

Opinion Statement ECJ-TF 1/2017 on the Decision of the Court of Justice of the European Union in *SECIL* (Case C-464/14) Concerning the Free Movement of Capital and Third Countries

This is an Opinion Statement prepared by the CFE ECJ Task Force on *SECIL* (Case C-464/14), in which the 5th Chamber of the Court of Justice of the European Union (ECJ) delivered its decision on 24 November 2016,¹ following the Opinion of Advocate General Wathelet of 27 January 2016.² The case concerned the discriminatory Portuguese taxation of dividends received by corporate shareholders from their subsidiaries in third states, namely in Lebanon and Tunisia. In a clear and instructive decision, the Court not only clarified the scope and impact of the Treaty provisions on the free movement of capital, but also the legal ramifications of the Euro-Mediterranean Agreements with Lebanon and Tunisia.

1. Background and Issues

At issue in *SECIL* were the Portuguese rules on the avoidance of economic double taxation of intercompany dividends. In summary, these rules provided that:

- A company resident in Portugal could deduct dividends from its taxable amount, in full or in part (50%), if those dividends were distributed by another Portuguese company.
- Both the full and the partial deduction were only available if the distributing company was “subject to and not exempt from corporation tax” (article 46(1)(a) and (8)(a) of the Corporate Income Tax Code).³ The

full deduction additionally required a direct holding of at least 10% or an acquisition value of EUR 20 million (article 48(1)(c) of the Corporate Income Tax Code). The full deduction would, however, be reduced by 50% when the income was derived from profits that had not been taxed (article 48(11) of the Corporate Income Tax Code).

- While Portuguese tax law also extended this treatment to distributions from qualifying EU subsidiaries, it did not apply the same treatment to dividends from third-country subsidiaries.

The case concerned Portugal’s apparently discriminatory treatment of dividends from third-country subsidiaries. *SECIL*, a Portuguese company, had major shareholdings in companies resident in Lebanon and Tunisia (direct holdings of 28.64% and 98.72%), respectively. The dividends that *SECIL* received from these subsidiaries were then fully taxed in Portugal. The question arose whether, given the full or partial deduction available for domestic dividends, such taxation violated either the provisions on the free movement of capital in the Treaty on the Functioning of the European Union (TFEU or the Treaty) (articles 63 to 65 of the TFEU (2007))⁴ or the Euro-Mediterranean Agreements with Lebanon⁵ and Tunisia,⁶ respectively. Both agreements were concluded by the European Communities and their Member States (including Portugal) and contain provisions on establishment and capital movement, but also certain tax carve-outs (articles 31, 33 and 85 and articles 31, 34 and 89, respectively).

* The Members of the Task Force include: Alfredo Garcia Prats, Werner Haslehner, Volker Heydt, Eric Kemmeren, Georg Kofler (Chair), Michael Lang, João Nogueira, Pasquale Pistone, Albert Rädler†, Emmanuel Raingard de la Blétière, Stella Raventos-Calvo, Isabelle Richelle, Alexander Rust and Rupert Shiers. Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group. For questions, contact Mary Dineen (CFE Fiscal Officer) or Georg Kofler (Chair of the ECJ Task Force) at brusselsoffice@cfe-eutax.org.

1. PT: ECJ, 24 Nov. 2016, Case C-464/14, *SECIL – Companhia Geral de Cal e Cimento SA v. Fazenda Pública*, ECJ Case Law IBFD.
 2. PT: Opinion of Advocate General Wathelet, 27 Jan. 2016, Case C-464/14, *SECIL – Companhia Geral de Cal e Cimento SA v. Fazenda Pública*, ECJ Case Law IBFD.
 3. PT: Code of Taxation of Income and Gains of Collective Persons (*Código do Imposto sobre o Rendimento das Pessoas Coletivas*), approved by Decree Law No 442-B/88 of 30 Nov. 1988, *Diário da República I*, Series

I-A, No 277, of 30 Nov. 1988), in the version in force in 2009 [hereinafter Corporate Income Tax Code].

4. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
 5. Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, signed in Luxembourg on 17 June 2002 and approved on behalf of the European Community by Council Decision 2006/356/EC of 14 February 2006, OJ L 143, p. 1 (2006) (hereinafter EC-Lebanon Agreement).
 6. Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, signed in Brussels on 17 July 1995 and approved on behalf of the European Community and the European Coal and Steel Community by Decision 98/238/EC ECSC of the Council and of the Commission of 26 January 1998, OJ L 97, p. 1 (2008) (hereinafter EC-Tunisia Agreement).

The referring Portuguese court in *SECIL* raised the issue of the concurrent applicability of the provisions of the TFEU and the Euro-Mediterranean Agreements. While Advocate General Wathelet provided a lengthy analysis of the relationship between these provisions,⁷ the Court started with the broad principle of article 63 of the TFEU, which lays down a clear and unconditional prohibition against discriminatory restrictions of the free movement of capital between the European Union and third countries that can be relied upon before national courts,⁸ and then seems to consider the Euro-Mediterranean Agreements only to address whether Portugal could rely on the “grandfathering” clause for pre-1994 restrictions in article 64 of the TFEU. In broad terms, the Court took the following approach:

- First, the Court interpreted articles 63 and 65 TFEU in order to determine whether *SECIL* could, in principle, rely on the free movement of capital in order to challenge the tax treatment of the dividends received from its subsidiaries in Lebanon and Tunisia (yes, it could).⁹
- Second, it addressed whether the tax treatment of dividends paid to that beneficiary company constituted a restriction within the meaning of article 63 of the TFEU (yes, it did)¹⁰ and whether such a restriction was justified, specifically by the need to ensure the effectiveness of fiscal supervision (possibly).¹¹
- Third, as articles 63 and 65 of the TFEU potentially precluded the taxation of the dividends in question, the Court considered whether Portugal could rely on article 64(1) of the TFEU, which “grandfathers” restrictions on direct investments that existed on 31 December 1993. Specifically, the Court considered whether the conclusion of the EC-Tunisia and EC-Lebanon Agreements could, in principle, affect the outcome (yes, it could).¹²
- Fourth, on that basis, the Court interpreted the provisions of the EC-Tunisia and EC-Lebanon Agreements to determine whether they could actually be relied on in the main proceedings (yes, they can).¹³
- Finally, the Court explained the consequences of all these issues for the main proceedings.¹⁴

The Court’s decision in *SECIL* is precise and instructive. Not only does it clarify the scope of the free movement

7. See AG Opinion in *SECIL* (C-464/14), para. 31 et seq.
 8. See *SECIL* (C-464/14), para. 24, referring to ES: ECJ, 14 Dec. 1995, Joined Cases C-163/94, C-165/94 and C-250/94, *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*, paras. 41 and 47, ECJ Case Law IBFD; SE: ECJ, 18 Dec. 2007, Case C-101/05, *Skatteverket v. A*, paras. 21 and 28, ECJ Case Law IBFD; and BE: ECJ, 4 June 2009, Case C-439/07, *Belgische Staat v. KBC Bank NV and Beleggen, Risicokapitaal, Beheer NV v. Belgische Staat*, para. 66, ECJ Case Law IBFD.
 9. *SECIL* (C-464/14), paras. 31-44.
 10. *Id.*, at paras. 45-51.
 11. *Id.*, at paras. 52-72.
 12. *Id.*, at paras. 73-92.
 13. *Id.*, at paras. 93-96, paras. 97-129 (on the EC-Tunisia agreement) and paras. 130-156 (on the EC-Lebanon agreement).
 14. *Id.*, at paras. 157-169.

