CONFEDERATION FISCALE EUROPEENNE

Opinion Statement ECJ-TF 1/2017

on the judgment of the Court of Justice of the EU of 24 November 2016 in Case C-464/14, *SECIL*, concerning the free movement of capital and third countries

Prepared by the CFE ECJ Task Force

Submitted to the European Institutions in February 2017

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This is an Opinion Statement prepared by the CFE ECJ Task Force[1] on Case C-464/14, SECIL*, in which the 5th Chamber of the Court of Justice of the European Union (ECJ) delivered its judgment on 24 November 2016,[2] following the Opinion of Advocate General Wathelet of 27 January 2016.[3] 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 judgment, the Court not only clarified the scope and impact of the Treaty provisions on free movement of capital but also the legal ramifications of the Euro-Mediterranean Agreements with Lebanon and Tunisia.*

Should the reader have any questions please do not hesitate to contact Mary Dineen CFE Fiscal Officer or Georg Kofler Chair of the ECJ Taskforce at brusselsoffice@cfe-eutax.org

I. Background and Issues

1. At issue in *SECIL* were the Portuguese rules on the avoidance of economic double taxation of inter-company dividends. In briefest summary, those 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 Corporation Tax Act): the full deduction additionally required a direct holding of at least 10% or an acquisition value of € 20M (Article 48(1)(c) of the Corporation Tax Act). The full deduction would, however, be reduced by 50% when the income derived from profits that had not been taxed (Article 48(11) of the Corporation Tax Act).
   - While Portuguese tax law also extended this treatment to distributions from qualifying EU subsidiaries, it did not apply the same treatment for dividends from third-country subsidiaries.

2. 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 those 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 Treaty provisions on the free movement of capital (Articles 63 to 65 TFEU) or the Euro-Mediterranean Agreements with Lebanon[4] and Tunisia respectively.[5] 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).

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[2] EU:C:2016:896.

[3] EU:C:2016:52.

[4] 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, [2006] OJ L 143, p. 1.

[5] 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, [1998] OJ L 97, p. 1.

3. The referring Portuguese court in *SECIL* phrased its questions so as to raise the issue of the concurrent applicability of the provisions of the TFEU and of the Euro-Mediterranean Agreements. While AG Wathelet provided a lengthy analysis of the relationship between those provisions,[6] the Court started with the broad principle of Article 63 TFEU, which lays down a clear and unconditional prohibition of discriminatory restrictions of the free movement of capital between the EU and third countries that can be relied upon before national courts,[7] and then seems to have considered the Euro-Mediterranean Agreements only to address whether Portugal could rely on the "grandfathering" clause for pre-1994 restrictions, in Article 64 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).[8]
   - Second, it addressed whether the tax treatment of dividends paid to that beneficiary company constituted a restriction within the meaning of Article 63 TFEU (yes, it did)[9] and whether such a restriction was justified, specifically by the need to ensure the effectiveness of fiscal supervision (possibly).[10]
   - Third, as Articles 63 and 65 TFEU potentially precluded the taxation of the dividends in question, the Court considered whether Portugal could rely on Article 64(1) 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 that (yes, it could).[11]
   - 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).[12]
   - Finally, the Court explained the consequences of all those issues for the main proceedings.[13]

4. The Court's judgment in *SECIL* is precise and instructive. Not only does it clarify the scope of the free movement 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 those agreements and also the Association Agreements and Partnership and Cooperation Agreements in other areas of law,[14] *SECIL* makes it clear for the first time that those agreements contain directly effective free movement provisions which can be invoked by taxpayers against discrimination in Member States' direct tax systems. *SECIL* is therefore a significant addition to the existing body of direct taxation case-law for capital movements to or from third countries, which prior to *SECIL* the Court had developed only based on the worldwide

[6] See Opinion of AG Wathelet, 27 January 2016, Case C-464/14, *SECIL*, EU:C:2016:52, paras 31 et seq.

[7] See ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 24, referring to ECJ, 14 December 1995, Joined Cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera and Others*, EU:C:1995:451, paras 41 and 47, ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, paras 21 and 28, and ECJ, 4 June 2009, Joined Cases C-439/07 and C-499/07, *KBC Bank NV*, EU:C:2009:339, para. 66.

[8] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 31-44.

[9] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 45-51.

[10] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 52-72.

[11] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 73-92.

[12] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 93-96, paras 97-129 (on the EC-Tunisia agreement) and paras 130-156 (on the EC-Lebanon agreement).

[13] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 157-169.

[14] See, with further references, Opinion of AG Wathelet, 27 January 2016, Case C-464/14, *SECIL*, EU:C:2016:52, paras 33-36.

effect of Article 63 TFEU, with regard to Article 40 of the EEA Agreement,[15] and in respect of movements of capital between a Member State and the overseas countries and territories (OCTs).[16]

II. The Judgment of the Court

II.1. Applicability of Article 63 TFEU

5. The free movement of capital in Article 63 TFEU is the only free movement provision that extends to third countries. It is therefore, and unlike, e.g. Article 49 TFEU on the freedom of establishment, not limited to EU-EU situations. The Court therefore had to determine whether Article 63 TFEU was applicable, or Article 49 TFEU instead, 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:[17] Within the scope of Article 49 TFEU was national legislation intended to apply only to shareholdings which enable the holder to exert a definite influence on the company's decisions and to determine its activities. Article 63 TFEU applied 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.[18] This leaves the question of other shareholdings, and legislation that does not clearly fall within one of those two categories.

