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Jarrod Tudor

The Free Movement of Capital in Europe: Is the European Court of Justice Living Up to its Framers' Intent and Setting an Example for the World?

JARROD TUDOR*

ABSTRACT

The benefits to free movement of international financial flows are numerous, but include an efficient asset market and the opportunity for economic growth and development for countries engaged in an agreement allowing for such freedom. The free movement of capital is one of the four pillars of the Treaty on the Function of the European Union (TFEU) along with the free movement of goods, services, and labor. Article 63 of the TFEU prohibits limitations on the free movement of capital while Article 65 of the TFEU allows for some exceptions. Not only does the free movement of capital doctrine suppose that currency can freely move across the political boundaries of the European Union, but the doctrine also affects the purchase of real estate, investment in securities, and taxation by citizens of its Member States. Non-compliance among Member States as they draft domestic law is the chief threat to the free movement of capital. It has been the responsibility of the European Court of Justice (ECJ) to interpret Articles 63 and 65 to limit infringements against this fundamental freedom. This Article surveys the leading cases on the free movement of capital and is designed to serve as both a resource for those wishing to gain a greater understanding of the free movement of capital in Europe and attempts by Member States to impede the free movement. This Article also explores the European Union's jurisprudence in an attempt to determine if the ECJ is meeting the TFEU Framers' intent to allow a seamless flow of capital across Member States. The final analysis reflects an ECJ with a strong preference for the free movement of capital and little toleration for a Member State's ability to craft favorable exceptions under domestic law.

* Jarrod Tudor teaches several law and finance courses to graduate and undergraduate students at Kent State University. He holds a B.A. in Political Science from The Ohio State University, an M.A. in Political Science from the University of Toledo, a J.D. from the University of Toledo, an M.B.A., an M.P.A., an Ed.S., and a Ph.D. from Kent State University, an LL.M. from Cleveland State University (International and Comparative Law), and an LL.M. from the University of Akron (Intellectual Property Law).

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I. INTRODUCTION

A. The European Union and the Free Movement of Capital

At the time of this writing, the United States and the European Union ("EU") are contemplating a free trade agreement to be called the Transatlantic Trade and Investment Partnership ("TTIP").[1] According to one report, the EU has gone as far as agreeing to reduce tariffs by 90% on some goods coming from the U.S.[2] Those practicing on either continent should note that a majority of Americans support the deal.[3] Regardless of the high level of support on the western side of the Atlantic, any finalized TTIP would have to narrow the philosophical separation on the issue of financial services regulation.[4]

1. Matthew Dalton, *U.S., EU Trade Deal Talks Have Strong Momentum*, WALL ST. J. (Feb. 18, 2014, 3:10 PM), http://www.wsj.com/articles/SB10001424052702304675504579391260073421626 [hereinafter Dalton, *U.S., EU Trade Deal Talks*]; William Mauldin, *Americans See Trade Deal With EU as 'Good Thing,' Pew Poll Says*, WALL ST. J. (Apr. 9, 2014, 6:04 PM), http://www.wsj.com/articles /SB10001424052702303873604579491991025563828.

2. Dalton, *U.S., EU Trade Deal Talks*, *supra* note 1.

3. Mauldin, *supra* note 1.

4. Simon Nixon, *Banks Pose Hurdle for Free-Trade Talks*, WALL ST. J. (June 19, 2013, 3:36 AM), http://www.wsj.com/articles/SB10001424127887324520904578551732895009030.

The free flow of capital across continents is a significant, current topic.[5] Recently, the European Commission has contacted national bank regulators to enforce EU law requiring the free flow of capital.[6] The Commission's action was prompted by Member States' activities that were designed to protect their banks, but those actions may infringe the free movement of capital requirement under the Treaty on the Functioning of the European Union ("TFEU").[7] The Commission's chief concerns about these "overzealous policies," aside from a violation of the TFEU, is that such financial restrictions may intensify the European debt and financial crisis.[8] For example, in 2010, the Commission aggressively sued Portugal over its corporation laws, which the Commission claimed—and the European Court of Justice ("ECJ") agreed—stymied the free movement of capital by limiting investment in corporations.[9] The Commission also sued Germany, alleging an infringement on the free flow of capital over its "Volkswagen law," which made investment in Volkswagen AG almost impossible due to a corporation law that prevented any one shareholder from exercising more than 20% of the voting rights in Volkswagen, regardless of how many shares that person owned in the firm.[10] However, the ECJ dismissed the case.[11]

There is comment that academic work on the EU is lacking.[12] Additional scholarship in the area of EU law could help erase the knowledge gap regarding how the EU works.[13] In fact, one 2009 poll found that 44% of Europeans did not know how the EU operated.[14] EU law, which directly governs the affairs of twenty-eight Member States, could become even more important in the future as additional countries join the

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5. *See generally* Matthew Dalton, *EU Aims to Free Flow of Funds Across Borders*, WALL ST. J. (Feb. 3, 2013, 7:17 PM), http://www.wsj.com/articles/SB10001424127887324761004578281563568661062 [hereinafter Dalton, *EU Aims to Free Flow of Funds*].

6. *Id*.

7. *Id*.

8. Matthew Dalton et al, *In EU, A Test of Wills*, WALL ST. J. (Dec. 10, 2012, 11:42 PM), http://www.wsj.com/articles/SB10001424127887324339204578171320383106476.

9. Carolyn Henson & Mike Gordon, *Court Rules Portugal's EDP Golden Shares Illegal*, WALL ST. J. (Nov.11, 2010, 12:31 PM), http://www.wsj.com/articles/SB10001424052748703848204575608560315260350.

10. Matina Stevis, *EU to Sue Germany Again Over Volkswagen Law*, WALL ST. J. (Nov.24, 2011, 9:21 AM), http://www.wsj.com/articles/SB10001424052970204630904577057730270544356.

11. Lawrence Norman, *EU Court Dismisses Case vs. Germany Over Volkswagen Law*, WALL ST. J. (Oct. 22, 2013, 8:39 AM), http://www.wsj.com/articles/SB10001424052702304402104579150943608439928.

12. Wolfram Kaiser et al, *Origins of a European Polity: A New Research Agenda for European Union History*, *in* THE HISTORY OF THE EUROPEAN UNION ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950-72 1, 1-2 (Wolfram Kaiser et al. eds., 2009).

13. *See* JOHN MCCORMICK, EUROPEAN UNION POLITICS 294 (2011).

14. *Id*.

club.[15] As new Member States join the ranks of the EU, the EU's power in world trade generally, and global trade negotiations specifically, will grow.[16]

B. The European Union and Furthering Economic Integration

The EU can best be described as a political system—not just a legal system.[17] The driving force behind the creation of the EU was to create a stronger link among European nations willing to sacrifice some sovereignty.[18] The establishment of the EU created a global standard for the link between capitalist economics and trade and democracy.[19] Economic integration in Europe began with the Treaty of Rome in 1957, and the continent became further integrated with later treaties.[20] The EU was an attempt to change the ways and habits of Europeans.[21] The Treaty of Rome and later treaties forced European integration in a way that would change the attitudes among Europe's citizens; the nation-state was not to be the most important unit of government.[22] However, the erasing of barriers to trade actually predates the Treaty of Rome as the Framers of the Benelux Agreement of 1944 sought to eliminate tariffs.[23] However, despite the removal of fiscal barriers in the form of tariffs, quotas were still in place that limited trade among the three countries.[24] The Central European Free Trade Agreement, an agreement established in 1992 between the EU and many Southeastern European countries who were not members of the EU, is

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15. *Id*. at 155-56. Currently, the European Union consists of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *Id.* at 295. However, several additional countries have been mentioned as future members including Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Iceland, Kosovo, Macedonia, Moldova, Norway, Serbia, Switzerland, Turkey, and Ukraine. *Id*. at 156-61.

16. Michael Burgess, *Federalism*, *in* EUROPEAN INTEGRATION THEORY 25, 41-42 (Antje Wiener & Thomas Diez eds., 2d ed. 2009).

17. *See* Morten Rasmussen, *Supranational Governance in the Making: Towards a European Political System*, *in* THE HISTORY OF THE EUROPEAN UNION ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950-72, *supra* note 12, at 34, 34.

18. *See* Ronald Linden, *EU Accession and the Role of International Actors*, *in* CENTRAL & EAST EUROPEAN POLITICS 125, 133 (Sharon L. Wolchik & Jane L. Curry eds., 2d ed. 2011).

19. *See* Valerie Bunce, *The Political Transition*, *in* CENTRAL & EAST EUROPEAN POLITICS, *supra* note 18, at 31, 47.

20. MCCORMICK, *supra* note 13, at 155.

21. Lise Rye, *The Origins of Community Information Policy: Educating Europeans*, *in* THE HISTORY OF THE EUROPEAN UNION ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950-72, *supra* note 12, at 148, 150.

22. *Id*.

23. LARRY NEAL, THE ECONOMICS OF EUROPEAN AND THE EUROPEAN UNION 34-35 (2007).

24. *Id*. at 35.

further evidence of the recognition that free trade benefits the populations of member countries.[25]

Studying economic and legal integration among countries, either as a political system or otherwise, can promote a better understanding as to how the EU works.[26] Integration is a process whereby political leaders agree to reconfigure loyalties around a new set of international political institutions that maintain jurisdiction over pre-exiting countries.[27] Economic integration allows Member States to specialize their production in areas whereby a comparative advantage exists and thus all Member States would benefit from more efficiently produced goods.[28] Further integration in the form of a common market would allow Member States to realign their industries in pursuit of economies of scale that are reflective of that comparative advantage and, as a result, its citizens would enjoy an efficient allocation of resources and the maximization of welfare.[29] Indeed, the Framers of the EU desired a dynamic trading condition across the Member States that would reverse the decades-long trend of high prices and low wages as well as greater economic interdependence that would reduce the likelihood of war.[30] The benefits of economic integration especially assist small and middle-sized European countries as they have the power to pool their resources.[31] One commentator labeled this a "pooling of sovereignty."[32] Integration into Europe has also assisted newly admitted countries quell extremism in politics.[33] However, many policy changes were difficult for countries recently entering the EU.[34] Additionally, due to the strength of European integration, the EU rivals the United States in the power to negotiate with the World Trade Organization.[35]

The common market has been said to be the EU's greatest accomplishment.[36] The common market, which requires the free movement

25. Sharon Fisher, *Re-Creating the Market*, *in* CENTRAL & EAST EUROPEAN POLITICS, *supra* note 18, at 53, 61. The current members of CEFTA include Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Moldova, Montenegro, and Serbia. *Central European Free Trade Agreement – CEFTA 2006*, CEFTA SECRETARIAT, http://www.cefta.int/ (last visited Oct. 22, 2015).

26. *See* Thomas Diez & Antje Wiener, *Introducing the Mosaic of Integration Theory*, *in* EUROPEAN INTEGRATION THEORY, *supra* note 16, at 2, 4.

27. *Id*. at 2.

28. PAUL KUBICEK, EUROPEAN POLITICS 68 (2012).

29. CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 3 (4th ed. 2013).

30. *Id*. at 6.

31. KUBICEK, *supra* note 28, at 68.

32. Diez & Wiener, *supra* note 26, at 9.

33. Bunce, *supra* note 19, at 49.

34. Jeffrey Simon & Joshua Spero, *Security Issues: NATO and Beyond*, *in* CENTRAL & EAST EUROPEAN POLITICS, *supra* note 18, at 143, 151.

