts of the case-rule cannot be applied if it would lead to results to would hinder third persons to invoke the free movement of capital, which means that in the future it will never be applied in cases involving third parties. Furthermore, in my view this will lead to more foreseeable outcomes and lead to the result that the facts of the case-rule will be applied in less extent than it was before.[179]

Hemels and many others with her criticize the facts of the case-rule by observing that persons with portfolio investments in third state relations have more protection than those persons with substantive holdings in third state relations. Boer puts forward similar criticism and observes that the facts of the case-rule is unforeseeable and might lead to undesirable results. One might agree that two third parties that in a different extent invest in a MS may obtain different treatment according to the same generic law which might lead to a situation where the concerned national legislation will create legal uncertainties and be unsafe. However, in line with the *FII (II)* judgment this situation will not apply according to the current case-law of the ECJ.

Nonetheless, the grandfather clause will still be interpreted in view of the facts of the case-rule (see above 2.3.2 and below 6.3) and might provide similar problems as described above. Moreover, I think that these problems are a natural outcome of the vagueness of the TFEU regulations of the scope of the free movement of capital and the ECJ's attempts to curb it under some circumstances. However, one might think that this is a general problem with generic legislation and that certainties will be created by the case law, which it however did not do above (see above 4.2).

[179] See supplement A for an overview of this change in the ECJ case law.

However, according to me there are also benefits with the Facts of the case-rule, even in circumstances involving third parties. It allows the Court to consider more circumstances than a legislation which often only requires a certain extent of a holding for a certain legislations to apply.

### 4.4.3.2 The scope of the facts of the case-rule

As discussed above the facts of the case-rule will never be applied when third parties are involved since it would further restrict their access to the inner market. However, Schaper argues that the ECJ has never applied the facts of the case-rule to preclude third parties from invoking EU law and consequently that the *FII (II)* judgment did, in fact, not change the case law in this field, a view not shared by many other scholars. In the *KBC* case there were third parties involved and the Court applied the facts of the case-rule and found the freedom of establishment to be the relevant freedom. Furthermore, in the *Scheunemann* and *Lasertec* cases the Court applied the purpose of the legislation-rule to rule that the freedom of establishment would apply but in the end observed that it after all existed factual definite influence in the those cases.

In the past the facts of the case-rule has had a major role in most cases not involving third parties that concerned generic measures, but not in all cases, such as *Glaxo Wellcome*. According to the *FII (II)* and *Beker* judgments (see below 5.2, 5.3) the facts of the case –rule will still and only apply under circumstances when dividends originate in an MS. Moreover, this is according to the ECJ because in those latter situations it would be impossible to establish the purpose of the legislation**.** However, I think that this comment is confusing since it is hard to understand why it would be harder to determine the purpose of the legislation under intra-EU circumstances compared to other similar legislation. What is the difference between these kinds of legislation when third parties are not involved? Does the EU assume that a purpose of the legislation can never be, if it does not confer definite influence, that third parties should not be able to take part in the inner market? Moreover, even if the *FII (II)* judgment limits these principles, concerning intra-EU situations, to dividends it has since been extended to other forms of direct taxation such as group relief in the recent *Felixstowe* judgment. However, the also recent *DMC* case (see below 5.3) involved MS parties with factual definite influence and concerned generic legislation regarding exit taxes. In this case the ECJ observed that generic legislation might fall under both freedoms (which would not be the case if third parties were involved) but did not apply the facts of the case-rule on the generic legislation. Furthermore, this provides that the ECJ case law is still unclear in this field.

It seems to be settled case-law, in line with the *FII (II)* and *Beker* cases, that the facts of the case-rule will still apply on generic legislation when dividends are distributed inside the inner market. This also seems to the case concerning group relief when third parties are not involved but

maybe not concerning exit taxes. It is surprising the ECJ applies the facts of the case principles regarding some types of direct taxation but not all types. This is especially the case since the ECJ seems to extend the purpose of the legislation-rule to apply on all kinds of direct taxes when third parties are involved (see above 6.2.1). Why not apply the facts of the case-rule on all kinds of generic measures when third parties are not involved if the Court already continued to apply the facts of the case-rule concerning dividends?

However, I am of the opinion that the ECJ-case law would be more easily understood and logical if the facts of the case-rule would also lose its importance in situations not involving third parties and as such the scope of the free movement of capital would also be extended in these circumstances. Moreover, this is because in intra-EU settings it is purely of academical importance which freedom will apply in these cases and as such I see it as unnecessary complicated to apply different rules in cases only involving MS parties.

I nonetheless partly agree with the explanation put forward by Nijkeuter (see above 5.2.2) that the only reason why the ECJ limited the use of the facts of the case-rule to intra-EU circumstances in *FII (II)* was because the purpose of the judgment was to open the inner market for more third parties, not to provide changes for MS parties. However, I also think one reason was that the Court did not want to make it appear as if the free movement of capital extended its reach too far by still allowing many MS parties to litigate under it. Perhaps some judges were dissenting and did not approve of the *FII (II)* principles and found a small victory in only providing the changes for third parties.

### 4.4.4 The purpose of the legislation-rule

The purpose of the case-rule is applied, either alone or together with the facts of the case-rule in all ECJ judgments that are relevant to this thesis. Furthermore, according to the current case law the purpose of the legislation-rule will always be applied if third parties are involved (except for when examining if a certain legislation will be grandfathered, see above 2.3.2, below 6.3).

The purpose of the legislation-rule is the preferred rule by most scholars but it is not free from criticism. Boer criticizes the wording that one freedom is an *unavoidable consequence* of another freedom that often occurs in ECJ judgments that rely on the purpose of legislation-rule. Moreover, this will under some circumstances lead to that legislation that aims to prevent undesirable actions, for example tax planning, only aims at cases which confer definite influence and as such MS parties in third state relation may not be subject of this kind of legislation. Furthermore, this is since the free movement of capital would just be an avoidable consequence of the freedom of establishment under those circumstances. It is my view that it is the responsibility of the MS to not

render more beneficial rules for third parties than for parties solely doing business within the internal market. However, this criticism seems to be more directed at the dominance rule (see above 3.3) than at the purpose of the legislation-rule since the facts of the case-rule, naturally, also may lead to similar results which shows that this is a general problem for legislation in this field.

It is my firm opinion that the purpose of the legislation-rule will as stated above create a more foreseeable case law since it is possible to examine what kind of legislation will confer definite influence and not take account of specific factual circumstances. Moreover, the ECJ examines if certain legislation is restricting any of the fundamental freedoms, not if a person is restricting it and thus it is more logical to only examine the legislation and not the factual circumstances.

# 5 Advancement of the free movement of capital

## 5.1 General remarks

In the previous chapter I analyzed how the ECJ determines if definite influence exists. However, in line with the *FII (II)* judgment there has been a trend by the Court, according to the rules explained in the third and fourth chapters, to extend the free movement of capital when third persons are involved. Moreover, this trend will be examined below and I will start by analyzing the landmark *FII (II)* case and scholarly opinions of this judgment. Furthermore, when I examine this case I will also put great focus on the safety clause in the judgment since that clause might restrict the free movement of capital when third persons are involved and as such requires additional scrutiny. Moreover, later in this chapter I will examine the cases that followed the *FII (II)* judgment and at the end of the chapter I will draw my own conclusions of the findings in this chapter.

## 5.2 The *FII (II)* case

### 5.2.1 Overview of the *FII (II)* case

The *FII (II)* case from November 2012 concerned generic legislation, factual definite influence and was ruled in Grand Chamber which implicates its great principal importance. In this judgment the ECJ started by observing that tax legislation concerning dividends may fall under one of the two freedoms and it is the purpose of the legislation that is pivotal when determining which freedom will apply. However, the ECJ referred to the *Burda*, *FII (I)* and *SGI* judgments and observed that in cases where the dividends originate from MS the facts of the case-rule has to be applied because it is not possible to deduce the purpose of the legislation in those circumstances.[180]

The ECJ also commented that since the freedom of establishment does not cover third parties tax treatment of dividends that originates in third states, legislation concerning such circumstances may not be examined in view of the freedom of establishment. Furthermore, the ECJ continued and observed that national tax legislation concerning dividends distributed from third countries that did *not apply exclusively*[181] to situations that conferred definite influence must be examined according to the free movement of capital.