6. In addressing this in *SECIL*, the Court followed *FII Group Litigation 2*,[19] *Itelcar*[20] and *Kronos*[21], demonstrating that the national legislation, and not the facts, is decisive when 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 TFEU (which is not excluded by Article 49 TFEU), irrespective of the size of its shareholding in the distributing company established in a non-member State.[22] In *SECIL* the Portuguese legislation was not intended to apply exclusively to situations in which the recipient company had a decisive influence over the distributing company (and also the 10% direct holding required for a full deduction did not restrict the rule to such situations[23]). Accordingly 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.

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[15] See with regard to Article 40 of the EEA Agreement, e.g., ECJ, 28 October 2010, Case C-72/09, *Établissements Rimbaud SA*, EU:C:2010:645; ECJ, 6 October 2011, Case C-493/09, *Commission v Republic*, EU:C:2011:635; ECJ, 20 October 2011, Case C-284/09, *Commission v Germany*, EU:C:2011:670, paras 95 et seq.; ECJ, 25 October 2012, Case C‑387/11, *Commission v Belgium*, EU:C:2012:670, para. 88; ECJ, 8 November 2012, Case C-342/10, *Commission v Finland*, EU:C:2012:688, paras 53-54.

[16] See for these issues, e.g., ECJ, 5 June 2014, Joined Cases C‑24/12 and C‑27/12, *X BV and TBG Limited*, EU:C:2014:1385.

[17] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 31.

[18] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 32 and 33, referring to ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paras 91 and 92.

[19] ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 99.

[20] ECJ, 3 October 2013, Case C‑282/12, *Itelcar*, EU:C:2013:629, paras 16 et seq.

[21] ECJ, 11 September 2014, Case C‑47/12, *Kronos International Inc*., EU:C:2014:2200, paras 37 et seq.

[22] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 33, referring to ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, para. 30.

[23] See ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 40, and, e.g., ECJ, 3 October 2013, Case C-282/12, *Itelcar*, EU:C:2013:629, para. 22, and ECJ, 11 September 2014, C-47/12, *Kronos International*, EU:C:2014:2200, para. 35.

7. However, the Court stated again that application of Article 63 TFEU should not extend the scope of the freedom of establishment for non-EU-situations via the backdoor.[24] However the Court 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 TFEU would not enable economic operators outside the territorial scope of the freedom of establishment to profit from that freedom.[25] Hence, Article 63 TFEU applied.

II.2. Restriction on the free movement of capital under Article 63 TFEU

8. Following the long line of case-law on dividend taxation,[26] the Court was quick to identify the restriction on free movement of capital, as the Portuguese rules clearly distinguished between domestic dividends (full or partial deductibility) and comparable third-country dividends (full taxation).[27] That difference in treatment was likely 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 income from capital originating in non-member States received 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.[28]

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

9. The Court traditionally reads Article 65(1)(a) and (3) TFEU as codifying its older case-law[29] so that a distinction must be made between the differences in treatment authorised 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.[30] While the Court quickly dismissed the notion that domestic and foreign dividends might not be comparable with regard to tax rules which seek to prevent or mitigate the economic double taxation of distributed profits (they clearly are[31]), it went on to evaluate whether the restriction was justified by overriding reasons in the public interest and was proportionate.[32]

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[24] See on that issue, e.g., ECJ, 11 September 2014, Case C-47/12, *Kronos International*, EU:C:2014:2200, para. 53; ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, para. 31.

[25] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 42-43.

[26] See, e.g., ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17.

[27] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 45-49, also noting that the Portugal-Tunisia double taxation convention (whose dividend article is patterned along the lines of the OECD MC) does not prevent such unfavourable treatment.

[28] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 50, referring to ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 64, and ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 80.

[29] E.g., ECJ, 15 July 2004, Case C-315/02, *Anneliese Lenz*, EU:C:2004:446, para. 27; ECJ, 7 September 2004, Case C-319/02, *Petri Manninen*, EU:C:2004:484, para. 29.

[30] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 52-54, referring to ECJ, 10 May 2012, Joined Cases C‑338/11 to C‑347/11, *Santander Asset Management SGIIC SA et al*, EU:C:2012:286, para. 23.

[31] 55, referring to see ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 84.

[32] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 56 et seq.

