The EU's Common Investment Policy – Connecting the Dots

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Introduction

The entry into force of the Treaty of Lisbon has shed light on an area that has widely lacked public attention in recent years: the treatment of investment from non-EU Member State countries, i.e. third countries, under EU law. By explicitly expanding the EU's external competence under the Common Commercial Policy to "foreign direct investment", the Lisbon Treaty has posed two questions which, as we argue in this paper, warrant a holistic view, so far apparently not propagated in the literature.

The Lisbon Treaty revives the question of, first, what is the predetermining framework in which the EU's competences to regulate access and treatment of third-country investment will have to be exercised and, second, what are in fact the EU's internal and external competences with respect to third-country investment. To this end, the present paper combines in its effort to provide a holistic view on what we term the Common Investment Policy (CIP), first, an analysis of the framework preconditioning the exercise of the competence, i.e. primarily the provisions on free movement of capital, and, second, turning to the competences, we will focus on the EU's external competences under Art. 207 of the Treaty on the Functioning of the European Union (TFEU) and its implied external powers based on the case law of the Court of Justice of the European Union (ECJ). Key value is added by putting the Lisbon Treaty's provisions not just in the perspective of the previous EU constitutional order but also by showing how the analytical outcome is indeed determined by the pre-Lisbon legal framework. This historic-systematic approach will ultimately allow us to comprehensively understand the EU's powers

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with respect to third-country investment in all its central aspects and provide the groundwork for those authors and studies focusing on what and how to deal with the EU's "newly old" competence inventory.

Competence and Fundamental Freedom

At first glance one might wonder what the provisions on free movement of capital and those on the CIP have to do with each other, aside from a certain terminological overlap.[1] A closer look reveals, however, that the scope of Art. 63 (1) TFEU (ex-Art. 56 (1) EC) significantly predetermines the basis on which a CIP will operate.

Art. 63 (1) TFEU (ex-Art. 56 (1) EC) contains the freedom of capital movement, which extends in its scope also to third countries. It reads "[. . .] all restrictions on the movement of capital between the Member States and between Member States and third countries shall be prohibited". Although one might think that this wording leaves hardly any room for ambiguity – the scope of the freedom in intra-EU and third-country context being, in principle, the same – the interpretation of this provision in a third-country context can hardly be described as settled in ECJ jurisprudence.[2] Also, views in the legal literature are divided on the scope of free movement of capital in respect of third countries.[3] As there is no agreement on the interpretation of the freedom of capital movement in relation to third countries, the basis on which a currently developing CIP will operate is, hence, burdened with uncertainties: If Art. 63 (1) TFEU (ex-Art. 56 (1) EC) is read as a mere programmatic statement which endeavours to achieve the objective of free movement of capital between the Member States and third countries, the opening up of the EU market to third countries must then be essentially achieved by means of secondary (autonomous) legislation and the conclusion of international treaties, which emblematize the notion of reciprocity. If, however, the scope of Art. 63 (1) TFEU (ex-Art. 56 (1) EC) goes beyond a mere programmatic statement and the freedom transfers subjective rights to a third-country investor similar to those of an intra-EU investor, then the EU would have committed itself not to interfere with – neither to discriminate[4] nor to hinder[5] – the access and operation of investments originating from third countries. The same seems to apply mutatis mutandis for outbound investment.

[1]The jurisprudence and writing in the area of free movement of capital offers valuable guidance on the interpretation of such notions as "direct investment" now also found in Art. 206 et seq. TFEU.

[2]For an overview, see Hindelang, Gestufte Freiheitsverbürgung? – Art. 63 Abs. 1 AEUV (ex-Art. 56 Abs. 1 EG) im Drittstaatenkontext, IStR (2010), pp. 443 et seq.

[3]Summarized and discussed in Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009.

[4]Cf., e.g. ECJ, *Test Claimants in the FII Group Litigation/Commissioners of Inland Revenue*, C-446/04, [2006] ECR I, p. 11753.

[5]Cf., in respect of an intra-EU context, for the first time in ECJ, C-367/98, *Commission of the European Communities/Portuguese Republic*, [2002] ECR I, p. 4731 (para. 45).

In this case the EU market would have "automatically" been liberalized unilaterally towards third countries and a CIP would basically be limited to secure market access and favourable treatment standards for EU investments in third countries.

But what would be the appropriate reading of Art. 63 (1) TFEU (ex-Art. 56 (1) EC)? Providing a clear and precise answer to this question faces several challenges. There is, to start with, no clarity on the delineation of free movement of capital and the freedom of establishment with respect to direct investment, an economic activity potentially covered by both freedoms. Uncertainty also exists in regard to the issue of whether the same teleological considerations apply to the interpretation of the freedom's prohibition of any restriction on free capital movement in an intra-EU and a third-country context. Last but not least, a clear picture has yet to emerge on the principles governing the justification of restrictions on the freedom in a third-country context. All these interpretive challenges shall now be addressed in turn.

The Relationship between Free Movement of Capital and the Freedom of Establishment

The relationship between the free movement of capital and the freedom of establishment in respect of direct investment is still a matter of debate. Although direct investment is not mentioned explicitly within Art. 63 (1) TFEU (ex-Art. 56 (1) EC), it is generally accepted that it forms a subcategory of capital movement. Owing to the fact that the notions of establishment and direct investment are not mutually exclusive but overlap to a great extent,[6] the economic activity of direct investment falls generally also within the scope of Art. 49 AEUV (ex-Art. 43 EC)[7]. The follow ing discusses the judicial and literary treatments of this "double topical relevance".

The ECJ's Jurisprudence

What the ECJ today describes as "settled case law" on the relationship of the two freedoms originated from two strands of case law. One strand comprised situations in which the ECJ is ignorant of whether there is, in addition to capital movements, an element of definite control over an undertaking in existence (or vice versa), either because the facts of the case did not hint at such or because the parties concerned simply did not refer to the freedom of establishment or free movement of capital,

[6]Ohler, *Europäische Kapital- und Zahlungsverkehrsfreiheit*, 2002, Art. 56 EC, mn. 120 et seq.; Somewhat more cautious: Tiedje and Troberg, in: *von der Groeben/Schwarze* (*eds.*), Art. 43 EC, mn 26 (2003); in respect of shareholdings: J. Lübke, *Der Erwerb von Gesellschaftsanteilen zwischen Kapitalverkehrs- und Niederlassungsfreiheit*, 2006, pp. 210 et seq.

[7]Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 82 et seq.

respectively. The second strand of judgements implicitly proceeded from the assumption that both freedoms are to be applied in parallel in respect of direct investment.[8]

In more recent decisions, however, the ECJ shifted towards a "centre of gravity" approach which under certain conditions grants, in respect to direct investment, priority to the freedom of establishment over the free movement of capital. Although this is without any significant consequence in terms of protection granted to a market participant in an intra-EU context, in a third-country context, the scope of protection potentially offered by the TFEU is nullified.

The situations in which the freedom of establishment would supersede free movement of capital have yet to be spelled out by the ECJ. There are cases such as *FII Group Litigation,*[9] *Thin Cap Group Litigation,*[10] *Holböck*[11] and – more recently – *Glaxo Welcome*[12] which suggest that the "purpose of the national legislation" – which refers to the intended regulatory ambit or scope of application of the national rule – determines predominantly the applicable freedom, not the actual economic activity pursued by the market participant. If the national measure at issue applies only to those market participants who are in the position to exercise definite influence over their holdings, then the national measure is only measured against the background of the freedom of establishment. As this freedom does not extend to third-country economic activities, a third-country direct investment would be without protection. In contrast, if the national measure applies independently of the size of the holding, both freedoms apply.

Other cases, though, point in a different direction. In *Burda*,[13] *Société* de *Gestion Industrielle SA*,[14] *Commission v. Italien*[15] and – albeit less clear – in the joined case *Belgische Staat v. KBC Bank NV and Beleggen, Risicokapitaal, Beheer NV v. Belgische Staat*[16] the ECJ focused on the actual economic activity

[8]See Hindelang, The EC Treaty's Freedom of Capital Movement as an Instrument of International Investment Law? in: Reinisch/Knahr (eds.), *International Investment Law in Context*, 2008, pp. 43 et seq. with further references.