[180] C-35/11 *FII (II)* p. 89 ff.
[181] C-35/11*FII (II)* p. 99.

Nonetheless, in the following paragraph the ECJ commented that if, when third parties are involved, consideration would be taken to both the aim and spirit of the legislation and factual circumstances this would be incompatible with the free movement of capital. The Court finally concluded that it was apparent that the free movement of capital included *in principle, capital movements involving establishment or direct investment*[182] and the Court elaborated *an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control*[183].[184]

## 5.2.2 Scholarly opinions on the *FII (II)* case

Some authors describe this case as a landmark case and Nijkeuter observes that it provides new principles to the EU tax law and comments that the ECJ in this judgment attempted to clarify the difference between the purpose of the legislation-rule and the facts of the case-rule.[185] Moreover, he interprets the judgment as that the ECJ does not only think that it is impossible to establish the purpose of the legislation in strict intra-EU situations but also under circumstances involving third parties since there is no difference between these cases. However, third parties are not covered by the freedom of establishment and thus the ECJ ruled that the freedom of capital would apply regardless of the factual circumstances. Moreover, Nijkeuter does not believe that the principles can be interpreted *a contrario* as if the freedom of establishment does not apply and as such the free movement of capital will be the relevant freedom. Furthermore, Nijkeuter observes

> *it appears that the CJEU [the ECJ] recognizes alternatives paths, whereby if it finds that one path (establishment) reaches a dead end, it will take the other path (capital).*[186]

Nijkeuter and Hilling further comments that the *FII (II)* judgment provides a case law where generic legislation concerning third parties will always fall under the free movement of capital.[187]

The AG in the *Kronos* case (see below 5.4) noted that the *FII (II)* judgment created a case law which did not, in contrast to pre-*FII (II)*

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[182] C-35/11 *FII (II)* p. 102.
[183] C-35/11 *FII (II)* p. 102.
[184] C-35/11 *FII (II)* p. 89 – p. 102.
[185] O'Shea *Featured perspectives ECJ Reexamines the U.K. Dividend Rules* (hereinafter O'Shea (2013) p. 823, Nijkeuter (2013) p. 252 f., Ohlsson *Ränteavdragen och EU-rätten* (hereinafter Ohlsson (2014) p. 3.
[186] Nijkeuter (2013) p. 252 f.
[187] Nijkeuter (2013) p. 252 f. & p. 255, Hilling *A EUF-fördraget* (hereinafter Hilling 2013) p. 419 f. Nijkeuter also observes that in line with that the *FII (II)* judgment extends the reach of the free movement of capital it is likely that this will also extend the use of justifications regarding the movement of capital and third parties and particularly the justifications *combating abuse*, *the effectiveness of fiscal supervision* and the *territoriality principle*, see also this thesis foot. 40, foot. 82, foot. 87, foot. 125 & foot. 226.

case law, create situations where the Union law could not be applied at all. Moreover, these circumstances would occur if legislation is found to fall under the scope of the freedom of establishment but the concerned party was a third party and thus EU law was not applicable. Furthermore, the *Kronos* AG concluded that the *FII (II)* case was explicit only regarding specifically third party situations.[188] O'Shea thinks that the *FII (II)* case does not drastically change the ECJ case law in this field. Moreover, this is mainly because the threshold for a legislation to be considered to confer definite influence is low, by way of example 25 percent in the *Scheunemann* case (see above 4.3.1).[189]

Ohlsson observes that with this new case law, the purpose of the legislation will determine which freedom to apply. Ohlsson further comments that the *FII (II)* judgment was very general in its wordings and should be applicable on other circumstances than when third parties distribute dividends to MS parties. Ohlsson then takes the *Itelcar* case (see below 5.3) as an example where the principles of the *FII (II)* has been applied on other areas than distribution of dividends from third parties. Moreover, Hilling observes that the *FII (II)* case to some extent is in line with the *Holböck* judgment.[190]

Tax notes international columnist Sheppard observes that normally persons having portfolio investments litigate under the free movement of capital and controlled companies instead use the freedom of establishment. However, she further comments that the *FII (II)* case has provided a *relentless march of […] the free movement of capital*[191] and that the ECJ despite a factual full ownership in the case *hoofed the ball into the opposing half*[192]. Moreover, this was to provide a remedy for the taxpayers and therefore stretched the free movement of capital to be the applicable freedom in the case.[193]

Sheppard also observes in another column regarding the recent ECJ case law concerning capital movements that the ECJ has given more rights to investors and at the same time restricted MS to retain subsidies for MS parties. Moreover, the consequence of this is that many EU citizens view the Union as illegitimate which makes them vote for populist parties.[194]

### 5.2.3 The safety clause in the *FII (II)* judgment

The ECJ makes a highly interesting comment at the end of the *FII (II)* judgment where it observes:

[188] C-47/12 *Kronos* opinion, esp. p. 24 – p. 72.
[189] O'Shea (2013) p. 823.
[190] Ohlsson (2014) p. 14 ff. Hilling (2013) p. 419 f.
[191] Sheppard (2013) p. 22.
[192] Sheppard (2013) p. 22.
[193] Sheppard (2013) p. 22.
[194] Sheppard *Pending Cases in the European Court of Justice* (2013) p. 1063.

> *Since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of Article 63(1) TFEU as regards relations with third countries does not enable* ***economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom*** *Such a risk does not exist in a situation such as that at issue in the main proceedings. The legislation of the [MS] in question does* ***not relate to the conditions for access of a company from that [MS] to the market in a third country or of a company from a third country to the market in that [MS]*** *It concerns only the tax treatment of dividends which derive from investments which their recipient has made in a company established in a third country* (emphasis added).[195]

Nijkeuter observes that the safety clause in the *FII (II)* judgment is formulated like an anti-abuse clause and is a novelty in the case law in this field and that it is hard to interpret. Furthermore, Nijkeuter observes that the probable intention of the ECJ is that those economic operators are *entities with a European nationality*[196] and observes that those are

*for tax purposes, resident outside the territories of the EU/EEA, or that are resident in the EU/EEA, but whose indirect or direct acts of establishment occur outside the EU/EEA. These entities fall under the personal scope of the freedom of establishment because of their 'European passport', but do not fall under the territorial scope of this freedom, as they are in fact investing outside the EU/EEA territory it involves outbound investments in other words.*[197]

Moreover, Nijkeuter comments that this could also be interpreted from the wording that *economic operators* are *a company of that [MS] in a third country* and that is why the intention of the ECJ is not that the safety clause should comprise inbound investments and third persons establishing themselves within the EU since their third status exempts them from the personal (not territorial) scope of the freedom of establishment.[198] Furthermore, Nijkeuter comments that this runs contrary to the ECJ wording *a company from a third country in that [MS]* and he further observes that he does not comprehend this because this situation does not fall *inside the territorial scope of the freedom of establishment, but outside its personal scope*?[199] Moreover, Nijkeuter observes that the only reason for this is if the territorial position of both the investors governs the territorial scope of the freedom of establishment but that would make the *FII (II) judgment*

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[195] C-35/11 *FII (II)* p. 100.
[196] Nijkeuter (2013) p. 254.
[197] Nijkeuter (2013) p. 254. This would according to Nijkeuter be the case if the MS in question apply the incorporation doctrine in their civil law (Nijkeuter (2013) p. 254 foot. 31).
[198] According to the *FII (II)* judgment where the ECJ indirectly observed that third parties cannot invoke the freedom of establishment.
[199] Nijkeuter (2013) p. 254.

incomprehensible since the judgment itself extends the reach of the freedom of capital to third parties with *external cross-border acts of establishment*[200] that cannot invoke the freedom of establishment. If the ECJ wanted to restrict them why not observe that their actions fall under the freedom of establishment instead of restricting them by *cryptically exclude them by way of a newly developed limitation*[201].