10. Two grounds of justification were considered: the need *(1)* to ensure the effectiveness of fiscal supervision; and *(2)* to prevent "tax evasion",[33] both of which have, in principle, already been accepted by the Court.[34] While the second ground could be dismissed quickly in *SECIL* (because the Portuguese rules do not specifically target wholly artificial arrangements which do not reflect economic reality and the sole purpose of which is to avoid the tax normally due or to obtain a tax advantage),[35] 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[36]] 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".[37]

    - Second, the Court reiterated settled case-law which shows that where the legislation of a Member State makes advantageous tax treatment dependent on the satisfaction of requirements, 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.[38] The obligation of the non-Member State to provide information under a double taxation convention can be sufficient to ensure effective fiscal supervision.[39]

11. Under the Portuguese regime at issue in *SECIL*, eligibility in 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 Corporation Tax Code), a condition which 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 double taxation convention enabled the Portuguese tax authorities to obtain from Tunisia the information which would enable them to verify satisfaction of 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.[40] No such convention existed with Lebanon, so that a justification based on the effectiveness of fiscal supervision is available with regards to dividends from the Lebanese subsidiary.[41] However, the Court also left it to the domestic court to determine whether a partial deduction would be available on the basis

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[33] In *SECIL*, 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, e.g., *Cadbury Schweppes* (ECJ, 12 September 2006, Case C-196/04, EU:C:2006:544), *Thin Cap Group Litigation* (ECJ, 13 March 2007, Case C-524/04, EU:C:2007:161, paras 72 and 74), *Glaxo Wellcome* (ECJ, 17 September 2009, Case C-182/08, EU:C:2009:559, para. 89) and *Itelcar* (ECJ, 3 October 2013, Case C-282/12, EU:C:2013:629, para. 34). This translation confusion obviously stems from the French technical terms "évasion fiscale" which is better translated as "tax avoidance".

[34] See on the prevention of tax evasion and avoidance, e.g., ECJ, 11 October 2007, Case C-451/05, *ELISA*, EU:C:2007:594, para. 81, and for the effectiveness of fiscal supervision, e.g., ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, para. 55, and ECJ, 5 July 2012, Case C-318/10, *SIAT*, EU:C:2012:415, para. 36.

[35] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 59-62.

[36] Directive 77/799, as amended by Council Directive 2006/98 of 20 November 2006 ([2006] OJ L 363, p. 129), 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 ([2011] OJ L 64, p. 1).

[37] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 64, referring to ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, paras 65 and 66.

[38] See, e.g., ECJ, 28 October 2010, Case C-72/09, *Établissements Rimbaud SA*, EU:C:2010:645, para. 44; and ECJ, 19 July 2012, Case C-48/11, *A Oy*, EU:C:2012:485, para. 36.

[39] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 64, referring to ECJ, 17 October 2013, Case C-181/12, *Welte*, EU:C:2013:662, para. 63.

[40] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 67-68.

[41] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 69.

of another provision (Article 48(11) of the Corporate Tax Act) that might not require such verification: in such a case the justification related to fiscal supervision would not apply,[42] and, as a consequence, SECIL would be entitled to at least the 50% deduction.

II.4. The "grandfathering clause" in Article 64(1) TFEU

12. Next, the Court had to establish whether an unjustified restriction may nevertheless be authorized under the "grandfathering clause" in Article 64(1) 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) TFEU".[43] According to Article 64(1) TFEU, the provisions of Article 63 are without prejudice to the application to non-member States of any restrictions which 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) TFEU: the nature of the capital movement, and the timing of any change.

13. With regards to the nature of the capital movement, the Court noted that the concept of "direct investment" was defined in the "old" capital movements Directive[44] and 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.[45] 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.[46] Moreover, Article 64(1) TFEU may not only "grandfather" national measures which restrict establishment or investment as such but also – as might be the case in *SECIL* – measures which restrict payments of dividends deriving from them.[47] 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.[48]

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[42] 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 (Article 46(11) of the Corporation Tax Code), which might be applicable in situations where 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 Article 46(11) of the Corporation Tax Code, in the case of dividends originating in Tunisia and Lebanon. See ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 70-71.

[43] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 86, referring to ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 187, and ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, para. 39.

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

[45] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 75, referring to ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, paras 33 and 34.

[46] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 76, referring to ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, para. 35.

[47] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 77, referring to ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 103.

[48] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 79-80.

14. 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".[49] 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.[50] However, a Member State waives Article 64(1) if: *(1)* it repeals the provisions which gave rise to the restriction in question (i.e., even an identical provision reintroduced later on would not be covered by Article 64(1)),[51] or *(2)* it adopts provisions that alter the logic underlying the earlier legislation. It acknowledged, however, that Article 64(1) TFEU would still cover provisions introduced in 1994 or later which, in their 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.[52]

15. 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) 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."[53] Hence, if the EC-Tunisia and EC-Lebanon Agreements (both of which were concluded after 31 December 1993) provided for a "liberalisation of" the direct investment in question, Portugal could not rely on Article 64(1) TFEU.[54]

II.5. Interpretation of the Euro-Mediterranean Agreements with Lebanon and Tunisia

16. Accordingly, application of Article 64(1) TFEU depended on whether 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.[55] In briefest summary of the Court's extensive analysis:

    - the provisions on capital movements in Article 34 of the EC-Tunisia Agreement and Article 31 of the EC-Lebanon Agreement had direct effect[56] and the situations in *SECIL* fell under those provisions,[57] so that those provisions could be relied on in a situation such as *SECIL* in relation to the tax treatment of those dividends in Portugal;

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[49] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 81, referring to ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, para. 48.

