Brexit and implications for the free movement of capital

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Abstract

One misleading mantra in the Brexit debate is that the EU's single market freedoms were inseparable. This article takes a micro-legal research approach in examining the question: to what extent would free movement of capital be available to the UK when the UK leaves the EU's single market? The free movement of capital is the only one of the EU's fundamental freedoms that extends beyond Member States to also apply to third countries. Like other fundamental freedoms, it extends beyond equal treatment to require market access. This article argues that free movement of capital would still be available to the UK post-Brexit, as all restrictions to free movement of capital are prohibited unless justified under EU law. It argues that as long as the post-Brexit legal context in the UK remains comparable with that of the EU, the justifiable derogations to free movement of capital would not apply against the UK. Thus, the mantra that the EU's single market freedoms were inseparable is misleading.

1. Introduction

To what extent will free movement of capital be available to the UK when the UK leaves the EU's single market? In the July 2018 White Paper, the UK Government stated: 'Following the decision of the people of the UK in the referendum, the UK is leaving the EU, and as a result will leave the Single Market and the Customs Union – seizing new opportunities and forging a new role in the world.'[1] But the EU leaders have, throughout the Brexit debate, insisted that the EU's single market freedoms are inseparable, and in July 2018 the EU chief negotiator Michel Barnier reiterated that 'we will protect the single market which is based on the indivisibility of what we call the four freedoms of movement for people, goods, services and capital.'[2] The question is whether EU law allows for separation of these freedoms.

This article argues that, unlike other EU freedoms, the free movement of capital applies *erga omnes*, and would therefore apply to the UK post-Brexit. In EU law, it is trite law that the free movement of capital extends to third countries. As such, when the UK becomes a third country, the UK will continue to benefit from free movement of capital. To the extent that EU law extends free movement of capital to third countries without imposing obligations upon third countries to subscribe to the other EU freedoms, it is misleading for EU leaders, in the Brexit debate, to insist that the EU freedoms are inseparable.

The arguments herein are twofold. First, that Article 63 TFEU on free movement of capital is not exhausted by the prohibition of nationality discrimination but rather by the prohibition of all restrictions between Member States and third countries. Where the Court has used the

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[1] HM Government, 'The future relationship between the United Kingdom and the European Union' (Cm 9593, July 2018) para 1.1.1.

[2] John Campbell, 'Brexit White Paper promises "frictionless" border' (2018) *BBC News*, 12 July.

phrase 'discrimination' or 'unequal treatment' in cases of free movement of capital, the phrase should be read as a shorthand (a quick way of deciding the case without the need to apply the non-restrictive test where the outcome would be the same) for assessing hindrance to market access in light of prohibition of 'all restrictions' under Article 63 TFEU. After Brexit, Member States will not only still be prohibited from discriminating against UK nationals, but will also still be prohibited from insulating their national markets as to hinder market access. Second, although in addition to the general derogations under Article 65 TFEU, applicable to both Member States and third countries, there are four distinct restrictions that Member States may apply against third countries, none of these derogations are likely to be applied to the UK after Brexit. For general EU economic market access, Brexit creates uncertainties for the UK, but as regards to the free movement of capital between Member States and third countries, the jurisprudence of the Court gives a degree of certainty to suggest that it is likely to be 'business as usual' for the UK post-Brexit.

It is not in the scope of this article to discuss the implications of Brexit in relation to the free movement of goods, services, establishment, and persons. It is confined to the examination of the extent that free movement of capital will be available to the UK after Brexit. This examination is confined to the Treaty provisions and EU case law, avoiding speculative discussions that may not fully assess the uncertainty of post-Brexit situation. For Brexit and other implications, the reader may refer to other academic works such as the works of Gareth Davies writing on 'free movement of workers;'[3] Panos Koutrakos writing on 'international trade treaties;'[4] Wolf-Georg Ringe writing on 'financial market;'[5] John Armour writing on 'financial services;'[6] Simon Deakin writing on 'labour rights;'[7] Niamh Moloney writing on 'financial services;'[8] and Gareth Davies writing on the question of 'what does it all mean?'[9]

The analysis herein proceeds as follows. The second section highlights the mantra by EU leaders that the EU freedoms are inseparable. The third provides a brief context of and key features of Article 63 TFEU. The fourth explores how Article 63 TFEU is not exhausted by equal treatment in the market and how the requirements for free movement of capital go beyond the prohibition of discrimination based on nationality. It argues that Article 63 TFEU is about market access and prohibits all restrictions whether or not they are non-discriminatory. The fifth looks at derogations in Articles 64-66 and 75 which may restrict free movement of capital between Member States and third countries and argues that none of these derogations are likely to apply to the UK after Brexit. The sixth offers thoughts on post-Brexit scenarios and what the foregoing discussion means. The final section concludes.

2. EU freedoms and the inseparability mantra

[3] Gareth Davies, 'Brexit and the free movement of workers: a plea for national legal assertiveness' (2016) 41 European Law Review 925.
[4] Panos Koutrakos, 'Negotiating international trade treaties after Brexit' (2016) 41 European Law Review 475.
[5] Wolf-Georg Ringe, 'The Irrelevance of Brexit for the European Financial Market' (2018) 19 European Business Organization Law Review 1.
[6] John Armour, 'Brexit and financial services' (2017) 33 Oxford Review of Economic Policy 54.
[7] Simon Deakin, 'Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels' (2016) 17 German Law Journal 13.
[8] Niamh Moloney, 'Financial services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17 German Law Journal 75; see also 'Brexit and EU financial governance' (2017) 42 European Law Review 112; and 'Brexit and financial services' (2018) Common Market Law Review 175.
[9] Gareth Davies, 'What Does It All Mean?' (2016) 17 German Law Journal 7.

When the UK finally leaves the EU, it will become a third country in relation to the EU. Having exited the EU, as a third country, the UK will no long have full enjoyment of the EU market unless a suitable EU/UK deal is agreed.

Those who campaigned for the UK to leave the EU seemed to want access to the EU market without free movement of people – as they desired to 'take back control' of immigration.[10] Mr Donald Tusk, the president of the European Council, was quick to announce that 'access to the single market means acceptance of all four freedoms – including free movement of people. There will be no single market à la carte.'[11] Mr Jean-Claude Juncker, the president of the European Commission, also warned that the UK would not be able to have 'à la carte' access to the EU's single market if it restricts free movements of persons and goods.[12] Mr Martin Schulz, the president of the European Parliament, echoing a consensus among EU leaders, said that the four freedoms – people, services, goods and capital – were inseparable.[13] This was echoed by Angela Merkel, the chancellor of Germany, where 'in a speech in Berlin on December 6th she reiterated that Europe's four freedoms are inseparable and inviolable.'[14] Starting the Brexit negotiations, Barnier, the EU chief negotiator, said: 'These four freedoms are indivisible. This is how our Single Market works. And let me be clear: the integrity of the Single Market will never be compromised in these negotiations.'[15] This mantra of inseparability of the EU freedoms ignores EU law in regards to the free movement of capital, which extends to third countries without imposing other freedoms, and therefore this mantra is misleading.

