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CJEU decision in the X v Staatssecretaris van Financiën case (C-317/15)

Article 64 TFEU – Free movement of capital – The provision of financial services – Recovery period extension

On February 15, 2017 the Court of Justice of the European Union ('CJEU', or 'Court') rendered its decision in the case X v Staatssecretaris van Financiën ([C-317/15](#)). The case concerned the derogation from the prohibition on restrictions to the free movement of capital (also referred to as the 'Standstill Clause'), and its application to the Dutch extended period for recovering third country tax debts (the 'Recovery Period'). The Court ruled that the Recovery Period falls within the remit of the Standstill Clause because its effect in the case at issue in the main proceedings creates a link between the movement of capital and the provision of financial services, even where the Recovery Period can apply to situations other than those specifically mentioned in the Standstill Clause.

Background

This case concerned Article 64(1) TFEU (the Standstill Clause), which allows a derogation from the prohibition on all restrictions existing on December 31, 1993 to the free movement of capital between Member States and third countries, where such capital movements involve direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

While it was not disputed that the Recovery Period amounted to a restriction to the free movement of capital, the Dutch Supreme Court referred the case to the CJEU querying whether the Standstill Clause applied to the Recovery Period in the case of an additional assessment on

foreign income derived by a Dutch resident through a Swiss securities account.



The CJEU decision

The Court primarily clarified that the applicability of the Standstill Clause depends on the effect, not the purpose, of the national legislation restricting capital movement. If the effect of the national provision at issue is the restriction of capital movements involving direct investment, establishment, the provision of financial services or the admission of securities to capital markets, then the Standstill Clause applies. Even if the national provision can also apply to other movements of capital, then Member States may rely on the Standstill Clause insofar as that provision applies to the capital movements covered therein. The Court therefore concluded that the Standstill Clause applies to the Recovery Period even though the latter can also apply to situations other than those covered by the Standstill Clause.

According to the Court, the opening of a securities account by a resident of a Member State with a banking institution outside the EU (the 'Transaction') falls within the concept of 'movement of capital'. In line with the Court's decision in *Wagner-Raith* (C-560/13, EU:C:2015:347), given that the TFEU does not define 'movement of capital', the list in [Annex I to Directive 88/361](#) may be referred to, although it should not be considered exhaustive. Therefore, in the present case, the Court agreed with the Commission that the Transaction fell within the remit of 'operations carried out by residents with foreign financial institutions' under Heading VI of the Annex.

The Court further concluded that in order to fall within the remit of the Standstill Clause, the national measure must relate to capital movements that have a sufficiently close link with direct investment, establishment, the provision of financial services or the admission of securities to capital markets. It further confirmed that it was irrelevant whether the restriction caused by the national measure concerns the provider of the services or the provision of services. With respect to the Recovery Period applicable to the Transaction, the Court concluded that in carrying out account management services for the account holder, the bank provided financial services, creating a 'causal link' between the Transaction (being the capital movement) and the provision of financial services.

The Court therefore concluded that the Recovery Period is a derogation within the remit of the Standstill Clause.



EU Tax Centre comment

In clarifying that the Standstill Clause applies even where a national measure does not solely involve direct investment, establishment, the

provision of financial services or the admission of securities to capital markets, the Court gave the derogation from the prohibition on restrictions to capital movements a more practical application. We also have a confirmation that the opening of a securities account by a resident of a Member State with a banking institution outside the EU is considered to fall under the Standstill Clause.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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