

Austria Clarifies Third-Country Impact of ECJ's *Lenz* Decision

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Austria Clarifies Third-Country Impact of ECJ's *Lenz* Decision

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The European Court of Justice ruled on the discriminatory taxation of foreign capital income in Austria in its July 15, 2004, judgment in *Anneliese Lenz v. Finanzlandesdirektion für Tirol* (C-315/02, *Lenz*).¹ (For the ECJ decision, see 2004 WTD 138-7 or Doc 2004-14606.) Under Austrian law prior to April 1, 2003, foreign capital income (interest, dividends, and income from foreign investment funds) was taxed at a progressive tax rate of up to 50 percent; in contrast, domestic capital income is taxed at a flat rate of 25 percent or, optionally, at the half-average income tax rate. The ECJ found that this rule infringed on the free movement of capital, which is generally prohibited under article 56 of the EC Treaty.²

In 2003 Austria enacted a new discrimination-free regime of capital income taxation to prevent further conflict with this foreseeable judgment. Foreign-source capital income that accrued on or after April 1, 2003, is taxed at a special tax rate of 25 percent under

section 37(8) of the Austrian Individual Income Tax Act³ or, optionally, at the half-average income tax rate.⁴

Following the *Lenz* decision, the Austrian Ministry of Finance (MoF) had to deal with “old” cases concerning foreign-source capital income that accrued before April 1, 2003. In a release of July 30, 2004,⁵ the MoF took the view that foreign-source capital income must also be taxed at the special tax rate of 25 percent, analogous to section 37(8) of the EStG insofar as possible under procedural law. Interestingly, the MoF extended, without further hesitation, the effects of the *Lenz* decision to third countries, although the ECJ has explicitly refrained from ruling on third-country situations.⁶ However, in that respect, it is not entirely clear how articles 56 and 58 EC work in third-country situations, because there are good reasons to give member states more leeway to justify restrictive measures towards third countries as opposed to member states.

I. The *Lenz* Decision: Background, Questions Referred, and Judgment of the ECJ

A. Background and Overview

The Ruding Report of 1992 highlighted that “the manner in which Member States currently provide relief for the double taxation of cross border dividend

¹Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir); for comments on this decision, see, e.g., Tatjana Polivanova-Rosenauer, “ECJ Rules on Austrian Discrimination of Foreign-Source Investment Income,” 44 *ET* 416, 419 (2004); Georg W. Kofler, “*Lenz*: Österreich darf ausländische Kapitalerträge nicht diskriminieren,” 57 *ÖSTZ* 343 (2004). For prior coverage of the case, see Markus Stefaner, “ECJ Advocate General Says Austrian Foreign Dividend Tax Regime is Discriminatory,” *Tax Notes Int'l*, Apr. 5, 2004, p. 8; Gerald Toifl and Tatjana Polivanova-Rosenauer, “Preliminary Ruling Requested from ECJ on Austrian Taxation on Foreign Dividends,” 43 *ET* 87 (2003).

²Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC]; a consolidated version of the EC is published in 2002 O.J. (C 325) 33 and can also be found, along with the case law of the ECJ and other legal documents, such as the official journal [hereinafter O.J.] and directives, in the official database “Eur-Lex — The portal to European Union law” at <http://europa.eu.int/eur-lex/>.

³*Einkommensteuergesetz* 1988, BGBl (Federal Gazette) 1988/400 [hereinafter EStG].

⁴Budget Supplementary Law 2003 (*Budgetbegleitgesetz* 2003), BGBl (Federal Gazette) I 2003/71. For these changes, see, e.g., Dietmar J. Aigner, Hans-Jörgen Aigner, and Georg W. Kofler, “Die Neuordnung der Besteuerung von Kapitalerträgen durch das BudgetbegleitG 2003,” 14 *ecolex*, 480 (2003); Niklas Schmidt, “Reform der Besteuerung ausländischer Kapitalerträge bei natürlichen Personen,” 2 *GeS* 187 (2003); Michael Tissot, “Besteuerung ausländischer Kapitaleinkünfte verfassungs- und EU-konform?” 21 *RdW* 672 (2003).

⁵“Auswirkungen des EuGH-Urteils vom 15.7.2004, C-315/02, *Lenz*” (Consequences of the ECJ's *Lenz* decision), Ministry of Finance release, July 30, 2004, 06 1602/2-IV/6/04 (available at <http://www.bmf.gv.at/steuern/einkommensteuer/erlaesse/lenzinfo.htm>).

⁶Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir) — para. 17.

payments to individual investors constitutes a source of discrimination against cross-border investment flows,” and stated that “such discrimination tends to fragment capital markets in the Community.”⁷ Thus, for many years, the differences in Austrian taxation of foreign- and domestic-source dividends at the level of individual investors have been the subject of controversial discussions in legal writing.⁸ Doubts about the compatibility of the Austrian regime of dividend taxation have recently been strengthened by the EC communication on “Dividend Taxation of Individuals in the Internal Market.”⁹ Following the unsuccessful preliminary request on these issues in the *Walter Schmid* case,¹⁰ which the ECJ denied answering because of lack of jurisdiction, the ECJ, on July 1, 2004, ruled on the Austrian tax regime in the long-expected *Lenz* decision.¹¹ The court held that articles 56 EC and 58(1) and (3) EC preclude legislation that allows only the recipients of revenue from capital of Austrian origin to choose between a flat 25 percent tax with discharging effect and ordinary income tax with the application of a half-average tax rate, while providing that revenue from capital originating in another member state be subject to ordinary income tax of up to 50 percent without any rate reduction. It further ruled that such discrimination cannot be justified simply because that revenue from companies established in another member state is subject to low taxation in that state.