[50] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 83-84; see also Opinion of AG Wathelet, 27 January 2016, Case C-464/14, *SECIL*, EU:C:2016:52, paras 159-163.

[51] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 87, referring to ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, para. 49.

[52] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 88, referring to ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 192, and ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, para. 41.

[53] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 89.

[54] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 90-91.

[55] For an extensive analysis of those provisions see Opinion of AG Wathelet, 27 January 2016, Case C-464/14, *SECIL*, EU:C:2016:52, paras 58 et seq.

[56] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 97-104 (on the EC-Tunisia Agreement) and paras 130-133 (on the EC-Lebanon Agreement).

[57] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 105-109 (on the EC-Tunisia Agreement) and paras 134-136 (on the EC-Lebanon Agreement).

- 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,[58] that the prohibition was also not limited by the specific "tax carve-outs" in Article 89 of the EC-Tunisia Agreement or Article 85 of the EC-Lebanon Agreement[59] and that it was not grandfathered by Article 33 of the EC-Lebanon Agreement (Art 33(2));[60]
- 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, 65 TFEU.[61]

17. 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 reasons in the public interest relating to the need to preserve the effectiveness of fiscal supervision.[62]

    The Court then returned to Article 64(1) TFEU. It concluded that where the restriction under the respective EU-Mediterranean Agreements cannot be justified (e.g., because information can be obtained under the Portugal-Tunisia double taxation convention), then the EC-Tunisia and EC-Lebanon agreements (are deemed to[63]) 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) TFEU for restrictions on "direct investments" that "existed on 31 December 1993", and the failure to extend full (or partial) exemption to dividends from those states is a prohibited restriction on the free movement of capital.

II.6. Consequences

18. The Court provided guidance on the consequences of its findings. It confirmed that Article 63 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".[64] 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,[65] i.e., "reimbursement not only of the tax unduly

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[58] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 111-114 (on the EC-Tunisia Agreement) and paras 138-142 (on the EC-Lebanon Agreement).

[59] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 115-121 (on the EC-Tunisia Agreement) and paras 143-152 (on the EC-Lebanon Agreement).

[60] See for that interpretation of Art. 33(2) of the EC-Lebanon Agreement ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 134-136.

[61] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 122-128 (on the EC-Tunisia Agreement) and paras 153-155 (on the EC-Lebanon Agreement).

[62] Such justification, however, is not 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 Portugal-Tunisia double taxation convention. It may likewise not be available with regard to both dividends from the subsidiaries in Tunisia and Lebanon (where no double taxation convention 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 which it is for the referring court to determine. ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 157-162.

[63] The English text (para. 160 of the judgment) refers to a "deemed" change ("must be deemed to amount"). The original Portuguese version refers to the treaty change given the same treatment, for purposes of Art, 64(1) TFEU, as a domestic legislative change, as do other language versions (e.g., the German "gleichzusetzen"). The Court obviously focuses the effect of the Agreements on the national rule and nothing turns on that difference in language.

[64] Para 163, referring to ECJ, 10 February 2011, Joined Cases C-436/08 and C-437/08, *Haribo and Salinen*, EU:C:2011:61, para. 60, and ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 38.

[65] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 164, referring to ECJ, 15 September 2011, Case C-310/09, *Accor*, EU:C:2011:581, para. 71.

levied but also of the amounts paid to that State or retained by it which relate directly to that tax".[66] 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".[67] In *SECIL*, therefore, Portugal is obliged to repay with interest the amounts collected in breach of Articles 63 and 65 TFEU, Article 34 of the EC-Tunisia Agreement and Article 31 of the EC-Lebanon Agreement, and the respective amounts correspond to the difference between the amount paid by SECIL and the amount it should have paid pursuant to Article 46(1), Article 46(8) or Article 46(11) of the CIRC as if the dividends distributed by the third-country subsidiaries had been paid by a company established in Portugal.[68]

III. Comments

19. The Court's judgment sets out a precise and instructive analysis of the application of Article 63 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) TFEU is a "special" freedom insofar as it extends the prohibition on the free movement of capital also 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 that of ensuring the credibility of the single Union currency on world financial markets and maintaining financial centres with a world-wide dimension within the Member States.[69]

20. Sometimes, however, investments by taxpayers could be viewed as an establishment and also as a capital movement, e.g., investment in companies and the subsequent flow of dividends.[70] It is now well settled case-law that the "purpose"[71] of the legislation concerned must be taken into consideration in determining whether national legislation falls within the scope of one or other of the freedoms of movement.[72]

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[66] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 166, referring to ECJ, 15 October 2014, Case C-331/13, *Nicula*, EU:C:2014:2285, para. 28.

[67] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 165, referring to ECJ, 6 September 2011, Case C-398/09, *Lady & Kid and Others*, EU:C:2011:540, para. 18, and ECJ, 15 September 2011, Case C-310/09, *Accor*, EU:C:2011:581, paras 72 and 74.

[68] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 167-168.

[69] See ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, para. 31; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, para. 87.