[9]ECJ, C-446/04, *Test Claimants in the FII Group Litigation/Commissioners of Inland Revenue*, [2006] ECR I, p. 11753 (paras. 36 et seq.).

[10]ECJ, C-524/04, *Test Claimants in the Thin Cap Group Litigation/Commissioners of Inland Revenue*, [2007] ECR I, p. 2107 (para. 27 et seq.); See also ECJ, Case C-492/04, *Lasertec Gesellschaft für Stanzformen mbH/Finanzamt Emmendingen*, [2007] ECR I, p. 3775 (paras. 19 et seq.).

[11]ECJ, Case C-157/05, *Winfried L. Holböck/Finanzamt Salzburg-Land*, [2007] ECR I, p. 4051 (para. 23).

[12]ECJ, C-182/08, *Glaxo Wellcome GmbH & Co./Finanzamt München II*, [2009] ECR I, n.y.p. (paras. 40, 47 et seq.).

[13]ECJ, C-284/06, *Finanzamt Hamburg-Am Tierpark/Burda GmbH*, [2008] ECR I, p. 4571 (paras. 68–73).

[14]ECJ, C-311/08, *Société de Gestion Industrielle (SGI)/Belgian State*, [2010] ECR I, n.y.p. (paras. 23–36).

[15]ECJ, C-531/06, *Commission of the European Communities/Italian Republic*, [2009] ECR I, n.y.p. (paras. 40–42).

[16]ECJ, Joined Cases C-439/07 and C-499/07, [2009] ECR I, n.y.p. (paras. 68–73).

pursued and the degree of influence which a market participant can in fact exercise over its holding.

Aside from the objections in principle which the ECJ's "centre of gravity" approach faces,[17] the present uncertainties in respect of the relationship of two fundamental freedoms – a key area of EU law – leaves behind a vacuum which is filled by national measures that most likely do not carry the most liberal notion. The effectiveness of the freedom is, hence, not only diminished by a doubtful delineation test of free movement of capital and the freedom of establishment but also by its still missing contours.

The Views in the Literature

The literature presents itself in a fragmented state. Two main broad tendencies can be identified: one favouring exclusivity of the freedom of establishment in respect of direct investment[18] and the other pleading parallel applicability of the free movement of capital and the freedom of establishment.[19]

Those views which favour exclusivity encounter, to begin with, one fundamental criticism. Each freedom uniquely covers and protects an aspect of a certain economic activity. Especially, in respect to cross-section economic activities which cannot be detangled into single components,[20] preventing the application of one of the freedoms would mean blending out the uniquely covered economic aspect and potentially exposing it to unjustified discrimination or hindrance. Only the consolidation of the freedoms can prevent such a result and furthers the effectiveness of EU law.[21]

In the event the freedom of capital movements were to become secondary to the freedom of establishment, third-country direct investments would be without any protection, as already explained. Accepting such a result would be contrary to the words and intent of the treaty,[22] which explicitly provides in Art. 63 (1) (ex-Art. 56

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[17]See Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 96 et seq.; Hindelang, Gestufte Freiheitsverbürgung? – Art. 63 Abs. 1 AEUV (ex-Art. 56 Abs. 1 EG) im Drittstaatenkontext, IStR (2010), pp. 443 et seq, with further references.

[18]E.g. Schön, Europäische Kapitalverkehrsfreiheit und nationales Steuerrecht, in: Schön (ed.), *Gedächtnisschrift für Brigitte Knobbe-Keuk*, 1997, pp. 743 et seq. (750 et seq.).

[19]E.g. Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 81 et seq.

[20]Weber, Kapitalverkehr und Kapitalmärkte im Vertrag über die Europäische Union, EuZW (1992), pp. 561 et seq.

[21]See also Hindelang, in: Reinisch/Knahr (eds.), *International Investment Law in Context*, 2008, pp. 43 et seq.

[22]It would go beyond the scope and subject of this paper to set out the economic effects of liberalized capital movements and their benefits for the attainment of the treaty aims in detail. For

(1) EC) for unilateral liberalization of capital movements *erga omnes* without any "cavities" from the scope of application in respect of certain categories of capital movements.[23] The expansion of the protective scope of the provision introduced with the Treaty of Maastricht would be nullified for economic cross-section activities, such as direct investment and, thus, the effectiveness of the fundamental freedom would be clearly limited. Ultimately, it would lead to the odd result that *the protection enjoyed by an investor would be inversely proportionate to the size of his holdings*.[24]

Moreover, the opinions which favour strict exclusivity are difficult to reconcile with the words of the treaty, which confirm in Art. 64 TFEU (ex-Art. 57 EC) that direct investment – largely, as regards the content of the term, overlapping with the notion of establishment found in Art. 49 TFEU (ex-Art. 43 EC) – constitutes a (sub)-category of "capital movement".[25] Also, the nomenclature of the EC Capital Movements Directive,[26] having indicative character under "post-Maastricht law", expressly refers to direct investment as a (sub-)category of capital movement.[27]

Apart from that, the suggested "distinguishing criteria" are largely unfeasible. To delineate the two freedoms by the way of a "centre of gravity" approach is of little practical value but rather helps to create the illusion of resolving delineation problems on a rational basis. This view basically encounters the pitfall of failing to determine clearly what constitutes a direct or indirect impairment with a given freedom when it comes to cross-section activities. The problem of delineation is not resolved but is just "relocated".[28]

It appears, therefore, that the more convincing arguments speak in favour of a parallel application of Art. 49 TFEU (ex-Art. 43 EC) and Art. 63 (1) TFEU (ex-Art. 56 (1) EC) in respect of direct investment.

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an in depth discussion, see Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 18 et seq.

[23]Haferkamp, *Die Kapitalverkehrsfreiheit im System der Grundfreiheiten des EG-Vertrages*, 2003, pp. 196 et seq.

[24]Case C-251/98 (Opinion of A.G. Alber), [2000] ECR I, p. 2787 (para. 50).

[25]Rohde, *Freier Kapitalverkehr in der Europäischen Gemeinschaft*, 1999, p. 97; Müller, *Kapitalverkehrsfreiheit in der Europäischen Union*, 2000, p. 193; Haferkamp, *Die Kapitalverkehrsfreiheit im System der Grundfreiheiten des EG-Vertrages*, 2003, p. 195.

[26]Annex I, Heading I of Directive 88/361/EEC.

[27]Ibid., at Annex I (I); See also, e.g. Kiemel, in: von der Groeben/ Schwarze (eds.), *EUV/EGV*, 2003, Art. 56 EC mn. 21.

[28]Ohler, *Europäische Kapital- und Zahlungsverkehrsfreiheit*, 2002, Art. 56 EC mn. 117; Weber, Kapitalverkehr und Kapitalmärkte im Vertrag über die Europäische Union, EuZW 3 (1992), pp. 561 et seq. (564); Case C-452/04 (Opinion of A.G. Stix-Hackl), [2006] ECR I, p. 9521 (para. 62).

The Scope of Prohibition of Restriction – Equal Treatment and Market Access

Jurisprudence

Although free movement of capital takes part in the broader context of converging tendencies of construction among the fundamental freedoms – i.e. Art. 63 (1) TFEU (ex-Art. 56 (1) EC) contains, besides a prohibition of discrimination, also one of hindrance[29] – the ECJ has failed so far to put forward a coherent doctrinal construction of Art. 63 (1) TFEU's (ex-Art. 56 (1) EC) scope of prohibition of restriction in a third-country context.

In more recent decisions the ECJ, in a rather formulaic fashion, has reiterated with respect to the prohibition of discrimination in a third-country context that one has to take into account *the fact that movement of capital to or from third countries takes place in a different legal context from that which occurs within the European Community. Accordingly, because of the degree of legal integration that exists between Community Member States*[30] intra-EU economic activities and such activities involving relations between Member States and third countries are not always comparable. Precise criteria for determining the comparability of third-country and intra-EU capital movements remain in the dark.

Doctrinal Construction of Art. 63 (1) TFEU (ex-Art. 56 (1) EC)

If one seeks to describe the scope of prohibition of Art. 63 (1) TFEU (ex-Art. 56 (1) EC) in a third-country context, the wording of the provision can serve as a starting point. Art. 63 (1) TFEU (Art. 56 (1) EC) provides unambiguously just one rule for both intra-EU and third-country capital movement, speaking in favour of an understanding in a third-country context that does not deviate from the one valid for intra-EU capital movement.