B. The Request for a Preliminary Ruling

The ECJ judgement referred to a dispute between Anneliese Lenz, a German national residing in Austria, and the *Finanzlandesdirektion Tirol* (Regional Tax Directorate, Tirol). In 1996 Lenz received income entirely consisting of dividends from German companies. The Austrian tax authority calculated her liability to tax for 1996 using the progressive rate of income tax (the marginal individual income tax being 50 percent) without applying the special final tax system for dividends received from Austrian companies (at a flat rate of 25 percent, deducted at source) or the reduced half-average income tax rate in sections 37 and 97 EStG. Lenz made a complaint against that assessment claiming, in particular, that

the failure to apply the final tax or the reduced rate to income from shareholdings in companies in other member states was contrary to the free movement of capital guaranteed by article 56 of the EC Treaty. The complaint was rejected by the tax authority, and Lenz brought proceedings before the federal administrative court (*Verwaltungsgerichtshof* — VwGH).

With doubts as to the compatibility of the national tax provisions with EC law, the VwGH referred several questions to the ECJ for a preliminary ruling. The VwGH wanted to know, *inter alia*, whether article 56 EC, in conjunction with article 58(1)(a) and (b) and (3) EC, precluded member state legislation that reserves the application of definitive taxation at a flat rate of 25 percent, or of a tax rate reduced by half, for revenue from capital paid by a company established in that member state, while excluding revenue paid by a company established in another member state. If so, the VwGH wanted to know whether the compatibility of that legislation with those provisions of the treaty depends on the level of corporation tax on the profits of companies in the state where they are established.

C. The ECJ's Judgment

1. Restriction on the Free Movement of Capital

Not surprisingly, the ECJ decided that the Austrian legislation constituted a restriction on the free movement of capital, in principle, prohibited by article 56 EC. It used a two-prong argument.¹²

First, the legislation deterred taxpayers living in Austria from investing capital in companies established in another member state.¹³ Second, the legislation produced a restrictive effect for companies established in other member states, because it constituted an obstacle to raising capital in Austria.¹⁴ To the extent that revenue from capital originating in another member state receives less favorable tax treatment than revenue from capital of Austrian origin, the shares of companies established in other member states are, for investors living in Austria, less attractive than the shares of companies established in that member state.¹⁵

⁷Commission of the European Communities, Report of the Committee of Independent Experts on Company Taxation — Ruding Report 207 *et seq.* (1992).

⁸See, e.g., Claus Staringer, “Dividendenbesteuerung und Kapitalverkehrsfreiheit,” in *Kapitalverkehrsfreiheit und Steuerrecht* 93 (99 *et seq.*) (Eduard Lechner, Claus Staringer, and Michael Tumpel, eds., 2000) and the references therein.

⁹Communication from the Commission on “Dividend Taxation of Individuals in the Internal Market,” COM (2003) 810 final.

¹⁰Case C-516/99, *Walter Schmid*, 2002 E.C.R. I-4573.

¹¹Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir).

¹²Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir) — para. 20 *et seq.*

¹³See also Case C-484/93, *Svensson and Gustavsson v. Ministre du Logement et de l'Urbanisme*, 1995 E.C.R. I-3955 — para. 10; Case C-222/97, *Trummer und Mayer*, 1999 E.C.R. I-1661 — para. 26.

¹⁴See also Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — para. 35; Case C-334/02, *Commission v. France*, 2004 E.C.R. (nir) — para. 24.

¹⁵See, to that effect, Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — para. 35; Case C-334/02, *Commission v. France*, 2004 E.C.R. (nir) — para. 24.

2. Justification Under the “Rule of Reason”?

The ECJ examined whether the restriction on the free movement of capital was justified under the provisions of the treaty. In principle, article 58(1)(a) EC allows member states to apply provisions of their tax law that distinguish between taxpayers not in the same situation because of the place where their capital is invested. However, this derogation from the fundamental principle of the free movement of capital must be interpreted strictly. It cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers because of the place where they invest their capital is automatically compatible with the treaty. The derogation in article 58(1)(a) EC is itself limited by article 58(3) EC, which provides that the national provisions “shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.”¹⁶

In 2003 Austria enacted a new discrimination-free regime of capital income taxation.

A distinction must be made, therefore, between unequal treatment permitted under article 58(1)(a) and arbitrary discrimination prohibited by article 58(3) EC. The ECJ case law shows that national tax legislation, which distinguishes between domestic- and foreign-source dividends, is only compatible with provisions on free movement of capital if the difference in treatment either concerns situations that are not objectively comparable or can be justified by overriding reasons in the general interest, such as safeguarding the cohesion of the tax system, fighting tax avoidance, and effective fiscal supervision.¹⁷ To be justified, moreover, the difference in treatment between different categories of revenue from capital must not go beyond what is necessary to attain the objective of the legislation.¹⁸

The ECJ considered the following arguments brought forward for justification:

- The court first rejected the argument that the Austrian tax legislation is justified by an objective difference in situation because

Austrian authorities are not able to tax revenue from foreign companies as they do that of domestic companies.¹⁹ The ECJ referred to its case law in stating that the Austrian tax legislation that applies the definitive tax rate of 25 percent, or of the tax rate reduced by half, to revenue from capital only of Austrian origin does not relate to a difference in situation within the meaning of article 58 EC between revenue from capital of Austrian origin and revenue from capital of another member state.²⁰ The Austrian tax legislation is designed to attenuate the economic effects of double taxation of company profits arising from the taxation of company profits, by way of corporation tax, and the taxation of a shareholder who is a taxpayer, by way of income tax, on the same profits distributed as dividends. However, both revenue from capital of Austrian origin and that revenue originating in another member state are capable of being the subject of double taxation. In both cases, the revenue is, in principle, subject first to corporation tax and then, to the extent to which it is distributed in the form of dividends, to income tax. For a tax rule designed to attenuate the effects of double taxation of the profits distributed by the company in which the investment is made, shareholders who are fully taxable in Austria and receive revenue from capital from a company established in another member state are in a situation comparable with that of shareholders who are likewise fully taxable in Austria but receive revenue from capital from a company established in Austria.