35. KUBICEK, *supra* note 28, at 319.

36. *Id*. at 119.

of goods, services, labor, and capital, was envisioned to form an ever-closer union among the European countries.[37] Immediately upon entering the EU, Member States would no longer remain bitter rivals and would instead cooperate through the sacrificing of some sovereignty on trade issues.[38] In fact, the most developed sub-area of EU law consists of the rules and regulations that make up the common market.[39] However, there is also comment that a fully functioning common market has not been achieved.[40] Confounding the problem is that not all newly admitted Member States move at the same speed to implement rules that foster integration toward a common market.[41] Since there are several derogations on the basis of the "public-interest" concern related to the free movement of capital, there is less case law on the subject in comparison to the other freedoms under the TFEU.[42] Despite all of the law developments intended to break down trade barriers, the EU certainly has not quite reached the level of economic integration as the United States when comparing the legal relationship among the American States to that of the EU's Member States.[43] However, there are several American influences found in EU law that assist the EU in its integration efforts.[44]

The concept of the free movement of capital was given a significant boost at the creation of the economic and monetary union.[45] Indeed, there is a strong connection between free movement of capital and monetary policy.[46] The Maastricht Treaty of 1992 created the common currency used by most of the Member States of the EU.[47] The common currency's introduction has led to the stability of exchange rates, which makes free movement of capital possible assuming EU law is enforced in order to remove capital controls on exported capital and restrictions on citizenship.[48] The introduction of common currency also made currency convertibility possible, which is necessary for the liberalization of trade, generally, and was a significant boon for newly admitted Member States.[49] However, the

37. *Id*. at 70.
38. *Id*. at 73.
39. *Id*. at 117.
40. KUBICEK, *supra* note 28, at 73.
41. *See* Linden, *supra* note 18, at 133-34.
42. BARNARD, *supra* note 29, at 605.
43. *See* KUBICEK, *supra* note 28, at 119.
44. Brigitte Leucht, *Transatlantic Policy Networks in the Creation of the First European Anti-Trust Law*, *in* THE HISTORY OF THE EUROPEAN UNION ORIGINS OF A TRANS- AND SUPRANATIONAL POLITY 1950-72, *supra* note 12, at 56, 60.
45. BARNARD, *supra* note 29, at 579.
46. *See id*.
47. KUBICEK, *supra* note 28, at 74.
48. NEAL, *supra* note 23, at 103.
49. Fisher, *supra* note 25, at 61.

free movement of capital was not liberalized at the same speed as the free movement of services, labor, and goods.[50]

Much of EU law is designed to force Member States and other trading partners to adopt EU-wide standards to facilitate all aspects of the common market.[51] Fiscal barriers were a significant nuisance to the building of a common market in the years immediately following the Treaty of Rome.[52] One of the most important goals of the Treaty of Rome, however, was the free movement of money and services, both of which are vital to capital finance.[53] The development of a common market is not an easy task, as it requires much in the way of policy harmonization in order to be effective.[54]

C. The Free Movement of Capital and the Threat of Non-Compliance by Member States

The free movement of capital is a significant part of the TFEU.[55] There are several advantages to the free movement of capital including an overall increase in the supply of capital within the EU, greater choice in financing packages for firms operating within the EU, fewer economic disruptions, and the maintenance of equal production conditions.[56] Ironically, Article 63 (ex 56, 73b) does not define the concept of free movement of capital.[57] The doctrine of non-discrimination also applies to the guarantee of free movement of capital.[58] Pursuant to the non-discrimination doctrine, out-of-state capital must enjoy the same treatment as in-state capital.[59] However, the non-discrimination doctrine does not interfere with the Member State's ability to regulate capital, but merely requires the Member State to regulate

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50. *See* BARNARD, *supra* note 29, at 579.
51. KUBICEK, *supra* note 28, at 13.
52. *See* BARNARD, *supra* note 29, at 43.
53. MCCORMICK, *supra* note 13, at 80-81.
54. KUBICEK, *supra* note 28, at 117.
55. *See generally* Consolidated Version of the Treaty on the Functioning of the European Union art. 63, EU, Dec. 13, 2007, 51 O.J. E.U. 2008/C 115/1 [hereinafter TFEU]. Article 63 (also known as art. 56 EC or EC Treaty, art. 73b) of the TFEU reads:

> 1. 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.
>
> 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Id.
56. BARNARD, *supra* note 29, at 579-80.
57. *Id*. at 583.
58. *Id*. at 17.
59. *Id*.

the capital equally.[60] Although the basic rule under Article 63(1) is that Member States must respect the free movement of capital, Member States are given an opportunity under Article 65 (ex 58, 73d) to defend restrictions on the free movement of capital.[61]

Professor Barnard has classified sub-areas of activity where the free movement of capital applies, including investment and purchase of property, currency issues and financial transactions, loans, investments in firms whereby national law affects those who do not have a dominant interest in the firm, newly privatized firms, and the tax treatment of capital movements.[62] Professor Barnard has also discussed several incentives as to why a Member State would engage in polices to thwart the free movement of capital, including the fear of capital outflow to other countries harming the ability of in-state firms to borrow, the strengthening of other economies to the detriment of the Member State, the loss of currency reserves needed to pay obligations, and the loss of power over currency that is in turn a loss of sovereignty and control over economic conditions.[63]

For a newly admitted Member State, legal and economic integration is a must, as one of the major principles of EU law is a constitutional-like mandate that requires EU case law (including the TFEU, regulations, directives) and ECJ case law to trump the national law of Member States in

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60. *Id*.

61. BARNARD, *supra* note 29, at 580. Article 65 (also known as art. 58 EC or EC Treaty, art. 73d) states:

> 1. The provisions of Article 63 shall be without prejudice to the right of Member States:
>
> > (a) to apply the relevant provisions of their tax law with distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
> >
> > (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
>
> 2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.
>
> 3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

TFEU, *supra* note 55, at art. 65.

62. BARNARD, *supra* note 29, at 589 (footnotes omitted).

63. *Id*. at 580 (citing WILLEM MOLLE, THE ECONOMICS OF EUROPEAN INTEGRATION: THEORY, PRACTICE, POLICY (5th ed. 2006)).

areas where EU law is competent.[64] There exist several challenges associated with integration efforts in regard to the free movement of capital.[65] First, despite the clear mandate to follow EU treaties, regulations, and directives, Member States differ in their implementation practices.[66] The second hurdle is non-compliance.[67] Any new entrant to the EU must agree to meet EU legal mandates quickly.[68] Non-compliance with EU law generally comes in two forms including the failure to correctly implement EU law or failure to correctly apply EU law.[69] Implementation of EU law comes in two stages, including the legal implementation of EU law though a Member State's domestic legislation and the development of administrative law that ensures compliance.[70] The threat associated with non-compliance of EU law is that the EU generally, and the common market specifically, becomes less effective and its legitimacy is in doubt.[71] Indeed, the costs associated with joining the EU and implementing EU law can be significant.[72]

The role of the ECJ is to *interpret* the TFEU, regulations, and directives, as well as its own previous case law, all of which constitutes the body of EU law.[73] Professor Hartley has commented that just as precedents from English courts were central to the development of common law, the body of EU case law is central to the development of general EU law.[74] However, unlike judges and justices in common law courts, justices of the ECJ do not try to determine the *intent* of the drafters of the TFEU.[75] In turn, this may make working in Europe difficult for common law-trained lawyers—the ECJ also does not follow its own precedent and it is therefore possible that two different rulings could come from the same set of facts.[76] Professor Hartley points out, however, that the ECJ has tried to follow its

64. MCCORMICK, *supra* note 13, at 222.

65. *See* SIMONA MILIO, FROM POLICY TO IMPLEMENTATION IN THE EUROPEAN UNION: THE CHALLENGE OF A MULTI-LEVEL GOVERNANCE SYSTEM 3-4 (2014) (there is an "implementation gap" between what in theory is required and what actually is implemented).

66. *Id*. at 3.

67. *Id*.

68. *See* Linden, *supra* note 18, at 129 (a country seeking admission is judged annually on whether it has met the strict compliance requirements).

69. *See* MILIO, *supra* note 65, at 5.

70. *Id*.

71. *Id*. at 3.

72. Linden, *supra* note 18, at 134.

73. T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN UNION 70-71 (7th ed. 2010).

74. *Id*. at 70.

75. *Id*.

76. *Id*.

own precedents, but lawyers operating in the EU should be prepared for a spectrum of possible outcomes.[77]

II. PURPOSE OF THIS WORK

The purpose of this work is three-fold. First, to enhance the reader's understanding of EU law, generally, and the jurisprudence of the ECJ on the topic of the free movement of capital, specifically. Second, this work is intended to create a greater understanding of Article 63's (of the TFEU) prohibition on limitations on the free movement of capital. Third, and most importantly, the mission of this work is to determine whether the ECJ's jurisprudence of Article 63 conforms to the intent of the TFEU to create a common market.

III. CASE LAW ON THE FREE MOVEMENT OF CAPITAL

A. The Physical Movement of Currency

One of the first cases to truly wrestle with a complex case on the topic of free movement of capital was *Criminal Proceedings Against Guerrino Casati*.[78] In *Casati*, a criminal defendant was charged and faced prison time for violating an Italian law that prohibited the exportation of currency over a certain amount but allowed a person to export the same amount previously imported and declared.[79] As he moved from Italy to Austria, Defendant Casati, an Italian national with residence in Germany, carried 24,000 Deutsche Mark—an amount he claimed he would use for purchasing equipment for his German firm but had to return to his home because the equipment factory was closed.[80]

What makes the *Casati* case difficult today is that the ECJ was forced to determine whether the Italian law passed muster with several provisions of the Treaty of Rome, specifically Articles 67, 69, 71, and 73, which are no longer in effect today.[81] Collectively, these Articles required Member States of the EU to remove national laws that limited the free movement of capital subject to some limitations.[82] However, the case is quite important for what the ECJ stated about the free movement of capital within the EU.[83]

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77. *Id*.

78. Case C-203/80, Criminal Proceedings against Guerrino Casati, 1981 E.C.R. 2595, 2598-99 [hereinafter *Casati*].

79. *Id*. at 2598, 2611.

80. *Id*. at 2611.

81. *Id*. at 2612-13; THE TREATY OF ROME CONSOLIDATED AND THE TREATY OF MAASTRICHT 620 (Neville March Hunnings & Joe MacDonald Hill eds. 1992).

82. *Casati*, 1981 E.C.R. at 2613-16.

83. *Id*. at 2614.

The ECJ remarked that "the free movement of capital constitutes . . . one of the fundamental freedoms of the Community."[84] However, specific to *Casati*, the ECJ stated that the free movement of capital did not guarantee a non-resident (which Casati indeed was, who was moving the currency from Italy to Austria, yet was residing in Germany) to re-export currency even if the intent was to perform commercial transactions.[85] The ECJ further commented that the complete free movement of capital had the potential to undermine the economic policy of Member States, possibly create an imbalance in a Member State's balance of payments, and/or impair the functioning of the greater common market.[86] As well, and clearly on point, the ECJ stated that EU law had not yet liberalized the type of transaction Casati was accused of committing.[87] However, the ECJ reminded Member States that when they choose to criminalize such actions through their capital controls, which limit the free movement of capital, any limitation must not be greater than what is strictly necessary and the penalty must not be disproportionate to the act.[88]

A second early case, also with criminal overtones, that helps explain the foundation for the free movement of capital is *Spain v. Sanz de Lera*.[89] In *Sanz de Lera*, the Spanish government was criminally charging three persons with either failing to declare or gain authorization for taking Spanish currency (here, labeled by the ECJ as "banknotes") out of Spain.[90] In two cases, the defendants were Spanish nationals and arrested in an EU Member State while moving undeclared and unauthorized currency into other Member States.[91] In a third case, a Turkish national but Spanish resident, was attempting to move Spanish currency to Turkey.[92] Spanish law, however, required any person moving Spanish banknotes, coins, and/or bank checks over certain minimum levels to either declare the amounts or gain authorization to move the currency out of the country.[93] The preliminary question presented to the ECJ was whether the Spanish law violated Articles 63 (ex 56, 73b), 64 (ex 57, 73c), and 65 (ex 58, 73d).[94]

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84. *Id*.
85. *Id*. at 2617.
86. *Id*. at 2614.
87. *Casati*, 1981 E.C.R. at 2618.
88. *Id*.
89. Joined Cases C-163/94, C-165/94, C-250/94, Criminal Proceedings against Sanz de Lera and Others, 1995 E.C.R. I-4830, I-4840, I-4842 [hereinafter *Sanz de Lera*].
90. *Id*. at I-4832-33.
91. *Id*.
92. *Id*. at I-4833.
93. *Id*. (a person would have to declare the currency for amounts greater than 1,000,000 Spanish pesetas and a person would have to gain prior authorization for amounts greater than 5,000,000 Spanish pesetas).
94. *Sanz de Lera*, 1995 E.C.R. at I-4834.