of capital in third-country situations (the focus of this Opinion Statement), but it is also the first case in the direct tax area that deals with the Euro-Mediterranean Agreements. While the ECJ has already interpreted provisions of these agreements and also the Association Agreements and Partnership and Cooperation Agreements in other areas of law,¹⁵ *SECIL* makes it clear, for the first time, that those agreements contain directly effective free movement provisions that can be invoked by taxpayers against discrimination in Member States’ direct tax systems. *SECIL*, therefore, represents a significant addition to the existing body of direct taxation case law on capital movements to or from third countries, which, prior to *SECIL*, the Court had developed only based on the worldwide effect of article 63 of the TFEU, with regard to article 40 of the EEA Agreement¹⁶ and in respect of movements of capital between a Member State and overseas countries and territories (OCTs).¹⁷

2. The Decision of the Court

2.1. Applicability of article 63 of the TFEU

The free movement of capital in article 63 of the TFEU is the only free movement provision that extends to third countries. It is, therefore, and unlike, for example, article 49 of the TFEU on the freedom of establishment, not limited to EU-EU situations. The Court, therefore, had to determine whether article 63 of the TFEU, or article 49 instead, was applicable, because the tax treatment of dividends may fall within the scope of either freedom. It held that determination of the relevant freedom depended on the purpose of the relevant national legislation:¹⁸ Within the scope of article 49 of the TFEU, was the national legislation intended to apply only to shareholdings that enable the holder to exert a definite influence on the company’s decisions and to determine its activities? Article 63 of the TFEU applies to national legislation intended to apply to shareholdings acquired solely with the intention of making an investment without any intention to influence the management and control of the company.¹⁹ Thus, the question of other shareholdings and legislation that does not clearly fall within one of those two categories remains open.

15. See, with further references, AG Opinion in *SECIL* (C-464/14), paras. 33-36.
 16. See with regard to art. 40 of the Agreement on the European Economic Area, 2 May 1992, EU Law IBFD, for example, FR: ECJ, 28 Oct. 2010, Case C-72/09, *Etablissements Rimbaud v. Direction Générale des Impôts*, ECJ Case Law IBFD; PT: ECJ, 6 Oct. 2011, Case C-493/09, *European Commission v. Portuguese Republic*, ECJ Case Law IBFD; DE: ECJ, 20 Oct. 2011, Case C-284/09, *Commission of the European Communities v. Federal Republic of Germany*, para. 95 et seq., ECJ Case Law IBFD; BE: ECJ, 25 Oct. 2012, Case C-387/11, *European Commission v. Kingdom of Belgium*, para. 88, ECJ Case Law IBFD; and FI: ECJ, 8 Nov. 2012, Case C-342/10, *European Commission v. Republic of Finland*, paras. 53-54, ECJ Case Law IBFD.
 17. See for these issues, for example, NL: ECJ, 5 June 2014, Case C-24/12, *X BV v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.
 18. *SECIL* (C-464/14), para. 31.
 19. *SECIL* (C-464/14), paras. 32 and 33, referring to UK: ECJ, 13 Nov. 2012, Case C-35/11, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, Commissioners for her Majesty’s Revenue & Customs*, paras. 91 and 92, ECJ Case Law IBFD.

In addressing this in *SECIL*, the Court followed *FII Group Litigation 2* (Case C-35/11),²⁰ *Itelcar* (Case C-282/12)²¹ and *Kronos* (Case C-47/12),²² which held that the national legislation, and not the facts, is decisive in identifying the applicable freedom in third-country situations: National legislation on the tax treatment of dividends that does not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends must be assessed by reference to article 63 of the TFEU (which is not excluded by article 49 of the TFEU), irrespective of the size of its shareholding in the distributing company established in a non-Member State.²³ In *SECIL*, the Portuguese legislation was not intended to apply exclusively to situations in which the recipient company had a decisive influence on the distributing company (and also the 10% direct holding required for a full deduction did not restrict the rule to such situations).²⁴ Accordingly, the free movement of capital applied even though the shareholdings in the subsidiaries resident in Lebanon and Tunisia amounted to 28.64% (with an indirect holding of 51.05%) and 98.72%, respectively.

The Court stated again, however, that application of article 63 of the TFEU should not extend the scope of the freedom of establishment to non-EU-situations via the back door.²⁵ The Court, however, concluded that since the Portuguese legislation related “only” to the tax treatment of dividends and did not cover the conditions of access to the market of a non-Member State by a company resident in Portugal or vice versa, the application of article 63 of the TFEU would not enable economic operators outside the territorial scope of the freedom of establishment to profit from that freedom.²⁶ Hence, article 63 of the TFEU applied.

2.2. Restriction on the free movement of capital under article 63 of the TFEU

Following a long line of case law on dividend taxation,²⁷ the Court was quick to identify the restriction on the free movement of capital, as the Portuguese rules clearly distinguished between domestic dividends (full or partial deductibility) and comparable third-country dividends (full taxation).²⁸ That difference in treatment was likely

20. *Id.*, at para. 99.
 21. PT: ECJ, 3 Oct. 2013, Case C-282/12, *Fazenda Pública v. Itelcar – Automóveis de Aluguer, Lda*, para. 16 et seq., ECJ Case Law IBFD.
 22. DE: ECJ, 11 Sept. 2014, Case C-47/12, *Kronos International Inc. v. Finanzamt Leverkusen*, para. 37 et seq., ECJ Case Law IBFD.
 23. *SECIL* (C-464/14), para. 33, referring to PL: ECJ, 10 Apr. 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company v. Dyrektor Izby Skarbowej w Bydgoszczy*, para. 30, ECJ Case Law IBFD.
 24. See *SECIL* (C-464/14), para. 40 and, for example, *Itelcar* (C-282/12), para. 22 and *Kronos International* (C-47/12), para. 35.
 25. See on that issue, for example, *Kronos International* (C-47/12), para. 53 and *Emerging Markets Series* (C-190/12), para. 31.
 26. *SECIL* (C-464/14), paras. 42-43.
 27. See, for example, AT: ECJ, 10 Feb. 2011, Case C-436/08, *Haribo Lakritzen Hans Riegel Betriebs GmbH and Österreichische Salinen AG v. Finanzamt Linz*, ECJ Case Law IBFD.
 28. *SECIL* (C-464/14), paras. 45-49, also noting that the *Convention between the Portuguese Republic and the Tunisian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income* [unofficial translation] (24 Feb. 1999), Treaties IBFD [hereinafter *Port.-Tun. Income Tax Treaty*] (whose dividend article is patterned along the lines of the OECD Model) does not prevent such unfavourable treatment.

to discourage companies resident in Portugal from investing in companies established in non-Member States, such as the Republic of Tunisia and the Republic of Lebanon. Accordingly, it held that, to the extent that income from capital originating in non-Member States receives less favourable tax treatment than dividends distributed by companies established in Portugal, the shares of companies established in non-Member States are less attractive to investors residing in Portugal.²⁹

2.3. Justification of the restriction on the free movement of capital under article 65(1)(a) and (3) of the TFEU

The Court traditionally reads article 65(1)(a) and (3) of the TFEU as codifying its older case law,³⁰ such that a distinction must be made between the differences in treatment authorized by article 65(1)(a) and discrimination prohibited by article 65(3). Based on that reading, restrictive domestic legislation may be regarded as compatible with the provisions of the Treaty on the free movement of capital if the difference in treatment: (1) concerns situations not objectively comparable; or (2) is justified by an overriding reason in the public interest.³¹ While the Court quickly dismissed the notion that domestic and foreign dividends might not be comparable with regard to tax rules that seek to prevent or mitigate the economic double taxation of distributed profits (they clearly are),³² it went on to evaluate whether the restriction was justified by overriding reasons in the public interest and was proportionate.³³