[70] The Court assumes that the nomenclature of the capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) ([1988] OJ L 178, p. 5) has indicative value of what is a "capital movement" (see, e.g., , 17 October 2013, Case C-181/12, *Welte*, EU:C:2013:662, para. 20), and that returns on investments (e.g., the receipt of dividends) are likewise covered by Article 63 TFEU (see already, e.g., ECJ, 6 June 2000, Case C-35/98, *Verkooijen*, EU:C:2000:294, para. 29).

[71] It should be noted briefly that the English version of the judgment (e.g., 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" (e.g., "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 (e.g., "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 (e.g., through the use preparatory materials etc).

[72] See, e.g., ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes*, EU:C:2006:544, paras 31-33; ECJ, 12 December 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, EU:C:2006:773, paras 37-38; ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 36; ECJ, 13 March 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, EU:C:2007:161, paras 26-34; ECJ, 10 May 2007, Case C-492/04, *Lasertec*, EU:C:2007:273, para. 19; ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, para. 22; ECJ, 6 November 2007, Case C-415/06, *Stahlwerk Ergste Westig GmbH*, EU:C:2007:651, para. 13; ECJ, 4 June 2009, Joined Cases C-439/07 and C-499/07, *KBC Bank NV*, EU:C:2009:339, para. 68; ECJ, 17 September 2009, Case C-182/08, *Glaxo Wellcome*, EU:C:2009:559, para. 36; ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 34; ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, para. 25; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 31.

a. Focusing on the taxation of dividends and capital gains, as explained above national legislation that applies only to those shareholdings which enable the holder to exert a definite influence on the company's decisions and to determine its activities falls exclusively within the scope of Article 49 TFEU on freedom of establishment (i.e., no protection in third-country situations),[73] while national provisions which 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.[74]

b. However, if national legislation applies to all shareholdings, the Court's older case-law had raised doubts as to whether it is necessary that the shareholding in question is not a controlling shareholding, in order for Article 63 TFEU to apply. The Court uses that fact-led approach to identify the relevant freedom in intra-EU-situations[75] (where it does not really matter which freedom applies), and had also applied it in *Burda*[76] and *KBC Bank*[77] 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 TFEU could be treated as secondary to Article 49 TFEU in a situation where the latter does not even apply. Furthermore it would be at odds with Article 64(1) TFEU, which makes it apparent that Article 63 TFEU covers, in principle, capital movements involving establishment or direct investment.[78] More recent case-law in *FII Group Litigation 2*,[79] *Itelcar*,[80] *Emerging Markets Series of DFA Investment Trust Company*,[81] *Kronos*[82] and *SECIL*[83] has, however, overcome these doubts (at

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[73] See, e.g., ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes plc*, EU:C:2006:544, paras 31 et seq.; ECJ, 13 March 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, EU:C:2007:161, paras 33, 34, 101 and 102; ECJ, 10 May 2007, Case C-492/04, *Lasertec*, EU:C:2007:273, paras 22 et seq. (however, noting in para. 23 that there was in fact a two thirds holding); ECJ, 10 May 2007, Case C-102/05, *A and B*, EU:C:2007:275, paras 25 et seq.; ECJ, 18 July 2007, Case C-231/05, *Oy AA*, EU:C:2007:439, paras 22 et seq.; ECJ, 6 November 2007, Case C-415/06, *Stahlwerk Ergste Westig GmbH*, EU:C:2007:651, paras 14 et seq. (concerning permanent establishments); ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 35; ECJ, 19 July 2012, Case C-31/11, *Scheunemann*, EU:C:2012:481, para. 30 (however, noting in para. 31, that there was in fact a 100% holing); ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paras 91 and 98.

[74] See, e.g., ECJ, 17 September 2009, Case C-182/08, *Glaxo Wellcome*, EU:C:2009:559, paras 40 and 45-52; ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 35; ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 92; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 32. It should be noted, however, that earlier case-law had assumed a (potential) concurrent application of both freedoms in these situations; see, e.g., ECJ, 12 December 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, EU:C:2006:773, paras 37-38; ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 36, 80 and 142; ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, para. 24; ECJ, 26 June 2008, Case C-284/06, *Burda GmbH*, EU:C:2008:365, para. 71; ECJ, 4 June 2009, Joined Cases C-439/07 and C-499/07, *KBC Bank NV*, EU:C:2009:339, para. 69.

[75] See for the delimitation of the freedoms based on the factual size of a shareholding in internal market situations where potentially two freedoms apply; e.g., ECJ, 26 June 2008, Case C-284/06, *Burda GmbH*, EU:C:2008:365, paras 71 et seq.; ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, EU:C:2009:377, paras 33 et seq.; ECJ, 21 January 2010, Case C-311/08, *Société de Gestion Industrielle (SGI)*, EU:C:2010:26, paras 33 et seq.

[76] ECJ, 26 June 2008, Case C-284/06, *Burda GmbH*, EU:C:2008:365, paras 72 et seq.

[77] ECJ, 4 June 2009, Joined Cases C-439/07 and C-499/07, *KBC Bank NV*, EU:C:2009:339, paras 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").

[78] See on that point ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paras 101-102.

[79] ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 99.

[80] ECJ, 3 October 2013, Case C‑282/12, *Itelcar*, EU:C:2013:629, paras 16 et seq.

[81] ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, para. 30.