According to the ECJ, Article 63 prevents Member States from enacting regulations in order to ensure the liberalization of the free movement of currency among Member States and between a Member State and a non-Member State, subjecting the export of coins, paper currency, and checks to either authorization or prior declaration as well as making a violation of either a criminal act.[95] However, the ECJ also held that currency in the form of coins and paper currency did not meet the definition of "payments" found in Article 64.[96] The ECJ did, however, comment that EU Directive 88/361/EEC allowed for some derogations from the free movement of capital guarantee in order for Member States "to prevent illegal activities such as tax evasion, money laundering, drug trafficking, or terrorism . . . [,]" but any such derogations may not reflect an arbitrary form of discrimination and there must be no lesser restrictive means for achieving those goals.[97] The ECJ remarked that the power of authorization would subject the free movement of capital to significant discretion by Member State governments and potentially make the free movement guarantee "illusory."[98] More importantly, the ECJ felt that the goals of the Member State could be met with a less restrictive system of declarations that would involve notifying the government of the citizen's identity and plan for the currency to allow for a "rapid examination" of both the identity and the plan in time for authorities to act without jeopardizing the citizen's plans for the currency—bearing in mind that the criminal law can always be enforced after the investigation without limiting the movement of the currency.[99] The ECJ also found that Article 64's provision allowing a Member State to enforce restrictions in place before December 31, 1993 did not apply.[100] Furthermore, the ECJ also stated that national courts of the Member States can utilize Articles 63, 64, and 65 to find that its Member States' rules are not in conformity with the free movement of capital guarantee.[101]

A third case involving a Member State's criminal law placing a restriction on the free movement of capital, decided just before *Sanz de Lera* and involving the same Spanish law, is *Bordessa v. Spain*.[102] The difference between *Sanz de Lera* and *Bordessa* was that the questions posed to the ECJ focused on different provisions of the TFEU.[103] In *Bordessa*, the questions

95. *Id*. at I-4836.
96. *Id*.
97. *Id*. at I-4837.
98. *Id*. at I-4837-38.
99. *Sanz de Lera*, 1995 E.C.R. at I-4838, I-4840-41.
100. *Id*. at I-4840-42; *see* TFEU, *supra* note 55, at art. 64.
101. *Sanz de Lera*, 1995 E.C.R. at I-4843.
102. Joined cases C-358/93, C-416/93, Criminal Proceedings against Aldo Bordessa and Others, 1995 ECR I-361, I-380 [hereinafter *Bordessa*].
103. *See id*. at I-381; *Sanz de Lera*, 1995 E.C.R. at I-4834.

were whether Article 34 (ex 28, 30), which prohibited quantitative restrictions on imports moving between Member States, and/or Article 56 (ex 49, 59), which prohibited restrictions on the free movement of services between Member States, trumped the Spanish law requiring a declaration and/or authorization to move banknotes, checks, and coins out of Spain.[104]

The ECJ made short shrift of the questions and held that Articles 34 and 56 do not apply to the Spanish law.[105] Specifically, the ECJ held that any means of payment are not to be considered goods for the purposes of Article 34 and the physical transfer of assets does not fall within the scope of either Article 34 or Article 56.[106] Furthermore, the ECJ stated that even if the banknotes, checks, or coins were to be used to purchase goods or services, such an act would fall outside the scope of Articles 34 and 56 but within the scope of Article 129 (ex 107, 106), concerning the powers of the European Central Bank.[107]

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104. *Bordessa*, 1995 E.C.R. at I-379-81. Article 34 (also known as art. 28 EC or EC Treaty, art. 30) states: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." TFEU, *supra* note 55, at art. 34. Furthermore, Article 56 (also known as art. 49 EC or EC Treaty, art. 59) of the TFEU reads:

> Within this framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Id. at art. 56.

105. *Bordessa*, 1995 E.C.R. at I-383.

106. *Id*.

107. *Id*. Article 129 (also known as art. 107 EC or EC Treaty, art. 106) states:

> 1. The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.
>
> 2. The Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as 'the Statute of the ESCB and of the ECB') is laid down in a Protocol annexed to the Treaties.
>
> 3. Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB and of the ECB may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. They shall act either on a recommendation from the European Central Bank and after consulting the Commission or on a proposal from the Commission and after consulting the European Central Bank.
>
> 4. The Council, either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB and of the ECB.

TFEU, *supra* note 55, at art. 129.

However, ECJ was next required to answer whether EU Directive 88/361/EEC could be used to bar the Spanish government from requiring a declaration and/or authorization by a citizen who desired to move coins, banknotes, and/or checks from one Member State to another.[108] The ECJ answered in the affirmative, while stating that Directive 88/361/EEC was designed to bring the full liberalization of the free movement of capital into reality.[109] Although the ECJ noted that, pursuant to the Directive, Member States have the right to enact laws to prohibit illegal activities such as tax evasion, terrorism, drug trafficking, and money laundering, these laws cannot impede the free movement of capital.[110] Additionally, Article 1 of the Directive, which allows Member States to act to prevent illegal activities, is subject to Article 4 of the same Directive requiring any limitations on the free movement of capital to comply with EU law.[111] The ECJ focused on the ability of a Member State government to suspend the transaction needed by an EU citizen; thus, an authorization mechanism would violate Directive 88/361/EEC while a mere declaration would be in compliance with the Directive since it does not interrupt the movement of capital.[112]

B. Investment in Real Estate

In *Manfred Trummer and Peter Mayer*,[113] the ECJ not only stated that the free movement of capital could creep into a contract between two parties, but also provided a terrific justification for the common currency.[114] In *Trummer*, two parties were involved in a real estate transaction, one a German resident and the other an Austrian resident, whereby the former sold the latter a parcel of land located in Austria at a price set in German Deutsche Marks.[115] The two parties attempted to register both the mortgage and the currency denomination in Austria, but Austrian law required that mortgages be registered in Austrian schillings at a reference point that mirrored the value of the Austrian schilling at the price of fine gold.[116] Both the buyer and the seller contended that the Austrian law violated Article 63's (ex 56, 73b) free movement of capital requirement.[117]

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108. *Bordessa*, 1995 E.C.R. at I-384.
109. *Id*. at I-384, I-386-87.
110. *Id*. at I-385.
111. *See id*. at I-386.
112. *See id*.
113. Case C-222/97, Manfred Trummer and Peter Mayer, 1999 E.C.R. I-1661 [hereinafter *Trummer*].
114. *Id*. at I-1680-81.
115. *Id*. at I-1673.
116. *Id*. at I-1673-74.
117. *Id*. at I-1674.

The ECJ put forth a two-step analysis to determine whether Article 73b precludes a Member State's application of domestic rules, which require registering a mortgage in the Member State's currency.[118] The first step required a determination as to whether a mortgage was an instrument covered by Article 63's free movement of capital dictate.[119] While the ECJ admitted that Article 63 did not define the phrases "movement of capital" or "payments," the ECJ stated that Directive 88/361/EEC should be examined to provide guidance.[120] According to the ECJ, Directive 88/361/EEC was very inclusive and although the Directive did specifically mention some forms of transactions, the Directive was in no way exhaustive.[121] More clearly, the ECJ stated that a transaction that reflects an investment in real property constitutes the movement of capital within the Directive's nomenclature, specifically within the category "[s]ureties, other guarantees and rights of pledge."[122]

The second step required the determination of whether a rule prohibiting the registration of mortgage in another Member State's currency constitutes a violation of Article 63.[123] The ECJ stated that such a rule weakens the relationship between the debt itself and the mortgage since currencies fluctuate and the real value of the debt may not be accurate.[124] Additionally, if the Austrian rule were to remain, the effectiveness of the mortgage would be diluted, become less attractive, and remove the attractiveness of using a particular currency—all of which could impair the free movement of capital.[125] Furthermore, if the Austrian rule were to be upheld, the transacting parties would have to incur additional costs in calculating the proper conversion value of two currencies.[126] Lastly, the ECJ contended that the Austrian law's demand that all currency be registered in schillings at the price of gold would not create the transparency that the Austrian government believed would occur since the price of gold itself fluctuates.[127]

As one might imagine, citizens of one Member State may choose to purchase real estate in another Member State for all sorts of purposes such as recreation and business. In *Alfredo Albore*,[128] the ECJ held that Member

118. *Trummer*, 1999 E.C.R. at I-1678-79.
119. *Id*. at I-1678.
120. *Id*.
121. *Id*.
122. *Id*. at I-1678-79.
123. *See Trummer*, 1999 E.C.R. at I-1679.
124. *Id*.
125. *Id.*
126. *Id*. at I-1680.
127. *Id*. at I-1681.
128. Case C-423/98, Alfredo Albore, 2000 E.C.R. I-5965 [hereinafter *Albore*].

State restrictions on the purchase of real estate by citizens of other Member States infringe upon the guarantee of free movement of capital under Article 63 (ex 56, 73b) if the restricting Member State cannot adequately justify the restrictions based on a serious risk to the security of the Member State.[129] In the *Alfredo Albore* case, the Italian government required application for prefectural authorization of any non-Italian citizen wishing to purchase real estate in areas designated as having "military importance," unless permission was obtained by the Prefect of that particular area.[130] Two German citizens had purchased property in the Italian area of Barano d'Ischia, which was designated as an area of military importance, but did not gain permission before the sale of the property and the Italian government thus refused to register the real estate transaction.[131]

Although the Italian court referred the case to the ECJ to address the provisions on the TFEU concerning discrimination based on nationality, the freedom of establishment, and the free movement of capital, the ECJ rested its decision almost solely on the free movement of capital pursuant to Article 63.[132] The ECJ bluntly stated that the Italian law placing restrictions on citizens of other Member States in their attempt to invest in real estate, which are not placed on Italian nationals, serves as a violation of the free movement of capital.[133] However, pursuant to Article 65 (ex 58, 73d), a Member State is allowed to justify the restriction if the Member State can show the restriction is necessary to maintain public security, the restriction is proportional, the restriction does not exceed the limits of what is appropriate and necessary to achieve public security, and the restriction does not represent an arbitrary form of discrimination.[134]

According to the ECJ, merely mentioning the concern for public security does not allow a Member State to place restrictions on the investment of real estate by citizens of other Member States.[135] Instead, the burden is on the Member State to demonstrate that the goal of public security could not be met by other means, to which the ECJ did not find the Italian government met.[136] The ECJ also hinted that the attempt to justify

129. *Id*. at I-6003.
130. *Id*. at I-5997.
131. *Id*. at I-5999.
132. *Id*. at I-6000-01.
133. *Albore*, 2000 E.C.R. at I-6001-02.
134. *Id*. at I-6002; *see* TFEU, *supra* note 55, at art. 65. The ECJ noted that the Italian government did not specify public security the chief mission of its law restricting access to real estate in its pleadings. *Albore*, 2000 E.C.R. at I-6002.
135. *Albore*, 2000 E.C.R. at I-6002-03.
136. *See id*. at I-6003.

public security concern would have to be specific to the region of the Member State.[137]

In *Klaus Konle v. Austrian Republic*,[138] the ECJ likewise found Austria's requirement that non-Austrians show that a residence purchased in Austria would not serve as a secondary residence, a violation of Article 63's (ex 56, 73b) free movement of capital.[139] The plaintiff, Konle, was a German national who was refused denied the ability to purchase the real estate in Austria despite the fact that, although not an Austrian, he intended to move his principal residence to Austria and continue his business activities.[140] The Austrian law in question had two versions including a 1993 version, which was in force before Austria became a member of the EU, and a 1996 version, which was in force after Austria became a Member State.[141] Both versions of the law required a non-Austrian purchaser of real estate show proof that the real estate purchased would not be used as a secondary residence.[142] Complicating matters in this case was Article 70 of the Act of Accession between Austria and the EU, an Article that allowed Austria to maintain its law on secondary residences for a period of five years from the date Austria became a Member State.[143] The Act of Accession would be Austria's chief defense to the Article 63 claim that the free movement of capital had been infringed since the 1996 law was a reflection of the 1993 law and that the five-year grace period would not expire until 2001.[144]

As expected, the ECJ relied on Directive 88/361/EEC to determine that the investment in real estate was covered under Article 63's guarantee of free movement of capital and that the right to acquire, use, or dispose of real estate located in a Member State, which is not the residence of the purchaser, is also within the scope of the right of establishment pursuant to Article 49 (ex 43, 52).[145] The ECJ, while finding that the 1993 version would not have infringed Article 63 nor the Act of Accession, focused its opinion on the 1996 version.[146]

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137. *See id*.