- Second, the court did not accept the argument that the legislation is objectively justified by the need to ensure coherence in the national tax system.²¹ Because there is no “direct link” between the taxation of the profits of the company and those taxation advantages at the shareholder level within the meaning of its settled case law on the coherence justification,²²

¹⁹Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir) — paras. 30-33.

²⁰See, to that effect, Case C-107/94, *Asscher v. Staatssecretaris van Financiën*, 1996 E.C.R. I-3089 — paras. 41-49; and Case C-234/01, *Gerritse v. Finanzamt Neukölln-Nord*, 2003 E.C.R. I-5933 — paras. 47-54.

²¹Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir) — paras. 34-43.

²²Case C-251/98, *Baars v. Inspecteur der Belastingdienst Particulieren*, 2000 E.C.R. I-2787 — para. 40; Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — paras. 57 and 58; Case C-168/01, *Bosal Holding BV v. Staatssecretaris van Financiën*, 2003 E.C.R. (nir) — para. 30.

¹⁶Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir) — para. 26 *et seq.*

¹⁷See, e.g., Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — para. 43; Case C-436/00, *X and Y v. Riksskatteverket*, 2002 E.C.R. I-10829 — paras. 49 and 72; Case C-334/02, *Commission v. France*, 2004 E.C.R. (nir) — para. 27.

¹⁸Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir) — para. 27.

individual income tax and corporate tax are two distinct taxes, which affect different taxpayers. The ECJ noted that the Austrian tax legislation does not make obtaining the tax advantages enjoyed by Austrian residents on their domestic revenue from capital dependent on the taxation of the companies' profits through corporation tax. Here, the aim of the legislation, the attenuation of an instance of double taxation, would not be affected in any way if one were also to give the benefit to those deriving revenue from capital originating in another member state. On the contrary, reserving the definitive tax rate of 25 percent and tax rate reduced by half solely for those deriving revenue from capital of Austrian origin increases the disparity between the overall tax burden on the profits of Austrian companies and that on the profits of companies established in another member state. The ECJ, therefore, could not accept an argument that the legislation was based on the need to preserve the coherence of the Austrian tax system.

- Finally, the ECJ rejected the justification of ensuring the effectiveness of fiscal supervision.²³ It stated that the application of different rates of tax because of the origin of the revenue from capital is not capable of making financial supervision more effective. The court then found that — although the definitive tax at the rate of 25 percent is deducted directly at source by companies established in Austria — tax definitive in nature does not necessarily presuppose a tax at source, but could also be paid voluntarily. Although the ECJ admitted that deduction at source carried out directly by companies established in Austria is easier for the tax administration than voluntary payment, mere administrative inconvenience does not justify an obstacle to a fundamental freedom of the EC Treaty, like the free movement of capital.²⁴

3. The ECJ's Holding

The ECJ held that articles 56 and 58 EC preclude legislation that allows only the recipients of revenue from capital of Austrian origin to choose between definitive taxation at the rate of 25 percent and ordinary income tax with the application of a rate reduced by half, while providing that revenue from capital originating in another member state be subject

to ordinary income tax without any reduction in the rate. Refusal to grant the recipients of revenue from capital originating in another member state the tax advantages granted to recipients of revenue from capital of Austrian origin cannot be justified just because revenue from companies established in another member state is subject to low taxation in that state.²⁵

II. The *Lenz* Aftermath

A. The MoF Reaction

As discussed in detail above, in 2003 Austria enacted a new, discrimination-free regime of capital income taxation to prevent further conflict with this foreseeable judgment in the *Lenz* case. Foreign-source capital income that accrued on or after April 1, 2003, is taxed at a special tax rate of 25 percent under section 37(8) EStG or, optionally, at the half-average income tax rate.²⁶ Following the *Lenz* decision, the MoF dealt with “old” cases of foreign-source capital income that accrued before April 1, 2003. In a release of July 30, 2004,²⁷ the MoF took the view that that foreign-source capital income should be taxed at the special rate of 25 percent in analogy to section 37(8) EStG. That gives effect to the *Lenz* decision for all former taxable years that are still pending or can be reopened under Austrian procedural law. Under section 299 of the Austrian Federal Fiscal Code (*Bundesabgabenordnung* — BAO), to which the MoF explicitly refers, the inland revenue agency of first instance may declare a tax assessment void if the decision proves to be “not right” and may issue a new decision. A corresponding request, based on the ECJ's decision in *Lenz*, may be filed by a taxpayer within the five-year statute of limitations.²⁸

B. Capital Movement Between Member States and Third Countries: MoF Position

According to the information given by the MoF, all foreign-source capital income for periods preceding April 1, 2003, is taxed at a flat rate of 25 percent or, optionally, at a half-average income tax rate. Interestingly, the MoF extends, without hesitation, the effects of the *Lenz* decision to third countries, although the ECJ has explicitly refrained from ruling on third-country situations.²⁹ Also giving effect to the *Lenz* decision for foreign-source capital income derived from nonmember countries seems to be in line with the

²³Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nyr) — paras. 45-48.

²⁴See also Case C-334/02, *Commission v. France*, 2004 E.C.R. (nyr) — paras. 29 and 30.

²⁵Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nyr) — para. 49.