This inseparability of EU freedoms has become a dogma that has been picked up by the press, with the *Financial Times* stating: 'Participation in the single market requires acceptance of all four EU freedoms: free movement of goods, capital, services and people.'[16] In the July 2018 White Paper, the UK reiterated that leaving the EU the UK would 'end free movement [of people], giving the UK back control over how many people come to live in the UK.'[17] The micro-legal question can be restated as follows: without free movement of people, to what extent would the UK have access to free movement of capital after Brexit?

3. Context and features of Article 63 TFEU

The basic rule in Article 63 TFEU is 'free movement of capital' within Member States and between Member States and third countries. Free movement of capital (Art 63 TFEU) is one of the fundamental freedoms (Art 26 TFEU) brought into force by the Maastricht Treaty (Art 73 EC). The earlier provision on free movement of capital was contained in Article 67 EEC, which the Court construed to mean that capital liberalisation was to take place 'to the extent

[10] Sarah O'Connor and Gonzalo Vina, 'What will Brexit mean for immigration?' (2016) *Financial Times*, 24 June.
[11] Mehreen Khan, 'EU warns UK: no "single market à la carte"' (2016) *Financial Times*, 29 June; Charlie Cooper, 'Brexit: UK cannot have "single market à la carte", say EU leaders' (2016) *Independent*, 29 June.
[12] BBC, 'No "à la carte" access to EU internal market for UK' (2016) *BBC News*, 14 September.
[13] Jennifer Rankin, 'Freedom of movement: the wedge that will split Britain from Europe' (2016) *The Guardian*, 6 October.
[14] Editorial, 'Economic integration and the four freedoms' (2016) *The Economist*, 6 December.
[15] Michel Barnier, Speech at the 7th State of the Union Conference, European University Institute, Florence, 5 May 2017 (European Commission, Press Release, SPEECH/17/1236).
[16] Delphine Strauss, 'What is the EU single market and how does Brexit affect it?' (2018) *Financial Times*, 5 July.
[17] HM Government, 'The future relationship between the United Kingdom and the European Union' (Cm 9593, July 2018) para 1.1.7c.

necessary to ensure the proper functioning of the common market.'[18] As by then Article 67 EEC had not abolished all restrictions to free movement of capital, reinforcement of the single market was made by secondary legislation under Directive 88/361,[19] which sought to abolish all restrictions to free movement of capital. The Maastricht Treaty substantially reproduced the content of Directive 88/361 into Article 73b(1) EC, which was renumbered at Amsterdam as Article 56(1) EC, and was later renumbered at Lisbon as Article 63(1) TFEU.[20]

Article 63 TFEU prohibits all restrictions on the movement of capital. Interpretation of this freedom lies with the Court of Justice of the European Union ('the Court'). The Council or Commission still plays a role: Article 65(4) allows the Council or Commission to rule on the legality of restrictive tax measures that a Member State has imposed on third countries. As discussed below, the potential for this and other derogations limiting free movement to or from the UK after Brexit is unlikely.

In referring to the free movement of capital, the TFEU does not define 'capital.' The Court's case law on free movement of capital, after decades of a shadowy existence, has experienced rapid development in recent years,[21] and in its developed case law, the Court has ruled that what amounts to movement of capital is not literally filling a car with money and moving it across the border.[22] 'Although the Treaty does not define the terms movements of capital and payments, it is settled case-law that Directive 88/361, together with the nomenclature annexed to it, may be used for the purposes of defining what constitutes a capital movement.'[23] According to Directive 88/361, capital movement include: direct investments; investments in real estate; operations in securities normally dealt in on the capital market; operations in units of collective investment undertakings; operations in securities and other instruments normally dealt in on the money market; operations in current and deposit accounts with financial institutions; credits related to commercial transactions or to the provision of services in which a resident is participating; other operations with financial institutions, including personal capital operations such as dowries, legacies, and endowments.

The Court has also stated that the list annexed to Directive 88/361 is not an exhaustive list of what amounts to 'capital' movements.[24] Movements of capital for the purpose of Article 63(1) TFEU thus include, in particular, investments in the form of a shareholding which confers the possibility of effective participation in the management and control of an undertaking ('direct' investment) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing its management and control ('portfolio investments').[25] Thus, the application of Article 63 TFEU is broad enough to cover all kinds of investments by both natural and legal persons,

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[18] Case 203/80, *Casati*, EU:C:1981:261, para 10.
[19] [1988] OJ L178/5.
[20] Case C-222/97, *Manfred Trummer and Peter Mayer*, EU:C:1999:143, para 21.
[21] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (OUP, 2009) 117.
[22] Joined Cases C-163/94, 165/94 & 250/94, *Lucas Emilio Sanz de Lera*, EU:C:1995:451, para 33.
[23] Case C-483/99 *Commission v France*, para 36; Case C-98/01 *Commission v United Kingdom*, EU:C:2003:273, para 39; subsequent cases on what amounts to capital include: Case E-9/11, *ESA v Norway* [2012] EFTA Court, para 48; Case C-39/11, *VBV v FMA*, EU:C:2012:327, para 21; Case C-560/13, *Finanzamt Ulm v Engeborg Wagner-Raith*, EU:C:2015:347, paras 23-24.
[24] Case C-222/97 *Manfred Trummer and Peter Mayer*, para 21.
[25] Joined Cases C-282/04 & 283/04, *Commission v Netherlands*, EU:C:2006:608, para 19; see also Case C-194/06, *Staatssecretaris van Financiën v Orange European Smallcap Fund NV*, EU:C:2008:289, para 100.

and includes shares or any form of share capital.[26] It is here argued that the UK, post-Brexit, would continue to access this broad context and application of the free movement of capital.

We turn to the features of the free movement of capital. Below is discussed the three features of the rule on free movement of capital. After Brexit, these three features would apply regardless of the status the UK holds in relation to the EU. It should be borne in mind that unless derogations apply, the scope of Article 63 TFEU covers third countries regardless of the status a third country holds in relation to the EU. This wide scope of Article 63 TFEU was meant to 'signal Europe's firm commitment to an open investment environment to the world and was based on the conviction that a free inflow of capital would benefit the EU area even if granted unilaterally.'[27] This wide scope of capital movement suggests that the EU is a 'market.' 'If the EU is really a market with frills, then Brexit is not such a big deal.'[28] A closer analysis of EU case law reveals that the below three features of Article 63 TFEU would apply post-Brexit regardless of the UK's status in relation to the EU.