Teleological and systematic arguments advanced by commentators[31] who would like to interpret the scope of prohibition of Art. 63 (1) TFEU (Art 56(1) EC) more narrowly in a third-country context are ultimately not compelling. In particular, the proposition that certain preconditions are still lacking, which, only if they were

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[29]See Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 115 et seq.

[30]ECJ, Joined Cases C-439/07 and C-499/07, [2009] ECR I, n.y.p. (para. 72).

[31]E.g. Schön, Der Kapitalverkehr mit Drittstaaten und das internationale Steuerrecht, in: Gocke/ et al. (eds.), *Festschrift für Franz Wassermeyer*, 2005, pp. 489 et seq.; Ståhl, Free movement of capital between Member States and third countries, EC Tax Review 13 (2004) 2, pp. 47 et seq.

fulfilled would justify interpreting the scope of prohibition similarly in an intra-EU and a third-country context,[32] cannot be upheld:

The unilateral liberalization of capital movements between the EU and third countries would not only be justified if the EU wanted to make an "altruistic" contribution to the advancement of a liberalized world capital market at large – although there is evidence in the TFEU that the EU indeed could have wanted this – but the EU itself benefits. Liberalized capital movement with third countries, for example, furthers economic growth within the EU by intensified competition, increased freedom of choice, especially for European capital recipients, and pressure on the Member States to maintain fiscal and tariff discipline. Liberalized capital movement *erga omnes* is also necessary to build up and maintain trust in the common currency, which is intended to live up to it being a global investment, financing, trade and reserve currency. The *erga omnes* principle can be seen as one of the clearest affirmations of the EU's commitment to a non-protectionist, open market economy, disproving any notion of a "Fortress Europe". Therefore, the unilateral liberalization of capital movements *erga omnes* advances those treaty aims that are directed at the development of the Internal Market.[33]

Moreover, liberalizing capital movements in third-country relations, economically speaking, requires – in the sense of a *conditio sine qua non* – neither the harmonization of third-country and Internal Market rules nor the coordination of monetary and economic policies between the EU and third countries. However, aiming at some degree of harmonization or coordination is desirable. It is also ultimately not convincing to argue that the bargaining powers of the EU vis-à-vis third countries are not sufficient to press for reciprocal market access and equal treatment of EU capital in third-country markets. Thus, the configuration of the EU competences (especially Art. 64 (2) TFEU (ex-Art. 57(2) EC), Art. 66 TFEU (ex-Art. 59 EC), Art. 75 TFEU (ex-Art. 60 EC), Art. 113, 114, 115 and 352 TFEU (ex-Art. 93 EC, and 94 EC together with Arts. 95 (2) EC and 308 EC) as well as Art. 207 (2) TFEU) are not of such a kind as to describe the EU as not sufficiently equipped to defend its and its Member States' interests. Protecting EU and Member State interests, therefore, does not require making liberalization of third-county capital movement subject to reciprocity.

Moreover, restricting third-country capital movement would not meaningfully prevent the access of third-country investors to the Internal Market, but the circumvention of restrictive access regimes in some Member States is caused by the so-called channel phenomenon. The "channel phenomenon", i.e. more-liberal-minded Member States functioning as "access channels" to the Internal Market for third-country capital movements that less-liberal-minded Member States wished to have

[32] Schön, Der Kapitalverkehr mit Drittstaaten und das internationale Steuerrecht, in: Gocke/et al. (eds.), *Festschrift für Franz Wassermeyer*, 2005, pp. 489 et seq. (502 et seq.); Mohamed, *European Community Law on the Free Movement of Capital and the EMU*, 1999, pp. 217 et seq.

[33] Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 173 et seq.

excluded or otherwise restricted, is caused by the way in which the other fundamental freedoms operate.[34]

Concerning the non-discrimination test, a distinction has to be made between case-specific considerations and those that we have termed "value-based decisions stipulated by the EU legal order". The former can always lead to a negation of the comparability of domestic/intra-EU and third-country direct investments. With respect to the latter, however, we cannot identify "value-based decisions" that would suggest incomparability per se. Arguments based on existing differences between a Member State and a third country on the level of taxation, social contributions, labour costs, etc. or the existence of intra-EU harmonization cannot form the basis for "value-based decisions" and are, thus, unsuitable to justify the negation of "comparability". Consequences springing from the unilateral opening of the EU capital market to the world have to be borne in the same way as in an intra-EU context.[35]

This interpretation leaves us with the following picture: the access, exit and transit of third-country capital must, in principle, be free of any restrictions. Once a third country investment has been made within the Internal Market (inbound) or an investment originating from a Member State has been established in a third-country market (outbound), the Member States are not allowed to treat that investment less favourably than a comparable domestic investment or an investment from another Member State. Hence, the scope of prohibition of Art. 63 (1) TFEU (ex-Art 56(1) EC) in a third-country context should be interpreted along the same lines as that developed for intra-EU capital movement.

Exceptions to the Freedom

The exceptions to the freedom of capital movement split in two groups: those exceptions which apply to intra-EU and third-country capital movements alike, and those that exclusively relate to third-country capital movement.

Art. 65 (1) lit. b. TFEU (ex-Art 58(1) lit. b EC) forms the only written exception applicable to intra-EU and third-country situations within the treaty chapter on free movement of capital. Supported by the wording and the existence of specific exceptions to third-country capital movements by which the treaty drafters expressly indicated those situations in which they wished to make a distinction between intra-EU and third-country capital movement, Art. 65 (1) lit. b. TFEU (ex-Art. 58(1) lit. b EC) must, in principle, be interpreted in the same way irrespective of whether intra-EU or third-country capital movements are involved. The lack of persuasiveness of teleological and systematic considerations, such as the purported

[34]Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 181 et seq.

[35]Ibid. 183 et seq.

"limited purpose" pursued by the liberalization of third-country capital movements or missing harmonization with third countries, prohibits an across-the-board treatment of such capital movements within the ambit of this provision. In particular, third-country capital movement does not constitute a general danger of infringement of national rules and regulations. Furthermore, the economic activity of direct investment in a third-country context does not per se constitute a threat to public policy or public security. The economic sectors in which public security concerns were recognized by the ECJ as legitimate are identical in an intra-EU and a third-country context.[36]

Possible differences between intra-EU and third-country capital movements are best considered in the balancing process taking place within the proportionality test. However, under the given conditions it is unclear why the ECJ should significantly deviate from the guidelines informing the application of the proportionality test developed in an intra-EU context. Concerning effective fiscal supervision, the Member States must resort first to international treaties concluded between the respective Member State and a third country to gain the information needed before restricting the freedom. Even if the means available under international law prove insufficient in the individual case, the market participant should first be given the opportunity to provide the information itself before recourse is taken to additional national restrictive measures.[37]

National measures that restrict foreign direct investment on the basis of the *ordre public* exception must fulfil the same high standards in terms of predictability, transparency and due process as are applicable in an intra-EU context. This is because, in principle, the threat posed does not differ depending on the origin or destination of the capital movement.

The "rule of reason" also applies in a third-country context. Its interpretation does not vary depending on whether the capital movement relates to another Member State or to a third country, but may follow in a third-country context the same lines that have been drawn by the ECJ for intra-EU capital movement. In particular, no across-the-board judgements penalizing third-country capital movements shall be applied, but the mandatory requirement pursued with a national measure and the freedom of capital movements have to be balanced carefully on a case-by-case basis. Sufficient argumentative support for the view which suggested interpreting accepted mandatory requirements, such as "fiscal cohesion", differently depending on the geographical mapping cannot be identified as missing reciprocity in a third-country context is not a valid argument. On the basis of the *telos* and systematic of the treaty, the unilateral liberalization of free movement of capital *erga omnes* is to be perceived as unconditional. Ultimately, missing reciprocity is not an argument for a restriction of third-country capital movement,

[36]Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 216 et seq., 236 et seq.