Two grounds of justification were considered: the need (1) to ensure the effectiveness of fiscal supervision; and (2) to prevent “tax evasion”,³⁴ both of which have, in principle, already been accepted by the Court.³⁵ While the second ground could be dismissed quickly in *SECIL* (because the

29. *SECIL* (C-464/14), para. 50, referring to *FII Group Litigation II* (C-35/11), para. 64 and *Haribo and Salinen* (C-436/08), para. 80.
 30. For example, AT: ECJ, 15 July 2004, Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, para. 27, ECJ Case Law IBFD and FI: ECJ, 7 Sept. 2004, Case C-319/02, *Petri Manninen*, para. 29, ECJ Case Law IBFD.
 31. *SECIL* (C-464/14), paras. 52-54, referring to FR: ECJ: 10 May 2012, Joined Cases C-338/11 to C-347/11, *Santander Asset Management SGIIC SA*, para. 23, ECJ Case Law IBFD.
 32. *SECIL* (C-464/14), para. 55, referring to *Haribo and Salinen* (C-437/08), para. 84.
 33. *SECIL* (C-464/14), para. 56 et seq.
 34. In *SECIL* (C-464/14), the Court explicitly uses the (narrow and specific) terms “tax evasion”, “tax fraud” and “evasion of taxes”, but, as is visible from the references, certainly means the broader case law on tax avoidance as in, for example, *Cadbury Schweppes* (C-196/04); UK: ECJ, 13 Mar. 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue*, paras. 72 and 74, ECJ Case Law IBFD; DE: ECJ, 17 Sept. 2009, Case C-182/08, *Glaxo Wellcome GmbH & Co. KG v. Finanzamt München II*, para. 89, ECJ Case Law IBFD; and *Itelcar* (C-282/12), para. 34. This translation confusion obviously stems from the French technical term “*évasion fiscale*”, which is better translated as “tax avoidance”.
 35. See, on the prevention of tax evasion and avoidance, for example, FR: ECJ, 11 Oct. 2007, Case C-451/05, *Européenne et Luxembourgeoise d’investissements SA v. Directeur général des Impôts, Direction des services généraux et de l’informatique and Ministère public*, para. 81, ECJ Case Law IBFD; and, for the effectiveness of fiscal supervision, for example, A (C-101/05), para. 55 and BE: ECJ, 5 July 2012, Case C-318/10, *Société d’investissement pour l’agriculture tropicale SA (SIAT) v. État Belge*, para. 36, ECJ Case Law IBFD.

Portuguese rules do not specifically target wholly artificial arrangements that do not reflect economic reality and the sole purpose of which is to avoid the tax normally due or to obtain a tax advantage),³⁶ the Court clarified its approach to the effectiveness of fiscal supervision in a third-country context:

- First, the Court confirmed that: “[...] movements between Member States and non-member States fall within a legal context different from that in force within the Union and that the framework for cooperation between the competent authorities of the Member States established by [the Mutual Assistance Directive]³⁷ does not exist between those authorities and the competent authorities of a non-member State where that State has not entered into any undertaking of mutual assistance”.³⁸
- Second, the Court reiterated settled case law that indicates that, where the legislation of a Member State makes advantageous tax treatment dependent on the satisfaction of requirements, the compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State, it is, in principle, legitimate for that Member State to refuse to grant that advantage if it proves impossible to obtain such information from that non-Member State.³⁹ The obligation of the non-Member State to provide information under a tax treaty can be sufficient to ensure effective fiscal supervision.⁴⁰

Under the Portuguese regime at issue in *SECIL*, eligibility under domestic law for (full or partial) deduction was dependent on the distributing company being subject to Portuguese corporate tax (article 46(1) and (8) of the Corporate Income Tax Code), a condition that the Court said the tax authorities must be able to verify. The Court then left it to the national court to determine whether the exchange of information provision in article 23 of the Portugal-Tunisia Income Tax Treaty (1999)⁴¹ enabled the Portuguese tax authorities to obtain from Tunisia the information that would enable them to verify this condition. If so, the denial of a full or partial deduction could not be justified by the need to ensure the effectiveness of fiscal supervision.⁴² No such tax treaty existed with Lebanon

36. *SECIL* (C-464/14), paras. 59-62.

37. Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Taxation of Insurance Premiums, EU Law IBFD, as amended by Council Directive 2006/98 of 20 November 2006 (OJ L 363, p. 129 (2006)), in force at the material time in the main proceedings, and Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), EU Law IBFD.

38. *SECIL* (C-464/14), para. 64, referring to *Haribo and Salinen* (C-436/08), paras. 65 and 66.

39. See, for example, *Rimbaud* (C-72/09), para. 44 and FI: ECJ, 19 July 2012, Case C-48/11, *Veronsaajien oikeudenvallontayksikkö v. A Oy*, para. 36, ECJ Case Law IBFD.

40. *SECIL* (C-464/14), para. 64, referring to DE: ECJ, 17 Oct. 2013, Case C-181/12, *Yvon Welte v. Finanzamt Velbert*, para. 63, ECJ Case Law IBFD.

41. *Port.-Tun. Income Tax Treaty*.

42. *SECIL* (C-464/14), paras. 67-68.

and thus a justification based on the effectiveness of fiscal supervision is available with regards to dividends from the Lebanese subsidiary.⁴³ The Court, however, also left it to the domestic court to determine whether a partial deduction would be available on the basis of another provision (article 48(11) of the Corporate Tax Code) that might not require such verification: in such an instance, the justification related to fiscal supervision would not apply⁴⁴ and, as a consequence, *SECIL* would be entitled to at least the 50% deduction.

2.4. The “grandfathering clause” in article 64(1) of the TFEU

Next, the Court had to establish whether or not an unjustified restriction may nevertheless be authorized under the “grandfathering clause” in article 64(1) of the TFEU. That clause “enshrines the power of the Member State, in its relations with non-member States, to apply restrictions on capital movements which come within the substantive scope of that provision, even though they contravene the principle of the free movement of capital under article 63(1) of the TFEU”.⁴⁵ According to article 64(1) of the TFEU, the provisions of article 63 are without prejudice to the application to non-Member States of any restrictions that existed on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets. The Court approached this analysis based on the two criteria of article 64(1) of the TFEU: the nature of the capital movement and the timing of any change.

With regard to the nature of the capital movement, the Court noted that the concept of “direct investment” was defined in the “old” Capital Movements Directive (88/361)⁴⁶ and concerns investments of any kind undertaken by natural or legal persons that 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

43. *Id.*, at para. 69.

44. Indeed, the ECJ left it to the national court to determine whether a deduction may be available based on another provision that foresees a 50% deduction when the income comes from profits that have not actually been taxed (art. 46(11) Corporate Income Tax Code), which might be applicable in situations in which the liability to tax of the distributing company in the state of residence cannot be verified. If so, the overriding reason in the general interest, based on the need to ensure the effectiveness of fiscal supervision, cannot be relied on to justify the restriction resulting from the refusal to grant the partial deduction provided for in art. 46(11) of the Corporate Income Tax Code, with regard to dividends originating in Tunisia and Lebanon. See *SECIL* (C-464/14), paras. 70-71.