First, Article 63 TFEU frees the movement of capital between a Member State and another Member State, and between a Member State and a third country.[29] One of the effects of prohibiting third country restrictions is to protect market participants against sudden single-handed attempts by Member States to revert to protectionist ideas.[30] After Brexit, this wider freedom would continue to pose challenges for Member States who may wish to protect their national economic interests against the UK. Even before Brexit, there has been a growing national protectionism hampering the free market.[31]

Second, the rule in Article 63 TFEU is directly effective.[32] In *Skatteverket v A*, the Court said that Article 63(1) TFEU 'lays down a clear and unconditional prohibition for which no implementing measure is needed and which confers rights on individuals which they can rely on before the courts.'[33] The question is: would a UK company, after Brexit, be able to rely on Article 63 TFEU directly? In *Fidium Finanz AG*, the Court said, 'contrary to the chapter of the Treaty concerning the free movement of capital, the chapter regulating the freedom to provide services does not contain any provision which enables service providers in non-member countries and established outside the European Union to rely on those provisions.'[34] The use of the phrase 'contrary to' denotes an exception – 'unlike' free movement of capital, freedom of services cannot be relied on by third countries. In *Skatteverket v A*, the Court put it in the following terms: 'as regards the movement of capital between Member and non-member States, Article 56(1) EC, in conjunction with Articles 57 EC and 58 EC, may be

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[26] See Andenas, Gutt and Pannier, 'Free movement of capital and national company law' (2005) 16 European Business Law Review 757, 766.
[27] Heike Schweitzer, 'Sovereign Wealth Funds – Market Investors or "Imperialist Capitalists"? The European Response to Direct Investments by Non-EU State-Controlled Entities' in Bernitz and Ringe (Eds), *Company Law and Economic Protectionism* (OUP, 2010) 250, 271.
[28] Gareth Davies, 'What Does It All Mean?' (2016) 17 German Law Journal 7.
[29] Case C-101/05 *Skatteverket v A*. Other freedoms do not cover third countries – see Case C-157/05, *Holbock v Finanzamt Salzburg-Land*, EU:C:2007:297, para 28; Case C-524/04, *Thin Cap Group Litigation v Commissioners of Inland Revenue*, EU:C:2007:161, para 100.
[30] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (OUP, 2009) 327.
[31] See Mariana Pargendler, 'The Grip of Nationalism on Corporate Law' (20 March 2018), available at https://ssrn.com/abstract=3144451 (last accessed 14 November 2018).
[32] Joined Cases C-163/94, 165/94 & 250/94, *Lucas Emilio Sanz de Lera*, para 41; Joined Cases C-358/93 & 416/93, *Aldo Bordessa and Others*, EU:C:1995:54, para 33; and C-101/05 *Skatteverket v A*, para 21.
[33] Case C-101/05 *Skatteverket v A*, para 21 and para 31.
[34] Case C-452/04 *Fidium Finanz AG*, EU:C:2006:631, para 25.

relied on before national courts and may render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question.' The Court said that Article 63 TFEU applies 'the same terms for movements of capital taking place within the [EU] and those relating to relations with third countries.'[35] Thus, after Brexit, a UK company would rely on Article 63 TFEU directly as would a Member State company.

Third, Article 63 TFEU prohibits all restrictions to capital movement and therefore goes beyond unequal treatment.[36] A national measure is subject to Article 63(1) TFEU, even though the rules in issue may not give rise to unequal treatment, if they are capable of impeding cross-border capital movement and dissuading investors from investing.[37] It is also worth noting that in the context of free movement of capital, no distinction is drawn between import and export of capital.[38] The prohibition in Article 63 TFEU applies 'irrespective of the category of capital movement in question,'[39] – which would encompass capital to or from the UK after Brexit. As such, unless justified under Articles 64, 65, 66 and 75 TFEU, Article 63 TFEU prohibits all restrictions to all capital flows in and out of the EU.

4. Is Article 63 about Equal Treatment or Market Access?

After Brexit, if, for example, a Member State were to have rules restricting free movement of capital, but rules that apply equally to that Member State's nationals and to UK nationals, such rules would still infringe Article 63 TFEU, for the Article is about market access, and prohibits all restrictions whether or not they are non-discriminatory.

Non-restrictive model as the primary test for assessing breach of Article 63 TFEU

It has been rightly argued by Steffen Hindelang that Article 63 TFEU guarantees access to the market, assured by the prohibition of hindrance.[40] The prohibition of hindrance is what is referred to herein as the 'non-restrictive' model of assessing breach of Article 63 TFEU. The Court has described free movement of capital as a fundamental freedom of the EU Treaty.[41] The Court regards EU treaties as having the effect of limiting Member States' 'sovereign rights' and creating 'a body of law which binds' Member States and 'their nationals.'[42] The interpretation of the Court in regard to Article 63 TFEU is binding on Member States. The Court applies a non-restrictive interpretation to Article 63 TFEU to guarantee market access.

As to whether Article 63 TFEU is primarily about market access and not per se about equal treatment, the Court has made it clear in a number of decisions that breach of Article 63

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[35] Case C-101/05 *Skatteverket v A*, para 27.
[36] Case C-367/98 *Commission v Portugal*, EU:C:2002:326, para 44.
[37] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (OUP, 2009) 129.
[38] Jonathan Mukwiri, *Takeovers and the European Legal Framework: A British Perspective* (Routledge-Cavendish, 2009) 133; see also Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (OUP, 2009) 129; Andenas, Gutt and Pannier, 'Free movement of capital and national company law' (2005) 16 European Business Law Review 757, 766.
[39] Case C-101/05 *Skatteverket v A*, para 21.
[40] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (OUP, 2009) 115.
[41] Case C-483/99, *Commission v France*, para 45; Case C-463/00, *Commission v Spain*, para 68; Case C-302/97, *Klaus Konle v Republik Osterreich*, para 38; Case 203/80, *Casati*, para 19.
[42] Case C-6/64 *Flaminio Costa v ENEL*, EU:C:1964:66.

TFEU does not per se depend on discrimination.[43] Article 63 TFEU prohibits not only discriminatory or particularly restrictive treatment of nationals of other Member States, but every restriction of cross-border transfer of capital.[44] For this reason, the requirement of the free movement of capital is infringed if the measure applies equally but dissuades investors from other Member States.[45] Thus, to guarantee market access, the Court applies the non-restrictive interpretation in finding whether there is a breach of Article 63 TFEU.

Moreover, in applying a non-restrictive interpretation to Article 63 TFEU, in seeking to ensure that market access is not hindered, a restriction to free movement of capital need not be substantial. In the non-restrictive interpretation of Article 63 TFEU, it suffices that a Member State imposes a measure that 'dissuades investors in other Member States from investing,' and it is irrelevant that the measure does 'not give rise to unequal treatment.'[46]

Taking a non-restrictive approach to the interpretation of Article 63 TFEU, the Court does not necessarily require evidence of discrimination or unequal treatment, but rather that there is hindrance to market access. To appreciate the non-restrictive approach, a few of these cases are examined briefly here below.