[37]Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, 2009, pp. 242 et seq.; different view: ECJ, Case C-101/05, *Skatteverket*, [2007] ECR I, p. 11531, para. 63.

but the very consequence of this unilateral act. Thus, the introduction of mandatory requirements pursuing budgetary purposes also based on "lacking reciprocity" in a third-country context must be rejected. Closely related to the "lacking reciprocity" argument is that of "lacking harmonization" in a third-country context, which also cannot form a valid plea to restrict third-country capital movement.[38]

Evaluation

If one is prepared to accept that Art. 63 (1) TFEU (ex-Art. 56 (1) EU) unilaterally liberalizes capital movements between the EU and third countries basically on the same terms as within the EU, then a CIP is limited essentially to secure market access and favourable treatment standards for EU investments in third countries. Secondary legislation liberalizing market access which exists, for example, in the area of free movement of goods[39] would not be necessary in the ambit of free movement of capital. Meaningful harmonization is conceivable in respect of Member State legislation on market access of third-country investment which is currently rather heterogeneous. Also useful could be a regulation roughly modelled on the "Trade Barriers Regulation",[40] which could offer some means of defence against third-country access restrictions on investment from the EU. Moreover, an empowerment of the European (Commission) to unilaterally restrict third-country investment into the EU on a temporary basis could increase the bargaining power of the EU towards third countries in the course of pushing for market access rights.

However, if one takes the current "sovereignty-oriented jurisprudence" of the ECJ in respect of third-country capital movements as a basis, then the function of secondary legislation and international agreements shifts basically from accompanying to allowing for liberalization. Although the "sovereignty-oriented jurisprudence" of the ECJ affects primarily the "initial situation" in the area of direct investments owing to the ECJ's doubtful delineation of free movement of capital and the freedom of establishment, third-country portfolio investments are also struck – albeit to a lesser extent – by the ECJ's restrictive understanding of the scope of application of the freedom of capital movement and the expanding reading of applicable exceptions to the freedom in a third-country context.

On a factual basis, Member States in the Council are "re-empowered" to decide on the level of openness of the EU Internal Market in respect of foreign direct investment; a situation which by and large existed prior to the entry into force of the Maastricht Treaty.

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[38]Hindelang, The EC Treaty's Freedom of Capital Movement as an Instrument of International Investment Law?, in: Reinisch/Knahr (eds.), *International Investment Law in Context*, 2008, pp. 43 et seq. (255 et seq.).

[39]Regulation (EC) No. 260/2009 of 26.02.2009, OJ L 84 of 31.3.2009, p. 1; Regulation (EC) No. 1061/2009 of 19.10.2009, OJ L 291 of 07.11.2009, p. 1.

[40]Regulation (EC) No. 3286/94 of 22.12.1994, OJ L 349 of 31.12.1994, p. 71.

The EU's External Competences in the Area of International Investment Law

The EU's Investment Competences pre-Lisbon as the Key to its post-Lisbon Competence Conglomerate

The EU's competence for conclusion of international agreements on investment before the entry into force of the Lisbon Treaty is not only of interest from a historical perspective, but is equally relevant today after entry into force of the Lisbon Treaty.[41] Indeed, one can only fully understand today's reach of EU competences in the area of international investment regulation if one properly grasps the concepts of implied shared external EU competence established before the entry into force of the Lisbon Treaty. This is particularly true for the EU's external, i.e. treaty-making powers, as opposed to its internal (autonomous) competence, which is not discussed in this paper.[42]

In the context of EU investment competences, it seems commonly accepted in the literature that the EU has – after the entry into force of the Lisbon Treaty – (explicit) exclusive competence to conclude international agreements on foreign direct investment. This is enshrined in Art. 207 TFEU (ex-Art. 133 EC).[43] Dispute remains, however, in how far, if at all, this EU competence also includes portfolio investments, the other major type of investment next to direct investment. This question is of particular importance as almost all bilateral investment treaties

[41]For an analysis of the EU's competences before the entry into force of the Lisbon Treaty, see Maydell, *The European Community's Competence to Conclude International Agreements on Investment - Revealing the Inconvenient Truth*, Vienna 2008, available at the Austrian National Library Vienna (Österreichischen Nationalbibliothek Wien) and the University Library of the Vienna University School of Law (Universitätsbibliothek der Rechtswissenschaftlichen Fakultät Wien).

[42]For a discussion of the EU's internal competences regarding foreign investment, see Hindelang/Maydell, Die Gemeinsame Europäische Investitionspolitik – Alter Wein in neuen Schläuchen? in: Bungenberg/Griebel/Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht*, 2010, pp. 11 et seq., pp 71 et seq.

[43]Art. 207 (1) TFEU under Title II *Common Commercial Policy* reads: *The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*. Emphasis added. Art. 3 (1) (e) confers exclusivity on the EU's investment competence: *The Union shall have exclusive competence in the following areas:* (...) (*e*) *common commercial policy*. On views in the literature regarding the EU's investment competence under Art. 207 TFEU, see, for instance, Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, Beiträge zum Transnationalen Wirtschaftsrecht, Heft 83, January 2009, p. 13; Eilmansberger, Bilateral Investment Treaties and EU Law, CMLR 46 (2009), pp. 383 et seq. (394).

(BITs) currently in force between EU Member States and third countries embrace both direct and portfolio investment. In other words, if the EU only had competence to conclude international agreements on foreign direct investment, it would not be capable of concluding agreements according to the commonly accepted international standard. Indeed, any new agreement concluded by the EU, unless concluded together with the Member States (mixed agreement), could and would necessarily lag behind the level of investment protection afforded by BITs today.

As will be argued in this paper, the EU continues to have implied non-exclusive, i.e. shared, competence[44] to conclude international agreements relating not just to foreign direct investment, but also to portfolio investment. Therefore, the EU will be competent, based on its explicit exclusive competence in Art. 207 TFEU for foreign direct investment and its implied shared competence for portfolio investment, to conclude international agreements providing for the standard commonly seen in today's BITs without any Member States' involvement.[45] For such a conclusion to be reached, the following analytical sequence shall be followed. First, it shall be discussed whether implied external competences still exist after the entry into force of the Lisbon Treaty and, if so, under which standard allowing for their exercise. Second, the conditions for exercising implied shared competences shall be more closely studied in light of most recent case law and, third, a comprehensive understanding of how implied shared EU competences cover portfolio investment commonly found in today's EU Member States' BITs shall be developed.

Implied Competences – The Quest for Their Existence After the Entry into Force of the Lisbon Treaty

According to the ECJ's long-standing case law and as the name already implies, the central characteristic of implied competences is that this type of competences is, or at least was, not explicitly laid down in EU primary law. This competence has only been developed by case law, in regard to both its existence as well as its requirements for exercise.[46] We will, thus, analyse in the first place whether or not, and if so, in how far, this changed owing to the Lisbon Treaty. As a starting point, we should look at the two key provisions newly introduced by the Lisbon Treaty in this regard. Both Art. 3 (2) TFEU and Art. 216 (1) TFEU did not exist in the Treaty establishing the European Community, the predecessor treaty of the TFEU, and

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[44] Art. 2 (2) TFEU now defines the EU's non-exclusive competence as "shared competence": *When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*. Emphasis added.

[45] Whether this is politically desirable and/or feasible is not part of the legal assessment undertaken in this paper.

[46] Schmalenbach, in: Calliess/Ruffert (eds.), *EUV/EGV*, (3. ed.) 2007, Art. 300, mn. 19.

both provisions deal with implied competences. These two provisions are key to understanding the concept of implied competences after the entry into force of the Lisbon Treaty. Art. 3 (2) TFEU reads: *The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*. Art. 216 (1) TFEU almost identically states that: *The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*. The interplay between these two provisions raises a multitude of questions, in particular in how far Art. 216 (1) TFEU goes beyond Art. 3 (2) TFEU in terms of competence reach and why Art. 216 (1) TFEU is partly identical with Art. 3 (2) TFEU and partly very similarly phrased, most likely leading to the same result. *In so far as its conclusion may affect common rules or alter their scope* (Art. 3 (2) TFEU) most likely has the same meaning as the subsentence of Art. 216 (1) TFEU, which reads as follows: *is likely to affect common rules or alter their scope*. And other, very narrow parts of Art. 216 (1) TFEU have a roughly similar phrasing but with most likely a different outcome: *is necessary to enable the Union to exercise its internal competence* (Art. 3 (2) TFEU) most likely has a meaning different from that of *is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties* (Art. 216 (1) TFEU).