45. *SECIL* (C-464/14), para. 86, referring to UK: ECJ, 12 Dec. 2006, Case C-446/04, *Test Claimants in the Franked Investment Income Group Litigation v. Commissioners of Inland Revenue*, para. 187, ECJ Case Law IBFD and AT: ECJ, 24 May 2007, Case C-157/05, *Winfried L. Holböck v. Finanzamt Salzburg-Land*, para. 39, ECJ Case Law IBFD.

46. See the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of art. 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ L 178, p. 5 (1988)).

activity.⁴⁷ As for shareholdings in new or existing undertakings, “direct investment” requires that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or in some other way, to participate effectively in the management of that company or in its control.⁴⁸ Moreover, article 64(1) of the TFEU may not only “grandfather” national measures that restrict establishment or investment as such, but also – as might be the case in *SECIL* – measures that restrict payments of dividends deriving from them.⁴⁹ To determine whether “direct investments” were involved, the Court focused on the size of the shareholdings in the Tunisian and Lebanese subsidiaries, i.e. 98.72% and 28.64%, respectively and concluded that such shareholdings were such as to enable the shareholder to effectively participate in the management or control of the distributing company and could, therefore, be regarded as a direct investment.⁵⁰

With regards to whether the restriction already “existed on 31 December 1993”, the Court noted that this criterion “presupposes that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date”.⁵¹ In relation to Tunisia and Lebanon, this was not affected by the fact that Portugal has subsequently introduced a tax benefit scheme for contractual investments in the Portuguese-speaking African countries and Timor-Leste.⁵² A Member State waives article 64(1), however, if: (1) it repeals the provisions that gave rise to the restriction in question (i.e. even an identical provision reintroduced later on would not be covered by article 64(1)),⁵³ or (2) adopts provisions that alter the logic underlying the earlier legislation. It acknowledged, however, that article 64(1) of the TFEU would still cover provisions introduced in 1994 or later which, in substance, are identical to previous legislation or which merely reduce or eliminate an obstacle to the exercise of Union rights and freedoms in earlier legislation.⁵⁴

The Court in *SECIL* then noted that a change in the logic of legislation can also be brought about by international agreements:

[A] Member State waives the power provided for in article 64(1) of the TFEU also where, without formally repealing or amending the existing rules, it concludes an international agreement, such as an association agreement, which provides, in a provision with direct effect, for a liberalisation of a category of capital referred to in article 64(1). That change in the legal framework must therefore be deemed to amount, in its effects on the possibility of invoking article 64(1) TFEU, to the introduction of

new legislation, since it is based on logic different from that of the existing legislation.⁵⁵

Hence, if the EC-Tunisia and EC-Lebanon Agreements (both of which were concluded after 31 December 1993) provided for a “liberalization of” the direct investment in question, Portugal could not rely on article 64(1) of the TFEU.⁵⁶

2.5. Interpretation of the EC-Tunisia and EC-Lebanon Agreements

Accordingly, the application of article 64(1) of the TFEU depended on whether or not the logic of the Portuguese legislation had been changed after 31 December 1993 by the EC-Tunisia and EC-Lebanon Agreements. To determine this, the Court had to interpret the EC-Tunisia and EC-Lebanon Agreements to see whether those agreements provided for a relevant liberalization of direct investment.⁵⁷ A brief summary of the Court’s extensive analysis is as follows:

- the provisions on capital movements in article 34 of the EC-Tunisia Agreement and article 31 of the EC-Lebanon Agreement had direct effect⁵⁸ and the situations in *SECIL* fell under those provisions,⁵⁹ so that those provisions could be relied on in a situation such as that in *SECIL* in relation to the tax treatment of those dividends in Portugal;
- the discriminatory tax treatment under the Portuguese legislation in *SECIL* constituted a restriction on the free movement of capital that was in principle prohibited by those provisions;⁶⁰ the prohibition was not limited by the specific “tax carve-outs” in article 89 of the EC-Tunisia Agreement or article 85 of the EC-Lebanon Agreement;⁶¹ and it was not grandfathered by article 33 of the EC-Lebanon Agreement (article 33(2));⁶²
- justifications under the rule of reason, specifically based on the need to preserve the effectiveness of fiscal supervision must also be allowed under the EC-Tunisia and EC-Lebanon Agreements, with the same effects as under articles 63 and 65 of the TFEU.⁶³

Hence, a refusal to grant a full or partial deduction of the dividends from the recipient company’s taxable amount was, in principle, prohibited by article 34 of the EC-Tunisia Agreement and article 31 of the EC-Lebanon Agreement, respectively, subject to being justified by overriding

47. *SECIL* (C-464/14), para. 75, referring to *Holböck* (C-157/05), paras. 33 and 34.

48. *SECIL* (C-464/14), para. 76, referring to *Holböck* (C-157/05), para. 35.

49. *SECIL* (C-464/14), para. 77, referring to *FII Group Litigation II* (C-35/11), para. 103.

50. *SECIL* (C-464/14), paras. 79-80.

51. *SECIL* (C-464/14), para. 81, referring to *A* (C-101/05), para. 48.

52. *SECIL* (C-464/14), paras. 83-84; see also AG Opinion in *SECIL* (C-464/14), paras. 159-163.

53. *SECIL* (C-464/14), para. 87, referring to *A* (C-101/05), para. 49.

54. *SECIL* (C-464/14), para. 88, referring to *Test Claimants in the FII Group Litigation* (C-446/04), para. 192 and *Holböck* (C-157/05), para. 41.

55. *SECIL* (C-464/14), para. 89.

56. *Id.*, at paras. 90-91.

57. For an extensive analysis of these provisions, see AG Opinion in *SECIL* (C-464/14), para. 58 et seq.

58. *SECIL* (C-464/14), paras. 97-104 (on the EC-Tunisia Agreement) and paras. 130-133 (on the EC-Lebanon Agreement).

59. *Id.*, at paras. 105-109 (on the EC-Tunisia Agreement) and paras. 134-136 (on the EC-Lebanon Agreement).

60. *Id.*, at paras. 111-114 (on the EC-Tunisia Agreement) and paras. 138-142 (on the EC-Lebanon Agreement).

61. *Id.*, at paras. 115-121 (on the EC-Tunisia Agreement) and paras. 143-152 (on the EC-Lebanon Agreement).

62. See for that interpretation of art. 33(2) of the EC-Lebanon Agreement *SECIL* (C-464/14), paras. 134-136.

63. *Id.*, at paras. 122-128 (on the EC-Tunisia Agreement) and paras. 153-155 (on the EC-Lebanon Agreement).

reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision.⁶⁴

The Court then returned to article 64(1) of the TFEU. It concluded that where the restriction under the respective EU-Mediterranean Agreements cannot be justified (for example, because information can be obtained under the Portugal-Tunisia Income Tax Treaty (1999)), then the EC-Tunisia and EC-Lebanon agreements (are deemed to)⁶⁵ have altered the logic of the Portuguese legislation in force in 1993. As such, Portugal cannot rely on the “grandfathering clause” of article 64(1) of the TFEU for restrictions on “direct investment” that “existed on 31 December 1993”, and the failure to extend a full (or partial) exemption to dividends from those states is a prohibited restriction on the free movement of capital.