In two golden share cases, *Commission v Spain*[47] and *Commission v United Kingdom*,[48] the Court found that the golden share arrangements applicable to the undertakings in Spanish companies (Repsol, Telefónica, Argentaria, Tabacalera, Endesa) and a British company (British Airports Authority) were a hindrance to market access and therefore breached Article 63(1) TFEU. In the Spanish companies, the golden share meant that the State had the power to restrict and approve certain decisions, including mergers or change of corporate objects or the disposal of certain assets or shareholdings in those companies. In the British company, the golden shares created power for the State to restrict and approve certain decisions, including the disposal of an airport and the acquisition of more than 15 per cent of the voting shares in a company. The court found that the measures 'affect the position of a person acquiring a shareholding as such and are thus liable to deter investors from other Member States from making such investments and, consequently, affect access to the market.'[49]

In *Commission v Portugal*, the Court having said that the prohibition in Article 63 TFEU 'goes beyond the mere elimination of unequal treatment' sought to clarify the non-restrictive requirement of Article 63 TFEU. According to the Court, the breach of Article 63 TFEU does not depend merely on unequal treatment and therefore is not exhausted by equal treatment. Even though the rules in issue may not give rise to unequal treatment, if nonetheless they are liable to impede the acquisition of shares in the undertakings concerned and to dissuade investors in other Member States from investing in the capital of those undertakings, they are therefore liable, as a result, to render the free movement of capital illusory.[50] In *Commission v Portugal*, although the measures did not involve any unequal

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[43] See Cases C-367/98, *Commission v Portugal*, paras 44-45; C-174/04 *Commission v Italy*, EU:C:2005:350, para 12.
[44] Andenas, Gutt and Pannier, 'Free movement of capital and national company law", (2005) 16 European Business Law Review 757, 769.
[45] Joined Cases C-163/94, 165/94 & 250/94, *Lucas Emilio Sanz de Lera*, para 25; C-302/97, *Klaus Konle v Republik Oesterreich*, para 44.
[46] Case C-367/98, *Commission v Portugal*, para 45.
[47] Case C-463/00, *Commission v Spain*.
[48] Case C-98/01, *Commission v United Kingdom*.
[49] Case C-98/01, *Commission v United Kingdom*, para 61.
[50] Case C-367/98, *Commission v Portugal*, para 44; see also Case C-483/99, *Commission v France*, para 45.

treatment, the fact that they were liable to 'dissuade investors in other Member States from investing in the capital of those undertakings,' was enough to breach Article 63 TFEU. Similarly, in *Festersen*, the Court found that the Danish rule on acquiring property for agricultural purpose, imposing certain conditions, while not discriminating between Danish nationals and nationals of other Member States, the rule was nevertheless restricting the free movement of capital contrary to the Treaty.[51] As such, any measure, regardless of its discriminatory nature or equality, which renders 'the free movement of capital illusory,' breaches Article 63 TFEU.

In some cases where the issue is clearly on discrimination, where a national provision creates discrimination, the Court tends to use the language that applies the non-restrictive test. Few examples will suffice. In *Verkooijen*, the issue was clearly on discrimination, yet the Court used the language that applied the non-restrictive test instead of the non-discrimination test. The Court in *Verkooijen* applied the non-restrictive test in finding that the discriminatory national provision 'constitutes a restriction of capital movements' and 'has the effect of dissuading nationals of a Member State residing in the Netherlands from investing their capital in companies which have their seat in another Member State.'[52]

In *Bordessa*, the national provision discriminated against exporters of certain capital based on the country of destination, requiring that a person leaving national territory bearing coins, banknotes or bearer cheques make a prior declaration and obtain prior administrative authorisation if the amount exceeded a certain amount. Prior authorisation was not acceptable as it would make capital movement subject to the discretion of administrative authorities. Applying the non-restrictive test in *Bordessa*, the Court found the discriminatory Spanish rules in breach of Article 63 TFEU where the rules caused 'the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory' and the rules had 'the effect of impeding capital movements.'[53]

In *Trummer*, the issue was clearly on discrimination, where a national provision required recourse to the national currency for the purposes of creating a mortgage, yet that Court applied the non-restrictive test instead of the non-discrimination test. Applying the non-restrictive test in *Trummer and Mayer*, the Court found the Austrian rule in breach of Article 63 TFEU where the effect of the rule was 'liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments.'[54]

In *Svensson and Gustafsson*, the Court found the Luxembourg rule in breach of Article 63 TFEU simply because it was 'liable to dissuade those concerned from approaching banks established in another Member State and therefore constitute an obstacle to movements of capital such as bank loans.'[55]

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[51] Case C-370/05, *Uwe Kay Festersen*, EU:C:2007:59, para 25. Note the exception in the 2016 provision on buying second homes in Denmark: OJ C202/317 Protocol (No 32) on the acquisition of property in Demark – a provision that permanently restricts the free movement of capital.
[52] Case C-35/98, *Staatssecretaris van Financiën v BGM Verkooijen*, EU:C:2000:294, para 31 and para 34.
[53] Joined Cases C-358/93 & 416/93, *Aldo Bordessa and Others*, para 25.
[54] Case C-222/97, *Manfred Trummer and Peter Mayer*, para 26; see also Case C-464/98 *Westdeutsche Landesbank Girozentrale v Friedrich Stefan and Republik Osterreich*, EU:C:2001:9, para 19.
[55] Case C-484/93, *Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme*, para 10.

Understanding the jurisprudence of the Court – the non-restrictive approach to Article 63 TFEU – gives a degree of certainty to conclude that after Brexit, the UK, as a third country, would continue to enjoy the benefits of the free movement of capital. The Court uses phrases such as to 'render that freedom illusory' and 'liable to dissuade' investors, to assess restrictions that breach Article 63 TFEU. Understanding the non-restrictive approach to Article 63 TFEU alleviates any fear that capital to or from a post-Brexit UK would be indirectly restricted by cleverly crafted rules by any Member State. This approach would also allow the UK to have 'à la carte' access to the EU's single market in regards to capital.

Non-discrimination model as short-hand for assessing breach Article 63 TFEU

It has been argued in the literature that Article 63 TFEU guarantees equal treatment in the market, enforced by the prohibition of discrimination.[56] This is what is referred to herein as the 'non-discrimination' model of assessing breach of Article 63 TFEU. In most of the cases where there is discrimination, there is likely to be a breach of Article 63 TFEU. But the analysis of the non-discrimination model is difficult to defend, as it either violates the non-restriction model by justifying a restriction if it is not 'substantial' or adopts the approach sometimes taken by the court in relation to other freedoms.[57] It is therefore here argued that the non-discrimination model is only applicable in so far as it hinders market access, for Article 63 TFEU is not primarily concerned with equal treatment but market access.

