

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

EATLP Congress, May 2015

Karoline Spies

- **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 **Member States and third countries** shall be prohibited.“
- **Other fundamental freedoms:**
limited to intra-EU situations
(except the free movement of payments)

Where to draw the line?

- 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

- Substantial shareholdings



capital movement

establishment

**corporation/
partnership**

- Real estate used for residential purposes



capital movement

movement of persons



- Financial services



loan = capital

service

bank

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-à-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 difficulties 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

- 1. 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
- 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)**
- 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**
→ 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

Thank you! Questions?



VIENNA UNIVERSITY OF
ECONOMICS AND BUSINESS

**INSTITUTE FOR AUSTRIAN AND
INTERNATIONAL TAX LAW**

Welthandelsplatz 1, 1020 Vienna, Austria

Dr. Karoline Spies

T +43-1-313 36-4343

F +43-1-313 36-730

karoline.spies@wu.ac.at

www.wu.ac.at/taxlaw