

Steffen Hindelang. ***The Free Movement of Capital and Foreign Direct Investment. The Scope of Protection in EU Law.*** Oxford: Oxford University Press, 2009. Pp. 448. £70.00. ISBN: 9780199572656.

Despite the fact that it is part of the economic freedoms on which the European integration project is said to be built, free movement of capital has never attracted the attention it deserves – at least as far as the English literature is concerned. This was understandable until the late 1980s, since this freedom was not politically fostered until then. However, two decades later just a couple of monographs are devoted exclusively to the matter,<sup>1</sup> and not too many others deal with it within a broader context.<sup>2</sup> The monograph under review from

<sup>1</sup> A.F.P. Bakker, *The Liberalization of Capital Movements in Europe – The Monetary Committee and Financial Integration, 1958–1994* (1996); S. Mohamed, *European Community Law on the Free Movement of Capital and the EMU* (1999).

<sup>2</sup> For instance, J. Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional*

now on will be an indispensable reference on the matter: first, because of the depth of Hindelang's effort: it is his purpose to analyse *foreign direct investment* and fully to explain its scope and breadth. Therefore, he studies in detail the legal regime of the *free movement of capital* and its recent evolution; in fact, he scrutinizes the European Court of Justice's (ECJ) case law, which constitutes a major contribution to the debate in a field immersed in a series of continuous developments. In addition, the main importance of this book is the fact that it brings to the English literature on free movement of capital the intense and sharp German debate on economic law, and on the legal regime of capital movements in particular; and it does so acutely distinguishing the stances – and their nuances – of each relevant author towards each particular aspect of the legal regime.

Free movement of capital is determined by Article 63(1) TFEC – ex Article 56(1) EC – which clearly states that '[w]ithin the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'. Hence, not just an intra-Community liberalization of capital movements has been achieved, but also a rather contentious *erga omnes* liberalization. However, scholars have not resolutely engaged in the study of the reasons why the latter has been achieved on a unilateral basis and without any explicit rationale, nor have they debated as deeply as required the limits for capital movements originating from or directed to a non-European Union Member State. Hindelang's book puts an end to this situation, dealing with both issues (and will hopefully trigger a new debate on them).

The main thesis which the book supports is that because capital flows between a Member State and a third country were liberalized to exactly the same degree as were movements

within the Community – with the sole exception of the specific provisions the Treaty contains for each particular category of movement – foreign direct investment will also enjoy the same guarantees as intra-Community direct investment. In order to prove this thesis the author adopts a comparative approach with respect to the legal regimes for both types of movements, describing first the breadth and scope of those within the Community, and then comparing them with those towards or from a third country. The author proceeds as follows: at first he explains why, from his point of view, liberalizing capital movements *erga omnes* contributes to the achievement of Treaty aims (Chapter I); then he devotes three chapters to delimiting the material scope of the freedom (Chapter II), its specific connection with freedom of establishment (Chapter III), and the scope of the prohibition of restrictions (Chapter IV); an extremely short analysis of the personal scope of the freedom, to the point that perhaps it might have been included as a section in the second chapter, follows (Chapter V); finally, chapters on exceptions which apply to both categories of movements (Chapter VI) and strictly to movements towards or from third countries (Chapter VII) are included. It is true that the scope of the whole freedom will determine the scope of foreign direct investment. Therefore, the approach of the book, dealing first with the general legal regime and after that with the particularities of foreign direct investment, is adequate.

Less convincing is some of the reasoning included in the book. Hindelang's identification with the object of study and his interest in broadening the scope of foreign direct investment sometimes make him slide over solid arguments and remain content with feeble ones which better suit his point of view. This happens, for instance, when he deals with the controversial issue of whether the protection of the national system of property ownership, which Article 345 TFUE – ex Article 295 EC – affords,<sup>3</sup> constitutes a limit to the free

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*Law of the European Community* (2002); C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (2004) or M. Dahlberg, *Direct Taxation in Relation to the Freedom of Establishment and the Free Movement of Capital* (2005).

<sup>3</sup> It states that '[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'.

movement of capital. Can Member States impose conditions on the ownership of privatized companies which could restrict the free movement of capital? Or may the free movement of capital stipulated in Article 63(1) TFUE erode the national system of property ownership protected by Article 345 TFUE? Hindelang argues that allowing the latter to restrict the freedom ‘would not only be alien but hostile to the level of integration and liberalization reached within the Common Market’ (at 252). Thus, for him the correct way of settling the conflict seems to be paying attention to the effects on liberalization and integration. Instead, when interpreting both provisions he should have taken into account the legal context as well as the aims of the Treaties: the teleological approach with which he has throughout the whole book consistently interpreted free movement of capital (see footnote 50 at 24).