138. Case C-302/97, Klaus Konle v. Austrian Republic, 1999 E.C.R. I-3099 [hereinafter *Konle*].

139. *Id*. at I-3125-26, I-3138.

140. *Id*. at I-3128.

141. *See id*. at I-3126.

142. *Id*. The 1996 version of the Austrian law also required that the non-Austrian purchaser show that he or she was exercising one of the freedoms established by the TFEU or the European Economic Area. However, the ECJ did not believe this was an issue in the cases. *Konle*, 1999 E.C.R. at I-3126-27.

143. *See id*. at I-3127. Article 70 of the Act of Accession reads: "Notwithstanding the obligations under the Treaties on which the European Union is founded, the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession." *Id*.

144. *See id*. at I-3128, I-3131.

145. *Id*. at I-3131.

146. *Konle*, 1999 E.C.R. at I-3133.

Konle not only argued that the Austrian law's requirement of authorization was an unlawful violation of the free movement of capital, but also asserted that the authorization mechanism could be applied in a discriminatory manner, there existed no overriding reasons for the authorization that would satisfy a general interest, and the authorization was not necessary to meet the objective of the law which was assumed to be control over real estate.[147] The Austrian government countered by asserting that Article 345 (ex 295, 222) would sustain a Member State's right to control its system of property ownership, even in the face of Article 63's prohibition against the limits on the free movement of capital.[148]

First, the ECJ stated that Article 345 could not give effect to protecting a system of property ownership that interfered with the fundamental rules of the TFEU, and that such a system could only be compatible with Article 63 under certain conditions (such as maintaining a permanent population in a specified area or an economic activity independent of tourism in that area), but such justification could never be discriminatory if less restrictive measures are possible.[149] Second, and seemingly more bothersome for the ECJ, was the fact that the non-Austrian purchaser of property located in Austria could not provide "incontrovertible proof" of the future use of that property; thus, the authorities have too much latitude in making decisions that would lend to discriminatory actions.[150] In contrast, the ECJ believed that Austria could have met its concern, specifically the gain of information, through a mere declaration process instead of the authorization process.[151] In turn, if a Member State were to elect to move to a declaration process, a Member State could take measures to make sure that the use of the property identified in the declaration was accurate and long-standing after the property was acquired.[152] Finally, the ECJ stated that the authorization process simply provided too much leeway for discrimination and, as a matter of a limitation on the free movement of capital, the authorization process was not essential to prevent the acquisition of secondary residences.[153]

On the issue concerning the Act of Accession, the ECJ found that the 1993 and 1996 versions of the law were so procedurally different that the 1996 version could not reflect a state of law that existed prior to Austria's

147. *Id*. at I-3134.

148. *Id*. Article 345 (also known as art. 295 EC or EC Treaty, art. 222) states: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." TFEU, *supra* note 55, at art. 345.

149. *Konle*, 1999 E.C.R. at I-3134-35.

150. *Id*. at I-3135.

151. *Id*. at I-3136.

152. *Id*.

153. *Id*. at I-3137.

accession to the EU.[154] Of minor yet important note, once the ECJ found that a violation of the free movement of capital had been established, there was no need to address claims brought by the plaintiff that the Austrian law violated Article 18 (ex 12, 6), prohibiting discrimination based on nationality, and Article 49 (ex 43, 52), prohibiting limitations on the right of establishment.[155]

C. Investment in Securities

Limitations set by a Member State regarding cross-border investment was the subject of both an Article 63 (ex 56, 73b) free movement of capital challenge and Article 49 (ex 43, 52) right of establishment challenge in *Commission v. United Kingdom*.[156] Here, the British government had recently privatized the British Airports Authority, but in doing so, statutorily limited the amount of shares that could be held by a non-government entity and the manner in which shares could be transferred.[157] The European Commission put forth several arguments as to why Article 63 and Article 49 infringements existed.[158] First, the Commission contended that the restrictions created by the British law would limit and downplay the exercise of the freedoms of capital movement and establishment.[159] Specific to the free movement of capital, the Commission argued that the British law could impose limitations on how a firm is managed and also the

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154. *Konle*, 1999 E.C.R. at I-3138.

155. *See id*. at I-3138; *see* TFEU, *supra* note 55, at art. 49. Article 18 (also known as art. 12 EC or EC Treaty, art. 6) of the TFEU reads: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination." TFEU, *supra* note 55, at art. 18.

156. Case C-98/01, Comm'n of the European Cmtys. v. U.K. of Gr. Brit. and N. Ir., 2003 E.C.R. I-4641, I-4655 [hereinafter *Commission v. United Kingdom*]. Article 49 (also known as art. 43 EC or EC Treaty, art. 52) states:

> Within the framework of the provision set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as a self-employed persons and to set up and manage undertakings in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provision of the Chapter relating to capital.

TFEU, *supra* note 55, at art. 49.

157. *See Commission v. United Kingdom*, 2003 E.C.R. at I-4649-50.

158. *Id*. at I-4655.

159. *Id*. at I-4655-56.

ability to participate in the management of the firm.[160] Additionally, the Commission remarked that the British law created restrictions on market access that likewise made the purchase of a particular asset less desirable.[161] The Commission further stated that any exceptions to the free movement of capital must be restrictively interpreted and the Member State cannot solely delineate the scope of those exceptions.[162]

The British government countered that, under national law of a Member State, different classes of equity shares can exist, the associated rights with those shares may be different, and the restrictions in question fall within these accepted categories.[163] The British government also asserted that there was no violation of the TFEU because there were no restrictions that specifically identified nationality or discrimination based on nationality.[164]

The ECJ began its opinion by clearly stating that Article 63 was designed to remove all restrictions on the free movement of capital between Member States and between Member States and third countries.[165] In a similar manner, the ECJ made clear that Directive 88/361/EEC was the authority on what is included within the definitions of "movements of capital" and "payments," and participation in a firm through the purchasing of equity shares and participating in the management of that firm after purchase of the shares were within the gambit of that Directive.[166] The ECJ rebuked the British government's claim that since nationality was not identified in the language of the law, there was no infringement of the TFEU—Article 63 does not just limit discrimination based on equal treatment as the result of categorization by nationality, but instead applies to any limitations on the free movement of capital.[167] According to the ECJ, the British law, deterring investors regardless of nationality, is what contributed to an infringement of Article 63.[168]

The ECJ made two other, very important declarations.[169] First, and more germane to the case at bar, the ECJ stated that once an infringement of Article 63 has been found, there was no need to address whether the British law violated Article 49's right of establishment.[170] Second, in regard to

160. *Id*. at I-4656.
161. *Id*. at I-4659.
162. *Commission v. United Kingdom*, 2003 E.C.R. at I-4656.
163. *Id*. at I-4657.
164. *Id*.
165. *Id*. at I-4660-61.
166. *Id*. at I-4661.
167. *Commission v. United Kingdom*, 2003 E.C.R. at I-4662.
168. *Id*. at I-4663.
169. *Id*. at I-4662, I-4664.
170. *Id*. at I-4664.

restrictions on market access, the rules associated with Article 34 (ex 28, 30) are different than those associated with Article 63.[171]

Article 63 (ex 56, 73b) and Article 49 (ex 43, 52) have also been associated to address a Member State's attempt to control its corporations.[172] In *Commission of the European Communities v. Italian Republic*,[173] the ECJ found a host of corporate controls under Italian law to violate both the free movement of capital guarantee and the freedom of establishment.[174] In the case at bar, the Italian government had placed into law several controls that would provide governmental control over its corporations in the areas of defense, transport, telecommunications, energy, and many public service sectors.[175] Among these controls was the power of the Minister of Economic Affairs and Finance to oppose acquisitions of shares that would comprise 5% or more of the voting shares, and the power to: oppose agreements between and among shareholders that could constitute 5% or more of the voting shares; veto several maneuvers such as resolutions, plans for dissolution, plans for merger, plans to move the headquarters abroad, alter the firm's assets; and appoint a non-voting director.[176] The 1994 Italian law provided the Italian Minister for Economic Affairs and Finance the ability to act when a there existed a real and serious threat to the supply of energy, the supply of the services needed to deliver that energy, the supply of the raw materials for that energy, a risk to the security of plants and networks which are essential in public services, threats to national defense or military security, and in health emergencies.[177] Ten years later, after initial concerns by the European Commission provided guidelines as to when the Minister could exercise these powers, the Italian law was modified.[178] Specifically, these powers could only be exercised in cases where there were compelling reasons of public interest in public policy, public security, public health, and defense.[179]

The European Commission's biggest concern was that in the face of Articles 49 and 63, the Italian law was not sufficiently clear as to the conditions surrounding the Minister's special exercise of powers.[180] Lack of clarity was at risk because investors would not understand the situations

171. *Id*. at I-4662.
172. Case C-326/07, Comm'n of the European Cmtys. v. Italian Republic, 2009 E.C.R. I-2291, I-2334-35, I-2239 [hereinafter *Commission v. Italy*].
173. *Id*.
174. *Id*. at I-2234-35, I-2239.
175. *Id*. at I-2319-20.
176. *Id*. at I-2320-21.
177. *Commission v. Italy*, 2009 E.C.R. at I-2321-22.
178. *Id*. at I-2321.
179. *Id*.
180. *Id*. at I-2323-24.

that call for the Italian government to control the firm through voting shares.[181] The European Commission conceded that Articles 52 and 65 could limit Articles 49 and 63, but only where no harmonizing legislation exists.[182] However, in its argument, the European Commission put forth several Directives that had the purpose of harmonizing EU law on the topics of energy and telecommunications.[183]

The Italian government countered with several arguments.[184] First, Italy stated that the European Commission's objections could not be found within both the right of establishment and the free movement of capital.[185] Second, the Italian government suggested that the Directives cited by the European Commission would only apply if the Italian limitations were made to affect the structure of the industries and not the procedures of the firms in these industries.[186] Third, Italy stated that the principle of proportionality should apply, in that the domestic law of the Member States is better suited to apply to the risks associated with interests of the state since only the state could recognize the risks and react properly in a short time period.[187]

The ECJ began its decision by stating that the answer to any question as to whether a Member State's law interferes with the freedoms within the TFEU must include an examination of the law's purpose.[188] The ECJ stated that any domestic law that affects a Member State citizen's holdings in a firm and ability to control the firm is within the ambit of Article 49.[189] Additionally, any Member State citizen's direct investment in a firm falls within the scope of Article 63.[190] However, the ECJ found it necessary to divide the Minister's special powers into the spheres of Articles 49 and 63, holding that both Articles 49 and 63 would judge "opposition powers"