2.6. Consequences

The Court provided guidance on the consequences of its findings. It confirmed that article 63 of the TFEU requires a Member State “which has a system for preventing economic double taxation as regards dividends paid to residents by other resident companies to accord equivalent treatment to dividends paid to residents by non-resident companies”.⁶⁶ This right of taxpayers is connected with the right to a refund of charges levied in a Member State in breach of the rules of Union law,⁶⁷ i.e. “reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it which relate directly to that tax”.⁶⁸ As the Court further noted, “the only exception to the right to repayment of taxes levied in breach of EU law is in a case in which a charge that was not due has been directly passed on by the taxable person to another person”.⁶⁹ In *SECIL*, therefore, Portugal is obliged to repay with interest the amounts collected in breach of articles 63 and 65 of the TFEU, article 34 of the EC-Tunisia Agreement and article 31 of the EC-Lebanon Agreement. The

64. Such justification is not, however, available in relation to dividends from the Tunisian subsidiary if the relevant information on the tax liability can be obtained by the Portuguese tax administration based on the exchange of information clause in the *Port.-Tun. Income Tax Treaty*. It may likewise not be available with regard to both dividends from the subsidiaries in Tunisia and Lebanon (where no tax treaty exists) if the provision granting a partial exemption can be applied in situations in which the tax liability of the companies distributing those dividends cannot be verified, a matter that it is for the referring court to determine. *SECIL* (C-464/14), paras. 157-162.

65. The English text (*SECIL* (C-464/14), para. 160) refers to a “deemed” change (“must be deemed to amount”). The original Portuguese version refers to the treaty change being given the same treatment, for purposes of art. 64(1) TFEU, as a domestic legislative change, as do other language versions (for example, the German *gleichzusetzen*). The Court obviously focuses the effect of the Agreements on the national rule and nothing turns on the difference in language.

66. *SECIL* (C-464/14), para. 163, referring to *Haribo and Salinen* (C-436/08), para. 60 and *FII Group Litigation II* (C-35/11), para. 38.

67. *SECIL* (C-464/14), para. 164, referring to FR: ECJ, 15 Sept. 2011, Case C-310/09, *Ministre du Budget, des Comptes publics et de la Fonction publique v. Accor SA*, para. 71, ECJ Case Law IBFD.

68. *SECIL* (C-464/14), para. 166, referring to RO: ECJ, 16 Oct. 2014, Case C-331/13, *Ilie Nicolae Nicula v. Administrația Finanțelor Publice a Municipiului Sibiu, Administrația Fondului pentru Mediu*, para. 28, ECJ Case Law IBFD.

69. *SECIL* (C-464/14), para. 165, referring to DK: ECJ, 6 Sept. 2011, Case C-398/09, *Lady & Kid A/S, Direct Nyt ApS, A/S Harald Nyborg Isenkræm- og Sportsforretning, KID-Holding A/S v Skatteministeriet*, para. 18 and *Accor* (C-310/09), paras. 72 and 74.

respective amounts correspond to the difference between the amount paid by SECIL and the amount it should have paid pursuant to article 46(1), 46(8) or 46(11) of the CIRC as if the dividends distributed by the third-country subsidiaries had been paid by a company established in Portugal.⁷⁰

3. Comments

The Court’s decision sets out a precise and instructive analysis of the application of article 63 of the TFEU in third-country situations. This Opinion Statement aims to highlight some of the issues it analysed. The starting point is that article 63(1) of the TFEU is a “special” freedom insofar as it extends the prohibition against restrictions to capital movements “between Member States and third countries”, while articles 45, 49 and 56 on workers, establishment and services are limited to EU situations. This non-reciprocal liberalization pursues objectives other than that of establishing the internal market, such as ensuring the credibility of the single Union currency on world financial markets and maintaining financial centres with a worldwide dimension within the Member States.⁷¹

Sometimes, however, investments by taxpayers could be viewed as an establishment and also as a capital movement, for example, investment in companies and the subsequent flow of dividends.⁷² It is now well settled case law that the “purpose”⁷³ of the legislation concerned must be taken into consideration in determining whether national legislation falls within the scope of one of the freedoms of movement.⁷⁴ In this regard, four comments can be made:

- (1) Focusing on the taxation of dividends and capital gains, as explained above, national legislation that applies only to those shareholdings that enable the

70. *SECIL* (C-464/14), paras. 167-168.

71. See *A* (C-101/05), para. 31; NL: ECJ, 20 May 2008, Case C-194/06, *Staatssecretaris van Financiën v. Orange European Smallcap Fund NV*, para. 87, ECJ Case Law IBFD.

72. The Court assumes that the nomenclature of the capital movements set out in Annex I to Council Directive 88/361 has indicative value of what a “capital movement” is (see, for example, *Welte* (C-181/12), para. 20) and that returns on investments (for example, the receipt of dividends) are likewise covered by article 63 TFEU (see already, for example, NL: ECJ, 6 June 2000, Case C-35/98, *Staatssecretaris van Financiën v. B.G.M. Verkooijen*, para. 29, ECJ Case Law IBFD).

73. It should be noted briefly that the English version of the decision (for example, paras. 31 and 34) uses the term “purpose” and also refers to the “intention” of the national legislation (para. 32), while other language versions consistently use the term “object” (for example, *Gegenstand* in German, *objet* in French, *objeto* in Spanish, *voorwerp* in Dutch, *objeto* in Portuguese, *oggetto* in Italian) or refer to the scope of applicability of the national rule (for example, “*nationale Regelung, die [...] anwendbar ist*” in German). It is not entirely clear if this is a relevant difference in the eyes of the Court and would imply either a subjective or an objective approach and if the former should be evaluated (for example, through the use preparatory materials, etc.).

74. See, for example, *Cadbury Schweppes* (C-196/04), paras. 31-33; *ACT Group Litigation* (C-374/04), paras. 37-38; *Test Claimants in the FII Group Litigation* (C-446/04), para. 36; *Test Claimants in the Thin Cap Group Litigation* (C-524/04), paras. 26-34; DE: ECJ, 10 May 2007, Case C-492/04, *Lasertec Gesellschaft für Stanzformen GmbH v. Finanzamt Emmendingen*, para. 19, ECJ Case Law IBFD; *Holböck* (C-157/05), para. 22; DE: ECJ, 6 Nov. 2007, Case C-415/06, *Stahlwerk Ergste Westig GmbH v. Finanzamt Düsseldorf-Mettmann*, para. 13, ECJ Case Law IBFD; *KBC Bank NV* (C-439/07 and C-499/07), para. 68; *Glaxo Wellcome* (C-182/08), para. 36; *Haribo and Salinen* (C-436/08), para. 34; and *Emerging Markets Series* (C-190/12), para. 31.

holder to exert a definite influence on the company's decisions and to determine its activities falls exclusively within the scope of article 49 of the TFEU on freedom of establishment (i.e. no protection in third-country situations),⁷⁵ while national provisions that apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital.⁷⁶

- (2) To the extent, however, that national legislation applies to all shareholdings, the Court's older case law had raised doubts as to whether or not it is necessary that the shareholding in question not be a controlling shareholding in order for article 63 of the TFEU to apply. The Court uses such a fact-led approach to identify the relevant freedom in intra-EU situations⁷⁷ (where it does not really matter which freedom applies) and had also applied it in *Burda* (Case C-284/06)⁷⁸ and *KBC Bank* (Joined Cases C-439/07 and C-499/07)⁷⁹ with regard to third-country situations. This would lead to the strange result that legal protection in third-country situations would decrease with the size of a shareholding and that article 63 of the TFEU could be treated as secondary to article 49 of the TFEU in a situation in which the latter does not even apply. Furthermore, it would be at odds with article 64(1) of the TFEU, which makes it apparent that article 63 of the TFEU covers, in principle, capital movements involving establishment or direct investment.⁸⁰ The more recent decisions in *FII*

Group Litigation 2,⁸¹ *Itelcar*,⁸² *Emerging Markets Series of DFA Investment Trust Company* (Case C-190/12),⁸³ *Kronos*⁸⁴ and *SECIL*⁸⁵ have, however, overcome these doubts (at least in relation to dividends) and clearly demonstrated that only the Union-law characterization of the national measure⁸⁶ and not the facts are decisive as to the applicable freedom when it comes to third-country situations: national legislation on the tax treatment of dividends that does not apply exclusively to situations in which the parent company exercises decisive influence over the company paying the dividends must be assessed in light of article 63 of the TFEU (which is not excluded by article 49 of the TFEU), irrespective of the size of its shareholding in the company paying the dividends.