²⁶See *supra* note 4.

²⁷See *supra* note 5.

²⁸See section 207(2), 302(2) BAO.

²⁹Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nyr) — para. 17.

worldwide approach of the freedom of capital movement as guaranteed by article 56 EC.

Article 56(1) EC provides that “all restrictions on the movement of capital between member states and between member states and third countries shall be prohibited.” Two limitations follow this basic principle of free movement — a grandfather clause for third-country-directed restrictions (article 57 EC) and an exceptions clause (article 58 EC). Further, articles 59 and 60 EC point out that freedom of capital movement for third countries may be subjected to restrictions.³⁰ Under article 56(1) EC, persons invoking the freedom of capital movement need not be nationals of a member state. While article 67 EEC, article 56’s predecessor, had merely required residence, not nationality, in a member state, the text of article 56 EC is wider, referring only to movement of capital between member states. This breadth can be seen in cases like *Svensson and Gustavsson*³¹ and *Bordessa*.³² In both of those cases, third country nationals invoked this freedom. However, the most interesting and unique feature of article 56 EC is its extra-Community dimension, because — according to its wording — it clearly covers third-country elements without limitation. It also extends to capital movements into and out of the European Community, as well as within it. However, although article 56(1) EC deals with external capital movements in the same broad terms as are used for intra-Community capital movements, the existence of articles 57, 59, and 60 EC clearly creates a less liberalized framework. Nevertheless, the ECJ has held on several occasions that article 56 EC has a direct effect for third countries.³³

³⁰Article 59 EC allows safeguard measures to be taken by the European Council to deal with exceptional circumstances when movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of the Economic and Monetary Union. Those measures for third countries may last for up to six months and must be strictly necessary. Article 60(1) EC allows the council, when adopting sanctions against third countries under article 301 EC, to take necessary urgent measures on the movement of capital and on payments to and from those third countries. Article 60(2) EC allows individual member states to act individually when the council has not acted under article 60(1) EC against a third country for capital movements and payments. This unilateral action can only be taken for serious political reasons and on grounds of urgency, and must occur within the framework of consultation established under article 297 EC. Moreover, the council may require the member state concerned to abolish or amend those measures.

³¹Case C-484/93, *Svensson and Gustavsson v. Ministre du Logement et de l’Urbanisme*, 1995 E.C.R. I-3955.

³²Case C-358/93 and 416/93, *Bordessa*, 1995 E.C.R. I-361.

³³Cases C-163/94, C-165/94, and C-250/94, *Criminal Proceedings against Sanz de Lera et al.*, 1995 E.C.R. I-4821 — para. 44 *et seq.*; see also Case C-452/01, *Margarethe Ospelt*, 2003 E.C.R. (nir); see also Ben Terra and Peter Wattel, *European Tax Law* 39 (3rd ed. 2001).

Given the clear wording of article 56 EC, it is nearly undisputed that it covers tax restrictions for third countries and has, in principle, the same meaning for third countries as it has for other member states.³⁴ Although the existence of policy reasons for that unilateral extension of the free movement of capital may be questioned,³⁵ the case law of the ECJ seems to treat both situations alike. Although the ECJ has not, to date, been compelled to deal with the application of the freedom of capital movements for third countries in tax cases, this conclusion may be inferred from the *Sanz de Lera* case,³⁶ also on national conditions for the export of money from a member state to a third country, and the *Ospelt* case³⁷ on investment in Austria by a Liechtenstein foundation.

Not surprisingly, the ECJ decided that the Austrian legislation before April 1, 2003, constituted a restriction on the free movement of capital.

The EC Treaty contains several provisions allowing for restrictions on the free movement of capital on third countries. In practice, the most important is the grandfather clause of article 57(1) EC. It allows the application to third countries of any restrictions that existed on December 31, 1993, under national or EC law on the movement of capital to or from third countries involving, *inter alia*, direct investment (including investment in real estate). Therefore, “portfolio investments” are not covered by the grandfather clause of article 57(1) EC. The term “direct investment,” as it is used in article 57(1) EC, seems to derive from annex II of the first directive for the implementation of article 67 of the EC Treaty.³⁸ It was described in the notes to the annex as meaning “investment of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or maintain lasting and direct links between the person providing the capital and the entrepreneur to whom the undertaking to which the capital is made available in order to carry on an economic activity.”³⁹ Thus, article 57 EC covers only investments for establishing

³⁴See, e.g., Michael Sedlacek, “Capital and Payments: The Prohibition of Discrimination and Restrictions,” 40 *ET* 14, 19 *et seq.* (2000).

³⁵See Kristina Ståhl, “Free Movement of Capital Between Member States and Third Countries,” 13 *EC Tax Rev.* 47, 50 (2004).

³⁶Cases C-163/94, C-165/94, and C-250/94, *Criminal Proceedings against Sanz de Lera et al.*, 1995 E.C.R. I-4821.

³⁷Case C-452/01, *Margarethe Ospelt*, 2003 E.C.R. (nir).

³⁸First council directive of May 11, 1960, for the implementation of article 67 of the EC Treaty, 1960 O.J. (N° 43) 921/60.

or maintaining lasting economic links⁴⁰ and, therefore, leaves portfolio investments outside its scope.

This said, the issue seems to be clear from an Austrian perspective. The information given by the MoF clarifies that Austria's tax administration will apply the *Lenz* decision without further restrictions to third countries. However, the broad statement of the MoF raises the disputed issue of whether there are differences in the ability of member states to justify restrictive measures applied toward nonmember states, especially for loss of tax revenue and fiscal supervision. It should be noted that — despite the uncertainty in these areas — the MoF has taken a very generous position. It neither claimed the grandfather clause applied nor did it invoke any differentiation between member states and third countries for the justification of the former discriminatory regime. Nevertheless, we take a closer look at those issues.