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181. *See id*.
182. *Commission v. Italy*, 2009 E.C.R. at I-2324.
183. *Id*. at I-2324-25. Article 52 (also known as art. 46 EC or EC Treaty, art. 55) states:

> 1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.
>
> 2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

TFEU, *supra* note 55, at art. 52.
184. *Commission v. Italy*, 2009 E.C.R. at I- 2326-27, I-2329.
185. *Id*. at I-2326.
186. *Id*. at I-2326-27.
187. *See id*. at I-2327.
188. *Id*. at I-2329.
189. *Commission v. Italy*, 2009 E.C.R. at I-2329.
190. *Id*. at I-2329.

maintained by the Minister while the power to veto should be judged only in the face of Article 49.[191]

When focusing on Italy's obligations under Article 63, the ECJ found that the Italian government did not meet the proportionality test—the powers of opposition were not appropriate for meeting the objectives of the law because there was no link between the powers and the criteria for exercising those powers.[192] The ECJ commented that powers of opposition and the criteria for using them cannot be exercised by any condition and specific objective circumstances must be identified.[193] Thus, due to the lack of specificity, the 1994 and 2004 Italian laws infringed upon Article 63.[194] Likewise, the lack of specificity, which creates the risk of a high level of discretion, also places the Italian laws in conflict with Article 49.[195]

On the issue of the power to veto a firm's decision, the ECJ also found that criteria governing the Minister's power was lacking and therefore contrary to Article 49, and that the power of veto can only be used in conformity with EU law.[196] Again, the ECJ did not accept Italy's argument that the Member State is in a better position than the European Commission to determine when the power of veto should be used.[197]

D. Taxation

Taxation practices of a Member State can also give rise to issues involving Articles 63 (ex 56, 73b) and 65 (ex 58, 73d).[198] In *Petri Manninen*,[199] the ECJ held that a Member State cannot afford tax credits to those residents associated with dividends from firms located in that Member State and deny the same tax credits to those residents who receive dividends from firms not located in that Member State.[200] In the case at bar, much like most nations, Finland maintained a tax practice whereby dividends received by a fully-taxable person in Finland were taxable as revenue, and firms established in Finland were subject to a tax on corporate profits.[201] To avoid double taxation, a fully-taxable person in Finland would be the beneficiary of a tax credit on taxes paid on dividends received from a firm

191. *Id*. at I-2330.
192. *Id*. at I-2333.
193. *Id*. at I-2333-34.
194. *Commission v. Italy*, 2009 E.C.R. at I-2334-35.
195. *Id*. at I-2335-36.
196. *Id*. at I-2238-39.
197. *Id*. at I-2337.
198. *See* Case C-319/02, Petri Manninen, 2004 E.C.R. I-7477, I-7504 [hereinafter *Petri Manninen*].
199. 2004 E.C.R. I-7477.
200. *Id*. at I-7515.
201. *Id*. at I-7501-02.

established in Finland for tax purposes.[202] However, in *Petri Manninen*, the plaintiff was a fully-taxable person in Finland who received dividends from a firm established in Sweden and was not entitled to the same tax credit.[203] The ECJ was faced with determining whether Article 63 precluded the taxation practice of Finland and, if so, whether Article 65 would allow for the taxation practice as an application of the relevant provisions of a Member State's tax law.[204]

According to the ECJ, the purpose of the Finnish tax policy was to avoid double taxation—the firm issuing the dividends to a shareholder would have already been taxed on its corporate profits of which a portion would be passed onto a Finnish investor who would later pay taxes on the dividends as income.[205] Further, the ECJ stated that the goal would be met if the Finnish shareholder would not have to pay taxes on the dividends.[206] The ECJ found two forms of disadvantage intolerable under Article 63.[207] First, the Finnish tax policy limits the choices of a fully-taxable person in Finland; if that person decides to invest in firms established in other Member States, he or she loses the financial advantage of the tax credit and, ultimately, his or her return on the investment would be lower in comparison to a similar investment in a firm in Finland.[208] Second, the tax policy harms the ability of a firm located in another Member State to raise capital in Finland because that firm will have to compete with firms in Finland that can, at least indirectly, offer fully-taxable, Finland-based investors a higher return for comparable risk in the form of a tax credit on dividends.[209]

The second question for the ECJ was whether the pre-established limitation on the free movement of capital, found under Article 63, could be excused by the Article 65(1)(a) clause, which allows Member States to apply their tax law in a way that distinguishes between taxpayers.[210] Before answering this question, the ECJ reminded the reader that any exception permitted under Article 65(1)(a) must be tempered by Article 65(3)'s requirement that any such exception not be based on an arbitrary form of discrimination or a disguised restriction on the free movement of capital and payments.[211] According to the ECJ, given all of the provisions in Article

202. *Id*. at I-7502.
203. *Id*. at I-7503.
204. *Petri Manninen*, 2004 E.C.R. at I-7504.
205. *Id*. at I-7505.
206. *Id*.
207. *Id*. at I-7505-06.
208. *Id*. at I-7505.
209. *Petri Manninen*, 2004 E.C.R. at I-7506.
210. *Id*. at I-7504, I-7506.
211. *Id*. at I-7507.

65, Finland's tax policy could be sustained only if the difference in tax treatment was based on situations that are not objectively comparable or justified through an overriding general interest, including maintaining the coherence of the tax system.[212] Specifically, the ECJ formed the question as to whether the difference in treatment between a fully-taxable person in Finland, investing in a Finland-established firm, and his or her counterpart investing in a Sweden-established firm was an objectively comparable situation.[213]

The ECJ found that both sets of dividends—those coming from the Finland-established firm and those coming from the Sweden-established firm—were capable of being subject to double taxation; thus, fully-taxable shareholders of either firm are in an objectively comparable situation.[214] Therefore, the only real difference is that the Finnish government has decided to extend tax credits to fully-taxable Finland-based investors who invest in Finland-based firms.[215] Under Article 65, the ECJ also found that the principle of territoriality did not excuse the difference in tax treatment between investors in Finnish and Swedish firms.[216] The ECJ also found that Article 65 did not excuse the Finnish tax policy as a means to safeguard the cohesion of the tax system since it would be possible under EU law for Finland to simply extend the same tax credit to Finland-based investors who invest in firms in other Member States (such as Sweden) in order to simply avoid double taxation.[217]

A similar case to *Petri Manninen*, yet with a few complicating factors, is *Winfried L. Holböck v. Finanzamt Salzburg-Land*.[218] Holböck, an Austrian resident with ownership in a Switzerland-established firm, was subject to a differential tax on his dividends from the Swiss firm between 1992 and 1996.[219] The dividends were taxed at a full rate in contrast to a "half-tax rate," which would have been applied had an Austrian-established firm delivered the dividends.[220] Holböck contended that such differential taxation was an infringement of the free movement of capital between a Member State and a third country, found in Article 63, as a form of "unequal treatment for which there is no justification."[221] In addition to the

212. *Id*.
213. *Id*. at I-7508.
214. *Petri Manninen*, 2004 E.C.R. at I-7509.
215. *Id*.
216. *Id*. at I-7510.
217. *Id*. at I-7513.
218. *See* Case C-157/05, Winfried L. Holböck v. Finanzamt Salzburg-Land, 2007 E.C.R. I-4051, I-4059-60 [hereinafter *Holböck*].
219. *Id*. at I-4059-60.
220. *Id*. at I-4060.
221. *Id*. at I-4059-60.

fact that the source country of the dividends was a non-Member State (Switzerland), Article 64 (ex 57, 73c) further complicated matters as it placed a limitation on Article 63's guarantee of the free movement of capital if a Member State implemented such restrictions on or before December 31, 1993.[222]

In a somewhat blanket statement, the ECJ held that any limitation on the freedoms of movement required an examination of the intent of the Member State's legislation.[223] Accordingly, when a Member State makes the tax rate on dividends dependent upon the Member State in which the funds originated, such a policy may fall within the scope of both the freedom of establishment under Article 49 (ex 43, 52), and the free movement of capital under Article 63.[224] The ECJ further held that the purpose of Article 49 was to ensure that host Member States treat firms and persons from other Member States in the same manner they treat their resident firms and Member States.[225] This right also prohibits a Member State from making it difficult for a firm or a person from another Member State to move to and operate in a host Member State.[226] However, the ECJ ruled that such a right does not extend to firms or persons from non-Member States.[227]

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222. *Id*. at I-4060-61. Article 64 (also known as art. 57 EC or EC Treaty, art. 73c) states:

> 1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under the 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. . . .
>
> 2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.
>
> 3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

TFEU, *supra* note 55, at art. 64.

223. *Holböck*, 2007 E.C.R. at I-4062.

224. *Id*. at I-4063.

225. *Id*. at I-4063-64.

226. *Id*.

227. *Id*. at I-4064.

Clearly, the balance between Articles 63 and 64 posed the most difficulty in the *Holböck* case. The ECJ acknowledged, as it did in *Petri Manninen*, that the Austrian law posed two disadvantages—Austrian investors would be limited in their ability to invest outside of Austria since such investments would carry a higher tax burden, and non-Austrian-based firms would face a greater difficulty raising capital in Austria, as investors would suffer a higher tax burden in comparison to investments in Austrian firms. [228] Additionally, the ECJ claimed that although the phrase "direct investment" is not expressly defined in Articles 63 or 64, the phrase is to be broadly defined and is captured by the nomenclature in Directive 88/361/EEC to include the purchase of shares in a firm (and the reality of non-preferential tax treatment) located in a non-Member State.[229] In the end, Holböck was not entitled to relief and the ECJ held that because the Austrian law creating the differential tax treatment was written in 1988, well before December 31, 1993, the law was within the gambit of Article 64 and thus permissible.[230] However, the ECJ did contend that had the Austrian law not been in place by December 31, 1993, the law would have been an infringement of Article 63.[231]

The facts of *Skatteverket v. A.*[232] are similar to those of both *Petri Manninen* and *Holböck*.[233] Here, the ECJ wrestled with a Swedish law that provided for a tax exemption on dividends issued by limited liability companies located in Sweden, within the European Economic Area ("EEA"), or in a country with which Sweden maintained a convention where tax information must be exchanged between that country and Sweden.[234] In the case at bar, a Swedish national sought a tax exemption from a Switzerland-based firm, which was not within the EEA and neither Sweden nor Switzerland had an agreement that allowed for the free flow of tax information.[235]

The first mission for the ECJ in *Skatteverket* was to clarify the concept of restriction on the free movement of capital and the relationship between Member States and non-Member States.[236] At the outset, the ECJ held that the right of direct taxation falls within the competence of a Member State's national law but that this right must have been in accord with EU law as

228. *Holböck*, 2007 E.C.R. at I-4064.
229. *Id*. at I-4065-66.
230. *Id*. at I-4067-68.
231. *Id*. at I-4067.
232. Case C-101/05, Skatteverket v. A., 2007 E.C.R. I-11531 [hereinafter *Skatteverket*].
233. *See id*. at I-11535; *Holböck*, 2007 E.C.R. at I-4059; *Petri Manninen*, 2004 E.C.R. at I-7480.
234. *Skatteverket*, 2007 E.C.R. at I-11537-38.
235. *Id*. at I-11539.
236. *Id*. at I-11542-43.

well.[237] Also, the ECJ remarked that Article 63 (ex 56, 73d) expressed a clear and unconditional prohibition against barriers to the free movement of capital and was not in need of any implementing legislation.[238] Furthermore, according to the ECJ, Article 63 was directly effective in application to the free movement of capital among Member States and between a Member State and a non-Member State.[239]