For sure there are cases that may seem to apply a non-discrimination model to free movement of capital, but these are rather shorthand measures of dispensing the cases before the Court without the need to emphasise that Article 63 TFEU is not exhausted by equal treatment. In *Konle v Republik Osterreich*,[58] the Court found that the Austrian law that exempted Austrian nationals from having to obtain authorisation before acquiring a plot of land which is built on, but required other nationals to obtain authorisation, created a discriminatory restriction against nationals of other Member States in respect of capital movements between Member States, and that such discrimination was prohibited by Article 63 TFEU. It is argued that the Court used non-discrimination as shorthand for dispensing of the issue, as the Court found it not necessary to explain the principle that Article 63 TFEU is not exhausted by equal treatment.

A good example that demonstrates the Court's use of non-discrimination as shorthand for dispensing the issues is *Commission v Portugal*.[59] First, the Portuguese government conceded that its prohibition precluding investors from other Member States from acquiring more than a given number of shares in certain Portuguese undertakings involved unequal treatment of nationals of other Member States and restricted the free movement of capital. But the Portuguese government argued that its administrative policy was not to use the powers conferred on it by the provisions in issue. The Court, applying a shorthand approach, did not at first attempt to correct the Portuguese government that Article 63 TFEU goes

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[56] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (OUP, 2009) 115.
[57] Jonathan Mukwiri, *Takeovers and the European Legal Framework: A British Perspective* (Routledge-Cavendish, 2009) 134.
[58] Case C-302/97 *Klaus Konle v Republik Osterreich*, paras 23-24; see also Case C-423/98, *Alfredo Albore*, EU:C:2000:401, paras 16-17; and Case C-443/06, *Hollmann v Fazenda Publica*, EU:C:2007:600, paras 36-40 (Court found that the Portuguese law that taxed only 50% of capital gains realised by residents and taxed 100% capital gains realised by nonresidents constituted a restriction on the movement of capital).
[59] Case C-367/98 *Commission v Portugal*, paras 40-44.

beyond unequal treatment. The Court was only concerned that the administrative practices of not enforcing the provisions in issue, 'which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfillment of a Member State's obligations under the Treaty.' Second, the Portuguese government argued that their rules, requiring authorization for the acquisition of a holding in certain Portuguese undertakings in excess of a specified level, though in principle contrary to free movement of capital, were non-discriminatory, applying without distinction to national shareholders and to shareholders who are nationals of other Member States. Lest the Portuguese government misunderstand that Article 63 TFEU is exhausted by equal treatment, the Court disagreed, stating that the general prohibition on restrictions on the movement of capital in Article 63 TFEU 'goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.'

Article 63 TFEU prohibits not only discriminatory treatment of nationals of other Member States, but also every restriction of cross-border transfer of capital.[60] In the assessment of Article 63 TFEU, any reference to discrimination or unequal treatment in the cases is only a shorthand tool to aid the assessment of the extent the measure in issue is liable to prevent or substantially restrict market access. The Court tends to treat any discrimination or unequal treatment as 'a restriction on the free movement of capital which is, in principle, prohibited by Article' 63(1) TFEU.[61] Where the phrase 'discrimination' or 'unequal treatment' is encountered in free movement of capital cases, it should be read in light of Article 63 TFEU prohibition of 'all restrictions' and therefore treated as a shorthand tool for measuring hindrance to market access. As such, discrimination or unequal treatment is not in itself an exhaustive yardstick for finding a breach of Article 63 TFEU. After Brexit, any Member State that may wish to insulate its local capital market against UK nationals by legislating non-discrimination rules that restrict capital movement would be in breach of Article 63 TFEU.

5. Justifying restrictions to free movement of capital

Justification of overriding general interest and derogation under Article 65(1)(c) TFEU

Notwithstanding that Article 63 TFEU prohibits all restrictions to free movement of capital, Member States may restrict free movement of capital if their national measures are justified in the Treaty or if there is justifiable overriding general interest.[62] As to the latter exception of overriding general interest, it suffices here to mention one example. In *Commission v the Netherlands*, the Court said 'that the guarantee of a service of general interest, such as universal postal service, may constitute an overriding reason in the general interest capable of justifying an obstacle to the free movement of capital.'[63] Justification of overriding general interest is not third country specific, but apply to both intra-EU and third countries. Given its general applicability, this exception is arguably unlikely to make any difference post-Brexit.

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[60] Andenas, Gutt and Pannier, 'Free movement of capital and national company law", (2005) 16 European Business Law Review 757, 769.
[61] Case C-157/05, *Holbock v Finanzamt Salzburg-Land*, para 30.
[62] Case C-483/99, *Commission v France*, EU:C:2002:327, para 45; Case C-463/00 *Commission v Spain*, EU:C:2003:272, para 68; Case C-302/97, *Klaus Konle v Republik Osterreich*, EU:C:1999:271, para 38.
[63] Joined cases C-282/04 & C-283/04, *Commission v the Netherlands*, ECLI:EU:C:2006:608, para 38 & para 39.

Case law justifying restriction of capital is less extensive. One explanation why there is less extensive case law on justifications in the field of capital than in respect of other freedoms is because of the fact that the derogations embrace some aspect of the public-interest requirements found elsewhere.[64] The Court will determine whether a given national legislation gives rise to an overriding reason to justify a restriction to free movement of capital and therefore not to be construed as arbitrary discrimination. For a national legislation to be justified, the difference in treatment must not go beyond what is necessary in order to attain the objective of the legislation.[65] According to the Court's settled case law, aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty.[66]

In principle, Article 65(1)(c) TFEU allows Member States to take measures which are justified on grounds of public policy or public security. However, it should be stated that this derogation in Article 65 TFEU is not easy to justifiably invoke. In *Commission v Portugal*,[67] the Court decided that a restriction to free movement of capital can be justified if (a) overriding requirements of general interest apply; or (b) express derogations in Article 65 TFEU apply, and the measure accords with the principle of proportionality. Public policy or security exceptions are difficult to invoke when a Member State wishes to restrict free movement of capital. The Court interprets these derogations very strictly.[68] Often, however, national activities are ostensibly aimed at national economic protectionism. The Court has, however, ruled that these derogations cannot be applied to serve purely economic ends.[69] In *Commission v Portugal* the court said that 'economic grounds can never serve as justification for obstacles prohibited by the Treaty.'[70] Invoking public policy or security, a Member State would find it difficult to successfully raise justification for breach of Article 63 TFEU.