Regarding the *market access* formulation in the safety clause Nijkeuter observes that the intention of the ECJ seems to be that the safety clause has certain restrictions and does not apply in the *FII (II)* case since there was no risk of market access because the concerned legislation did *not relate to the conditions for access to the market* but instead only *involves a tax measure*. This according to Nijkeuter would be because the case related to UK taxation and not that the concerned company by way of example did not apply for a license or similar to establish itself as in the *Fidium Finanz* case. Moreover, Nijkeuter interprets this as if the ECJ differentiates measures that apply on taxes that apply after market entry and taxes that apply when entering a market and if that is the case the safety clause does not apply at all on direct taxation and that the distinction is *somewhat tenuous*[202] since it is only a *gradual distinguishing. Nijkeuter concludes and observes that*

> *[The ECJ does express concern about abuse situations, although it does not seem to see any problems arising as regards taxation.*[203]

Sheppard observes regarding the safety clause that seemingly some judges were worried of the consequences of the *FII (II)* case and hence added this clause in the *FII (II)* judgment. This is according to Sheppard to hinder third persons to use the free movement of capital to access the internal market when the freedom of establishment was inapplicable. Moreover, Sheppard observes that some tax scholars[204], namely Philip Baker QC of Gray's Inn Tax Chambers, are worried of the practical consequences of the clause since it is not clear what legislation qualifies for the safety clause and that MS will use the clause to restrict the free movement of capital.[205]

The AG in the currently pending *Kronos* case observed that the safety clause in the *FII (II)* case restricted third parties from abusing legislation that gave access to the internal market. The AG further observed that the safety clause was, in principle, the same as the safety clause in the

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[200] Nijkeuter (2013) p. 254.
[201] Nijkeuter (2013) p. 254.
[202] Nijkeuter (2013) p. 255.
[203] Nijkeuter (2013) p. 256.
[204] At the Vienna University of Economics and Business Institute for Austrian and International Tax Law conference (Sheppard *Pending Cases in the European Court of Justice* (2013) p. 1063)
[205] Sheppard (2013) p. 22, Sheppard *Pending Cases in the European Court of Justice* (2013) p. 1063.

*Fidium Finanz* case. That case concerned a license for financial services in Germany and that was in fact a form accessing the market in that state. With that in mind, it was according to the AG, hard to imagine that acquiring such a license would fall under the scope of the free movement of capital. The AG concluded that in *FII (II)* case the British law did not have the purpose to regulate the access to the market like the German regulations did in the *Fidium Finanz* case.[206]

## 5.3 Confirmations of the FII (II) principles

The ECJ confirmed the principles outlined in the *FII (II)* case in several judgments in 2013 and 2014. The first case in this field after the *FII (II)* judgment was the *Beker* judgment. Moreover, this case related to dividends distributed from EU parties or third parties and the factual circumstances involved minority holdings and third relations. The Court first observed that when third parties were involved the freedom of establishment would only be applied if the concerned legislation solely conferred definite influence. However, The ECJ also commented that in those circumstances when the dividends were distributed solely inside the inner market the facts of the case-rule would apply.[207]

The *Itelcar* judgment concerned Portuguese thin cap regulations that applied on all holdings of more than 10 percent and the factual circumstances involved a third party owner with an indirectly wholly owned subsidiary in Portugal. The case contained similar wordings like the *FII (II)* judgment and the ECJ concluded that if the national tax legislation did not apply exclusively on circumstances that conferred definite interest when third parties were involved the free movement of capital would apply. Moreover, in this case the ECJ observed that a tax legislation that required at least a 10 percent holding or voting rights to apply will not confer a definite influence. Finally the ECJ also inserted the same safety clause in the *Itelcar* judgment as has been found in the *FII (II)* case, with the only difference that it changed the term *economic operators*[208] to *lending companies established in those countries*[209].[210]

Câmara observes that the national thin cap regulations in *Itelcar* deviated from other thin cap cases in the ECJ case-law[211] which concerned groups of companies. Moreover, this is since the regulations in *Itelcar* apply directly at an ownership of 10 percent, if a certain degree of certain thin

[206] C-47/12 *Kronos* opinion p. 62 ff.
[207] C-168/11 *Beker*, esp. p. 22 – p. 31.
[208] C-35/11 *FII (II)* p. 100.
[209] C-282/12 *Itelcar* p. 24.
[210] C-282/12 *Itelcar* p. 14 – p. 25.
[211] For instance, C-524/04 *Thin Cap*, C-492/04 *Lasertec*.

cap exists, and this situation might not always confer definite influence.[212]

The *DMC* case from January 2014 concerned exit taxes on partnership assets and the factual circumstances only covered parties from within the EU with factual definite influence. Furthermore, the Court continued and commented that in line with the *Holböck* case that generic legislation might fall into the ambit of both freedoms. Moreover, the Court also observed that the purpose of the concerned legislation was to protect the fiscal interests of the home state in relation to capital gains generated in the same state where taxation in other states may undermine the German tax base. The ECJ thus concluded that the legislation not only covered circumstances where investors had definite influence. As such the concerned regulations had more bearing on the procedure of transferring assets than on that of establishment as such the measures should be examined only in the view of the free movement of capital.[213]

In April 2014 the ECJ rendered its decision in the *DFA* case, which concerned third parties, generic legislation and no factual definite influence.[214] In this case the Court did not even mention the factual circumstances and observed that the free movement of capital would be the relevant freedom since the aim and spirit of the concerned national legislation was not to only cover circumstances which conferred definite influence. In this judgment the ECJ also observed that the concerned legislation did not allow economic operators who *do not fall within the limits of the territorial scope of freedom of establishment*[215] to profit from the freedom of establishment.[216]

## 5.4 Currently pending cases

The currently pending *Kronos* case concerns taxation of dividends that applies on 10 percent holdings and involves third parties with subsidiaries in the inner market and in EEA states. In this case the AG observed that when the freedom of establishment cannot be applied on a generic national tax law because of that a third party is involved, there is no risk of abuse and the concerned legislation does not only confer definite influence the free movement of capital will apply. Furthermore, the AG commented that the principles formed in the *FII (II)* case also should apply on inner market relationships concerning generic measures if the parties cannot invoke the freedom of establishment. By way of example this could be when the parent is a third party and that it would

[212] Câmara *The Applicability of Portuguese Thin Capitalization Rules to Third Countries* (2012) p. 374.
[213] C-164/12 *DMC* p. 28 - p. 35 ff.
[214] C-190/12 *DMC* opinion, esp. p. 6.
[215] C-190/12 *DFA* p. 31 ff.
[216] C-190/12 *DFA* p. 23 – p. 35.

be an anomaly if the *FII (II)* principles could not also be applied under these circumstances.[217]

# 5.5 Conclusions

## 5.5.1 General conclusions

The *FII (II)* judgment has been described as a landmark decision by many authors. I fully agree since it provides changes to the ECJ case law, adds structure to a field that has been characterized by inconsistency and furthermore provides that more third parties than before will be covered by EU law.

The AG in the *Kronos* case welcomed the *FII (II)* judgment and he observed that it repaired many undesirable effects of the past case law. The AG pointed to the fact that prior to the *FII (II)* judgment under certain circumstances some parties were not covered by EU-law at all, for example third parties. However, I think that this is somewhat surprising since there will always be parties that are not covered by the EU-law since it is called European Union not the World Union and still all parties will not always covered, by way of example when the concerned legislation only confers definite influence. Moreover, I rather think that the benefits of the *FII (II)* case lies in that it provides more foreseeable case law.

Hilling observes that the *FII (II)* case is mainly in line with the *Holböck* case. I think that this is in most part correct since the ECJ in both judgments applied the purpose of the legislation-rule on the concerned generic measures. Moreover, the *FII (II)* case may be interpreted, as Nijkeuter argues, that the ECJ examined the free movement of capital since the freedom of establishment did not apply because third parties were involved. This is a similar reasoning as in the *Holböck* judgment with the difference that in the *Holböck* case the Court also, in brief, examined the freedom of establishment. Moreover, the safety clause in the *FII (II)* judgment is not found in the *Holböck* judgment but this might be because the grandfather clause applied in the *Holböck* case. As such there was no need to assure that no abuse of EU legislation was involved. However, Terra points out that the only reason the *Holböck* case was ruled the way it was might be because the concerned national legislation was grandfathered. The *Holböck* judgment was ruled under a time when the ECJ often applied the facts of the case-rule and there was no red line in the ECJ judgments in this field. This makes it hard to know the reasons behind the wording in the *Holböck* judgment.