Despite these and other unclear points in the relationship between these two articles, this paper follows the apparently prevailing doctrine that Art. 216 (1) TFEU gives the EU external competence without defining its nature and only becomes exclusive when the requirements of Art. 3 (2) TFEU are fulfilled. The nature of Art. 216 (1) TFEU, thus, becomes only clear in the interplay with Art. 3 (2) TFEU, namely that Art. 216 (1) TFEU always provides the EU with exclusive external competence if its wording is identical with that of or has the same meaning as Art. 3 (2) TFEU. This in turn means that Art. 216 (1) TFEU generally establishes exclusive competence, as the meaning of Art. 216 (1) TFEU and that of Art. 3 (2) TFEU are almost identical or are the same. External competence is only non-exclusive, i.e. shared, *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*. Most likely, this represents the only part of Art. 216 (1) TFEU which is not covered by Art. 3 (2) TFEU as Art. 216 (1) speaks of *objectives referred to in the Treaties*, whereas Art. 3 (2) TFEU refers to *internal competences*, two different legal terms in the TFEU.

On the basis of this diagnosis, one can assume that Art. 216 (1) TFEU together with Art. 3 (2) TFEU confers exclusive as well as shared external competences on the EU. This, in turn, leads to the crucial question of this paper, namely in how far these two newly included provisions in EU primary law affect, i.e. codify, and, thus, alter or terminate, the existence of implied external competences as developed by

the ECJ over the course of the four past decades. To answer this question, we will take a brief look at implied exclusive competences first and subsequently undertake a more thorough analysis of implied shared competences and the impact of Art. 216 (1) TFEU and Art. 3 (2) TFEU on these two categories of implied competences.

This paper will conclude that Art. 216 (1) TFEU in connection with Art. 3 (2) TFEU codifies the ECJ's case law with respect to implied exclusive competences but does not codify or otherwise affect implied shared competences. As will be shown below, this follows from an ECJ case law analysis and the understanding of the only shared competence under Art. 216 (1) TFEU, namely the conferral of explicit shared competence on the EU *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*. This provision represents nothing more than, in accordance with the rephrasing under the Lisbon Treaty of Art. 352 TFEU (ex-Art. 308 EC), the extension of the competence sweeping clause of ex-Art. 308 EC from internal to external matters.[47] And, importantly, this clause already existed when the ECJ developed and refined its implied competence doctrine and has continuously existed since then.

Implied Exclusive Competence After the Entry into Force of the Lisbon Treaty

As already indicated, Art. 216 (1) TFEU together with Art. 3(2) TFEU clearly codifies what has been developed by the ECJ and is commonly known in the literature as implied exclusive competence. This is the case as Art. 216 (1) TFEU together with Art. 3(2) TFEU contains the same language and substance and stipulates the same conditions for when exclusive competence exists as was developed by the ECJ. The ECJ-developed *acquis communautaire* on the EU's implied *exclusive* competence before the entry into force of the Lisbon Treaty can be summarized as follows:

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[47]With respect to the concept of the competence sweeping clause, see Winkler, in: Grabitz/Hilf (eds.), *Kommentar zum EGV*, (EL 34 January) 2008, Art. 308 EGV, para. 11. Art. 352 (1) TFEU reads: *If action by the Union should prove necessary, <u>within the framework of the policies defined in the Treaties</u>, <u>to attain one of the objectives set out in the Treaties</u>, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures*. Emphasis added. Ex-Art. 308 EC was limiting the competence sweeping clause to the EU's internal sphere (compare emphasis): *If action by the Community should prove necessary to attain, <u>in the course of the operation of the common market</u>, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.*

1. First, the EU has implied exclusive competences if and as far as the EU has already adopted internal rules in a certain field.[48] Also, the conclusion of international agreements constitutes internal rules in that sense through the necessary internal act of adoption. Regularly, this is the case with internal (full) harmonization measures.[49] They automatically render an internal competence exclusive and do not require any affecting test. As far as only minimum standard legislation is concerned, it appears to be necessary to assess whether the international agreement at stake could indeed affect and, thus, render less effective these internal rules.[50]
2. Second, even though an internal legislation does not fully cover a certain subject area of the treaty, the EU can nevertheless claim implied exclusive competence if that subject area is largely (and not necessarily entirely) covered by EU rules with a perspective of additional internal harmonization in the future. It remains unclear how exactly "largely covered" is to be interpreted and to what extent the adoption of future legislation must be certain. As regards the ECJ's case law, this competence category has been applied within Opinion 2/91-ILO.[51]
3. Third, the EU has exclusive competence if this is explicitly enshrined in EU secondary legislation. This is the case where internal legislation provides for the conclusion of international agreements in that field and/or which includes provisions on the treatment of third-state nationals, be they natural or legal persons.[52]
4. Fourth, the EU has implied exclusive external competence in a certain subject area when and insofar that this is necessary to make effective use of the respective internal competence.[53] This requires that the internal competence must cover the same field as the external one and that the use of the implied

[48]ECJ, Opinion 2/92, OECD, [1995] ECR I, p. 521: (...) *the Member States, whether acting individually or collectively, only lose their right to enter into obligations with non-member countries as and when there are common rules which could be affected by such obligations.*

[49]Gilsdorf, Die Außenkompetenzen der EG im Wandel, EuR (1996), p. 149.

[50]Louis, La Cour et les Relations extérieures de la Communauté, CDE 42 (2006), pp. 285 et seq. (287).

[51]ILO Opinion, mn. 25: *While there is no contradiction between these provisions of the Convention and those of the directives mentioned, it must nevertheless be accepted that Part III of Convention No 170 is concerned with an area which is already covered to a large extent by Community rules progressively adopted since 1967 with a view to achieving an ever greater degree of harmonization* (...).

[52]ECJ, Opinion 1/94, WTO, [1994] ECR I, p. 5267, para. 95; and ECJ, Opinion 2/92, OECD, [1995] ECR I, p. 521, para. 33.

[53]ECJ, Opinion 1/76,. [1977] ECR, p. 741, para. 4; ECJ, Opinion 1/94, WTO, [1994] ECR I, p. 5267, para. 87; Open Skies, paras. 56 et seq. For a summary, see ECJ, Opinion 2/92, OECD, [1995] ECR I, p. 521: *It is true that, as the Court stated in Opinion 1/76, the external competence based on the Community's internal powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted. However, this relates to a situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules.*

external competence must serve one of the objectives underlying the respective internal provision. In addition, the implied external competence can only be established if the effective exercise of the corresponding internal competence cannot be guaranteed by "concerted action" of the Member States or by autonomous internal EU legislation.[54]

From the above case law analysis one can clearly see that Art. 216 (1) TFEU together with Art. 3 (2) TFEU indeed codify the ECJ's case law on implied *exclusive* competences. The first and second implied competence categories – possible impact on already existing secondary legislation – is now covered in Art. 216 (1) TFEU by stating *is likely to affect common rules or alter their scope* and by Art. 3 (2) TFEU by stating *in so far as its conclusion may affect common rules or alter their scope*. Art. 3 (2) TFEU's part *when its conclusion is provided for in a legislative act of the Union* and Art. 216 (1) TFEU's part *is provided for in a legally binding Union act* correspond to above third category of case law. The fourth category is enshrined in Art. 3 (2) TFEU's *is necessary to enable the Union to exercise its internal competence*. To conclude, Art. 3 (2) TFEU and partially Art. 216 (1) TFEU codify the ECJ's case law on implied exclusive external competences. They do not go beyond what has been developed by the ECJ and the ECJ's case law, thus, will also in the future continue to be a helpful and legitimate guide when interpreting Art. 3 (2) TFEU and Art. 216 (1) TFEU.

Existence and Requirements for the Exercise of Implied Shared Competences Before the Entry into Force of the Lisbon Treaty

Although there has been a lot of discussion in the past on whether implied shared external EU competences exist at all, this seems to be undisputedly answered in the positive, at least since the ECJ's Lugano Opinion.[55] The Lugano Opinion was the ECJ's answer to a request as to the "exclusive or shared" competence of the EU to conclude the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, in short, the Lugano Convention.[56] It, therefore, had been explicitly asked to speak out also on shared (read

[54]Koutrakos, *EU International Relations Law*, 2006, pp. 113 and 125. Since no internal legislation must have been released before, this competence category is the only quasi-parallel within implied exclusive competences. It is only quasi-parallel since the necessity test applies. See, for instance, Lenaerts/Van Nuffel, *Constitutional Law of the European Union*, 2005, p. 858.