Continuing with the line of debate on the concept of restrictions on the movement of capital between Member States and non-Member States, the ECJ entertained a set of arguments from the German, French, and Netherlands governments.[240] The first argument was that the free movement of capital among Member States and between a Member State and a non-Member State could not be similarly interpreted.[241] The three governments contended that the intention of the free movement of capital between Member States was to complete the internal market of the EU, while the extension of Article 63 to non-Member States was more concerned with economic and monetary union.[242] The three governments also argued that extension of the free movement of capital to non-Member States in the same manner as Member States would unilaterally liberalize the non-Member States' common markets without a guarantee of equivalent liberalization.[243] Thus, these three governments asserted that if the free movement of capital were applied in the same manner, Member States would lose the ability to negotiate terms of marker liberalization with non-Member States.[244] They reasoned that the latter group would have already earned that right to free movement of capital and that in the past such negotiated agreements had maintained provisions narrower than Article 63's guarantees.[245]

The ECJ disagreed with the German, French, and Netherlands governments.[246] First, the ECJ held that Article 63's guarantee of the free movement of capital had more to accomplish than just maintaining the internal market, such as establishing the credibility of the EU and the common currency in world financial markets.[247] Second, in a very rare move, the ECJ focused on the intent of the Framers of the TFEU by holding

237. *Id*. at I-11541.
238. *Id*. at I-11543-44.
239. *Skatteverket*, 2007 E.C.R. at I-11544.
240. *Id*. at I-11549.
241. *Id*.
242. *Id*.
243. *Id*.
244. *Skatteverket*, 2007 E.C.R. at I-11549-50.
245. *Id*.
246. *Id*. at I-11550.
247. *Id*. at I-11549.

that the Framers made the conscious choice to extend the free movement of capital to non-Member States.[248] Similarly, the ECJ remarked that the Framers of the EU made other conscious decisions by providing pathways for the EU government—mostly the European Council—to act to limit the free movement of capital in other TFEU provisions including Article 64 and Article 66.[249] Article 64 (ex 57, 73c) allows for restrictions on the free movement of capital set in place on or before December 31, 1993 to remain.[250] Article 66 allows the European Council to take action in exceptional circumstances whereby movements of capital cause or threaten to cause serious difficulties in the execution of economic and monetary policy.[251] While the ECJ admitted that the amount of legal integration between and among the Member States is different from that between a Member State and a non-Member State, especially concerning taxation practices, the ECJ held that the above provisions of the TFEU were to be applied uniquely to each situation and not in a blanket manner.[252] The ECJ reasoned that each Member State that desired to implement a restriction would have to prove its merit.[253]

Next, the ECJ addressed the question as to whether the Swedish law created a restriction in light of Article 63.[254] According to the ECJ, a restriction on the free movement of capital will be found when a Member State's law discourages non-residents from investing in firms located in other Member States or when a Member State's law discourages its residents from making investments in other Member States or non-Member States.[255] The ECJ flatly stated that the design of the Swedish law discouraged its residents from making investments outside the EEA therefore making the equity shares of firms outside the EEA less attractive

248. *Id*. at I-11551.
249. *Skatteverket*, 2007 E.C.R. at I-11551.
250. *Id*. at I-11552.
251. TFEU, *supra* note 55, at art. 66. Article 66 (also known as art. 59 EC or EC Treaty, art. 73f) states:

> Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

Id.
252. *Skatteverket*, 2007 E.C.R. at I-11550-52.
253. *Id*. at I-11553.
254. *Id*. at I-11549.
255. *Id*. at I-11556.

to Swedish residents; thus, the law was, on its face, a violation of Article 63.[256]

The next-to-last step for the ECJ was to determine if Article 65, as an exception that existed before December 31, 1993, could save the Swedish law.[257] Complicating the facts, Sweden enacted the law in question before December 31, 1993, repealed it in 1994, but then reintroduced the provision in 1995; Sweden then extended the tax exemption under the law further in 2001.[258] According to the ECJ, however, the tax exemptions should be viewed as in place by or on December 31, 1993 continuously since the tax exemptions included firms in Sweden, EEA Member States, and any country with which Sweden had an agreement to obtain tax information.[259]

The final step required the ECJ to determine if a justification by an overriding requirement of general interest—specifically, the need to guarantee the effectiveness of fiscal supervision—could save the Swedish legislation.[260] The European Commission and the plaintiff contended that the objective was not proportionate to Sweden's approach since the Swedish government could always require the Swedish investor seeking the tax exemption to put forth proof that he or she is eligible.[261] Similarly, the European Commission and the plaintiff asserted that the Swedish government could not rely on the impossibility of cooperation from another Member State and the investor could not be denied the opportunity to seek the tax exemption.[262] However, the ECJ found that it was within the Member State's power to set requirements upon the investor to gain information from a country in which the firm in question resides, and if that country makes it impossible to gain the required information, the Member State could deny the tax exemption.[263] Therefore, with knowledge that the source country cannot furnish the Member State or the investor with the required information to gain the tax exemption, the tax exemption can be denied without giving the investor the opportunity to furnish documentation.[264]

Inheritance taxes are also subject to the free movement of capital analysis and within the scope of Article 63 (ex 56, 73d).[265] In *Margarete*

256. *Id*.
257. *Skatteverket*, 2007 E.C.R. at I-11556.
258. *Id*. at I-11585-86.
259. *Id*. at I-11557.
260. *Id*. at I-11556.
261. *Id*. at I-11559.
262. *Skatteverket*, 2007 E.C.R. at I-11559-60.
263. *Id*. at I-11561-62.
264. *Id*.
265. Case C-67/08, Margarete Block v. Finanzamt Kaufbeuren, 2009 E.C.R. I-883, I-901 [hereinafter *Block*].

Block v. Finanzamt Kaufbeuren,[266] the ECJ held that a Member State need not allow a resident heir to escape double taxation on an inheritance whereby some of the corpus of the inheritance was located in another Member State.[267] The facts at bar are likely to occur in a multinational unit like the EU. The plaintiff, Block, was the heir to a fortune that included assets invested in Germany as well as assets, in the form of bank accounts, invested in Spain.[268] Both Germany and Spain maintained inheritance taxes.[269] However, German law did not allow for inheritance taxes on assets located in another Member State, and paid to that same Member State, to be credited against the inheritance taxes that would also apply in Germany against the same assets located in that other Member State if the decedent lived in Germany.[270] Therefore, Ms. Block would have to pay inheritance taxes in Spain as well as in Germany on the bank accounts that were in Spain at the death of the testator.[271]

Ms. Block contended that the differential treatment under German law was an infringement of Article 63's guarantee of free movement of capital.[272] Specifically, Ms. Block stated that since the decedent was a resident of Germany, her inherited assets in both Germany and Spain would not have been considered "foreign assets," ineligible for the Spanish tax paid to be credited against the German tax paid, and thus would face double taxation.[273] The ECJ held that inheritance taxes are within the scope of Article 63 in that the nomenclature of Directive 88/361/EEC identifies "personal capital movements" and that any inheritance, be it a liquid or immovable form of property, should be included within the free movement of capital guarantee.[274] However, the ECJ also remarked that inheritance tax issues arising wholly within one Member State would not fall within the scope of free movement of capital under Article 63.[275]

The plaintiff's main contention was that Germany's inheritance tax policy created the risk of double taxation, which would deter investors who may leave some or all of their estate to an heir from investing in assets in

266. 2009 E.C.R. I-883.
267. *Id*. at I-901.
268. *Id*. at I-893.
269. *Id*.
270. *Id*. at I-893-94.
271. *Block*, 2009 E.C.R. at I-894. It should be noted that Spain taxed the inherited assets based on the residence of the debtor, which in this case would be a bank account, and the bank's residence (Spain). *Id*. Germany taxed foreign assets based on the residence of the creditor, which in the case of a bank account would be the owner of the account, and this case would be the heir (Germany). *Id*.
272. *Id*. at I-897.
273. *Id*. at I-898.
274. *Block*, 2009 E.C.R at 896-97.
275. *Id*. at I-897.

other Member States.[276] The ECJ found the German and Spanish tax policies were the result of decisions of fiscal sovereignty, whereby one Member State decided to tax bank accounts based on the residence of the creditor (Germany) and the other Member State decided to tax bank accounts based on the residence of the debtor (Spain).[277] According to the ECJ, in its current state, EU law did not put forth general criteria as to how Member States should work to eliminate the risk of double taxation.[278] Accordingly, the ECJ held that Member States maintain a certain level of autonomy in the area of inheritance tax policy, so long as they adhere to EU law, and are not required to mold their tax systems to offset the possibility of double taxation on inherited assets.[279]

In *Finanzamt Speyer-Germersheim v. STEKO Industriemontage GmbH*,[280] the ECJ held that Germany's tax law that treated holdings by a resident firm in other firms located in the same Member State differently than holdings by a resident firm in other firms located outside the Member State for purposes of taxation is an infringement of the free movement of capital under Article 63.[281] Pursuant to German tax law, profits garnered by German firms that held at least a 10% interest in another firm located outside Germany were subject to unlimited taxation, as there was no allowance for the deduction of losses incurred by the sale of holdings.[282] However, for a German firm that earned profits on another firm located in Germany in which the former had at least a 10% interest in the latter, German tax law allowed for a tax reduction that would include the losses suffered following the sale of that interest.[283] Additionally, if a German firm with less than 10% interest in a firm outside of Germany sold the interest at a loss, the German firm would enjoy a tax reduction based on the losses associated with the sale of that firm.[284] German tax law also provided a lesser time period for the ability to reduce a tax liability through a write-down of its value when a firm outside Germany held the interest in contrast to a write-down of the value when a firm located in Germany sold the interest.[285]

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276. *Id*. at I-898.
277. *Id*. at 899.
278. *Id*.
279. *Block*, 2009 E.C.R at I-900.
280. Case C-377/07, Finanzamt Speyer-Germersheim v. STEKO Industriemontage GmbH, 2009 E.C.R. I-299 [hereinafter *STEKO*].
281. *Id*. at I-309-10, I-317-18.
282. *Id*. at I-304.
283. *Id*. at I-304-05.
284. *Id*. at I-316.
285. *STEKO*, 2009 E.C.R. at I-310.

The German government provided three supporting rationales in order to save its tax statute.[286] First, Germany argued that although there was unequal treatment based on the location of the firm where shares were sold, the unequal treatment of such duration would not prevent or deter taxpayers from investing in firms outside Germany.[287] Second, Germany contended that a restriction on the free movement of capital should be tolerated when the Member State is attempting to transition its taxation system.[288] Lastly, the German government supported its tax policy by stating that such a difference in tax policy is necessary in order to maintain fiscal control.[289]

The ECJ began its decision by reminding the parties that Article 63 does not tolerate any restriction on the free movement of capital if it is likely to discourage non-residents from investing in a non-resident firm.[290] However, the ECJ also stated that Article 63 would prohibit restrictions on the free movement in capital when the restrictions prevent or limit the acquisition of an interest in firms located in other Member States and/or discourage an investor from maintaining those interests in a firm located in other Member States.[291] The ECJ also remarked that a limitation on the free movement of capital could be supported under the TFEU if the difference in tax treatment was based on "situations which are not objectively comparable or . . . by overriding reasons in the general interest."[292]

The ECJ concluded that the difference in taxation, based on whether the selling firm is located within or outside of Germany, was not a difference resembling objective comparability.[293] The ECJ found that losses sustained by a parent company, the functional party paying the tax and located in Germany, was objectively comparable despite the fact that the interest sold may or may not be in a firm located in Germany.[294] According to the ECJ, it was only the German tax policy that made the difference in treatment.[295] As Member States adjusted their tax systems in compliance with EU law, the ECJ held that the need for a period of leeway did not justify two tax policies—the fundamental freedoms, including the free movement of capital, limits any margin of discretion associated with compliance.[296]

286. *Id*. at I-308.
287. *Id*.
288. *Id*. In 2000, there were two German tax statutes that differed based on the offset procedure concerning the ability to deduct losses from the sale of an interest in a firm located in Germany versus an interest in a firm located outside of Germany. *See id*. at I-304-05.
289. *STEKO*, 2009 E.C.R. at I-308.
290. *Id*. at I-309.
291. *Id*.
292. *Id*. at I-311.
293. *Id*. at I-312.
294. *STEKO*, 2009 E.C.R. at I-312.
295. *Id*. at I-311-12.
296. *Id*. at I-316.