It is true as Sheppard observes that the *FII (II)* judgment provides that many cases that according to the past case law would fall under the scope of the freedom of establishment now will fall under the free

[217] C-47/12 *kronos* opinion p. 24 – p. 66.

movement of capital. However, I think that referring to this as *the relentless march of the free movement of capital* is an overstatement and that the scope is still thinner than it would be if the two freedoms could be applied simultaneously.

Sheppard further observes that the *FII (II)* judgment restricts governments from subsidizing MS parties at the expense of third parties and that this might lead to unwelcomed political developments. If this is the case I see this as the fault of the legislator and not the ECJ since it is the legislator that extended the reach of the free movement of capital to third states and should be aware of these potential consequences.

I further think that Sheppard's criticism of *FII (II)* is exaggerated since as O'Shea observes the *FII (II)* judgment appears to provide a greater change in the case law than it actually does. Moreover, this is because still the threshold for legislation to confer definite influence is not high and as such still numerous legislations will be considered as only conferring definite influence. However, I do not agree with Schaper that the *FII (II)* provided no change in the ECJ case law concerning third parties (see above 4.4.3.2).

The only significant change that the *FII (II)* case provides is that cases concerns generic legislation, involves third parties and contains factual definite influence will now fall under the scope of the free movement of capital and not the freedom of establishment. A legislation that confers definite influence will still fall under the scope of the freedom of establishment, regardless of if there are third parties or not, and nothing indicates that the threshold for if a legislation is conferring definite influence has changed. Moreover, also since the *FII (II)* case provides clear principles to this field I think that this case in general provides many benefits to the topic relevant to this thesis.

### 5.5.2 The scope and impact of the *FII (II)* principles

The principles of the *FII (II)* judgment have been applied consequently in later case law. It is not strange even in relation to older case law that the *Beker* or *DFA* cases would fall under the free movement of capital since they involved generic legislation and third parties with factual minority holdings. However, they contained, as did the *Itelcar* judgment, strikingly similar wordings as the *FII (II)*. Moreover, in the *Itelcar* case the national legislation concerned thin cap regulations (which often has been identified with groups of companies) and there was a clear factual definite influence but still the free movement of capital applied.

The AG in the *Kronos* opinion observed that the *FII (II)* principles used in its wording only applied to third parties that distributed dividends to MS parties. However, he further argued that they should be extended to cover all circumstances involving generic measures since third parties in

these circumstances could also not invoke the freedom of establishment since everything else would be an anomaly. Moreover, in the cases following the landmark *FII (II)* case the ECJ seems to agree with the AG in the *Kronos* case since the Court has extended the *FII (II)* principles to also cover circumstances involving third parties and dividends distributed from MS and interests. Moreover, the intention behind *the FII (II)* case was to allow third parties to take action against restrictions when legislation does not only confer definite influence. Furthermore, because of this it would be, as the *Kronos* AG argued, an anomaly to not extend the *FII (II)* principles to other types of direct taxes when third parties are unable to invoke the freedom of establishment and the concerned legislation is generic. I further think that this also has benefits pertaining to that it would create a more easily understood case law if the *FII (II)* principles would cover all kinds of direct taxation involving third parties.

Ohlsson points out that the wording in the *FII (II)* judgment is general and as such should also apply on legislation covering other circumstances than dividends distributed from third parties. However, I do not agree since the ECJ specifically only observed that the new principles laid down in the *FII (II)* judgment would apply to dividends distributed from third parties. Nonetheless, Ohlsson, maybe since he published his article commenting this in 2014, was right and now the ECJ has extended the scope of the *FII (II)* principles to other circumstances such as interests.

### 5.5.3 Conclusions regarding the safety clause

The *FII (II)* case extended the reach of the free movement of capital. However at the end of the judgment the ECJ formulated a safety clause observed that the concerned circumstances did not fall under the scope of that clause. Is this a way to decrease the extension of the free movement of capital in another way than applying the freedom of establishment? According to *Nijkeuter* the safety clause in the *FII (II)* judgment has not been applied before in ECJ case law but the AG in the *Kronos* case argued differently. However, the clause in the *Fidium Finanz* case has a similar meaning but is formulated differently so I think it is a matter of taste if the clause is a novelty or not. The *Itelcar* and *DFA* cases contain similar clauses and should be subject to the same discussions as the clause in the *FII (II)* judgment below. Moreover, I do not know why the court did not insert such wording in the *Beker* case but in the cases following the *Beker* case that involved third parties the court has inserted this kind of clause.[218]

[218] C- 282/12 *Itelcar*, C- 190/12 *DFA*, see also supplement A for an overview of when the ECJ has inserted this kind of clauses in its judgments.

Some tax scholars (according to Sheppard) are worried of the practical consequences of the clause and observe that it is unclear. As will be shown below the clause is vague and the practical consequences are probably that it will never be applied, at least not concerning direct taxation. I do also think that that technically Nijkeuter is correct when he points out the logical problems in the clause. First, according to its wording the clause appears to take concern to parties domicile or where they generate income when establishing if third parties that establish themselves within the EU fall outside the freedom of establishment. However, that would, as Nijkeuter observes, interfere with the other parts of the *FII (II)* judgment. Moreover, this is because if the ECJ would not want these parties to invoke the free movement of capital why extend the free movement of capital to include them in the first place. The AG in the *Kronos* case did not discuss these issues at all, which is surprising since he discussed parts of the clause in a case that involved the two freedoms.

Secondly, Nijkeuter argues that if the safety clause will be interpreted as that it only applies on cases similar to the *Fidium Finanz* case (a non-tax case) it will never apply on direct taxation. The AG in the *Kronos* case agreed on the similarities with the *Fidium Finanz* case but did not observe if it will ever apply on legislation concerning direct taxation. As Sheppard points out it is uncertain what legislation would qualify here but I cannot think of any legislation involving direct taxation where this clause could apply.

It is of course unsatisfactory that the ECJ continues to formulate a clause that is incomprehensible. However, I think that Nijkeuter overanalyzes the wording of the clause. Furthermore, I agree with Sheppard that the reason behind the clause is more likely that it is put there because some judges did not agree on the majority view and expressed concern about a too wide scope of the free movement of capital. Moreover, as such I think that the ECJ added the clause to make it appear that the free movement of capital would not provide unrestricted access to the inner market. Moreover, the Court also, on purpose, may have formulated the clause so that it would not apply on many circumstances but did not think much of the exact formulation of the clause. Furthermore, naturally since legislation may confer definite influence if it applies on 25 percent holdings (see below 6.2) it is hard to think that such a low percentage can allow this kind of abuse. As such I choose to call this clause a safety clause and not an anti-abuse clause since its use seems more to be of esthetical purpose. Finally, since this clause has been inserted in all recent judgments in this field that involves third parties it is likely that it will be found in future similar judgments.