[55]For an extensive discussion on this competence category's proof of existence, also in addition to the Lugano Opinion, and a related discussion in literature, see Maydell, The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence, in: Reinisch/Knahr (eds.), *International Investment Law in Context*, 2008, p. 84.

[56]Opinion 1/03, Lugano Convention, [2006] ECR I, p. 1145, para. 134: *The request for an opinion does not concern the actual existence of competence of the Community to conclude the agreement envisaged, but whether that competence is exclusive or shared.*

"non-exclusive") competences, in decisive contrast to earlier cases, such as the WTO Opinion or the Open Skies case law.[57] The relevant paragraphs are worth quoting in full:

> The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see ERTA, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7).
>
> That competence of the Community may be exclusive or shared with the Member States. As regards exclusive competence, the Court has held that the situation envisaged in Opinion 1/76 is that in which internal competence may be effectively exercised only at the same time as external competence (see Opinion 1/76, paragraphs 4 and 7, and Opinion 1/94, paragraph 85), the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (see, in particular, Commission v Denmark, paragraph 57).[58]

That competence in the first line of the second paragraph must be understood to refer only to implied competences since it is them the ECJ discussed in the preceding paragraph. Thus, there is an unambiguous statement on the existence of implied shared competences.[59] The remainder of the second paragraph, and of the judgement as a whole, is concerned with exclusive powers and finds the EU alone competent for concluding the Lugano Convention.[60] There was, consequently, no need and occasion for the ECJ to declare further on shared competences, especially on the requirements for the exercise of this competence type.

In theory, two alternative assumptions may possibly be made. First, the EU has an implied shared external competence whenever and wherever it has an internal shared competence to act. This goes under the term "parallelism" or *in foro interno, in foro externo*.[61] This alternative has been dismissed by the ECJ. Indeed, contrary

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[57]Opinion 1/94, WTO, [1994] ECR I, p. 5267, para. 1, and Case C-467/98, *Commission/Denmark* (*Open Skies*), [2002] ECR I, p. 9519, para. 1.

[58]Opinion 1/03, Lugano Convention, [2006] ECR I, p. 1145, paras. 114 and 115. Emphasis added.

[59]This has also been noted by Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law*, 2006, p. 2, and not mentioned by Lavranos, Annotation to Opinion 1/03, CML Rev. 43 (2006), pp. 1087 et seq.

[60]See Opinion 1/03, Lugano Convention, [2006] ECR I, p. 1145, para. 173. The ambiguity observed regarding the Opinions 1/94 and 2/91 as to the result (mixity) proclaimed by the ECJ mentioned above, therefore, did not arise here.

[61]Without elaboration, see Tridimas, The WTO and OECD Opinions, in: Dashwood/Hillion (eds), *The General Law of EC External Relations*, 2000, pp. 48–60 at p. 57; Schmalenbach, in: Callies/Ruffert (eds), *EUV/EGV*, 2007, (3rd edn) Art. 300 para. 15. This also seems to be the opinion of Eeckhout, *External Relations of the European Union*, 2004, pp. 90–91, who has submitted that Opinion 1/76 *did not establish exclusive external competence, but simply confirmed general*

to misleading wording in earlier case law,[62] the Lugano Opinion clarifies that the EU may not enter into international agreements absent of some enabling criterion.[63] Second, shared competence must be conditional on some enabling criterion, which logically must constitute a minus compared with criteria for establishing implied exclusive external competence. According to this theory, which has been called the principle of complementarity,[64] the EU does not automatically have an external competence when it has a competence to enact directives or regulations such as under Art. 114 TFEU (ex-Art. 95 EC).

The pertinent requirement for implied shared competences thus has to be attached to the nature of an internal competence in the sense of the Opinion 1/76 line of jurisprudence. Since the EU is exclusively competent for the conclusion of an international agreement if it is the only way an EU objective can be attained, it is to be argued that the competence is shared when the participation merely facilitates the exercise of an internal competence. An implied shared competence, according to this theory, requires that the entering into obligations by the EU vis-à-vis third states furthers the attainment of one or several of its internal competences.[65] This test of facilitation is to be derived from the necessity element to establish exclusive external competence as introduced by the ECJ in Opinion 1/76. Facilitation, thus, constitutes a second, lower-threshold test under a "double standard" of necessity established as a principle of law by case law cited above.[66] To put it differently, fulfilling the requirements of the necessity test prompts EU exclusivity, as has been

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parallelism between internal and external powers and that *it is only the exercise of competence which creates its exclusive character*. See also Heliskoski, *Mixed Agreements as Technique for Organizing the International Relations of the European Community and its Member States*, 2001, p. 44, and the joined opinion by A.G.Tizzano in the *Open Skies Cases*, [2002] ECR I, p. 9427, paras 49 et seq. cf. also the account of the diverging doctrine by Holdgaard, *The European Community's Implied External Competence after the Open Skies Cases*, 2003, pp. 372–373.

[62]Opinion 1/94, WTO, [1994] ECR I, p. 5267, para. 85: *It is understandable, therefore, that external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted*. See also Opinion 2/92, ILO, [1993] ECR I, p. 1061, para. 4.

[63]In somewhat reluctant agreement, see Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law*, 2006, p. 3.

[64]Dashwood, The Attribution of External Relations Competence, in: Dashwood/Hillion (eds), *The General Law of EC External Relations*, 2000, pp. 127–136.

[65]See Dashwood and Heliskoski, The Classic Authorities Revisited, in: Dashwood/Hillion (eds), *The General Law of EC External Relations*, 2000, pp. 3–19 at pp. 16–18. They, however, seem to read the (early) case law only as providing for the "lower" standard of necessity to establish an implied shared competence. See, in contrast, Dashwood, *The Attribution of External Relations Competence, in: The General Law of EC External Relations*, 2000, pp. 132–134: *implied external competence arises, where this will help ensure the optimal exercise of the expressly conferred internal competence*.

[66]Griller and Gamharter, External Trade: Is There a Path Through the Maze of Competences?, in: Griller/Weidel (eds), *External Economic Relations and Foreign Policy in the European Union*, 2002, pp. 79–80.

codified in the Lisbon Treaty, whereas a positive test of facilitation elicits shared EU competence.

This view finds support in the Lugano Opinion, as explained above. Comparison with proportionality pursuant to Art. 5(3) EC is misguided,[67] since this principle weighs upon EU acts against alternative measures in the sense of a test of appropriateness and indispensability.[68] Moreover, contrary to the application of the proportionality principle,[69] review by the ECJ of the necessity test is objective, ex post facto and might replace the assessment of the authorities.[70] Apprehension of a *Kompetenz-Kompetenz* of the EU is, thus, not warranted.[71] Unresolved is the question of the exact standard of facilitation to be required for establishing implied shared competence.

Necessity, we know, has been understood as requiring an inextricable link leaving no other choice than for the EU to act externally to fulfil its tasks internally.[72] As a consequence of this high threshold, application of the necessity test has, but in a single case, always resulted in denial of exclusive competence of the EU.[73] Assuming a double standard, "necessity" to generate shared competence must, thus, presuppose some lesser connection to the realization of EU Treaty goals. This, conversely, is not to say that the criterion should not be as objective as the necessity test for exclusive competences, or that it need not embody more than pure political expediency.

Two thoughts, we submit, can instruct us on this. First, the term "necessary" implies that there must still be a close, though not indispensable, link to the internal competence. Second, the ECJ has never rationalized its award of exclusive external competence in the 1/76 constellation that has been deplored in the doctrine.[74] Justification cannot be to preserve the unity and consistency of EU law such as with the AETR line of case law.[75] It is submitted that the test of necessity and more so the test of facilitation are rather guided by the principle of effectiveness.[76] Both

[67]But see Schütze, *Parallel External Powers in the European Community: From "Cubist" Perspectives Towards "Naturalist" Constitutional Principles?* 2004, p. 239.

[68]Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, 2005, pp. 109–115.