Finally, the ECJ stated that the German government's argument that there is an overriding general interest for fiscal control was unfounded; the value of interests in firms, both inside and outside Germany, are based on the fluctuations in the stock market.[297]

Pursuant to Article 63's (ex 56, 73b) prohibition against rules restraining the free movement of capital, Member States cannot treat charitable organizations located in other Member States differently in regard to levels of tax liability.[298] In *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*,[299] the German government's tax policy—prohibiting charitable organizations chartered in other Member States from enjoying limited tax liability on rental income derived from property owned in Germany, yet permitting German-chartered charitable organizations with rental property located in Germany to enjoy the tax benefit—was challenged under Article 49's right of establishment and Article 56's free movement of services guarantee.[300]

Although the ECJ contended that the right of establishment should be read broadly, the it should not apply to the German tax law.[301] According to the ECJ, the right of establishment allows nationals of the various Member States to take up and pursue activities in other Member States as either self-employed persons or in the form of business associations, including branches, subsidiaries, and agency, while enjoying the same treatment as those citizens of the host Member State.[302] This right also extends to provide a citizen of a Member State the ability to engage in the economic and social life of the host Member State and profit from those activities.[303] However, the ECJ stated that such a right and the freedoms associated with that right can only extend to persons and entities that have created a permanent residence in the host Member State and, in cases where real estate is obtained, that real estate in the host Member State is actively managed.[304] The ECJ believed that the plaintiff, an Italian charitable organization, utilized the property it owned in an ancillary way in comparison to the organization's core activities.[305]

In contrast, the ECJ held that the free movement of capital doctrine applied to activities including the ownership and administration of real

297. *Id*. at I-317.

298. Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften, 2006 E.C.R. I-8203, I-8255-56 [hereinafter *Stauffer*].

299. 2006 E.C.R. I-8203.

300. *Id*. at I-8244.

301. *Id*. at I-8245.

302. *Id.*

303. *Id*.

304. *Stauffer*, 2006 E.C.R. at I-8245.

305. *Id*.

estate owned by a firm chartered in one Member State but located in another Member State.[306] The ECJ found that the German tax law provided a restriction of the free movement of capital under Article 63, but next queried as to whether the German law was permissible under the derogations allowed in Article 65 (58, 73d), the latter of which must be interpreted strictly and would not allow for any blanket tax law distinguishing between comparable taxpayers merely on the basis of location.[307] Additionally, Article 65 does not allow for derogation from the free movement of capital unless the restriction: (1) is free from arbitrary discrimination, (2) concerns differences that are not objectively comparable, or (3) is justified by an overriding reason in the general interest.[308]

The German government put forth several justifications for its tax law.[309] First, the German government contended that because German charitable organizations play a vital role in Germany and assume duties that would otherwise depend on the German government, they should receive the limited tax liability on the rental income from their real estate holdings in Germany.[310] Second, the German government contended that each Member State has its own rules on the conception of charitable organizations and thus the variation in what amounts to charitable purposes creates a condition whereby, in this case, German charities and Italian charities are not comparable.[311] Third, the German government contended that the difference in tax treatment can be supported by Article 167 (ex 151, 128), which allows for the promotion of a Member State's differences in culture, and Article 107 (ex 87, 92), which allows a Member State to engage in some forms of state aid to benefit undertakings engaged in the promotion of cultural conservation.[312] Fourth, the German government argued that it is

306. *Id*. at I-8246. The ECJ once again used the nomenclature of Directive 88/361 of the EEC Treaty to identify the investment in real estate in another Member State as included in the free movement of capital guarantee. *Id*.

307. *Id*. at I-8247-48.

308. *Stauffer*, 2006 E.C.R at I-8248.

309. *Id*. at I-8248-49, I-8251, I-8253, I-8255.

310. *Id*. at I-8249.

311. *Id*.

312. *Id*. at I-8251. Article 167 states:

> 1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
>
> 2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
>
> - improvement of the knowledge and dissemination of the culture and history of the European peoples,

> - conservation and safeguarding of cultural heritage of European significance;
>
> - non-commercial cultural exchanges,
>
> - artistic and literary creation, including the audio-visual sector.
>
> 3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.
>
> 4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.
>
> 5. In order to contribute to the achievement of the objectives referred to in this Article:
>
> - the European Parliament and Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
>
> - the Council, on a proposal from the Commission, shall adopt recommendations.

TFEU, *supra* note 55, at art. 167. Article 107 (also known as art. 87 EC or EC Treaty, art. 92) reads:

> 1. Save as otherwise provided in the Treaties, any aid granted by a Member State or though State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.
>
> 2. The following shall be compatible with the internal market:
>
> (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
>
> (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
>
> (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. . . .
>
> 3. The following may be considered to be compatible with the internal market:
>
> (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment . . . ;
>
> (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
>
> (c) aid to facilitate the development of certain economic . . . areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

too difficult to determine whether a charitable organization chartered in another Member State actually meets the objectives of that Member State's law and, likewise, that the cost of monitoring that compliance is too costly.[313] Fifth, the German government stated that allowing charitable organizations from other Member States to reap the same tax benefits would threaten the cohesion of the German tax system.[314] Lastly, the German government argued that if the limited tax liability is permitted, the German government could be fostering the creation of criminal gangs and terrorist organizations that have formed as charitable organizations for the purposes of money-laundering and illegal transfers of funds.[315]

While finding that the German tax law violated Article 63 of the TFEU, the ECJ addressed each of Germany's contentions.[316] First, the ECJ stated that a link between the functions of a charitable organization and the organization's activities is irrelevant—German law did not make a distinction as to whether those activities are carried out in Germany or elsewhere.[317] According to the ECJ, the German law did not require a charitable foundation, even if located in Germany, to engage in activities in order to meet the public interest of Germans.[318] Second, the ECJ stated that if a Member State grants charitable organization status to an undertaking, other Member States must recognize that status under their own law and cannot deny equal treatment.[319] Here, the ECJ believed that the German law only made a difference based on location, not the mission of the charitable organizations.[320] Third, The ECJ did not believe Germany's tax law on charitable organizations passed muster under Articles 167 or 107.[321] The ECJ found that the limited tax liability benefit was not designed to further the interests identified in those Articles.[322] Fourth, the ECJ contended that although fiscal supervision may constitute an overriding requirement of general interest capable of justifying a restriction on the free movement of

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> (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
>
> (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Id. at art. 107.

313. *Stauffer*, 2006 E.C.R. at I-8251.
314. *Id*. at I-8253.
315. *Id*. at I-8255.
316. *Id*. at I-8249-56.
317. *Id*. at I-8249.
318. *Stauffer*, 2006 E.C.R. at I-8249.
319. *Id*. at I-8250.
320. *Id*.
321. *Id*. at I-8251.
322. *Id*.

capital, a Member State cannot implement a blanket denial of equal treatment; the Member State can force the charitable organization operating in another Member State to prove that it is meeting the charitable requirements of its home Member State.[323] Additionally, the German government could have relied on Directive 77/799/EEC, which requires Member States to engage in mutual assistance in the field of taxation, and Directive 2004/106/EEC, which requires Member States to furnish other Member States with tax information to determine correct tax assessments.[324] Fifth, although the need to maintain cohesion of a national tax system can be grounds for a restriction on the free movement of capital, the ECJ did not believe that there must be a link between the tax advantage and the offsetting of that tax advantage in order to sustain the restriction.[325] Here, the ECJ remarked that there was no such link; the German law did not specify that charitable organizations would gain the advantage of limited tax liability based on their specific activities.[326] Instead, the advantage was based on geographic location.[327] Lastly, the ECJ stated that merely because a charitable organization is established in another Member State, a general presumption that the organization is engaged in criminal activity, leading to a blanket denial of limited tax liability, cannot exist.[328]

IV. ANALYSIS OF THE FREE MOVEMENT OF CAPITAL JURISPRUDENCE IN THE EUROPEAN UNION

There are four dominant themes identified in this survey of the ECJ's jurisprudence on the free movement of capital. First, after the ECJ's decision in *Casati*, the free movement of capital guarantee became much more absolute.[329] In *Casati*, the ECJ respected the ability of the Italian government to prohibit the export of a specified amount of currency despite the recognition that the free movement of currency was a fundamental freedom of the TFEU.[330] Specifically, the ECJ had stated that since the EU law had not liberalized the exportation of currency, Member States had greater freedom to regulate the flow of currency across borders.[331] However, in *Sanz de Lera*, the ECJ took a much stronger, pro-TFEU approach to the free movement of capital and found a Spanish law requiring

323. *Stauffer*, 2006 E.C.R. at I-8252. According to the ECJ, the proof could come in the form of an annual report on accounts and activities. *Id*.
324. *Id*. at I-8252-53.
325. *Id*. at I-8253.
326. *Id*. at I-8254.
327. *See Stauffer*, 2006 E.C.R. at I-8254.
328. *Id*. at I-8255.
329. *See Casati*, 1981 E.C.R. at 2619-20.
330. *Id*. at 2617-18.
331. *Id*. at 2614.

authorization to move currency across the border a violation of Article 63.[332] The ECJ found that a Member State's power of authorization could be abused in a way that would greatly impair the free movement of capital and noted that EU citizens moving currency from one Member State to another should be able to enjoy a free movement of capital in a way that respects urgency.[333] Likewise, in *Bordessa*, the ECJ stated that Member States could not engage many-tiered levels of administration that could slow the free movement of capital.[334]

Aside from transactions involving the physical movement of currency, the ECJ also extended the free movement of capital to the pricing of real estate by prohibiting Member States form requiring the pricing of real estate transactions in the Member State's currency.[335] Additionally, in *Commission v. United Kingdom*, the ECJ found the free movement of capital to block limitations in the amount of shares that can be owned by a non-government entity and stated that Article 63 was designed to remove all restrictions on the free movement of capital among Member States and between a Member State and a non-Member State.[336] In *Mannien*, *Holböck*, *Skatteverket*, *Block*, and *STEKO*, the ECJ extended the free movement of capital guarantee to block the ability of Member States to use their tax policies to favor investment in firms and activities physically within the Member State.[337] In *Skatteverket*, the ECJ went as far as requiring a Member State that did not have an agreement with Switzerland to exchange tax information to allow a taxpayer to show proof of tax exemption eligibility.[338] In *Stauffer*, the ECJ further extended Article 63's free movement of capital to tax laws that favored charitable organizations located within a Member State.[339]

The only case surveyed here that serves as an outlier in regard to the continuous strengthening of the free movement of capital trend is *Block*.[340] Here, the ECJ, in a very uncharacteristic way (given that the case was decided in 2009, fourteen years after the strongly-worded *Sanz de Lera* case), allowed a Member State to tax inheritances twice, even though the free movement of capital could be limited; in order to prevent heirs from

332. *Sanz de Lera*, 1995 E.C.R. at I-4838.
333. *Id*. at I-4838, I-4840-41.
334. *Bordessa*, 1995 E.C.R. at I-385.
335. *Trummer*, 1999 E.C.R. at I-1678-79.
336. *Commission v. United Kingdom*, 2003 E.C.R. at I-4660-61.
337. *Petri Mannien*, 2004 E.C.R. at I-7515; *Holböck*, 2007 E.C.R. at I-4067; *Skatteverket*, 2007 E.C.R. at I-11583; *Block*, 2009 E.C.R. at I-901; *STEKO*, 2009 E.C.R. at I-309-10, I-317-18.
338. *Skatteverket*, 2007 E.C.R. at I-11588-90.
339. *Stauffer*, 2006 E.C.R. at I-8246-48.
340. *Block*, 2009 E.C.R. at I-900.

