

The borderline between the free movement of capital and the other fundamental freedoms

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The Issue



• Free movement of capital in Art 63 TFEU:

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

• Other fundamental freedoms:

limited to intra-EU situations (except the free movement of payments)

Where to draw the line?





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Introduction



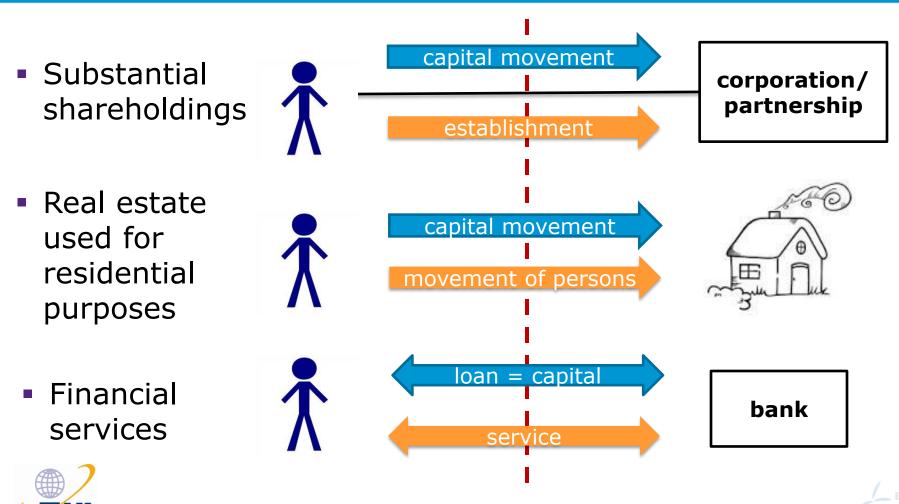
- Free movement of capital has a very broad substantive scope: all transactions in connection with assets/property (as a rule not subject to economic depreciation), in particular transfer of ownership, investment in financial assets and income thereof
- Applying a fundamental freedom requires that:
 (i) the **facts** of the case are covered *and* (ii) that a **causal link** of the national measure to the rights guaranteed by the fundamental freedom exists
- Exclusive vs parallel





Overlapping areas





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Solving the conflict



The free movement of capital and the fundamental freedoms focusing on persons are in a **normative conflict in third-country cases** → Decision in favour of **one** provision on a case-by-case basis

- Conflict of norms:
 - Free movement of capital: unilateral liberalization obligation in third-country situations, confirmed in Art 64(1) TFEU
 - Free movement of persons: no liberalization obligation in third-country situations, but sovereignty for the Member States, well-considered decision (see ECJ opinion 1/94)
- General priority to one freedom (or "parallel/simultaneous" application) not convincing





Solving the conflict



The conflict of the free movement of capital and the free movement of persons should be solved by **relying on the national measure under dispute (not the facts!)**

- Which areas should be unilaterally liberalized vis-á-vis third countries?
 - Teleological background: unclear
 - Historical context: GATS: limitations on "market access"
 - Systematic difference: movement of objects vs subjects
- Overall delimiting criterion is the "market access" of persons or the access to the social life (see *Fidium Finanz* and *FII GLO 2*)
- Focusing on the facts would limit the scope of the FoC in a disproportional manner (*FII GLO 2*); major difficutlies in case of real estate, financial services





Solving the conflict



In the area of tax law the **substantive scope** of the national measure under dispute should serve as benchmark for the delimitation

- Tax law does not provide conditions for the market access
- Subject matter seems not to be of any help (sovereignty in tax policy)
- Substantive scope may show the intention of the national legislator
- No protection by the free movement of capital, if national measure is limited to the overlapping area:
 - Only shareholdings with "definite influence" (= establishment)
 - Only real estate which is used for own residential purposes
 - Financial services? Only measures of commercial/supervisory law?
- **Protection** by the free movement of capital, if national measure covers more than overlapping area and is, hence, targeted at capital movements



Points for discussion



- Overlapping areas exist between the free movement of capital and the free movement of persons (in particular substantial shareholdings, real estate used for residential purposes, financial services) if a causal link of the national measure under dispute to the fundamental freedom can be established
- 2. The **conflict** between the free movement of capital and the fundamental freedoms focusing on persons in a third-country case should be solved by relying on the national **measure under dispute (not the facts)**
- 3. Overall delimiting criteria are the **"market access of persons**" and the intention of the national legislator behind a tax measure which is reflected by the **substantive scope of the tax measure**

 \rightarrow no protection exists if national measure is limited to cases which are covered by the freedom of establishment, the free movement of workers and/or the free movement of EU citizens



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Thank you! Questions?





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