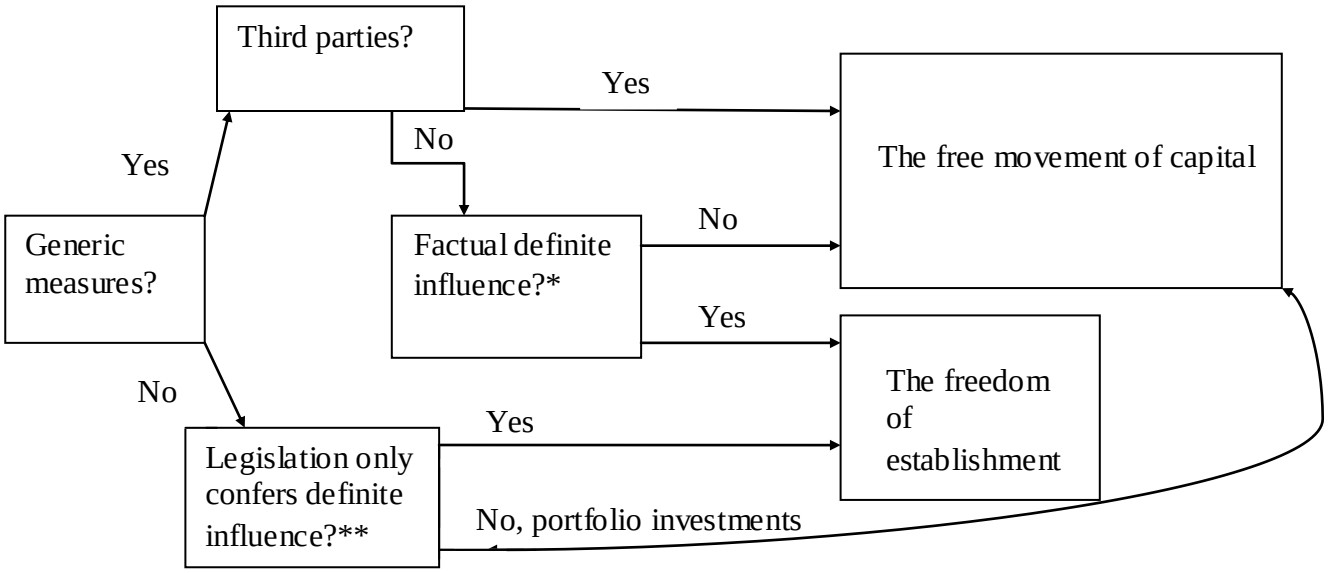
# 6 Conclusions

## 6.1 Introduction

The ECJ started to be confronted in the early 90s with how the free movement of capital and the freedom establishment interact and the area has since that time been the subject of a hectic debate among scholars. Moreover, the two freedoms have been applied in many of the ECJ judgments concerning direct taxation and also to an almost equal extent which points to their importance and relevance. Furthermore, starting from the beginning of the 21st century the ECJ developed the dominance and definite influence-rules. Moreover, the Court also established that legislation that only aims at portfolio investments will fall under the scope of the free movement of capital and legislation that only confers definite influence (often legislation that aims at group of companies such as transfer pricing, thin cap, group relief etc.) will fall under the scope of the freedom of establishment. However, regarding generic legislation, it has been hard to define a red line in the judgments from the ECJ. Moreover, for a long time it seemed that the facts of the case-rule would have importance in determining the relevant freedom in those cases, together with the purpose of the legislation-rule.[219]

However, in 2009 several AG's started to oppose this unforeseeable and inconsistent case law in their opinions and from 2010 the purpose of the legislation-rule was used more and more at the expense of the facts of the case-rule. In 2012 in the *FII (II)* judgment the ECJ finally clarified the case law and observed that when third parties are not involved the facts of the case-rule will still be applied on generic legislation. However, when those parties are part of the case, the purpose of the legislation-rule is the only rule that will be applied and the free movement of capital will always be the relevant freedom except for when the relevant legislation only confers definite influence. Consequently, the ECJ has shifted positions and provided more leeway to apply the free movement of capital and as an effect of this the ECJ sometimes observes that the freedom of establishment is merely an unavoidable consequence of the free movement of capital and not the opposite as was the case in older case law.[220] Moreover, in line with the TFEU and the *Felixstowe* judgment it is important to note that persons indirectly held by third parties will still be considered MS parties. The current case law of the ECJ of which of the two freedoms national regulations will fall can be seen in the graph below.

[219] See also supplement A for an overview of the historic development of the ECJ case law in this field.
[220] See also supplement A for an overview of the current ECJ case law in this field.




It is the definite influence-rule that decides to what extent third parties may be part of the internal market. Moreover, because of that the crucial question of what legislation confers definite influence will be discussed below in this chapter. Furthermore, as the grandfather clause has a potential to restrict the reach of the free movement of capital when third parties are involved it will be examined in the following chapter. Moreover, after this a discussion will follow on the topics of whether the free movement of capital has a different reach when third parties are involved. Additionally, I will also examine if a wide reach of the free movement of capital will provide any negative consequences and the ECJ case law's effect on national courts. Finally, I will in the final remarks make a summary of the current legal position in this field and the findings of this thesis.

## 6.2 What factors confer definite influence?

### 6.2.1 General remarks

It is not easy to interpret exactly how the ECJ determines if a national legislation confers definite influence in borderline cases. Moreover, pertaining generic national legislation the national legislation seldom contains information on what parties are covered by the scope of the

* Note that the facts of the case-rule will apply regarding generic legislation that concerns dividends distributed within the inner market. Furthermore regarding group relief the facts of the case-rule will also still apply if third parties are not involved but maybe not concerning exit taxes and the situation must be regarded as unclear regarding other types of direct taxation (see above 4.4.3.2). However, the difference in these cases are not of vital importance because the examination of if restrictions exists will be the same regardless of freedom.

** According to the current case-law legislation that requires a 25 percent holding seems to confer definite influence and a requirement of 10 percent does certainly not confer definite influence (see below 6.2.1).

legislation and the purpose of the concerned measures. Historically the ECJ has in some of these cases occasionally relied on the facts of the case-rule instead.

However, after a more thorough research of a legislations preparatory work, national agencies and departments' interpretation of national legislation might render that it would be easier to determine the purpose of the legislation. Moreover, this would be easier done by a national court than by the ECJ and as the Court comments in the joint *Haribo* and *Salinen* joint cases the ECJ might only consider facts that has been provided to the ECJ. However, with a more clear case law in this field from the ECJ there might be more room for national courts to, without referring a case to the ECJ, render judgments and hence further examining the purpose of the concerned national legislation in a way that the ECJ is unable to.

However, the ECJ and the AG in the *SGI* opinion have put relevance to other facts than the extent of a holding if it has been possible. By way of example, in the *Idryma Typou* judgment the ECJ observed that journalists might have a purpose of exerting definite influence. In the *DMC* judgment the ECJ observed that the purpose of the concerned legislation was to protect the fiscal interests of the home state and as such did not confer definite influence and in the *Glaxo Wellcome* case the purpose of hindering undue tax advantages did not exert definite influence. However, the wordings are vague since most tax legislation has the purpose of avoiding undue tax advantages and protecting the fiscal interest. The AG in the *SGI* opinion observed that in factual situations also factors such as technologies, relationships between owners, board members etc. should be taken into consideration and the ECJ in its judgment took concern of management ties between the companies at issue.

If a national measure contains information on who it applies to this is often in the form of that it only applies to a certain extent to a shareholding. Consequently, the ECJ case law also heavily relies on what extent of a holding a certain national legislation requires to apply. As of now it is uncertain if the *FII (II)* case has provided a case law which has decreased the requirement for when a definite influence will exist to compensate for the extended reach of the free movement of capital. However, in the *Itelcar* judgment the ECJ confirmed its old case law that a legislation that requires a 10 percent holding does not confer definite influence.

A legislation that required a 25 percent holding conferred definite influence in the *Idryma Typou, Lasertec* and *Scheunemann* cases. However, in the latter two cases the ECJ in the end concluded that there was also a factual definite influence. In the *Idryma Typou* case the ECJ observed that legislation requiring a 25 percent holding to apply could confer definite influence considering how the other 75 percent were held

which means that the ECJ in *Idryma Typou* also examined the factual circumstances in the case. Moreover, Ohlsson observes that the threshold for legislation to confer definite influence is between 10 and 25 percent and refers to the *Itelcar* and *Scheunemann* cases. Moreover, Cordewener also observes, based on the *Lasertec* case, that a 25 percent requirement confers definite influence, and that threshold might be loved if other circumstances are considered. However, they do not comment on the issue of the ECJ's observation of the factual definite influence in the end of those cases. However, since in *Idryma Typou* a 25 percent requirement also confers definite the threshold is probably not higher than that. However, there is no exact threshold for when a national legislation will confer definite influence and therefore an MS cannot enact legislation that will, by little margin, only cover MS parties. It is important to bear in mind that the ECJ will also consider other factors than sheer percentage if possible.