Further, a post-Brexit UK would draw comfort from the understanding that the application of public policy and public security derogations in Article 65(1)(c) TFEU to justify restriction of the movement of capital to or from third countries, are subject to a number of limitations. In *Eglise de scientologie v The Prime Minister*,[71] the Court outlined five limitations. First, 'derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the EU institutions.' Second, 'those derogations must not be misapplied so as, in fact, to serve purely economic ends.' Third, 'any person affected by a restrictive measure based on such a derogation must have access to legal redress.' Fourth, measures applied must be proportionate – 'justified only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.' Fifth, the derogations are subject to the principle of legal certainty – the measure applied should 'enable individuals to be apprised of the extent of their rights and obligations deriving from Article [63] of the Treaty.' The jurisprudence on capital requires that the national measure allow potential investors, purchasers or other persons

[64] See Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (3rd ed, OUP, 2010).
[65] Case C-319/02, *Petri Manninen*, EU:C:2004:484, para 29.
[66] Case C-35/98, *Staatssecretaris van Financiën v BGM Verkooijen*, EU:C:2000:294, para 48; Case C-120/95, *Nicolas Decker v Caisse de Maladie des Employés Privés*, EU:C:1998:167, para 39; and Case C-158/96, *Raymond Kohll v Union des Caisses de Maladie*, EU:C:1998:171, para 41.
[67] Case C-367/98, *Commission v Portugal*.
[68] see Case C-36/75, *Rutili v Minister of the Interior*, EU:C:1975:137, para 26/27.
[69] Case C-36/75, *Rutili v Minister of the Interior*, para 30.
[70] Case C-367/98, *Commission v Portugal*, para 52.
[71] Case C-54/99, *Eglise de Scientologie v The Prime Minister*, paras 17-18, and 22.

invoking this freedom to be clear when a particular form of restriction will be applied.[72] In the inapplicability of these derogations, it is here argued that the UK would have 'à la carte' access to the EU's single market in regards to the free movement of capital.

Justification on national taxation grounds under Article 65(1)(a)-(b) TFEU

In some cases, where there is a restriction, the Court has not found breach of Article 63 TFEU because the restriction fell within a legitimate exercise of national sovereignty or was not truly a restriction. For example, in *Kerckhaert-Morres v Belgium*,[73] the Court found that the restriction and adverse double taxation that applied equally was a result of justified exercise of Member States' fiscal sovereignty. In other words, as opined by Advocate General Geelhoed, a distinction is drawn between 'quasi restrictions' and 'true restrictions,' and the 'quasi restrictions' in the taxation systems should be treated as falling outside Article 63 TFEU.[74] The 'quasi restriction' approach in the area of taxation was recognised by the Court in *Block v Finanzamt Kaufbeuren*,[75] where the Court said that it is settled case-law that the Treaty offers no guarantee for neutral taxation, and that the disparities in the tax legislation of the Member States may often produce advantages or disadvantages for EU citizens.[76]

One general restriction that may continue to apply to the UK is on taxation, but as it applies to both Intra-EU and Extra-EU capital movements, it would make no difference to the UK post-Brexit. Taxation remains the main field where Member States may continue restricting free movement of capital. Article 65(1)(a) allows Member States 'to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.' Article 65(1)(b) allows Member States 'to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions.' Accordingly, national legislation may justifiably distinguish between resident and non-resident taxpayers. However, unequal treatment permitted under Article 65(1)(a) TFEU must be distinguished from arbitrary discrimination, which is prohibited under Article 65(3) TFEU.[77] In general, it seems that the Treaty here gave Member States all that they wanted, 'both free movement of capital and national tax autonomy.'[78]

It could be argued that the Court remains lenient on upholding restrictions based on national taxation. The case of *Kerckhaert* demonstrates the leniency the Court takes on taxation.[79] This argument is well made by Jukka Snell,[80] who states that 'the judgment in *Kerckhaert* was a clear statement of principle. International double taxation is not contrary to the Treaty

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[72] Leo Flynn, 'Coming of age: The free movement of capital case law 1993-2002' (2002) 39 CML Rev 773, 802.
[73] Case C-513/04, *Kerckhaert-Morres v Belgium*, EU:C:2006:713, paras 17-18, 21.
[74] Per Advocate General Geelhoed in Case C-374/04, *ACT Group Litigation*, EU:C:2006:139, paras 37-40.
[75] Case C-67/08, *Margarete Block v Finanzamt Kaufbeuren*, EU:C:2009:92, para 35.
[76] See also Case C-365/02, *Marie Lindfors*, EU:C:2004:449, para 34; and Case C-403/03, *Egon Schempp v Finanzamt Munchen V*, EU:C:2005:446, para 45.
[77] Case C-512/03, *Blanckaert v Inspecteur*, EU:C:2005:516, para 42.
[78] Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' In Craig and de Burca (eds), *The Evolution of EU Law* (OUP, 2011) 552.
[79] Case C-513/04, *Mark Kerckhaert and Bernadette Morres v Belgische Staat*, EU:C:2006:713.
[80] Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' In Craig and de Burca (eds), *The Evolution of EU Law* (OUP, 2011) 559 and 563.

free movement rules.' Taxation remains an area not fully in harmony with free movement due to the autonomy Member States hold in matters of national tax. While in other areas barriers are easily found to be in breach of Article 63 TFEU, Snell observes that, 'in the field of tax barriers a different approach now prevails, despite the fact that double taxation is the most serious obstacle there can be to people and their capital crossing internal borders.'[81] The Court in the field of double regulation does not take this leniency seen in taxation. The result of *Kerckhaert*, Snell concludes, is that 'the Court is prepared to accommodate Member States in the field of taxation to a far greater degree than in the field of regulation.'

In a third country where the legal context is not comparable to that of the EU, the Court is willing to interpret the Treaty derogations against third country more generously in favour of restriction of free movement of capital. In *FII Group Litigation v Commissioners of Inland Revenue*, the Court said that 'it may be that a Member State will be able to demonstrate that a restriction on capital movement to or from non-member countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States.'[82] As long as the legal context in the UK remains comparable to that of the EU, Member States may not justify restricting capital movement to or from the UK post-Brexit. The rebuttable presumption for allowing restrictions is that: 'movements of capital to or from third countries take place in a different legal context from that which occurs within the' EU, such that the differing legal context does not 'ensure cooperation between national tax authorities,' which leads to the conclusion that 'the taxation by a Member State of economic activities having cross-border aspects which take place within the' EU 'is not always comparable to that of economic activities involving relations between Member States and third countries.'[83] As the legal context in the UK is likely to remain comparable to that of the EU, and if the UK maintains cooperation with EU tax authorities, the presumption would be rebutted in the case of the UK post-Brexit.