[82] ECJ, 11 September 2014, Case C‑47/12, *Kronos International Inc*., EU:C:2014:2200, paras 37 et seq.

[83] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 33.

least in relation to dividends) and clearly demonstrated that only the Union-law characterization of the national measure[84]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 the light of Article 63 TFEU (which is not excluded by Article 49 TFEU), irrespective of the size of its shareholding in the company paying the dividends.

c. 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 TFEU nor Article 63 TFEU may be relied upon.[85] 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 and allowing them to determine its activities".[86] While investment in a branch generally triggers Article 49 TFEU,[87] and the Court's case-law seems to imply that holding requirements of 100%,[88] 90%,[89] 75%,[90] 66,66%,[91] 65%,[92] more than 50%,[93] exactly 50%,[94] 34%[95] or even 25%[96] will also trigger the exclusive application of Article 49 TFEU, a holding requirement of 10% is not enough to exclude the application of Article 63 TFEU: as the Court has confirmed in *Haribo and Salinen*,[97] *Itelcar*,[98] *Kronos*[99] and *SECIL*,[100] 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 (e.g., the deduction at issue in *SECIL*) applicable only to those shareholdings which enable the holder to exert a definite influence on the company's decisions

[84] See *infra* point c.

[85] See, e.g., ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paras 91 and 98.

[86] See for that criterion ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes plc*, EU:C:2006:544, para. 31.; ECJ, 13 March 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, EU:C:2007:161, para. 27; ECJ, 17 September 2009, Case C-182/08, *Glaxo Wellcome*, EU:C:2009:559, para. 47.

[87] ECJ, 6 November 2007, Case C-415/06, *Stahlwerk Ergste Westig GmbH*, EU:C:2007:651, paras 14 et seq. However, investments in partnerships may also be covered by Art. 63 TFEU; see for intra-EU situations, e.g., ECJ, 6 December 2007, Case C-298/05, *Columbus Container Services BVBA & Co*., EU:C:2007:754, and ECJ, 23 January 2014, Case C-164/12, *DMC Beteiligungsgesellschaft mbH*, ECLI:EU:C:2014:20,

[88] ECJ, 13 April 2000, Case C-251/98, *Baars*, EU:C:2000:205, para. 21; ECJ, 5 November 2002, Case C-208/00, *Überseering BV*, EU:C:2002:632, para. 70; ECJ, 7 September 2006, Case C-470/04, *N*, EU:C:2006:525, paras 24 et seq.; ECJ, 12 December 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation*, EU:C:2006:773, para. 39; ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 37; ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, EU:C:2009:377, paras 33 et seq.; see also ECJ, 6 December 2007, Case C-298/05, *Columbus Container Services BVBA & Co*., EU:C:2007:754, para. 30 (concerning holdings in a partnership).

[89] ECJ, 18 July 2007, Case C-231/05, *Oy AA*, EU:C:2007:439, paras 21 et seq.

[90] ECJ, 13 March 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, EU:C:2007:161, paras 32 et seq.

[91] ECJ, 10 May 2007, Case C-492/04, *Lasertec*, EU:C:2007:273, para. 23.

[92] ECJ, 21 January 2010, Case C-311/08, *Société de Gestion Industrielle (SGI)*, EU:C:2010:26, paras 34 et seq.

[93] ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes plc*, EU:C:2006:544, paras 6 and 32.

[94] ECJ, 26 June 2008, Case C-284/06, *Burda GmbH*, EU:C:2008:365, para. 70.

[95] ECJ, 21 January 2010, Case C-311/08, *Société de Gestion Industrielle (SGI)*, EU:C:2010:26, paras 34 et seq.

[96] ECJ, 10 May 2007, Case C-492/04, *Lasertec*, EU:C:2007:273, para. 21; ECJ, 19 July 2012, Case C-31/11, *Scheunemann*, EU:C:2012:481, paras 25 et seq.

[97] ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 36.

[98] ECJ, 3 October 2013, Case C‑282/12, *Itelcar*, EU:C:2013:629, para. 22.

[99] ECJ, 11 September 2014, Case C‑47/12, *Kronos International Inc*., EU:C:2014:2200, para. 35.

[100] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 40.

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".[101]

d. 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) 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".[102] Article 63(1) TFEU should, therefore, not serve to apply the freedom of establishment "through the back door".[103] However, in all direct tax cases so far, 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".[104]

21. Even though Article 63 TFEU constitutes a unilateral "liberalisation" 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 in relations between Member States.[105] If a restriction is found in a third-country situation, the Court proceeds with the well-known analysis of comparability,[106] justifications[107] and proportionality.[108] 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 EU,[109] specifically because of the existence of administrative cooperation within the EU in the direct tax area.[110] This may lead to differences with regard to the comparability analysis or a potential justification.[111] As is evidenced by, e.g., *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, compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State.[112] Conversely, such justification is not available where an obligation for the non-Member State to provide information results from an exchange of information provision in a double taxation convention (e.g., a standard exchange of

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[101] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 40.

[102] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 42.

[103] See on that issue, e.g., ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 100; ECJ, 11 September 2014, Case C-47/12, *Kronos International*, EU:C:2014:2200, para. 53; ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, para. 31; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para 42-43.