### 6.2.2 Regarding groups of companies

Legislation that aims at only applying on groups of companies such as thin cap, CFC, transfer pricing, group taxation etc. also normally aims at circumstances that would confer definite influence. This is since such a corporate group often forms a single economic entity and the subsidiaries and parents form a common source of control. However, there are doubtful cases where definition of groups of companies has been wide, by way of example the recent *Itelcar* judgment. Moreover, as such it is important to note that just because a certain national law states that it applies solely to circumstances covering groups of companies do not mean that it really is that way. For example, as Câmara observes, in the *Itelcar* case the regulations were called thin cap law and its purpose was to prevent certain types of thin capitalization related tax planning. However, the concerned legislation was wider than traditional thin cap regulations and naturally it thus did not only confer definite influence since it was applied to all holdings of 10 percent if there were a certain amount of thin capitalization. The *Felixstowe* judgment brings similar considerations and is discussed above under 4.3.3.2 because of its relevance to the facts of the case-rule. Finally, it is important to note that also legislation that does not aim at groups of companies may confer definite influence, for example the *Scheunemann* case that concerned inheritance tax.

## 6.3 The grandfather clause

The grandfather clause has only been applied in a total of five direct tax cases by the ECJ and out of these cases three have been examined in this thesis.[222] Only in one of those did the ECJ consider the concerned holding as a direct investment. As the clause as of now only has been applied in few cases, which might be a result of the scarcity of ECJ case

[222] C-446/04 *FII (I)*, C-157/05 *Holböck*, *C-436/08 & C-437/08 Haribo & Salinen*.

law concerning third parties and the free movement of capital, it is hard to know its true scope. However, the concerned ECJ case law provides that the scope is not wide.

Nijkeuter observes that in most cases the grandfather clause will not be relevant because it does not apply in majority interests with the purpose of a portfolio investment and this is supported by the directive,[223] the TFEU and some case law[224]. However, because the ECJ does not apply the facts of the case-rule in cases concerning third parties anymore it is likely that the clause will be applied in cases that would prior to the *FII (II)* case be ruled in the view of the freedom of establishment according to the facts of the case-rule as that rule is still applied to examine if the grandfather clause is applicable. Furthermore, in the *Holböck* case a two thirds holding was enough for the clause to apply. Moreover, if the concerned legislation only applies on minor holdings the factual circumstances, naturally, also do not constitute direct investments, such as in the *Haribo* and *Salinen* joint cases.

To conclude it is clear that the grandfather clause is limited to a restricted amount of circumstances but still has a pivotal role in this field since it limits the scope of the free movement of capital for third parties, the same scope that has been extended since the *FII (II)* judgment.

## 6.4 The scope of the free movement of capital and third markets

The TFEU provides that capital movements involving third parties are subject to different regulations than if only MS parties are involved, most notably the grandfather clause. Furthermore, the ECJ has previously observed that in some particular circumstances third parties act in a different legal market but generally the difference seems slim, especially since the ECJ has consistently rejected any lack of reciprocity arguments. Later case law in this field does not support a view that the free movement of capital should have a lesser scope when third parties are involved. [225] Moreover, it seems more the opposite since the *FII (II)* judgment stretched the scope of the free movements of capital when third parties are involved.

[223] Directive 88/361/EEC.
[224] C-446/04 *FII (I)*, C-157/05 *Holböck*, C-436/08 & C-437/08 *Haribo & Salinen*.
[225] However, it must be noted that the *FII (II)* case might have extended the leeway for MS to invoke justifications, nonetheless this discussion falls outside the scope of this thesis, see also this thesis foot. 40, foot. 82, foot. 87, foot. 125 & foot. 188.

## 6.5 The potential risk of the advancement of capital movements

Terra and Smit observe that a too wide scope of the free movement of capital would run contrary to fundamental interests of the EU, for example negotiating free trade treaties inside and outside of the WTO. Moreover, this risk occurs because of the lack of reciprocity. However, as the ECJ observers it is the MS themselves that has extended the free movement of capital to also cover third parties and they should have been aware of this when they did that. Moreover, the free movement of capital is restricted by both the dominance rule and the grandfather clause.

To conclude, this risk is political and is the responsibility of the legislators, not the ECJ. However, the ECJ seems to be concerned of third parties benefiting from the internal market since it was the Court that developed the dominance rule. Moreover, in all cases, except the grandfathered *Holböck* case, where the ECJ has deviated from this rule no third parties has been involved.

Nonetheless, I do not think that it is only negative that third parties are covered by a wide scope of the free movement of capital. This is since it might provide incentives for third parties when they are protected from restrictions to invest in the inner market and as such improve the European economy.

## 6.6 Considerations of the national situation and the ECJ case law

National courts have mainly been inconsistent regarding the choice between the purpose of the legislation-rule and the facts of the case-rule. This has led to different national courts ruling differently on these issues. This is probably the result of what this thesis has proven that the ECJ cases law on this issue has not been consistent in the past. However, as such the national courts must refer the cases to the ECJ and if this is not done it is obvious that diverging national courts will create even more uncertainty and legal uncertainty for MS persons. Moreover, as such not solely the ECJ can be blamed for this inconsistency on a national level.

However, it is my view that considering the *FII (II)* judgment, it is an acte clair that the purpose of the legislation-rule will be applied when third parties are involved and that the freedom of establishment will only be applied in those cases if the concerned national regulations only confer definite influence. Moreover, this provides more leeway - for national courts to render decisions without first consulting the ECJ, even if more case-law is needed on other relevant areas. By way of example

more exact guidelines for national courts on when a national legislation confers definite influence.

Regarding the newly enacted Swedish thin cap rules the European Commission chose to complain under the freedom of establishment. I do not think that this should be interpreted as if the Commission supports an extension of the freedom of establishment but that that litigation is in its early stages and that the Swedish rules mostly applies to groups of companies and that the they most likely will require an ownership of more than 25 percent to apply.

## 6.7 Final remarks

The ECJ case-law in this field has almost always provided that national legislation that only covers portfolio investments will fall under the free movement of capital and legislation that only confers definite influence will fall under the freedom of establishment. However, in the past the ECJ case law concerning generic legislation has been characterized by inconsistency mostly regarding if the facts of the case-rule or the purpose of the legislation-rule should determine definite influence. Nonetheless, there has also been inconsistency regarding the standpoint of the dominance rule and the definite influence-rule.

However, the more clear current legal position is that only one freedom can be applied and that freedom is dominant. When third parties are involved the freedom of establishment will only be the relevant freedom if the concerned national legislation solely confers definite influence, under all other circumstances (such as generic measures) the free movement of capital will be the relevant freedom. Moreover, because of the recent consistent case regarding this issue I see this is an acte clair.

Nonetheless, it is important to note that the facts of the case-rule will be applied when determining whether the grandfather clause applies and that clause might have a more major role in the future to restrict third parties from invoking the free movement of capital. Furthermore, the ECJ in its current case-law involving third parties also examines if third parties are piggybacking on the free movement of capital to benefit from the freedom of establishment. However, this is a situation that will most probably never occur because of the ECJs' restrictive wording in these clauses. Nonetheless, even if the facts of the case-rule has lost its importance in cases involving third parties it will still be applied when dividends are distributed within the inner market if a national legislation the generic. Furthermore, this rule might also be applied concerning other types of direct taxation when third parties are not involved. Nonetheless, this distinction is not of great importance since there is no practical difference between the two freedoms when third parties are not involved.

The threshold for when legislation confers definite influence is probably around 25 percent. However, this requirement might be lower considering other aspects such as the type of the concerned of regulations and what kind of persons it intends to cover. Nonetheless, a 10 percent requirement to apply will not confer definite influence.

It seems like the current objective of the ECJ will be that as many parties as possible should be able to invoke EU law while maintaining the dominance-rule. This recent method of determining if legislation confers definite influence provides a much more foreseeable case law than before and as such makes it easier for legislators and law practitioners to examine which freedom should be relevant under certain circumstances. Furthermore, the *FII (II)* case while undoubtedly extending the reach of the free movement of capital does not in any way severely reduce the use of the freedom of establishment and open the Pandora's Box for third parties to benefit from the third market. Moreover, since the ECJ consistently applies the dominance rule in later case-law it still provides less use of the free movement of capital than might have been the idea behind the TFEU.