Justifications distinct to third countries under Articles 64, 66 and 75 TFEU

As we recall that Article 63 TFEU extends to third countries, we also note that Article 63 TFEU has direct effect as regards third country investors.[84] UK investors will fall into a third country situation when the UK leaves the EU, unless the UK joins any of the alternatives to EU membership options or agrees a 'unique model' with the EU. The question is whether third country situations are treated the same way as intra-EU situations. The case law on third countries is characterised by caution, as the Court is not seeking to apply the full force of its intra-EU jurisprudence.[85] It is argued by Catherine Barnard that free movement of capital between Member States and third countries is more limited than the provisions of Article 63 would at first suggest.[86] While Article 63 TFEU applies free movement of capital to third countries, the derogations applicable against third countries may limit the extent to which a third country can enjoy the benefit of EU economic market by way of free movement of capital.

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[81] Citing AG Ruiz-Jarabo Colomer in Case C-376/03, *D v Inspecteur*, EU:C:2005:663, para 85.
[82] Case C-446/04, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, EU:C:2006:774, para 121.
[83] Case C-194/06, *Staatssecretaris van Financiën v Orange European Smallcap Fund NV*, para 89; Case C-446/04 *FII*, para 170; Case C-101/05, *A*, para 37.
[84] Joined Cases Case C-163/94, 165/94 & 250/94, *Lucas Emilio Sanz de Lera*.
[85] Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' In Craig and de Burca (eds), *The Evolution of EU Law* (OUP, 2011) 573.
[86] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (3rd ed, OUP, 2010) 565.

To the extent that most concerns that arise in third country situations would not apply to the UK after Brexit, the UK would still enjoy full benefit of Article 63 TFEU. One concern with unrestricted third country participation by way of direct foreign investment is the lack of plain playing field between Member States and third countries. Investment infrastructure, including favourable public security in some third countries, may not be the same as is in the Member State. Reciprocity of investment between third countries and Member States may remain unlevelled given different infrastructure. And 'the preconditions (functioning market economy, implementation of the *acquis*, and compliance with basic principles and values of the Union) for far-going liberalisation may not be met in the third country context.'[87] It is argued that these concerns would not apply to the UK after Brexit. We turn to consider four distinct restrictions that Member States may potentially apply against the UK after Brexit.

First, the restriction contained in Article 64(1) TFEU would not apply to the UK post-Brexit. This allows any restriction that existed before 31 December 1993[88] to remain between Member States and third countries in respect of the movement of capital to or from third countries involving direct investment. Article 64(1) TFEU is interpreted by the Court to presuppose that the legal provision relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since 31 December 1993.[89] Moreover, the Court has stated that any national measure adopted after 31 December 1993 is not, by that fact alone, automatically excluded from the derogation laid down in Article 64(1) TFEU – a provision which is, in substance, identical to the previous legislation, and will be covered by the derogation.[90] However, the condition in Article 64(1) TFEU concerning restrictions is not satisfied where national provisions adopted after 31 December 1993 are based on an approach which differs from that of the previous law and establishes new procedures.[91]

Second, long-lasting restrictions that EU institutions may impose on third countries – it is argued that these are unlikely to be imposed on the UK post-Brexit unless it is deemed that participation of the UK hinders the proper functioning of the internal market. 'The EU, taken as a whole, is the UK's major trading partner, accounting for 44% of exports and 53% of imports of goods and services in 2015.'[92] As 'the UK imports more from the EU than it exports to it,'[93] thereby enhancing rather than hindering the proper functioning of the internal market, the EU is unlikely to impose long-lasting restrictions on the UK. Nonetheless, one such restriction is contained in Article 64(2) TFEU. This allows the Parliament and Council to adopt measures restricting third countries' capital movement. The Council, consulting the Parliament, 'may unanimously' adopt further restrictive measures affecting third countries under Article 64(3) TFEU. The Council and the Commission may adopt further restrictive measures affecting third countries under Article 65(4) TFEU. All these restrictive measures fall in the category of long-lasting measures that the EU institutions may impose. As long as the legal context in the UK remains comparable to that of the EU, with the UK maintaining

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[87] Jukka Snell, 'Free movement of capital: Evolution as a non-linear process' In Craig and de Burca (eds), *The Evolution of EU Law* (OUP, 2011) 565.
[88] For Bulgaria, Estonia and Hungary, the relevant year is 1999, and for Croatia it is 2002.
[89] Case C-101/05, *Skatteverket v A*, paras 47-49.
[90] Case C-157/05, *Holbock v Finanzamt Salzburg-Land*, para 41.
[91] Case C-541/08, *Fokus Invest AG v FIAG*, EU:C:2010:74, para 42.
[92] Matthew Keep and Dominic Webb, 'In brief: UK-EU economic relations' (House of Commons Library, Briefing Paper number 06091 of 13 June 2016) 3.
[93] Vaughne Miller and others, 'Brexit: impact across policy areas' (House of Commons Library, Briefing Paper number 07213 of 26 August 2016) 9.

cooperation with EU authorities, and the UK having favourable conditions for EU investors, EU institutions may not justify imposing long-lasting restrictions on the UK post-Brexit.

Third, the restriction contained in Article 66 TFEU. The Council may impose restrictive measures for up to six months where, in exceptional circumstances, movement of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of the economic and monetary union. As long as the UK continues with financial policies that meet EU laws, it is unlikely that capital to or from the UK post-Brexit would cause a threat to the EU financial stability to justify measures under Article 66 TFEU. As the nature of measures taken under Article 66 TFEU tends to be confined to measures seeking to safeguard tax revenue,[94] targeting third countries that provide offshore tax havens,[95] it is unlikely that such measures would be applicable to the UK as to restrict capital to or from the UK post-Brexit.

Fourth, the restriction contained in Article 75 TFEU – given its primary focus on fighting terrorism, with the UK leading on data systems of fighting terrorism in the EU,[96] it is unlikely to be used against the UK's interest post-Brexit. The Article allows the Parliament and Council to impose administrative restrictions such as freezing of funds 'belonging to, or owned by or held by, natural or legal persons, groups or non-state entities.' Article 75 TFEU draws on Articles 60 and 301 TEC, stipulating power to impose anti-terrorist financial sanctions. This now removes the difficulties identified in *Kadi v Council*, that is, the difficulties that Articles 60 TEC and 301 TEC did not provide for any express or implied powers of action to impose measures on addressees in no way linked to the governing regime of a third country.[97] The UK complements rather than hinders the efforts of the EU in the fight against terrorism.