[69]Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, 2005, p. 111.

[70]See Koutrakos, *EU International Relations Law*, 2006, p. 124. But see A.G. Tizzano, *Open Skies Cases*, [2002] ECR I, p. 9427, para. 51.

[71]Eeckhout, *External Relations of the European Union*, 2004, pp. 89 and 97. See also Dörr, *Die Entwicklungen der ungeschriebenen Außenkompetenzen der EG*, 1996, p. 41.

[72]But see Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law*, 2006, p. 3, who suggests that in Opinion 1/03 this test has been relaxed again by the ECJ.

[73]Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, 2005, p. 858.

[74]Eeckhout, *External Relations of the European Union*, 2004, p. 99; Koutrakos, *EU International Relations Law*, 2006, p. 113.

[75]Louis, Editorial: La Cour et les Relations extérieures des la Communauté, CDE (2007), pp. 285 et seq. (289).

[76]Kovar, Les compétences implicites: jurisprudence de la Cour et pratique communautaire, in: Demaret (ed), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels*, 1986, pp. 15 et seq. (20–21).

are rooted in the *effet utile* of the internal power that requires external action in order to be effectively exercised. This suggests that there must be an actual, reasoned assessment of whether the internal competence would be furthered by external action of the EU. Account must be taken of both the international agreement and the internal competence concerned before affirming facilitation and, thus, the right of the EU to act.

Continued Existence of Implied Shared Competences After the Entry into Force of the Lisbon Treaty

On the basis of the above explanations with respect to existence and requirements of exercise of implied shared competences, it is clear that the only part of Art. 216 (1) TFEU which does not establish exclusive competence together with Art. 3 (2) TFEU, namely *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*, does not represent a codification of the ECJ's case law with respect to implied *shared* competences. Put simply, the EU has a shared competence according to Art. 216 (1) TFEU whenever this is necessary for the achievement of one of the treaties' objectives. The EU (only) has implied shared competence, according to the ECJ's case law if the conclusion of an international agreement would facilitate the exercise of an internal *competence*. Art. 216 (1) TFEU and implied shared competences according to the ECJ's case law thus differ within both categories of competence exercise, namely objective versus competence and necessity versus facilitation.[77]

Even though the part of Art. 216 (1) TFEU discussed does not represent a codification of the ECJ's case law, the question remains whether from the mere existence of Art. 216 (1) TFEU it could follow that implied shared competences founded on the ECJ's case law would no longer be valid, even if it does not represent a codification. As far as can be seen, both opinions, for the continued existence of implied shared competences after the entry into force of the Lisbon

[77]Note that the facilitation test is considerably easier to fulfill than the encessity test of Art. 216 (1) TFEU. The necessity standard represents a legal and factual condition sine qua non. while the facilitation standard is already met when the exercise of internal EU competence is being facilitated through external EU treaty making. Therefrom also follows the significantly increased attractiveness of implied external competences as compared to Art. 216 (1) TFEU, in particular for inclusion of portfolio investment in future EU treaties. Judging the inclusion of portfolio investment merely on the basis of Art. 216 (1) TFEU would not allow the EU to include this type of investment in an international treaty, as the EU could simply conclude a mixed agreement together with Member States in order to cover protfolio investment. Such a possiblity frustrates the necessity requirement, as EU external action is not necessary, i.e., the only alternative, to achieve one of the objectives referred to in the Treaties.

Treaty and against it, are expressed in the literature.[78] This paper sees more convincing arguments for a continued existence of implied shared competences on the basis of the requirements for exercise of this competence as developed by the ECJ also after the entry into force of the Lisbon Treaty. This view is based, first, on the fact that no provision to the contrary is contained in the TFEU or the TEU, not even in the general competence foundations section in Art. 2–6 TFEU. It is therefore unlikely that, without an explicit provision to the contrary in the treaties, a commonly accepted principle of international law and many national constitutions, which has been (explicitly) accepted by the ECJ in an elaborated and long-standing case law, would suddenly no longer be a part of EU law. Second, the ECJ has explicitly acknowledged the existence of implied shared competences in its Lugano Opinion in 2006, i.e. at a point in time at which the current provision of Art. 216 (1) TFEU was already contained, in equal wording, in the signed but not yet ratified, Constitutional Treaty of 2004. In other words, it is very unlikely that Art. 216 (1) TFEU rules out the existence of a competence category, which was explicitly recognized by the ECJ after this provision had been drafted. Third, the relevant part of Art. 216 (1) TFEU cannot relate to implied shared competences as it refers to a different competence, namely the extension of the competence sweeping clause of ex-Art. 308 EC to embrace also external competences. Although ex-Art. 308 EC only provided for EU competence if EU action was *necessary* to *attain, in the course of the operation of the common market, one of the objectives of the Community*, Art. 352 (1) TFEU, the provision replacing ex-Art. 308 EC, now provides for EU competence if *action* (...) *should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties*. It therefore follows, on the one hand, that the competence sweeping clause, which was purely an internal competence before the entry into force of the Lisbon Treaty owing to its formulation, is now also an external competence. On the other hand, the extension to now cover also external competence matters in Art. 352 (1) TFEU is replicated in the same terms and meaning in Art. 216 (1) TFEU, namely that the EU has competence if *the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties* (...). This exact replication in Art. 216 (1) TFEU of Art. 352 (1) TFEU is systematically speaking correct as Art. 216 (1) TFEU lists all general

[78]For a continued existence of implied shared competences apparently Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW (2010) 6, p. 210. Arg.: *Investitionen, die diese Schwelle nicht erreichen, sind als Portfolioinvestitionen zu bezeichnen und sind von den ausschließlichen Kompetenzen nach Art. 206 und Art. 207 I AEUV nicht abgedeckt. Damit soll die Union nach ganz überwiegender Auffassung im Schrifttum nicht über eine ausschließliche Kompetenz zur Regelung von Portfolioinvestitionen verfügen. Eine solche Kompetenz könne sich allenfalls als geteilte Zuständigkeit aus den Bestimmungen über die Kapitalverkehrsfreiheit ergeben*. Herrmann does not make any reference whatsoever to Art. 216 (1) TFEU.

external EU competences as opposed to those special EU external competences, which are listed in the various chapters on EU policies, such as the chapter on the EU's Common Commercial Policy. In sum, the relevant part of Art. 216 (1) TFEU refers to a competence category very different from implied shared external competence, namely the competence sweeping clause of Art. 352 (1) TFEU, and can therefore, owing to its very nature and function, not rule against the existence of implied shared competences as developed by the ECJ. It is therefore safe to assume that the ECJ's jurisprudence with respect to implied shared competence remains fully valid also after the entry into force of the Lisbon Treaty and as such also the existence and requirements of exercise of implied shared competence remain unaffected by the Lisbon Treaty.

The Significance of Implied Shared Competences for Portfolio Investment

One can look at the EU's external competences in the area of international investment law in several ways, one of which being drawn along the distinction between explicit and implied EU competences. Although there has been considerable debate in recent literature with respect to the EU's explicit external competences, in particular centred around but not limited to Art. 207 TFEU, little attention, if any at all, has been paid to the impact of the EU's implied competences on its international investment law competences.[79] This paper will therefore focus on the interplay of this later competence category with international investment law. Portfolio investment, as opposed to foreign direct investment, represents the major area of interest for this task as the EU's explicit competence is limited to foreign direct investment in Art. 207 TFEU. In other words, the EU, without Members States being contracting parties as well could only conclude international agreements on investment promotion and protection embracing foreign direct investment but not portfolio investment if one were to look only at explicit competences

[79]To the knowledge of the authors, no publication has discussed the foundations and impact of implied shared competences after the entry into force of the Lisbon Treaty on the EU's competences in the field of international investment law in detail. Herrmann, without providing a dogmatic explanation, seems to argue that the EU's external competence also covers portfolio investment, which would eventually even be covered by exclusive EU competence: Herrmann, Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon, EuZW (2010) 6, p. 210. With respect to explicit competences, see Eilmansberger, Bilateral Investment Treaties and EU Law, CMLRev (2009), pp. 394 et seq.; Bungenberg, Außenbeziehungen und Außenhandelspolitik, Beiheft EuR 1/2009, pp. 207 et seq. For a comparative analysis between explicit and implied external EU competences with respect to international investment law, see Hindelang/Maydell, Die Gemeinsame Europäische Investitionspolitik – Alter Wein in neuen Schläuchen?, in: Bungenberg/Griebel/Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht*, 2010, pp. 11 et seq.

following the mainstream view in the literature.[80] Although indeed Art. 207 TFEU covers foreign direct investment, it cannot be argued that, as a consequence, EU competence is limited to foreign direct investment. This would neglect an entire type of competences, namely implied shared competences, a type of competence which has not been terminated or modified by the Lisbon Treaty, as shown above. Implied exclusive competences, on the other hand, have been codified by the Lisbon Treaty and shall not be analysed further here as the very strict requirements for their exercise are explicitly enshrined in the Lisbon Treaty and are most likely not met in the context of international investment agreements. As will be shown in the remainder of this paper, EU competence also embraces portfolio investment based on its implied shared competence and the EU is thus in a position to conclude state-of-the-art investment agreements alone, i.e. without Member States' participation.