# Supplement A
## Overview of the ECJ judgments discussed in this thesis[226]

| Name | Rule[227] | Circumstances | Freedom examined | Third parties | Grandfather[228] | Safety clause[229] | Chapter |
|---|---|---|---|---|---|---|---|
| C-524/04 *Thin cap* | purpose | GOC[230] leg., factual def inf. | Establishment | No | No | No | 4.3.1 |
| C-492/04 *Lasertec* | Facts[231] + purpose | GOC leg. 25 %, factual def inf. | Establishment | Yes | No | No | 4.3.1 |
| C-157/05 *Holböck* | Purpose | Generic leg, factual def inf. | Capital + establishment | Yes | Yes | No | 4.3.1 |
| C-231/05 *OY AA* | Facts + purpose | GOC leg., factual def inf. | Establishment | No | No | No | 4.3.1 |
| C-298/05 *Columbus* | Facts + purpose | Generic leg., factual def inf. | Capital + establishment | No | No | No | 3.3.2 |
| C-105/07 *Lammers* | Purpose | Generic leg., unclear factual circ. | Capital + establishment | No | No | No | 3.3.2 |
| C-284/06 *Burda* | Facts + purpose | Directive 25 %, Factual def. inf. | Establishment | No | No | No | 4.2.1 |
| C-282/07 *Truck center* | Facts + purpose | GOC leg 25 %, factual def inf. | Capital + establishment | No | No | No | 3.3.2 |
| C-439/07 *KBC* | Facts + purpose | Generic leg., factual def inf. | Establishment | Yes | No | No | 4.2.1 |
| C-303/07 *Aberdeen* | Facts + purpose | Generic leg., factual def inf. Leg. 20 %, factual def inf. | Establishment | No | No | No | 4.2.1 |
| C-182/08 *Glaxo* | Purpose | Generic leg., factual def inf. | Capital | No | No | No | 3.4.4 |
| C-247/08 *Gaz* | Purpose | Generic leg., factual def inf. | Capital + establishment | No | No | No | 3.3.2 |
| C-311/08 *SGI* | Facts + purpose | Generic leg., factual def inf. | Establishment | No | No | No | 4.2.1 |
| C-81/09 *Idryma* | Purpose | Leg. 2,5 % & 25 %, applied on journalists, unclear factual circ. | Capital + establishment | No | No | No | 4.3.1 |
| C-436/08 *Haribo* | Purpose | Leg. 10 % | Capital | Yes | Yes | No | 4.3.1 |
| C-310/09 *Accor* | Purpose[232] | Leg. under 10 %, unclear factual circ. | Capital + establishment | No | No | No | 3.3.2 |
| C-31/11 *Scheunemann* | Facts + purpose | Leg. 25 %, factual def inf. | Establishment | Yes | No | No | 4.3.1 |
| C-35/11 *FII (II)* | Purpose | Generic leg., factual def inf. | Capital | Yes | No | Yes | 5.2.1 |
| C-168/11 *Beker* | Facts + purpose | Generic leg. no factual def inf. | Capital | Yes[233] | No | No | 5.3 |
| C-282/12 *Itelcar* | Purpose | Thin cap leg. 10 %, factual def Inf. | Capital | Yes | No | Yes | 5.3 |
| C-164/12 *DMC* | Purpose | Generic leg. Factual def inf. | Capital | No | No | No | 5.3 |
| C-80/12 *Felixstowe* | Facts + purpose | GOC legislation, factual def inf. | Establishment | No | No | No | 3.4.3 |
| C-190/12 *DFA* | Purpose | Generic leg, no factual def inf. | Capital | Yes | No | Yes | 5.3 |

[226] The cases in this table are from 2007 and onwards and inserted in chronological order.
[227] If the purpose of the legislation-rule or the facts of the case-rule was examined (see chapter 4), the purpose of the legislation-rule is inserted before the facts of the case-rule.
[228] If the grandfather clause was discussed in the case (it was only applied in *Holböck*).
[229] The safety / anti-abuse clause (see above 5.2.3).
[230] Groups of companies.
[231] As the purpose of the legislation-rule always is applied to determine the concerned legislation constitutes a specific or generic measure the facts of the case-rule will never be applied on its own.
[232] The ECJ observed that the factual circumstances were unclear.
[233] The ECJ only applied the facts of the case-rule when the third parties were not involved.

# Bibliography

## European Union Legal Acts

Treaty on European Union 13 December 2007 [ECR] C 306

Treaty on the Functioning of the European Union 26 October 2012 [ECR] C 326

Council Directive 88/361/EEC 07 July 1988 [ECR] OJ L 178

Council Directive 90/435/EEC 23 July 1990 [ECR] L 225

## EU Commission and Council Documents

EU PILOT 4437/13 TAXU - Sweden

## Swedish Legal Acts

Inkomstskattelag (SFS 1999:1229)

Proposition 2012/13:1 p. 239

## The Swedish Tax Agency's standpoints

Skatteverkets ställningstagande *Några frågor vid tillämpningen av ränteavdragsbegränsningsreglerna gällande väsentligt inflytande, undantaget från 10 %-regeln och ventilen* 25 februari 2013 [dnr] 131-117306-13/11

**ARTICLES**

Boer, Steven den, *Freedom of Establishment versus Free Movement of Capital: Ongoing Confusion at the ECJ and in the National Courts?* European taxation, 2010 p. 250 – p. 258

Câmara, Francisco de Sousa da, Almeida Fernandes, José, *The Applicability of Portuguese Thin Capitalization Rules to Third Countries*, Tax notes international, 2012, p. 373 – p. 375

Cordewener, Axel, *Free movement of Capital between EU Member States and Third Countries: How Far Has the Door Been Closed?* EC Tax Review 2009, p. 260 – p. 263

Cordewener, Axel, Kofler, Georg W., Schindler Clemens Philipp, *Free Movement of Capital and Third Countries: Exploring the Outer Boundaries with Lasertec, A and B and Holböck*, European Taxation, 2007, p. 371 – p. 376

Englisch, Joachim, *Taxation of Cross-Border Dividends and EC Fundamental Freedoms*, Intertax 2010, p. 197 – p. 221

Fontana, Renata, *Direct Investments and Third Countries: Things are Finally Moving ... in the Wrong Direction*, European Taxation 2007, p. 431 – p. 436

Hemels, Sigrid, Rompen, Joost, Smet, Patrick, De Waele, Isabelle, Adfeldt, Steffan, Breuningerm Gottfried, Ernst, Markus, Carpentier, Viviane, Mostafi, Siamak, *Freedom of Establishment or Free Movement of Capital: Is There an Order of Priority? Conflicting visions of national courts and the ECJ*, EC tax review 2010, p. 19– p. 31

Hilling, Maria, Cejie, Katia, *Aktuellt om EU-domstolens praxis - direkt beskattning*, Skattenytt 2013, p. 210 – p. 214

Hilling, Maria, Cejie, Katia, *A EUF-fördraget*, Skattenytt 2013, p. 406 - p. 428

Nijkeuter, Erwin, Wilde, Maarten F. de, *FII 2 and the Applicable Freedoms of Movement in Third Country Situations*, EC Tax Review 2013, p. 250 – p. 257

Ohlsson, Fredrik, *Ränteavdragen och EU-rätten*, Skattenytt 2014, p. 11– p. 24

Ohlsson, Fredrik, *Även solen har sina fläckar EU-rättsliga frågetecken kring flera svenska skatteregler*, Skattenytt 2013, p. 102 – p. 116

O'Shea, Tom, *Featured perspectives ECJ Reexamines the U.K. Dividend Rules*, Tax Notes International 2013, p. 815 – p. 825

Schaper, Marcel *G.H., 30 Years of Direct Tax Litigation before the Court of Justice of the European Union: An Empirical Survey*, Bulletin for International Taxation 2014, p. 236 – p. 249

Sheppard, Lee A., *Pending Cases in the ECJ: Article 63 TFEU Expands Its Reach*, Tax Notes International 2013, p. 22 – p. 26

Sheppard, Lee A., *Pending Cases in the European Court of Justice*, Tax notes international 2013, p. 1063 – p. 1068

Smit, Daniël S., *EU Freedoms, Non-EU Countries and Company Taxation: An Overview and Future Prospect*, EC tax review 2012, p. 234 - p. 247

Snell, Jukka, *Free movement of capital: evolution as a non-linear process*, the evolution of EU law, second edition, p. 547 – p. 574, Oxford, Oxford University Press 2011.