- (3) In third-country situations, therefore, where it is apparent from the purpose of national legislation that it can only apply to shareholdings that enable the holder to exert a definite influence on the decisions of the company concerned and to determine its activities, neither article 49 of the TFEU nor article 63 of the TFEU may be relied upon.⁸⁷ Relying on the "purpose" of national legislation to identify the applicable freedom is, however, not an easy task and additionally triggers the question of when a holding gives the shareholder "definite influence on the company's decisions [...] allowing them to determine its activities".⁸⁸ While investment in a branch generally triggers article 49 of the TFEU⁸⁹ and the Court's case law seems to imply that holding requirements of 100%,⁹⁰ 90%,⁹¹ 75%,⁹² 66.66%,⁹³ 65%,⁹⁴ more than

75. See, for example, *Cadbury Schweppes* (C-196/04), para. 31 et seq.; *Test Claimants in the Thin Cap Group Litigation* (C-524/04), paras. 33, 34, 101 and 102; *Lasertec* (C-492/04), para. 22 et seq. (however, noting in para. 23 that there was in fact a two thirds holding); SE: ECJ, 10 May 2007, Case C-102/05, *A and B*, para. 25 et seq.; FI: ECJ, 18 July 2007, Case C-231/05, *Oy AA*, para. 22 et seq., ECJ Case Law IBFD; *Stahlwerk Ergste Westig* (C-415/06), para. 14 et seq. (concerning permanent establishments); *Haribo and Salinen* (C-436/08), para. 35; DE: ECJ, 19 July 2012, Case C-31/11, *Marianne Scheuermann v. Finanzamt Bremerhaven*, para. 30, ECJ Case Law IBFD (however, noting in para. 31, that there was in fact a 100% holding); and *FII Group Litigation II* (C-35/11), paras. 91 and 98.

76. See, for example, *Glaxo Wellcome* (C-182/08), paras. 40 and 45-52; *Haribo and Salinen* (C-436/08), para. 35; *FII Group Litigation* (C-35/11), para. 92; *SECIL* (C-464/14), para. 32. It should be noted, however, that earlier case law had assumed a (potential) concurrent application of both freedoms in these situations; see, for example, *ACT Group Litigation* (C-374/04), paras. 37-38; *Test Claimants in the FII Group Litigation* (C-446/04), paras. 36, 80 and 142; *Holböck* (C-157/05), para. 24; DE: ECJ, 26 June 2008, Case C-284/06, *Burda Verlagsbeteiligungen GmbH v. Finanzamt Hamburg-Am Tierpark*, para. 71, ECJ Case Law IBFD; and *KBC Bank NV* (C-439/07 and C-499/07), para. 69.

77. See for the delimitation of the freedoms based on the factual size of a shareholding in internal market situations where potentially two freedoms apply; for example, *Burda GmbH* (C-284/06), para. 71 et seq.; FI: ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, para. 33 et seq., ECJ Case Law IBFD; and BE: ECJ, 21 Jan. 2010, Case C-311/08, *Société de Gestion Industrielle SA (SGI) v. Belgian State*, para. 33 et seq., ECJ Case Law IBFD.

78. *Burda GmbH* (C-284/06), para. 72 et seq.

79. *KBC Bank NV* (C-439/07 and C-499/07), para. 68 et seq. (holding that "to the extent to which the holdings in question confer on their owner a definite influence over the decisions of the companies concerned and allow it to determine their activities, it is the provisions of the Treaty relating to freedom of establishment which apply").

80. See on that point *FII Group Litigation II* (C-35/11), paras. 101-102.

81. *Id.*, at para. 99.

82. *Itelcar* (C-282/12), para. 16 et seq.

83. *Emerging Markets Series* (C-190/12), para. 30.

84. *Kronos International* (C-47/12), para. 37 et seq.

85. *SECIL* (C-464/14), para. 33.

86. See *infra* section 3., point 3.

87. See, for example, *FII Group Litigation II* (C-35/11), paras. 91 and 98.

88. See for that criterion *Cadbury Schweppes* (C-196/04), para. 31.; *Test Claimants in the Thin Cap Group Litigation* (C-524/04), para. 27 and *Glaxo Wellcome* (C-182/08), para. 47.

89. *Stahlwerk Ergste Westig* (C-415/06), para. 14 et seq. However, investments in partnerships may also be covered by art. 63 TFEU; see for intra-EU situations, for example, DE: ECJ, 6 Dec. 2007, Case C-298/05, *Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt*, ECJ Case Law IBFD and AT: ECJ, 23. Jan. 2014, Case C-164/12, *DMC Beteiligungsgesellschaft mbH v. Finanzamt Hamburg-Mitte*, ECJ Case Law IBFD.

90. NL: ECJ, 13 Apr. 2000, Case C-251/98, *C. Baars v. Inspecteur der Belastingdienst Particulieren/Ondernemingen Gorinchem*, para. 21, ECJ Case Law IBFD; DE: ECJ, 5 Nov. 2002, Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, para. 70, ECJ Case Law IBFD; NL: ECJ, 7 Sept. 2006, Case C-470/04, *N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo*, para. 24 et seq., ECJ Case Law IBFD; *ACT Group Litigation* (C-374/04), para. 39; *Test Claimants in the FII Group Litigation* (C-446/04), para. 37; *Aberdeen* (C-303/07), para. 33 et seq.; see also DE: ECJ, 6 Dec. 2007, Case C-298/05, *Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld-Innenstadt*, para. 30, ECJ Case Law IBFD (concerning holdings in a partnership).

91. *Oy AA* (C-231/05), para. 21 et seq.

92. *Test Claimants in the Thin Cap Group Litigation* (C-524/04), para. 32 et seq.

93. *Lasertec* (C-492/04), para. 23.

94. *SGI* (C-311/08), para. 34 et seq.