C. Justification of Restrictive Measures Toward Third Countries

1. Justification Under the "Rule of Reason"

Once it appears that a different rule applies to objectively comparable situations based on either nationality (overt discrimination) or another criterion that draws a similar distinction in most cases (covert discrimination), the issue becomes whether the member state can justify that infringement of the EC Treaty freedoms. For overt discrimination, the possible grounds of justification are, under the case law of the ECJ, limited to the very narrow circumstances explicitly described in the EC Treaty (that is, public policy, public security, or public health).⁴¹ However, covert discrimination, as well as nondiscriminatory restrictions, may be justified based on a much broader "rule of reason."⁴² Under this rule of reason, a covertly discriminatory measure can be justified only if the provision pursues a legitimate aim compatible with the EC Treaty and is justified by pressing reasons of public interest, that is, objective factors other than nationality.⁴³ But even in that case, a measure must fulfill a

three-prong proportionality test. First, it must be suitable, that is, of the nature to ensure achievement of the aim in question. Second, it must be "necessary," that is, not go beyond what was necessary for that purpose.⁴⁴ Thus, to satisfy the criterion of necessity, there should be no other, less restrictive means to protect the public interest in question.⁴⁵ Finally, the measure must be adequate. That refers to proportionality in its narrow sense, asking whether a national measure, even though there is no other effective means, has an excessive impact on the addressee's own interests.⁴⁶

Interestingly, the Ministry of Finance extends, without hesitation, the effects of the *Lenz* decision to third countries.

2. Is Article 58(1) a Carve-Out Provision for Discriminatory Taxation?

However, for freedom of capital movement, article 58 EC contains an express reference to permissible restrictions while, at the same time, it prohibits arbitrary discrimination and disguised restrictions. Under article 58(1)(a) EC, the member states keep the right "to apply the relevant provisions of their tax law which 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." Article 58(1) EC thus is similar to articles 30, 40(3), and 46 EC in that it sets out grounds for an express exception to the basic principle of free movement. However, article 58(3) EC specifically states that the national provisions referred to by article 58(1)(a) EC cannot constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments, as defined in article 56 EC. Until recently, the interpretation of those clauses was unclear.⁴⁷ However, the prevailing

³⁹Leo Flynn, "Coming of Age: The Free Movement of Capital Case Law 1993-2002," 39 *CML Rev.* 773, 776 (2002).

⁴⁰See Tatjana Polivanova-Rosenauer, "ECJ Rules on Austrian Discrimination of Foreign-Source Investment Income," 44 *ET* 416, 419 (2004).

⁴¹See articles 39(3), 46(1), and 55 EC.

⁴²For a recent discussion of the relationship between the type of discrimination and the available grounds of justification, see, e.g., Georg W. Kofler, "Ramstedt: Benachteiligung von Beitragszahlungen an ausländische Rentenversicherer ist nicht mit der Dienstleistungsfreiheit vereinbar!" 56 *ÖSTZ* 404, 406 (2003).

⁴³See, e.g., Case C-204/90, *Bachmann v. Belgium*, 1992 E.C.R. I-249 — para. 21 *et seq.*; Case C-300/90, *Commission v. Belgium*, 1992 E.C.R. I-305 — para. 14 *et seq.*; Case C-107/94, *Asscher v. Staatssecretaris van Financiën*, 1996 E.C.R. I-3089 — para. 49 *et seq.*; Case C-136/00, *Danner*, 2002 E.C.R. I-8147 — para. 33 *et seq.* and para. 44 *et seq.*

⁴⁴Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*, 1997 E.C.R. I-2471 — para. 26; Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — para. 43; Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, 2002 E.C.R. I-11779 — para. 33.

⁴⁵For an extensive discussion, see Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* 70 *et seq.*, 926 *et seq.* (2002).

⁴⁶See Axel Cordewener, Mattias Dahlberg, Pasquale Pistone, Ekkehart Reimer, and Carlo Romano, "The Tax Treatment of Foreign Losses: Ritter, M&S, and the Way Ahead," 44 *ET* 218, 223 (2004).

⁴⁷For an overview, see, e.g., Michael Sedlaczek, "Der Begriff der Diskriminierung und der Beschränkung — die Kapitalverkehrsfreiheit als konvergente Grundfreiheit des EG-Vertrages," in *Kapitalverkehrsfreiheit und Steuerrecht* 27 (51 *et seq.*) (Eduard Lechner, Claus Staringer, and Michael Tumpel, eds., 2000).

opinion in legal writing suggested that they have only clarifying character.⁴⁸ In the *Verkooijen* case,⁴⁹ the ECJ basically confirmed this view and qualified article 58(1)(a) EC as a codification of its prior case law. The court stated that, based on that case law, national tax provisions referred to in article 58(1)(a) EC, if they establish certain distinctions based on the residence of taxpayers, could be compatible with EC law if they apply to situations that are not objectively comparable or could be justified by overriding reasons in the general interest, in particular, for the cohesion of the tax system.⁵⁰

3. Possible Grounds of Justification Under the "Rule of Reason"

Thus, under the ECJ's case law, article 58 EC does not grant any special leeway to member states to justify restrictive measures; this means that restrictions of the free movement of capital must be evaluated under the same principles as restrictions of the other freedoms. On justifications of infringements, the ECJ's case law, however, is quite restrictive. An insight into the case law on national rules on direct taxation shows that the ECJ has enforced the principle of nondiscrimination very strictly. In line with general principles developed outside the tax field, the ECJ rejected a number of justifications for discriminatory measures advanced by member states, many of them repeatedly. These include: (1) the lack of harmonization of direct taxation;⁵¹ (2) the fact that a nonresident could have avoided the discrimination, for example, by setting up a subsidiary company rather than a branch;⁵² (3)

economic aims or the protection of tax revenue;⁵³ (4) the absence of reciprocity;⁵⁴ (5) the existence of discretionary or equitable procedures to ensure appropriate fiscal treatment;⁵⁵ and (6) low taxation in one member state as a justification for higher, compensatory taxation in another member state.⁵⁶