Terenius Jilkén, Carina, Jikén, Daniel, *Väsentligt inflytande och under huvudsak gemensam ledning – luddiga begrepp på drift?* Svensk Skattetidning 2013, p. 492 – p. 517

## Literature

Dahlberg, Mattias, *Internationell beskattning*, third edition, Lund, Studentlitteratur 2012

Pelin, Lars, *internationell skatterätt*, fifth edition, Lund, studentlitteratur 2011

Ståhl, Kristina, Österman, Roger Persson, Hilling, Maria, Öberg, Jesper, *EU-skatterätt*, third edition, Uppsala, Iustus förlag 2011

Terra, J.M Ben, Wattel, Peter J, *European Tax Law*, sixth edition, the Netherlands, Wolters Kluwer Law & business 2012

# Table of Cases

## European Court of justice

Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* 5 February 1963 [ECR] 00001

Case C-6/64 *Flaminio Costa v. E.N.E.L.* 15 July 1964 [ECR] 01141

Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* 6 October 1982 [ECR] 03415

Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* 10 April 1984 [ECR] 01891

Case C-106/89 *SA v La Comercial Internacional de Alimentacion SA* 13 November 1990 [ECR] I-04135

Case C-204/90 *Hanns-Martin Bachmann v. Belgian* State 28 January 1992 [ECR] I-00249

Case C-369/90, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria 7* July 1992 *[*ECR] I-4239

Case C-275/92 *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* 24 March 1994 [ECR] I-01039

Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*, 15 November 1994, [ECR] I-05267

Case C-279/93 Finanzamt Köln-Altstadt v. Roland Schumacker 14 February 1995 [ECR] I-00225

Case C-80/94 G.*H.E.J. Wielockx v. Inspecteur der Directe Belastingen* 11 August 1995 [ECR] I-2493

Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* 30 November 1995 [ECR] I-04165

Case C-107/94 P.H. Asscher v. Staatssecretaris van Financiën 27 June 1996 [ECR] I-03089

Case C-222/97 *Trummer and Mayer* 16 March 1999 [ECR] I-1673

Case C-302/97 *Klaus Konle v. Republik Österreich* 1 June 1999 [ECR] I-03099

Case C-200/98 *X AB and Y AB v. Riksskatteverket* 18 November 1999 [ECR] I-08261

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

Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* 6 June 2000 [ECR] I-04071

Case C-390/*99 Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)* 22 January 2002 [ECR] I-00607

Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC*) 5 November 2002 [ECR] I-09919

Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* 14 October 2004 [ECR] I-09609

Case C-436/00 *X and Y v. Riksskatteverket* 21 November 2002 [ECR] I-10829

Case C-376/03 D. *v. Inspecteur van de Belastingdienst/ Particulieren/ Ondernemingen buitenland te Heerlen* 5 July 2005 [ECR] I-05821

Case C-512/03 *J.E.J. Blanckaert v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* 8 September 2005 [ECR] I-07685

Case C-196/04 *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* 12 September 2006 Grand chamber [ECR] I-07995

Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* 03 October 2006 [ECR] I-09521

Case C-513/04 *Mark Kerckhaert and Bernadette Morres v Belgische Staat* 14 November 2006 [ECR] I-10967

Case C-374/04 Test *Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue* 12 December 2006 I-11673

Case C-446/04 *Test Claimants in the Franked Investment Income Group Litigation v. Commissioners of Inland Revenue* 12 December 2006 [ECR] I-11753

Case C-492/04 *Lasertec Gesellschaft für Stanzformen GmbH v. Finanzamt Emmendingen* 10 May 2007 [ECR] I-03775

Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue* 13 March 2007 [ECR] I-02107 Grand Chamber

Case C-157/05 *Winfried L. Holböck v. Finanzamt Salzburg-Land* 24 May 2007 [ECR] I-04051

*Case* C-231/05 *OY AA* 18 July 2007 [ECR] I-06373

Case C-298/05 *Columbus Container Services BVBA & Co. v Finanzamt Bielefeld-Innenstad* 6 December 2007 [ECR] I-10451

Case C-101/05 *A v. Skatteverket* 18 December 2007 [ECR] I-11531

Case C-105/07 *Lammers & Van Cleeff NV v Belgische Staat* 17 January 2008 [ECR] I-00173

Case C-284/*06 Burda Verlagsbeteiligungen GmbH v. Finanzamt Hamburg-Am Tierpark* 26 June 2008 [ECR] I-04571

Case C-210/06, *Cartesio Oktató és Szolgáltató bt* 16 December 2008 [ECR] I-9641

Case C-282/07 *Belgian State - SPF Finances v Truck Center SA 22* December 2008 [ECR] I-10767

Case C-439/07 *Belgische Staat v. KBC Bank NV and Beleggen, Risicokapitaal, Beheer NV v. Belgische Staat* 4 June 2009 [ECR] C-439/07

Case C-303/07 *Aberdeen Property Fininvest Alpha Oy v. Uudenmaan verovirasto and Helsingin kaupunkiAlpha* 18 June 2009 [ECR] I-05145

Case C-182/08 *Glaxo Wellcome GmbH & Co. KG v. Finanzamt München II* 17 September 2009 [ECR] I-08591

Case C-247/08 *Gaz de France - Berliner Investissement SA v Bundeszentralamt für Steuernc 1 October 2009* [ECR] I-09225

Case C-569/07 HSBC *Holdings plc and Vidacos Nominees Ltd v The Commissioners of Her Majesty's Revenue & Customs* 1 October 2009 [ECR] I-09047

Case C-311/08 *Société de Gestion Industrielle SA (SGI) v. Belgian State* 21 January 2010 [ECR] I-00487

Case C-81/09 *Idryma Typou AE v Ypourgos Typou kai Meson Mazikis Enimerosis* 21 October 2010 [ECR] I-10161

Case C-72/09 *Établissements Rimbaud SA v Directeur général des impôts and Directeur des services fiscaux d'Aix-en-Provence* 28 October 2010 [ECR] I-10659

Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v. Finanzamt Linz* 10 February 2011 [ECR] I-00305

Case C-310/09 *Ministre du Budget, des Comptes publics et de la Fonction publique v. Accor* SA 15 September 2011 [ECR] I-08115
Case C-31/11 *Marianne Scheunemann v Finanzamt Bremerhaven* 19 July 2012

Case C-35/11 *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, Commissioners for her Majesty's Revenue & Customs* 13 November 2012

Case C-168/11 *Dr Manfred Beker and Christa Beker v. Finanzamt Heilbronn* 28 February 2013

Case C-282/12 *Fazenda Pública v. Itelcar - Automóveis de Aluguer, Lda* 3 October 2013

Case C-164/12 *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* 23 January 2014

Case C-80/12 *Felixstowe Dock and Railway Company Ltd, Savers Health and Beaut Ltd Walton Container Terminal Ltd, WPCS (UK) Finance Ltd, AS Watson Card Services (UK) Ltd, Hutchison Whampoa (Europe) Ltd, Kruidvat UK Ltd, Superdrug Stores plc v The Commissioners for Her Majesty's Revenue and Customs 1 April 2014*

Case C-190/12 *Emerging Markets Series of DFA Investment Trust Company v Directors Izby Skarbowej w Bydgoszczy* 10 April 2014

Case C-47/12 *Kronos International Inc. v Finanzamt Leverkusen*

# EFTA court

E-22/13 - *Íslandsbanki hf. v Gunnar V. Engilbertsson*

# The Dutch Supreme Court (Hoge Raad)

*No. 43339 BNB 2009/2* 26 September 2008

*No. 43338 BNB 2009/23* 26 September 2008

*No. 43629 VN 2009/24.11* 15 May 2009

## Federal Finance Court of Germany (Bundesfinanzhof)

I R 7/08 *Internationales Steuerrecht 7/2009, 244 7/2009:244* 26 November 2008

I R 95/05 *Internationales Steuerrecht 24 /2006: 864* 9 August 2006

## Nancy Court of Appeal (Cour administrative d'appel de Nancy)

*No. 07NC00783* 22 August 2008

*No.07VE00529* 20 May 2008