In general terms, it would appear that where the restriction negatively affects the ability of residents of Member States investing in third countries, the Court is cautious. In *Skatteverket v A*,[98] Germany and Netherlands unsuccessfully argued that drawing from case law to apply direct effect of Article 63 TFEU in favour of third countries 'would unilaterally open up the market to third countries without retaining the means of negotiation necessary to achieve liberalisation on the part of those countries.' The Court was concerned with the effect the Swedish law has on investors residing in Sweden seeking to invest in third countries. The Court observed that 'the effect of such legislation is to discourage taxpayers residing in Sweden from investing their capital in companies established outside the EEA.' As such, the Court found that the Swedish law entailed 'a restriction of the movement of capital between Member States and third countries which, in principle, is prohibited by Article' 63(1). For extending the scope of protection to third-country investment in Article 63 TFEU, Heike Schweitzer argues that this was meant to 'signal Europe's firm commitment to an open investment environment to the world and was based on the conviction that a free inflow of

[94] See O.J. 2013 C332E/144.
[95] See O.J. 2008 C10/96, para 1.18.
[96] For example, in 2010, the Commission reported that 'in the EU, only the United Kingdom has a PNR system' – the Passenger Name Record system enables participating countries to exchange air carrier flight information to prevent terrorism – European Commission (Brussels, 20/07/2010) (COM(2010) 385 final.
[97] Joint Cases C-402/05 & 415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council*, EU:C:2008:461, para 216.
[98] Case C-101/05, *Skatteverket v A*, paras 38-43.

capital would benefit the EU area even if granted unilaterally.'[99] It is in this regard that the UK, post-Brexit, is likely to continue enjoying free movement of capital as before Brexit.

6. How free is the free movement of capital post-Brexit?

How free is the free movement of capital likely to be for the UK post-Brexit? While avoiding speculation, this question can be answered, albeit briefly, with a reasonable degree of certainty. There are four scenarios as to how free the free movement is likely to be for the UK post-Brexit. (i) There would be movements of capital from EU Member States to Brexit UK. EU Member States would be bound by Article 63 TFEU. Legally, Brexit UK would not be bound by Article 63 TFEU, as it only prohibits Member States from restricting capital to or from third countries, but it may not be in the Brexit UK's interest to restrict capital inflow. But Brexit UK could legally complain against Member States for any unjustified restriction. (ii) There would be movements of capital from Brexit UK to EU Member States. EU Member States would be bound by Article 63 TFEU, unless derogations apply. (iii) There would be movements of capital from third countries to Brexit UK. This would not be covered by Article 63 TFEU. (iv) There would be movements of capital from Brexit UK to third countries. This too would not be covered by Article 63 TFEU. So far in this article, it is scenarios (i) and (ii) that have been discussed, which fall in the scope of Article 63 TFEU, and would in that sense allow the UK to have 'à la carte' access to the EU's single market.

As to scenarios (iii) and (iv) above, Article 63 TFEU does not apply. The UK will need to negotiate investment deals with non-EU countries, unless the competence is retained by the EU under any post-Brexit arrangement between the EU and the UK. Where competence to negotiate investment deals with non-EU countries reverts to the UK, with regards to capital movement, it will make no difference that Article 63 TFEU is inapplicable, as long as the UK does not restrict capital movement to or from non-EU countries. The effect of Article 63 TFEU is to prohibit the restriction of capital flows. If the effect of Article 63 TFEU is maintained post-Brexit, between Brexit UK and non-EU countries, capital flow will still not be restricted in light of scenarios (iii) and (iv) even though Article 63 TFEU is inapplicable.

For sure there are factors that may negatively affect the flow of capital into the UK that are not caught by Article 63 TFEU or/and its derogations. These may include, for example, if an EU or a non-EU company were to relocate from to outside the UK. For example, companies that were located in the UK because of UK's EU membership may wish to relocate outside the UK. The impact of such factors may not be fully assessed without much speculation. But much level of capital flow could be maintained if the UK maintains the factors that attract foreign investors. These factors include: 'the UK's flexible labour market, strong rule of law, independent judiciary, relatively skilled workforce, political stability, the English language, openness of the UK economy, the UK's relaxed attitude towards foreign ownership of assets.'[100] After Brexit, if EU or non-EU investors find conditions in the UK to be most favourable than in their countries, they are likely to continue investing their capital in the UK.

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[99] Heike Schweitzer, 'Sovereign Wealth Funds – Market Investors or "Imperialist Capitalists"? The European Response to Direct Investments by Non-EU State-Controlled Entities' In Bernitz and Ringe (Eds), *Company Law and Economic Protectionism* (OUP, 2010) 271.

[100] Treasury Committee, 'The economic and financial cost and benefits of the UK's EU membership' (House of Commons (HC 122), 27 May 2016) paras 206-211.

The UK Government intends to maintain the legal context comparable to that of the EU after the UK exits the EU. The first major step taken was to pass a law to convert EU law into UK law. On 26 June 2018, the European Union (Withdrawal) Act 2018 received Royal Assent. This will convert existing EU law to UK law, to ensure that the same rules and laws will apply after Brexit to provide the maximum possible certainty and continuity to businesses. EU/UK rules on the free movement of capital would remain unchanged. While the EU legal framework on the free movement of capital is likely to remain unchanged for the UK post-Brexit, UK's overall access to the EU internal market will depend on the UK's negotiation with the EU on other EU freedoms that are not by EU law already extended to third countries. But as post-Brexit UK will be one of the stronger third country economies to which Article 63 TFEU guarantees free movement of capital, as a major EU trading partner, this should put the post-Brexit UK in a stronger, not weaker, position to negotiate mutually favourable deals with the EU on the other EU freedoms.

7. Conclusion

Contrary to the widespread mantra that EU freedoms are inseparable, this article has shown that the free movement of capital applies to third countries without acceptance of the other EU freedoms. The implication of the free movement of capital for the UK post-Brexit has been discussed in the light of the jurisprudence of the Court of Justice of the European Union. It is clear in the EU case law that Article 63 TFEU guarantees non-restrictive market access for the free movement of capital not only to Member States, but also to third countries. This would apply equally to the UK post-Brexit. To affirm that Article 63 TFEU is primarily about market access and not per se about equal treatment, the Court has made it clear that breach of Article 63 TFEU does not per se depend on discrimination. The Court has also stated that the requirements of free movement of capital are infringed even when the measure applies equally but dissuades investors from other countries or renders that freedom illusory.

Article 63 TFEU unilaterally opens up the internal market to third countries. This means that the UK would continue to enjoy free movement of capital post-Brexit. Although the general derogations in Article 65 TFEU and the additional third-country specific derogations in Articles 64, 66 and 75 TFEU potentially limit the extent third countries may participate in the internal market, these are unlikely to affect the UK post-Brexit. One general restriction that may remain applicable to the UK post-Brexit is in the field of taxation. But as the autonomy of Member States to apply taxation restrictions applies to both Intra-EU and Extra-EU capital movements, it would make no difference to the UK post-Brexit. Further, as long as the legal context in the UK remains comparable to that of the EU and the UK cooperates with EU tax authorities, Member States may not justify tax restrictions. As such, it is argued that after Brexit, regardless of the status the UK has in relation to the EU, the UK would continue enjoying free movement of capital as before Brexit. In other words, under EU law on the free movement of capital, the UK post-Brexit can have 'à la carte' access to the EU's single market.