On the other hand, it is clear from the ECJ's case law that, for example, the need to safeguard the cohesion of a tax system,⁵⁷ the prevention of tax evasion or tax avoidance,⁵⁸ or the effectiveness of fiscal supervision⁵⁹ may constitute overriding requirements of general

⁵³Case C-264/96, *ICI v. Colmer*, 1998 E.C.R. I-4695 — para. 28; Case C-397/98 and C-410/98, *Metallgesellschaft Ltd. and Others v. Commissioners of Inland Revenue*, 2001 E.C.R. I-1727 — para. 59, Case C-307/97, *Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt*, 1999 E.C.R. I-6161 — para. 50; Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — para. 48; Case C-136/00, *Danner*, 2002 E.C.R. I-8147 — para. 56; Case C-436/00, *X, Y v. Riksskatteverket*, 2002 E.C.R. I-10829 — para. 50; Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, 2002 E.C.R. I-11779 — para. 36.

⁵⁴See, e.g., Case 270/83, *Commission v. France*, 1986 E.C.R. 273 (*avoir fiscal*) — para. 26.

⁵⁵See Case C-279/93, *Finanzamt Köln-Altstadt v. Schumacker*, 1995 E.C.R. I-225 — para. 53 *et seq.*

⁵⁶See, e.g., Case C-294/97, *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, 1999 E.C.R. I-7447 — para. 43 *et seq.*; Case C-136/00, *Danner*, 2002 E.C.R. I-8147 — para. 56.

⁵⁷Case C-204/90, *Bachmann v. Belgium*, 1992 E.C.R. I-249 — para. 21 *et seq.*; Case C-300/90, *Commission v. Belgium*, 1992 E.C.R. I-305 — para. 14 *et seq.*; however, the ECJ has subsequently denied a justification on the ground of the cohesion of the tax system; see, e.g., Case C-279/93, *Finanzamt Köln-Altstadt v. Schumacker*, 1995 E.C.R. I-225 — para. 40 *et seq.*; Case C-80/94, *Wielockx v. Inspecteur der Directe Belastingen*, 1995 E.C.R. I-2493 — para. 13 *et seq.*; Case C-484/93, *Svensson and Gustavsson v. Ministre du Logement et de l'Urbanisme*, 1995 E.C.R. I-3955 — para. 15 *et seq.*; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, 1999 E.C.R. I-7641 — para. 24; Case C-264/96, *ICI v. Colmer*, 1998 E.C.R. I-4695 — para. 29; Case C-294/97, *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, 1999 E.C.R. I-7447 — para. 41 *et seq.*; Case C-251/98, *Baars v. Inspecteur der Belastingdienst Particulieren*, 2000 E.C.R. I-2787 — para. 37 *et seq.*; Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — para. 49 *et seq.*; Case C-397/98 and C-410/98, *Metallgesellschaft Ltd. and Others v. Commissioners of Inland Revenue*, 2001 E.C.R. I-1727 — para. 67 *et seq.*; Case C-136/00, *Danner*, 2002 E.C.R. I-8147 — para. 33 *et seq.*; Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, 2002 E.C.R. I-11779 — para. 40 *et seq.*; Case C-422/01, *Ramstedt v. Riksskatteverket*, 2003 E.C.R. I-6817 — para. 30 *et seq.*

⁵⁸Case C-264/96, *ICI v. Colmer*, 1998 E.C.R. I-4695 — para. 26; Case C-397/98 and C-410/98, *Metallgesellschaft Ltd. and Others v. Commissioners of Inland Revenue*, 2001 E.C.R. I-1727 — para. 57; Case C-436/00, *X, Y v. Riksskatteverket*, 2002 E.C.R. I-10829 — para. 61; Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, 2002 E.C.R. I-11779 — para. 37.

⁵⁹Case C-250/95, *Futura Participations SA and Singer v. Administration des contributions*, 1997 E.C.R. I-2471 — para. 31; Case C-254/97, *Baxter*, 1999 E.C.R. I-4809 — para. 18; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, 1999 E.C.R. I-7641 — para. 25; Case C-136/00, *Danner*, 2002 E.C.R. I-8147 — para. 51 *et seq.*

⁴⁸See, e.g., Norbert Dautzenberg, "Die Kapitalverkehrsfreiheit des EG-Vertrages, der Steuervorbehalt des Art 73d EGV und die Folgen für die Besteuerung," 44 *RIW* 537, 544 (1998); Hans Georg Ruppe, "Die Bedeutung der Kapitalverkehrsfreiheit für das Steuerrecht," in *Kapitalverkehrsfreiheit und Steuerrecht* 9 (21 *et seq.*) (Eduard Lechner, Claus Staringer, and Michael Tumpel, eds., 2000); Claus Staringer, "Dividendenbesteuerung und Kapitalverkehrsfreiheit," in *Kapitalverkehrsfreiheit und Steuerrecht* 93 (106 *et seq.*) (Eduard Lechner, Claus Staringer, and Michael Tumpel, eds., 2000).