The persuasiveness of Hindelang’s reasoning is also weakened since he ignores some arguments against his case. All these result in the avoidance of the teleological interpretation precisely when it would have led the author to recognize that Article 345 TFUE constitutes a limit to the freedom because of its location in the sixth part of the Treaty (‘General and Final Provisions’), from which it should be deduced that it inspires the content of the whole Treaty. But Hindelang conveniently says nothing about this argument of Advocate General Ruiz-Jarabo Colomer (at 251). Furthermore, as the latter points out,<sup>4</sup> this provision is literally based on the Schuman Declaration; hence it should have an unquestionable influence on the European integration process itself; an influence which Hindelang’s interpretation limited considerably – a stance which, therefore, would have merited further argument.

The same feeling, although to a much lesser extent, remains when one reads the pages which support the cumulative application of economic freedoms – particularly free movement of capital and freedom of establishment – instead of considering them exclusive

domains. The relevance of this distinction for foreign direct investment is of major importance, due to the fact that, while inside the European Union all movements are liberalized, beyond its borders just capital flows are. If a measure must respect the provisions of all the internal market freedoms (‘cumulative application’), some measures which are more closely connected to other freedoms will nonetheless fall within the scope of Article 63(1) TFUE. By contrast, if a movement is subject merely to the legal regime of one of the freedoms (‘centre of gravity’ approach) all the freedom of establishment related movements, frequently closely connected to the free movement of capital, would not enjoy the *erga omnes* liberalization effected by the latter’s provisions. When dealing with this issue, Hindelang supports his opinion in favour of ‘cumulative application’ with solid arguments. However, when criticizing the ECJ’s preference for the ‘centre of gravity’ approach, his wording reveals that what primarily matters to him once again is the effect on foreign direct investment instead of the general coherence of the legal regime.<sup>5</sup>

Nevertheless, these timely comments should not keep readers interested in the field from paying attention to this book. It contains many valuable thoughts concerning the applicability of legal reasoning developed with respect to the other economic freedoms to the free movement of capital – specifically the ‘non-hindrance’ test the ECJ established in *Dassonville*,<sup>6</sup> or

<sup>4</sup> See the Opinion of Ruiz-Jarabo Colomer AG in Case C-463/00, *Commission v. Kingdom of Spain (Re Golden Shares IV)* [2003] ECR I-4581.

<sup>5</sup> ‘[I]t could be argued that due to the converging tendencies in the interpretation of the fundamental freedoms it does not really matter to which freedom a certain economic activity is subjected. While this argument might – in practical, but not doctrinal terms – not be dismissed right away, the outcome of the exclusivity theory would be devastating when it comes to third country capital movements. In the event that the freedom of capital movements was to become second to the freedom of establishment, third country transfers would be without any protection’ (at 111).

<sup>6</sup> Case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville* [1974] ECR 837.

the 'rule of reason' resulting from *Cassis de Dijon*.<sup>7</sup> Nonetheless, Hindelang recognizes that this is a risky intellectual task. It is true that '[t]he Court's case law is of an ambiguous nature' and that '[t]aking into account the evolving state of the jurisprudence, any conclusive evaluation would be premature' (at 198). However, his effort to determine whether a paradigm developed by the ECJ for one freedom is applicable to another, and indeed if this is giving rise to the application of the same jurisprudence to the whole set of economic freedoms, remains of great doctrinal interest and is worth future research.

Finally, a comment on how the Lisbon Treaty affects the legal regime of the free movement of capital would have been a valuable contribution to the book. In particular, the changes it introduces are likely to reduce the scope of free movement of capital in the international context. In substance, these changes are: (1) that from now on 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment' (Article 64(2) TFUE – added emphasis), whereas hitherto this was a discretionary power of the European institutions (cf. Article 57(2) EC); and (2) that those institutions 'may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market' (Article 65(4) TFUE). As a result of both changes, it is highly probable that the scope of the freedom will be reduced, because regulating a fully liberalized regime can only, by definition, restrict such regime, and because

national tax regimes are explicitly considered able to limit capital flows.<sup>8</sup>

To sum up, this monograph will be an obligatory reference for all those who want to know how the free movement of capital is regulated in the EU. Despite the above-mentioned bias towards interpreting the Treaty as fostering foreign direct investment, its up-to-date analysis of the ECJ's case law, its doctrinal effort towards the systematization of economic freedoms rules, and its constant references to the German debate on issues not fully dealt with in the English literature make Hindelang's book a major contribution to the field.

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*doi: 10.1093/ejil/chq034*

<sup>7</sup> Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*') [1979] ECR 649.

<sup>8</sup> The Lisbon Treaty drafters seem to have been aware of the ECJ's decision in Case C-101/05, *Skatteverket v. A* [2007] ECR I-11531.