[104] See ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 43, and also, e.g., ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 100.

[105] See ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, para. 38; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, para. 88.

[106] See, e.g., ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 170; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 54 et seq.

[107] ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 171-172; ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, paras 28 et seq.; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, paras 89 et seq.; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 56 et seq.

[108] E.g., ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 56 et seq.

[109] See ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, para. 36; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, para. 89; ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, paras 65 and 66; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 64.

[110] E.g., Council Directive 2011/16/EU of 15 February 2011, on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC ([2011] OJ L 64, p. 1).

[111] ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, para. 38; ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 170-171; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, paras 89-90.

[112] See, e.g., ECJ, 28 October 2010, Case C-72/09, *Établissements Rimbaud SA*, EU:C:2010:645, para. 44; and ECJ, 19 July 2012, Case C-48/11, *A Oy*, EU:C:2012:485, para. 36.

information provision along the lines of Article 26 OECD-MC) or any other agreement (e.g., a Tax Information Exchange Agreement or the OECD/Council of Europe Multilateral Convention on Exchange of Information).[113] However, the Court has not yet explicitly addressed the situation where the third country does not, in fact, comply with its obligation to provide the relevant information.

22. Moreover, even if Article 63 TFEU applies in principle in a third-country situation, Article 64(1) TFEU "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) TFEU".[114] It is also clear from the Court's settled case-law that tax legislation of Member States is capable of falling within Article 64(1) TFEU.[115]

    a. According to this "grandfathering clause", the provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions existed on 31 December 1993[116] 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),[117] freedom of establishment, the provision of financial services[118] or the admission of securities to capital markets. *SECIL* has given useful guidance on the type of capital movement in question, e.g., a "direct investment") and also on whether the restriction "existed on 31 December 1993"), both of which must be satisfied for Article 64(1) TFEU to apply.

    b. What *SECIL* has clarified is that *(1)* 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 (e.g., shareholdings of 98.72% and 28.64%, respectively, are sufficient);[119] and that *(2)* the subsequent conclusion of directly effective international agreements (including Euro-Mediterranean Agreements*)* may alter the logic of domestic legislation so that, even though unchanged on its face, the restriction at issue had not "existed on 31 December 1993".[120]

23. The path of analysis for third-country situations may therefore be summarised as follows:

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[113] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 64, referring to ECJ, 17 October 2013, Case C-181/12, *Welte*, EU:C:2013:662, para. 63.

[114] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 86, referring to ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 187, and ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, para. 39.

[115] See, e.g., ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 174-196; ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, paras 37-45; ECJ, 21 May 2015, Case C-560/13, *Wagner-Raith*, EU:C:2015:347, para. 41.

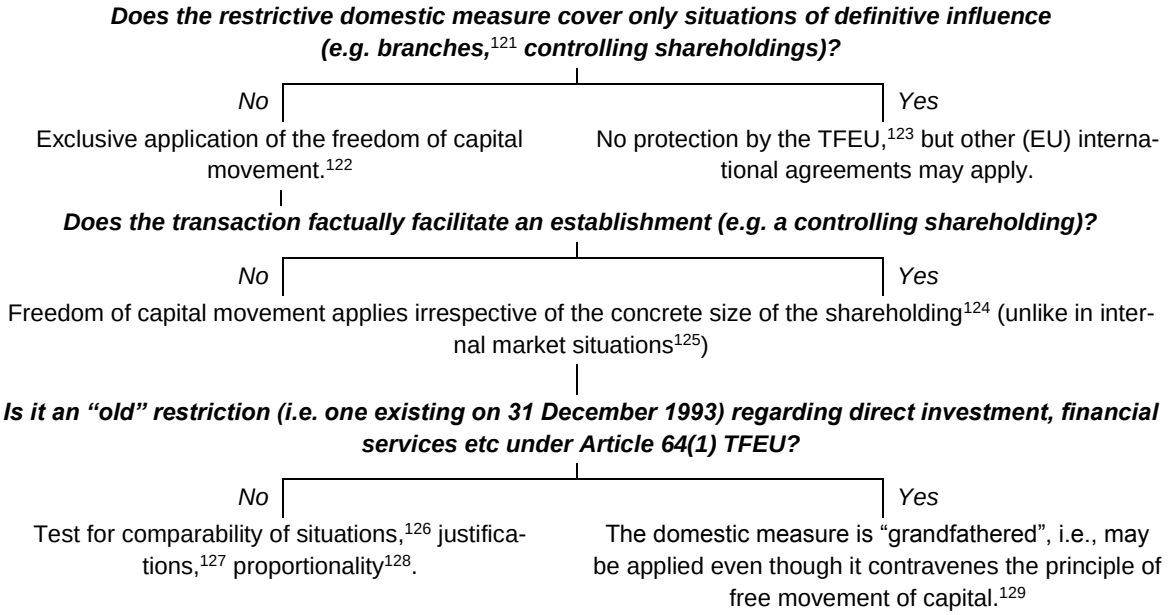
[116] For analysis of this criterion see, e.g., ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 189 et seq.; ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, paras 39 et seq.; ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, paras 47 et seq.; ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 81 et seq. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.