⁴⁹See Case C-35/98, *Staatssecretaris van Financiën v. Verkooijen*, 2000 E.C.R. I-4071 — para. 42 *et seq.*

⁵⁰Cf., Ben Terra and Peter Wattel, *European Tax Law* 40 *et seq.* (3rd ed. 2001); Axel Cordewener, *Europäische Grundfreiheiten und nationales Steuerrecht* 747 *et seq.* (2002); Leo Flynn, "Coming of Age: The Free Movement of Capital Case Law" 1993-2002, 39 *CML Rev.* 773, 793 *et seq.* (2002).

⁵¹See, e.g., Case 270/83, *Commission v. France*, 1986 E.C.R. 273 (*avoir fiscal*) — para. 24; Case C-204/90, *Bachmann v. Belgium*, 1992 E.C.R. I-249 — para. 10 *et seq.*

⁵²Case 270/83, *Commission v. France*, 1986 E.C.R. 273 (*avoir fiscal*) — para. 22; see also Case C-307/97, *Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt*, 1999 E.C.R. I-6161 — para. 42.

interest justifying a restriction on the exercise of fundamental freedoms guaranteed by the EC Treaty.⁶⁰ However, the general recognition of the prevention of tax evasion or tax avoidance as a ground of justification has to date never been able to save restrictive national measures brought before the ECJ.⁶¹ That said, generally the ECJ has been very reluctant to accept justifications based on administrative difficulties involved in ensuring efficient fiscal supervision or the prevention of tax avoidance.⁶² It has taken the view that member states should, if need be, provide each other with mutual assistance to overcome those difficulties.⁶³

4. Justification in a Third-Country Setting

On direct taxation, the ECJ has not yet been compelled to deal with the application of article 58(1) EC for third countries. Nevertheless, Advocate General Juliane Kokott addressed this issue in her conclusion in the *Manninen* case on the Finnish imputation system. She held that in a third-country situation, member states do not necessarily have to provide for the same amount of indirect tax credit as they would in an intra-EC situation.⁶⁴ She reasoned that equal treatment only applies if situations are comparable, but left it open whether EU residents are in the same situation regardless of an investment in a domestic company, an EU company, or a third-country company. Given the decisions of the ECJ in the *Lenz*⁶⁵ and *Manninen*⁶⁶ cases, there is evidence that equal treatment is also required in a third-country situation, because, from the viewpoint of the domestic EU dividend recipient, there is no difference from which country he derives dividend income. Nevertheless, on

the level of justification, there are good reasons to argue that the possibilities for member states to justify restrictive measures should be much greater towards third countries than when it concerns the free movement of capital within the European Union.⁶⁷ We submit that several relevant differences between intra-EU and third-country situations exist.

The EC Treaty contains several provisions allowing for restrictions on the free movement of capital on third countries.

The first issue concerns the effectiveness of fiscal supervision. In intra-EU situations, the ECJ has frequently rejected justifications based on this ground by referring the member states to the mutual assistance directive.⁶⁸ It has held that member states should provide each other with mutual assistance to overcome those difficulties.⁶⁹ It is generally expected that the ECJ will apply the same line of reasoning to the recovery of tax claims, because the 2001 amendment of the recovery of claims directive⁷⁰ also obligates member states to provide mutual assistance in collecting direct tax claims.⁷¹ In contrast, neither of those arguments is valid for third countries, although one might think about the relevance of mutual assistance clauses in tax treaties with third countries.⁷² However, the leeway of justifications based on the effectiveness of fiscal supervision seems, in any event, to be greater for third countries than in intra-EU settings. An example may illustrate this approach.

⁶⁰See, in particular, on those justifications in the context of restrictions in a difference in income tax treatment, Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, 1999 E.C.R. I-7641 — para. 23.

⁶¹See Ben Terra and Peter Wattel, *European Tax Law* 77 (3rd ed. 2001); see, e.g., Case C-264/96, *ICI v. Colmer*, 1998 E.C.R. I-4695 — para. 26; Case C-324/00, *Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*, 2002 E.C.R. I-11779 — para. 37.

⁶²See, e.g., Case C-254/97, *Baxter*, 1999 E.C.R. I-4809 — para. 18 *et seq.*; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, 1999 E.C.R. I-7641 — para. 25 *et seq.*

⁶³See the Council directive 77/799/EEC of December 19, 1977, concerning mutual assistance by the competent authorities of the member states in the field of direct taxation, 1977 O.J. (L 336) 15; for the respective line of case law, see, e.g., Case C-279/93, *Finanzamt Köln-Altstadt v. Schumacker*, 1995 E.C.R. I-225 — para. 45; Case C-55/98, *Skatteministeriet v. Bent Vestergaard*, 1999 E.C.R. I-7641 — para. 26; Case C-136/00, *Danner*, 2002 E.C.R. I-8147 — para. 44 *et seq.*

⁶⁴Opinion of AG Kokott, Case C-319/02, *Manninen*, 2004 E.C.R. (nir) — para. 79.

⁶⁵Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nir).

⁶⁶Case C-319/02, *Manninen*, 2004 E.C.R. (nir).

⁶⁷See also Kristina Ståhl, “Free Movement of Capital Between Member States and Third Countries,” 13 *EC Tax Rev.* 47, 54 *et seq.* (2004).

⁶⁸See Council Directive 77/799/EEC of December 19, 1977, concerning mutual assistance by the competent authorities of the member states in the field of direct taxation, 1977 O.J. (L 336) 15.

⁶⁹See *supra* note 57.

⁷⁰See Council Directive 76/308/EEC of March 15, 1976, on mutual assistance for the recovery of claims relating to certain levies, duties, and other measures, O.J. L 73/18 (March 19, 1976), amended, *inter alia*, by Council directive 2001/44/EC of June 15, 2001, 2001 O.J. (L 175) 17.