losing some value in the estate, people were forced to make their investments in the residential Member State.[341]

The second major theme identified in this work is the increased strength of the free movement of capital since the adoption of EU Directive 88/361/EEC. Beginning in *Sanz de Lera* and after the enactment of Directive 88/361/EEC, the ECJ took a much harder approach against Member State attempts to limit the free movement of capital in breach of Article 63.[342] In *Bordessa*, the ECJ went as far as claiming that the goal of Directive 88/361/EEC was to bring the full liberalization of the free movement of capital.[343] Furthermore, in *Trummer & Mayer*, the ECJ stated that the mission of Directive 88/361/EEC was not exhaustive in what activities encompassed the free movement of capital.[344] In *Block*, the ECJ contended that Directive 88/361/EEC also included inheritance taxes as a form of "personal capital movements."[345] Without the thrust of Directive 88/361/EEC, the ECJ may have left the free movement of capital without teeth, as was the case in *Casati*, where the ECJ stated that the free movement of capital had not been fully liberalized across the EU.[346]

The third theme seemingly espoused by the ECJ is to limit the excuses, creative or otherwise, that Member States may use in order to justify limitations on the free movement of capital. *Alfredo Albore* is perhaps the best example of this theme.[347] As late as the 1990s, the Italian government was prohibiting non-Italians from purchasing real estate in regions of military importance unless granted governmental permission, even if the potential purchaser held European Union citizenship.[348] Despite the popular concern held by the Italian government in the name of "security," the ECJ stated that the Italian government would have to engage in other methods of insuring security without limiting the cross-border purchase of real estate, as it is a violation of the free movement of capital under Article 63.[349] A similar result was achieved in *Klaus Konle*, in which the ECJ entertained an Austrian law prohibiting the purchase of a second residence in Austria, but such a rule was found to run afoul of the free movement of capital.[350]

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341. *Id*. at I-901.
342. *See Sanz de Lera*, 1995 E.C.R. at I-4836-40.
343. *Bordessa*, 1995 E.C.R. at I-384.
344. *Trummer*, 1999 E.C.R. at I-1678.
345. *Block*, 2009 E.C.R. at I-896-97.
346. *See Casati*, 1981 E.C.R. at 2616-17.
347. *Albore*, 2000 E.C.R. at I-6003.
348. *Id*. at I-5997-98, I-6003.
349. *Id*. at I-6002-03.
350. *Konle*, 1999 E.C.R. at I-3125-26, I-3128.

A third example of this theme also comes from Italy.[351] In *Commission v. Italy*, the Italian government attempted to block significant investments in firms that could serve as a threat to certain vital industries.[352] Once again, the ECJ turned away a Member State's rationale for limiting investment in real estate, deeming the maneuver to be an unacceptable breach of the free movement of capital.[353] A fourth example is found in *Centro di Musicologia*.[354] Here, the German government attempted to extend limited tax liability provisions to charitable organizations not chartered in Germany even if the organization was chartered in another EU Member State.[355] The German government defended its policy, at least in part, on the grounds that such charitable organizations did not support the German population and such organizations could be fostering terrorism and money laundering.[356] The ECJ held that because the location of the organization's charter was the only guiding principle as to whether a charity garnered the benefit of limited tax liability, it infringed upon Article 63's guarantee of the free movement of capital.[357]

The fourth theme depicted in the ECJ's jurisprudence, and one that perhaps meets the most important mission of the EU's common market, is the creation of a more liquid investment arena. As stated above, if the decision in *Casati* were to stand indefinitely, it would have limited the liquidity of assets located in other Member States.[358] In other words, if EU citizens were not permitted to bring currency across Member State boundaries, those citizens would have a difficult time purchasing assets in another Member State.[359] The ECJ's decision in *Trummer & Mayer* is a good example.[360] Here, the ECJ made it clear that Member States could not mandate that contracts for the purchase of real estate be denominated in the same Member State's currency.[361] If the ECJ decided these cases differently, the liquidity of real estate would diminish, as the buyer and seller would then face government regulations interfering with the negotiation process.[362] *Petri Mannien* is another example of the ECJ's disapproval of a Member State's attempt to award tax benefits associated with dividends only if the firm issuing the dividends was located in the

351. *See Commission v. Italy*, 2009 E.C.R. at I-2333-34.
352. *Id*. at I-2319-20.
353. *Id*. at I-2333-34.
354. *Stauffer*, 2006 E.C.R. at I-8250-51.
355. *Id*. at I-8239-40.
356. *Id*. at I-8255.
357. *Id*. at I-8250-51.
358. *See Casati*, 1981 E.C.R. at 2619.
359. *See id*. at 2618-19.
360. *See Trummer*, 1999 E.C.R. at I-1679.
361. *Id*.
362. *See id*.

Member State.[363] Once again, if this case were decided differently, Member States would most likely extend the same rule to their own jurisdictions; thus, making the purchase of stock inefficient as investment dollars would not likely cross Member State borders.[364] The same reality can be associated with the ECJ's decision in *Holbock*, where the ECJ extended the free movement of capital to non-Member State jurisdictions through Directive 88/361/EEC.[365]

Similar results are found in both *Alfredo Albore* and *Klaus Konle*.[366] In both cases, Member States were placing restrictions on the purchase of real estate for non-financial reasons including security and second residency, respectively.[367] However, by lifting the restrictions placed on the purchase of real estate in the strategic region (Italy) and the ban on a second residence (Austria), anyone in the EU could purchase the real estate in these areas, making the property more liquid.[368] The *Commission v. Italy* decision further contributed to a more liquid investment environment as the ECJ barred Italy from limiting the levels of investment by an investor in any one firm.[369] It was held that if ownership of a firm is open to all at prices a market will bear, it is inherently more efficient.[370] Similarly, the ECJ held in *STEKO* that Germany could not limit tax benefits associated with dividend payments based on the amount of ownership in a firm.[371]

V. CONCLUSION

The case law surveyed in this work depicts ECJ's strong front against Member States' ability to infringe upon the TFEU's free movement of capital doctrine. With the exception of one case, the ECJ has not deemed appropriate any Member State justification for limiting the movement of capital between Member States of the European Union or between a Member State and a non-Member State.[372] The ECJ's jurisprudence clearly sets a policy that any such limitations will be met with great skepticism and when the domestic law of a Member State constructs such limitations, the ECJ demands strict clarity so that those operating within Member States will be able to attack those limitations on the grounds that Article 63 and

363. *Petri Mannien*, 2004 E.C.R. at I-7505-06.
364. *Id*.
365. *Holböck*, 2007 E.C.R. at I-4065-66.
366. *Albore*, 2000 E.C.R. at I-6003; *Konle*, 1999 E.C.R. at I-3138.
367. *Albore*, 2000 E.C.R.at I-6003; *Konle*, 1999 E.C.R. at I-3126, I-3138.
368. *Albore*, 2000 E.C.R. at I-6003; *Konle*, 1999 E.C.R. at 3138.
369. *See Commission v. Italy*, 2009 E.C.R. at I-2333-34.
370. *Id*.
371. *STEKO*, 2009 E.C.R. at I-309-10.
372. *See supra* Part IV.

Article 65 are violated.[373] Therefore, even the most facially neutral limitations placed on the free flow of capital by a Member State will not save a domestic law from a high hurdle set by the ECJ's interpretation of Articles 63 and 65.[374]

Due to its interpretations of the TFEU, the ECJ's jurisprudence has crafted a more liquid investment environment in Europe, indicating that assets in virtually all forms can be purchased within the European Union without restriction.[375] This was an imperative mission of the Framers when they set out to draft the TFEU.[376] Likewise, Member States are not as readily able to protect firms dubbed as national champions from being purchased with capital from another member-state.[377] In cases where it is relevant, the ECJ has consistently mandated that Member States adopt the least restrictive means to meet its objectives.[378] In such cases, Member States will be subject to questioning as to whether their domestic concerns could be met by regulations other than those limiting the free flow of capital.[379]

The surveyed cases also support the macro-level goal of economic integration.[380] Member States, subject to the free movement of capital, goods, services, and labor, are more interconnected through purchases of assets by citizens of other Member States.[381] In 1962, Professor Balassa commented that the pure competition brought on by the free movement of these factors would bring about price equalization and efficient resource allocation.[382] The ECJ's jurisprudence on the free movement of capital supports this theory in that as the free movement of capital becomes more entrenched, there are more buyers available to purchase assets across Member State boundaries, thus broadening the marketplace.[383] Each potential buyer of assets brings his or her own perspective on the value of an asset; the final price of that asset is likely to reflect a truer, more efficient, market value.[384] Professor Balassa calls this phenomenon a "optimum condition[]."[385]

373. *See Commission v. Italy*, 2009 E.C.R. at I-2334-35.
374. *See Stauffer*, 2006 E.C.R. at I-8254-55; *Commission v. United Kingdom*, 2003 E.C.R. at I-4655-56.
375. *See Skatteverket*, 2007 E.C.R. at 11555-56; *Trummer*, 1999 E.C.R. at I-1678.
376. *See Skatteverket*, 2007 E.C.R. at I-11551; *Trummer*, 1999 E.C.R. at I-1678.
377. *See Commission v. Italy*, 2009 E.C.R. at I-2329-30.
378. *Sanz de Lera*, 1995 E.C.R. at I-4838, I-4840-41.
379. *Id*.
380. *See supra* Part III.
381. KUBICEK, *supra* note 28, at 70.
382. BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION 80 (1961).
383. *See Skatteverket*, 2007 E.C.R.at I-11555-56; *Trummer*, 1999 E.C.R. at I-1678.
384. BALASSA, *supra* note 382, at 80.
385. *Id*.

One of the chief objectives behind the creation of the European Union was the acceleration of economic growth and development.[386] The European Union's mission, as identified by its Framers, will only progress if the ECJ's decisions continue to reinforce the free movement of capital while also repelling Member State domestic laws that interfere with this route to economic integration.[387] With the free movement of capital, assets are priced and sold at an efficient value.[388] Without free movement of capital, asset prices are associated with a lack of knowledge, Member States are free to draft regulations that favor its own citizens, and the overall economy of the twenty-eight-member European Union becomes less efficient.[389] The ECJ's role is critical in that Member States, despite agreeing to become parties to the TFEU, may attempt to stray from the TFEU's requirements.[390] The free movement of capital is not only central to the European Union, but is also a part of the legal fabric of many free trade agreements.[391] Free trade agreements, in their various forms, require the coordination of commercial policies such as those that promote the free movement of capital.[392] It may be that the ECJ is in the best position to enforce this commercial policy coordination. As the ECJ continues to succeed in harmonizing and coordinating the free movement of capital among the twenty-eight Member States, its efforts will become the model for promoting the free movement of capital, should the Transatlantic Trade and Investment Partnership between the United States and the European Union become a reality.[393]

386. Oleksandr Pastukov, *Counteracting Harmful Tax Competition in the European Union*, 16 SW. J. INT'L. L. 159, 159 (2010).

387. *See id*. at 160.

388. KUBICEK, *supra* note 28, at 68.

389. *Id*.

390. MILIO, *supra* note 65, at 3.

391. Adam Feibelman, *The IMF and Regulation of Cross-Border Capital Flows*, 15 CHI. J. INT'L. L. 409, 411 (2015).

392. BALASSA, *supra* note 382, at 77.

393. *See* Mark Weaver, *The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications*, 29 EMORY INT'L. L. REV. 225, 251 (2014).