50%,⁹⁵ exactly 50%,⁹⁶ 34%⁹⁷ or even 25%⁹⁸ will also trigger the exclusive application of article 49 of the TFEU, a holding requirement of 10% is not enough to exclude the application of article 63 of the TFEU. As the Court confirmed in *Haribo and Salinen* (Case C-436/08),⁹⁹ *Itelcar*,¹⁰⁰ *Kronos*¹⁰¹ and *SECIL*,¹⁰² a domestic threshold of 10% excludes from the scope of the fiscal advantage those shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking, but does not in itself make the relevant tax benefit (for example, the deduction at issue in *SECIL*) applicable only to those shareholdings that enable the holder to exert a definite influence on the company's decisions and to determine its activities. This is because "a holding of such a size does not necessarily imply that the owner of the holding exerts a definite influence over the decisions of the company in which it is a shareholder".¹⁰³

- (4) The Court's case law also consistently states "that, since the Treaty does not extend freedom of establishment to non-member States, it is important to ensure that the interpretation of article 63(1) of the TFEU as regards relations with those states does not enable economic operators who fall outside the territorial scope of freedom of establishment to profit from that freedom".¹⁰⁴ Article 63(1) of the TFEU should, therefore, not serve to apply the freedom of establishment "through the back door".¹⁰⁵ In all direct tax cases so far, however, the Court has not yet identified such a risk because the tax legislation under consideration did "not cover the conditions of access to the market of a non-member State by a company resident in Portugal or to the market in a Member State by a company from a non-member State".¹⁰⁶

Even though article 63 of the TFEU constitutes a unilateral "liberalization" by the Member States in relation to movement of capital with third countries, the concept of "restrictions" is to be understood in the same manner in relations between Member States and third countries as it is understood with regard to relations between Member States.¹⁰⁷ If a restriction is found in a third-country situation, the Court proceeds with the well-known analy-

95. *Cadbury Schweppes* (C-196/04), paras. 6 and 32.

96. *Burda GmbH* (C-284/06), para. 70.

97. *SGI* (C-311/08), para. 34 et seq.

98. *Lasertec* (C-492/04), para. 21 and *Scheunemann* (C-31/11), para. 25 et seq.

99. *Haribo and Salinen* (C-436/08), para. 36.

100. *Itelcar* (C-282/12), para. 22.

101. *Kronos International* (C-47/12), para. 35.

102. *SECIL* (C-464/14), para. 40.

103. *Id.*, at para. 40.

104. *Id.*, at para. 42.

105. See on that issue, for example, *FII Group Litigation II* (C-35/11), para. 100; *Kronos International* (C-47/12), para. 53; *Emerging Markets Series* (C-190/12), para. 31 and *SECIL* (C-464/14), paras. 42-43.

106. See *SECIL* (C-464/14), para. 43 and also, for example, *FII Group Litigation II* (C-35/11), para. 100.

107. See *A* (C-101/05), para. 38; *Orange European Smallcap Fund* (C-194/06), para. 88.

sis of comparability,¹⁰⁸ justifications¹⁰⁹ and proportionality.¹¹⁰ Due to the different degree of legal integration, however, movements of capital to or from third countries still take place in a different legal context from that which occurs within the European Union,¹¹¹ specifically because of the existence of administrative cooperation within the European Union in the direct tax area.¹¹² This may lead to differences with regard to the comparability analysis or a potential justification.¹¹³ As is evidenced by, for example, *SECIL*, the need for effective fiscal supervision may be a valid ground of justification in a third-country context if the tax advantage depends on the satisfaction of requirements, the compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State.¹¹⁴ Conversely, such a justification is not available where an obligation for the non-Member State to provide information results from an exchange of information provision in a tax treaty (for example, a standard exchange of information provision along the lines of article 26 of the OECD Model (2014))¹¹⁵ or any other agreement (for example, a Tax Information Exchange Agreement or the OECD/Council of Europe Multilateral Convention on Exchange of Information).¹¹⁶ The Court, however, has not yet explicitly addressed a situation in which the third country does not, in fact, comply with its obligation to provide the relevant information.

Moreover, even if article 63 of the TFEU applies in principle in a third-country situation, article 64(1) of the TFEU:¹¹⁷

[...] enshrines the power of the Member State, in its relations with non-member States, to apply restrictions on capital movements which come within the substantive scope of that provision, even though they contravene the principle of the free movement of capital laid down under article 63(1) of the TFEU.

It is also clear from the Court's settled case law that the tax legislation of Member States is capable of falling within article 64(1) of the TFEU.¹¹⁸ In this regard, two comments can be made:

108. See, for example, *Test Claimants in the FII Group Litigation* (C-446/04), para. 170 and *SECIL* (C-464/14), para. 54 et seq.

109. *Test Claimants in the FII Group Litigation* (C-446/04), paras. 171-172; *A* (C-101/05), paras. 28 et seq.; *Orange European Smallcap Fund* (C-194/06), para. 89 et seq.; and *SECIL* (C-464/14), para. 56 et seq.

110. For example, *SECIL* (C-464/14), para. 56 et seq.

111. See *A* (C-101/05), para. 36; *Orange European Smallcap Fund* (C-194/06), para. 89; *Haribo and Salinen* (C-436/08), paras. 65 and 66; and *SECIL* (C-464/14), para. 64.

112. For example, the Directive on Administrative Cooperation in the Field of Taxation (2011/16), *supra* n. 37.

113. *A* (C-101/05), para. 38; *Test Claimants in the FII Group Litigation* (C-446/04), paras. 170-171; and *Orange European Smallcap Fund* (C-194/06), paras. 89-90.

114. See, for example, *Rimbaud* (C-72/09), para. 44 and *A Oy* (C-48/11), para. 36.

115. *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD.

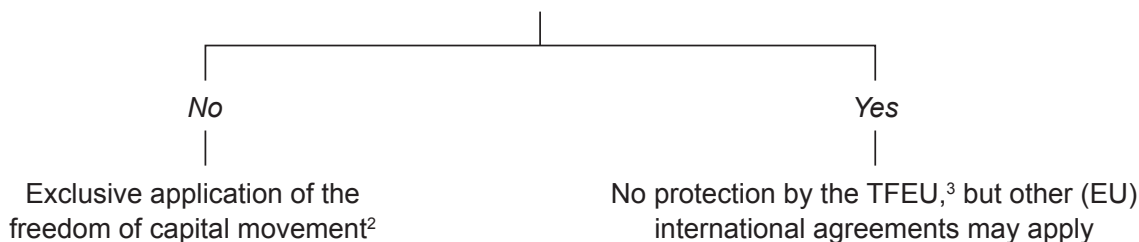
116. *SECIL* (C-464/14), para. 64, referring to *Welte* (C-181/12), para. 63.

117. *SECIL* (C-464/14), para. 86, referring to *Test Claimants in the FII Group Litigation* (C-446/04), para. 187 and *Holböck* (C-157/05), para. 39.

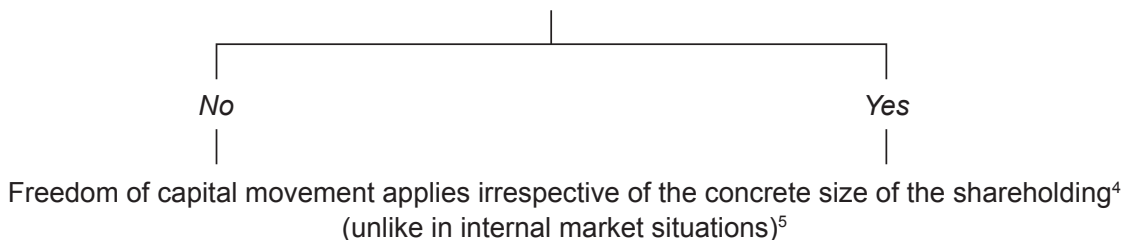
118. See, for example, *Test Claimants in the FII Group Litigation* (C-446/04), paras. 174-196; *Holböck* (C-157/05), paras. 37-45; and DE: ECJ, 21 May 2015, Case C-560/13, *Finanzamt Ulm v. Ingeborg Wagner-Raith als Rechtsnachfolgerin der verstorbenen Maria Schweizer*, para. 41, ECJ Case Law IBFD.