⁷¹For this see, e.g., Georg W. Kofler, “Hughes de Lasteyrie du Saillant: Französische ‘Wegzugsbesteuerung’ verstößt gegen die Niederlassungsfreiheit,” 57 *ÖSTZ* 195, 195 *et seq.* (2004); Clemens Phillip Schindler, “Die EuGH-Entscheidung ‘Hughes de Lasteyrie du Saillant’ und ihre Auswirkungen auf die österreichische Wegzugsbesteuerung,” 3 *GES* 34, 38 *et seq.* (2004).

⁷²See, e.g., Kristina Ståhl, “Free Movement of Capital Between Member States and Third Countries,” 13 *EC Tax Rev.* 47, 54 *et seq.* (2004).

In the recent *Hughes de Lasteyrie du Saillant* case,⁷³ the ECJ ruled that an exit tax on substantial shareholdings infringes on the freedom of establishment and that the effectiveness of fiscal supervision cannot justify that measure. It is generally agreed that the freedom of capital movement would also apply to an exit tax.⁷⁴ However, if an EC resident moves to a third country and thereby triggers the exit tax, justification of that restrictive measure on grounds of fiscal supervision or collection of tax claims may be possible.

Second, the need to protect the tax base and to prevent the reduction of revenue has not been accepted as a justification in an intra-EU setting.⁷⁵ From a policy, as well as from a legal, perspective, the situation is different for third countries. The EC interest to secure the free movement of capital does not carry as much weight in this area as it does when it concerns movement within the European Union.⁷⁶ This idea may even be extended further, especially for taxation of foreign-source dividends. On several occasions, the ECJ's reasoning, in substance, was that it is sufficient that tax is paid once in the European Union, regardless of the country to which it is paid.⁷⁷ Thus, according to the recent *Manninen* judgment,⁷⁸ a member state has to grant an imputation credit — based on the underlying foreign tax — to resident shareholders, whether the distributing company has been taxed by that member state or by another member state. That said, it seems that the ECJ forces member states to treat taxation in other member states as not being “foreign” in the traditional sense of international taxation. However, that policy idea, which is clearly derived from the aims of the internal market, does not equally apply to third countries. In any event, it should not be ruled out that the need to protect the tax base and to prevent the reduction of revenue might, at least in some cases, be an overriding requirement of public interest that may justify tax discrimination towards third countries.

Finally, the combat of competition distortions could gain some relevance for third countries in situations when national rules aim at avoiding economic double taxation of distributed corporate income. Although this

issue was (unsuccessfully) raised in the *Lenz* case by the referring Austrian Administrative Court in an intra-EU context, the European Commission has shown some sympathy for this argument in third-country situations. The European Commission has apparently taken the position that different tax treatment may be justified as a means to combat distortion of competition, provided that the state of residence of the distribution company is a no- or low-tax jurisdiction and the restricting domestic provision is in line with the unwritten principle of proportionality.⁷⁹ Thus, it seems that member states should be able to protect themselves against capital outflows to “tax havens,” keeping in mind that foreign low taxation or nontaxation would effectively distort competition to the disadvantage of domestic companies. One might therefore speculate whether member states may be allowed to, for example, apply an indirect credit system for the avoidance of economic double taxation for low-taxed third-country distributions while they apply an exemption or relief system in domestic and intra-EU settings.

III. Conclusion

As a result of the recent *Lenz*⁸⁰ decision of the ECJ, it is clear that member states must extend a relief system applied for domestic distributions also to distributions from foreign EU companies. Because the freedom of capital movement, as guaranteed by articles 56 and 58 EC, employs a worldwide approach, this result applies, in principle, equally to distributions from third-country companies. However, member states seem to have more leeway to justify restrictive measures toward third countries than they have in an intra-EU setting, especially for the effectiveness of fiscal supervision, the protection of the tax base, and the combat of competition distortions. Against this background, the MoF has recently taken a very generous position in its information on the consequences of the *Lenz* decision.⁸¹ It neither claimed the grandfather clause applied nor invoked any difference between member states and third countries as a justification of the discriminatory regime of capital income taxation in Austria that applied to foreign-source capital income accruing before April 1, 2003.

⁷³Case C-9/02, *Hughes de Lasteyrie du Saillant*, 2004 E.C.R. (nry).

⁷⁴For further references, see Georg W. Kofler, “Hughes de Lasteyrie du Saillant: Wegzugsbesteuerung verstößt gegen die Niederlassungsfreiheit!” 56 *ÖSTZ* 262, 263 *et seq.* (2003).

⁷⁵*Supra* note 53.

⁷⁶See Kristina Ståhl, “Free Movement of Capital Between Member States and Third Countries,” 13 *EC Tax Rev.* 47, 54 (2004).

⁷⁷See also Mark Nichols and Hamilton Forrest, “ECJ: If Tax Is Paid Once in the EU, Does It Matter Where?” *Tax Notes Int'l*, Dec. 8, 2003, p. 899.

⁷⁸Case C-319/02, *Manninen*, 2004 E.C.R. (nry).

⁷⁹See Tatjana Polivanova-Rosenauer, “ECJ Rules on Austrian Discrimination of Foreign-Source Investment Income,” 44 *ET* 416, 419 (2004).

⁸⁰Case C-315/02, *Anneliese Lenz v. Finanzlandesdirektion für Tirol*, 2004 E.C.R. (nry).

⁸¹“Auswirkungen des EuGH-Urteils vom 15.7.2004, C-315/02, *Lenz*” (Consequences of the ECJ's *Lenz* decision), Ministry of Finance release, July 30, 2004, 06 1602/2-IV/6/04 (available at <http://www.bmf.gv.at/steuern/einkommensteuer/erlaesse/lenzinfo.htm>).