[117] ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 174 et seq.; ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, paras 32 et seq.; ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, paras 46 et seq.; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, paras 98 et seq.; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 75 et seq.

[118] See ECJ, 21 May 2015, Case C-560/13, *Wagner-Raith*, EU:C:2015:347 (concerning taxation of income derived from third-country investment funds).

[119] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 79-80.

[120] ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 89-91.



[121] ECJ, 6 November 2007, Case C-415/06, *Stahlwerk Ergste Westig GmbH*, EU:C:2007:651, paras 14 et seq. However, investments in partnerships may also be covered by Art. 63 TFEU; see for intra-EU situations, e.g., ECJ, 6 December 2007, Case C-298/05, *Columbus Container Services BVBA & Co*., EU:C:2007:754, and ECJ, 23 January 2014, Case C-164/12, *DMC Beteiligungsgesellschaft mbH*, ECLI:EU:C:2014:20,

[122] See, e.g., ECJ, 17 September 2009, Case C-182/08, *Glaxo Wellcome*, EU:C:2009:559, paras 40 and 45-52; ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 35; ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 92; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 32.

[123] See, e.g., ECJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes plc*, EU:C:2006:544, paras 31 et seq.; ECJ, 13 March 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, EU:C:2007:161, paras 33, 34, 101 and 102; ECJ, 10 May 2007, Case C-492/04, *Lasertec*, EU:C:2007:273, paras 22 et seq. (however, noting in para. 23 that there was in fact a two thirds holding); ECJ, 10 May 2007, Case C-102/05, *A and B*, EU:C:2007:275, paras 25 et seq.; ECJ, 18 July 2007, Case C-231/05, *Oy AA*, EU:C:2007:439, paras 22 et seq.; ECJ, 6 November 2007, Case C-415/06, *Stahlwerk Ergste Westig GmbH*, EU:C:2007:651, paras 14 et seq. (concerning permanent establishments); ECJ, 10 February 2011, Joined Cases C-436/08, C-437/08, *Haribo and Salinen*, EU:C:2009:17, para. 35; ECJ, 19 July 2012, Case C-31/11, *Scheunemann*, EU:C:2012:481, para. 30 (however, noting in para. 31, that there was in fact a 100% holing); ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, paras 91 and 98.

[124] ECJ, 17 September 2009, Case C-182/08, *Glaxo Wellcome*, EU:C:2009:559, paras 49 et seq.; ECJ, 13 November 2012, Case C-35/11, *Test Claimants in the FII Group Litigation*, EU:C:2012:707, para. 99; ECJ, 3 October 2013, Case C‑282/12, *Itelcar*, EU:C:2013:629, paras 16 et seq.; ECJ, 10 April 2014, Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, EU:C:2014:249, paras 27 et seq.; ECJ, 11 September 2014, Case C‑47/12, *Kronos International Inc*., EU:C:2014:2200, paras 37 et seq.; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, para. 35. For a different position with regard to third-country situations see, however, ECJ, 26 June 2008, Case C-284/06, *Burda GmbH*, EU:C:2008:365, paras 72 et seq., and ECJ, 4 June 2009, Joined Cases C-439/07 and C-499/07, *KBC Bank NV*, EU:C:2009:339, paras 68 et seq.; also relying on the factual size of the holding, e.g., ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 38 et seq.

[125] See for the delimitation of the freedoms based on the factual size of a shareholding in internal market situations where potentially two freedoms apply; e.g., ECJ, 26 June 2008, Case C-284/06, *Burda GmbH*, EU:C:2008:365, paras 71 et seq.; ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, EU:C:2009:377, paras 33 et seq.; ECJ, 21 January 2010, Case C-311/08, *Société de Gestion Industrielle (SGI)*, EU:C:2010:26, paras 33 et seq.

[126] See, e.g., ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, para. 170; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 54 et seq.

[127] ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 171-172; ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, paras 28 et seq.; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, paras 89 et seq.; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 56 et seq.

[128] E.g., ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 56 et seq.

[129] ECJ, 12 December 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, EU:C:2006:774, paras 174 et seq.; ECJ, 24 May 2007, Case C-157/05, *Holböck*, EU:C:2007:297, paras 32 et seq.; ECJ, 18 December 2007, Case C-101/05, *A*, EU:C:2007:804, paras 45 et seq.; ECJ, 20 May 2008, Case C-194/06, *Orange European Smallcap Fund NV*, EU:C:2008:289, paras 98 et seq.; ECJ, 21 May 2015, Case C-560/13, *Wagner-Raith*, EU:C:2015:347; ECJ, 24 November 2016, Case C-464/14, *SECIL*, EU:C:2016:896, paras 73 et seq.

IV. The Statement

24. The *Confédération Fiscale Européenne* welcomes the precise and instructive judgment in *SECIL*. The judgment clarifies the application of Article 63 TFEU on free movement of capital to tax legislation which denies tax benefits to dividends originating in non-EU Member States, and demonstrates that Member States may not rely on the Article 64(1) TFEU "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 (e.g., Euro-Mediterranean Agreements).

25. 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.