Diagram 1: Third-country situations

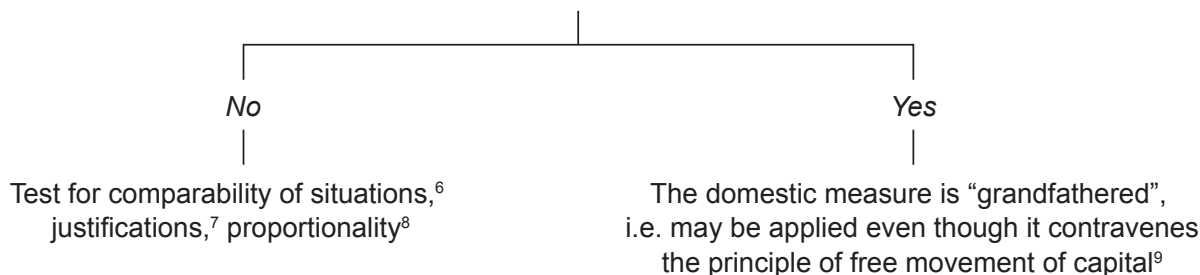
Does the restrictive domestic measure cover only situations of definitive influence (for example, branches,¹ controlling shareholdings)?



Does the transaction factually facilitate an establishment (for example, a controlling shareholding)?



Is it an “old” restriction (i.e. one existing on 31 December 1993) regarding direct investment, financial services, etc. under article 64(1) of the TFEU?



1 See, *Glaxo Wellcome* (C-182/08), paras. 40 and 45-52; *Haribo and Salinen* (C-436/08), para. 35; *FII Group Litigation II* (C-35/11), para. 92 and *SECIL* (C-464/14), para. 32.
 2 See, for example, *Cadbury Schweppes* (C-196/04), para. 31 et seq.; *Test Claimants in the Thin Cap Group Litigation* (C-524/04), paras. 33, 34, 101 and 102; *Lasertec* (C-492/04), para. 22 et seq. (noting in para. 23, however, that there was in fact a two thirds holding); *A and B* (C-102/05), para. 25 et seq.; *Oy AA* (C-231/05), para. 22 et seq.; *Stahlwerk Ergste Westig GmbH* (C-415/06), para. 14 et seq. (concerning permanent establishments); *Haribo and Salinen* (C-436/08), para. 35; *Marianne Scheunemann* (C-31/11), para. 30 (noting in para. 31, however, that there was in fact a 100% holding) and *FII Group Litigation II* (C-35/11), paras. 91 and 98.
 3 *Glaxo Wellcome* (C-182/08), para. 49 et seq.; *FII Group Litigation II* (C-35/11), para. 99; *Itelcar* (C-282/12), para. 16 et seq.; *Emerging Markets Series* (C-190/12), para. 27 et seq.; *Kronos International* (C-47/12), para. 37 et seq.; and *SECIL* (C-464/14), para. 35. For a different position with regard to third-country situations, see, however, *Burda GmbH* (C-284/06), para. 72 et seq. and *KBC Bank NV* (C-439/07 and C-499/07), para. 68 et seq.; also relying on the factual size of the holding, for example, *Test Claimants in the FII Group Litigation* (C-446/04), para. 38 et seq.
 4 See for a delimitation of the freedoms based on the factual size of a shareholding in internal market situations where potentially two freedoms apply, for example, *Burda GmbH* (C-284/06), para. 71 et seq.; *Aberdeen* (C-303/07), para. 33 et seq.; and *SGL* (C-311/08), para. 33 et seq.
 5 See, for example, *Test Claimants in the FII Group Litigation* (C-446/04), para. 170 and *SECIL* (C-464/14), para. 54 et seq.
 6 *Test Claimants in the FII Group Litigation* (C-446/04), paras. 171-172; *A* (C-101/05), para. 28 et seq.; *Orange European Smallcap Fund* (C-194/06), para. 89 et seq. and *SECIL* (C-464/14), para. 56 et seq.
 7 For example, *SECIL* (C-464/14), para. 56 et seq.
 8 *Test Claimants in the FII Group Litigation* (C-446/04), para. 174 et seq.; *Holböck* (C-157/05), para. 32 et seq.; *A* (C-101/05), para. 45 et seq.; *Orange European Smallcap Fund* (C-194/06), para. 98 et seq.; and *Wagner-Raith* (C-560/13), para. 73 et seq.
 9 *Stahlwerk Ergste Westig GmbH* (C-415/06), para. 14 et seq. Investments in partnerships may also be covered by art. 63 TFEU; see for intra-EU situations, for example, *Columbus Container Services* (C-298/05) and *DMC Beteiligungsgesellschaft mbH* (C-164/12).

- (1) According to this “grandfathering clause”, the provisions of article 63 shall be without prejudice to the application to third countries of any restrictions that existed on 31 December 1993¹¹⁹ under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment (including in real estate),¹²⁰ the freedom of establishment, the provision of financial services¹²¹ or the admission of securities to capital markets. *SECIL* has given useful guidance on the type of capital movement in question (for example, a “direct investment”) and also on whether the restriction “existed on 31 December 1993”, both of which must be satisfied for article 64(1) of the TFEU to apply.
- (2) What *SECIL* has clarified is that (i) the notion of “direct investment” (i.e. the possibility to participate effectively in the management of a company or in its control) refers to the concrete investment made by the taxpayer and not which investments are intended to be addressed by the domestic rule (for example, shareholdings of 98.72% and 28.64%, respectively, are

-
119. For an analysis of this criterion, see, for example, *Test Claimants in the FII Group Litigation* (C-446/04), para. 189 et seq.; *Holböck* (C-157/05), para. 39 et seq.; A (C-101/05), para. 47 et seq.; *Emerging Markets Series* (C-190/12); *SECIL* (C-464/14), para. 81 et seq. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date is 31 Dec. 1999.
120. *Test Claimants in the FII Group Litigation* (C-446/04), para. 174 et seq.; *Holböck* (C-157/05), para. 32 et seq.; A (C-101/05), para. 46 et seq.; *Orange European Smallcap Fund* (C-194/06), para. 98 et seq.; and *SECIL* (C-464/14), para. 75 et seq.
121. See *Wagner-Raith* (C-560/13) (concerning taxation of income derived from third-country investment funds).

sufficient);¹²² and that (ii) the subsequent conclusion of directly effective international agreements (including Euro-Mediterranean Agreements) may alter the logic of domestic legislation such that, even though unchanged on its face, the restriction at issue did not exist on 31 December 1993.¹²³

The path of analysis for third-country situations may therefore be summarized as outlined in Diagram 1.

4. The Statement

The Confédération Fiscale Européenne welcomes the precise and instructive decision in *SECIL*. The decision clarifies the application of article 63 of the TFEU on the free movement of capital to tax legislation that denies tax benefits to dividends originating in non-EU Member States and demonstrates that Member States may not rely on article 64(1) of the TFEU, i.e. the “grandfathering clause”, if the logic of their tax legislation changed after 31 December 1993, which change can also be brought about through the conclusion of directly applicable international agreements (for example, Euro-Mediterranean Agreements).

The Confédération Fiscale Européenne appreciates the further clarification that provisions with direct effect in EU international agreements with third countries, such as the Euro-Mediterranean Agreements, can create economic rights that can be relied upon by taxpayers.

-
122. *SECIL* (C-464/14), paras. 79-80.
123. *Id.*, at paras. 89-91.