The underlying assumptions are as follows: first, the existence of implied shared external competences as established above; second, the facilitation test laid out above for when such competences can be exercised; and third, the Lisbon Treaty has not terminated the existence or altered the requirements of exercise of implied shared competences. Treatment standards regularly established in BITs referring to foreign direct investment as well as portfolio investment, such as non-expropriation, "fair and equitable treatment", "national treatment" and "most favoured nation treatment" provisions, correspond to core "treatment standards" in EU law, such as the provisions regarding the fundamental freedoms and competition law, in particular state aid, including numerous secondary legislation and individual decisions based upon these treaty provisions. In other words, core provisions of BITs are regularly also covered by EU law. Although EU law generally goes into much greater regulatory depth, by means of primary or secondary EU law, EU law and BITs overlap in terms of subject matter area to be regulated, such as not to discriminate against different investors. These EU law and BIT provisions can and regularly do conflict with each other, such as in the case of the *Eastern Sugar* arbitration.[81] In the case of conflict between EU law and BIT provisions, the Member State concerned is faced with the dilemma, at least in case of third-country as opposed to intra-EU investment, of either not applying EU provisions, and thus being in breach of EU law, or applying the EU provision, therefore violating the applicable BIT and thus facing potential financial sanctions by the investor concerned through arbitration proceedings.[82] Both constellations are negatively affecting the effectiveness of EU law. To be more precise, conflict negatively affects the

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[80] With a comprehensive overview on relevant literature following this view, see Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, Beiträge zum Transnationalen Wirtschaftsrecht, Heft 83, January 2009, pp. 13 et seq.

[81] Partial award of 27 March 2007, *Eastern Sugar v. Czech Republic*, SCC No. 088/2004, para. 156; for a detailed analysis, see: Eilmansberger, Bilateral Investment Treaties and EU Law, CMLR 46 (2009), pp. 383 et seq. (388 et seq.).

[82] Eilmansberger, Bilateral Investment Treaties and EU Law, CMLR 46 (2009), pp. 383 et seq. (398 et seq.).

effectiveness of the EU's exercise of its internal competence with respect to those areas of law regulated in both the BIT and EU law, such as the EU's state aid law.

EU law regularly extends to both foreign direct investment and portfolio investment in these areas of regulation. Although such analysis is not warranted for foreign direct investment owing to the EU's explicit exclusive competence in Art. 207 TFEU, it is argued that the exercise of the EU's internal competences in those areas of law covered by BITs concluded by its Member States is facilitated in the sense of the above-established facilitation test by the EU concluding such international investment agreements itself. Such facilitation is achieved by the EU being able to conclude only such international agreements on investment which do not contradict EU law. This is of particular importance as Member States' BITs regularly aim to generally regulate the treatment of foreign investors, an area which is also of prominent regulatory significance under EU law as described before. In other words, the conclusion of international investment agreements applying also to portfolio investments fulfils the requirements of the exercise of implied shared external competences by the EU under the facilitation test.

It cannot be argued, however, that the requirements for (formerly implied) exclusive competence under Art. 216 (1) TFEU in connection with Art. 3 (2) TFEU are met, namely that the conclusion of an international agreement is "necessary", i.e. the only way for the internal competence to be exercised. Apart from the central criterion of the facilitation test, the facilitation of exercise of internal competence by the EU's exercise of its external competence, the other criteria of the test are also met: Internal competence norms with a scope comprising all those areas to be included in the international agreement exist, in particular Art. 114 TFEU (ex-Art. 95 EC), and the – fictional – exercise of such internal competence with respect to those subject matters to be covered by the international agreement would not contradict the principle of subsidiarity.

Evaluation

The implied shared competence for portfolio investment distilled on this basis would be rather broad in its horizontal scope of application, but equally narrow in its vertical depth of application. In fact, the implied shared competence for portfolio investment is limited to the treatment standards mentioned before common to Member States' state-of-the-art BITs which are equally contained, in EU law, in particular in its fundamental freedoms and its competition law provisions, including state aid. The EU's implied shared competence thus enables the EU to conclude international agreements on portfolio investment. This competence is, contrary to the explicit external competence for foreign direct investment, shared with the Member States, i.e. Member States could – in theory – continue to conclude BITs containing portfolio investment only. Together with its exclusive competence under Art. 207 (1) TFEU, the EU can, thus, conclude state-of-the-art international investment agreements, containing both foreign direct investment and portfolio

investment, without Member States' involvement. In other words, the EU does not have to conclude mixed agreements together with the Member States but can be the only treaty party on the European side.

The actual "function" of these comprehensive competences of the EU to conclude international agreements on investment, however, strongly depends on one's understanding of free movement of capital in a third-country context as outlined above. Only if one follows the restrictive approach apparently favoured by the ECJ, the EU would have the "justification" to develop a comprehensive CIP determining both the conditions of access to and postaccess treatment of foreign investment in the EU through international agreements and autonomous legislation. Further steps towards liberalization with third countries would be discussed on the basis of reciprocity under this approach as opposed to a more "unilateral outcome" if one follows a reading (favoured in this paper) of the free movement of capital provisions as already granting access and treatment standards for third country and EU investors alike.

Conclusion

This paper has attempted to bridge the gap between the EU's competence with regard to third-country investment under the Lisbon Treaty and its predecessor constitutional order. For this purpose, we have linked both fundamental freedom and competences as well as portfolio investment and foreign direct investment to provide a comprehensive picture. That said, the two following main conclusions are to be drawn:

Although the more convincing arguments speak in favour of a liberal reading of free movement of capital in a third-country context, and hence the unilateral liberalization of the Internal Market towards non-EU countries, the ECJ has chosen to lend a narrow reading to the freedom of capital movement in a third-country context: third-country direct investment is largely excluded from the protective scope of Art. 63 (1) EC, the protection of third-country portfolio investments is limited in comparison with such occurring within the EU. Hence, the function of regulation in the context of a CIP shifts from attending to liberalization to allowing for it, both through internal regulation as well as through international agreements.

Concerning the scope of the EU's external competences, although implied exclusive competences have been codified in the Lisbon Treaty, implied shared competences have continued to exist since the entry into force of the Lisbon Treaty and can be exercised under the standard developed by the ECJ and further developed in this paper, the so-called facilitation test. Under this standard, the EU has shared competence to conclude international agreements if, among others, the conclusion would enable the exercise of an internal competence with the same subject matter scope. As has been shown in this paper, the facilitation test is met with regard to portfolio investment as commonly included in Member States' BITs. Implied shared competence together with the EU's exclusive competence of Art.

207 (1) TFEU thus enables the EU to conclude state-of-the-art international agreements on investment – alone, without the necessity of mixed agreements together with Member States.

Combining these two main conclusions, one is left with a picture of an EU which is in the context of the CIP comprehensively empowered to regulate foreign investment independent of the Member States. In exercising these powers the EU relies on the idea that it is charged not just with attending to already liberalized third-country investments by way of regulation, but in essence of allowing for such economic activity, most likely on the basis of reciprocity through international agreements. Such a setting lends much power to the Commission as "negotiator-in-chief" for international agreements in this area and Member States' representatives in the Council in respect of a future design of the CIP. Whether such power will be used wisely remains to be seen, in particular in light of an ever-changing international consensus on the pros and cons of cross-border investment.