

Newsalert

EU Direct Tax Group

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The EUDTG is one of PwC's Thought Leadership Initiatives and embedded in the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EU law.

Judgment in the case Fidium Finanz, C-452/04

Fidium Finanz is a Swiss company that offer small scale credits to foreign customers. Approximately 90 % of the credits are granted German residents. The credits are offered by an internet site, run from Switzerland. Fidium Finanz is not authorised to carry on banking activities and to provide financial services in Germany. Authorisation in Switzerland was not needed, as Fidium only provided credits to foreign customers. The German supervisory authority informed Fidium that it had to obtain an authorisation, as it was of the opinion that Fidium carried out banking activities on the Germany territory. Fidium was of the opinion that the activities were not carried out on German territory, but were only "directed towards" that territory. The German authority prohibited Fidium from carrying on lending activities on a commercial basis or as a business entity with target customers in Germany. Fidium claimed that this is an infringement of the free movement of capital and took the case to court.

The administrative Court of Frankfurt decided to stay the proceedings and refer the case to the ECJ, thereby posing several questions, the first one being whether an undertaking having its registered office in a non-EU Member State (here: Switzerland) can rely on the free movement of capital in Art. 56 EC in respect of the granting of credit to residents of a Member State of the EU (here: Germany), or if such financial services are solely covered by the freedom to provide services in Art. 49 EC?

The ECJ passed its judgment in the case on October 3, 2006. It started by stating that a company established in a non-EU Member State cannot rely on the freedom to provide services, as this is - contrary to the free movement of capital - not applicable to services providers in non-EU Member States. Moreover, the agreement between the EU and Switzerland on the free movement of persons, which facilitates the provision of services between the EU and Switzerland was not valid at the time of the case.

The Court went on to ascertain that, although closely linked, the freedom to provide services and the free movement of capital were designed to regulate different situations and each have their own field of application. It is possible that in certain cases, both freedoms are concerned and that a provision thus might hinder the exercise of both freedoms. However, there is no order of priority between the freedom to provide services and the other fundamental freedoms.

It is settled case law that the granting of credits by credit institutions constitutes a service in the meaning of Art. 49 EC. Additionally, Directive 2000/12/EC relating to the business of credit institutions seeks to regulate the activity of granting loans, e.g. from the point of view of the freedom to provide services.

In respect of the free movement of capital, this is not defined in the EC treaty. It is settled case law that the Directive 88/361/EEC with its nomenclature has indicative value for the purpose of defining the notion of capital movements. The annex and the explanatory notes to this Directive contain loans and credits, including consumer credits as capital movements covered by the Directive. Thus, the activity of granting credits on a commercial basis in principle falls both under the freedom to provide services and the free movement of capital. It is therefore necessary to consider if and to what extent the disputed rules might be capable of hindering the exercise of these freedoms.

The disputed rules aim at supervising the provision of banking and financial services and to authorise provision only for undertakings which guarantee to conduct the transactions properly and thereby prevent economic operators without the qualities required by German law from accessing the German market. This prevention restricts the freedom to provide services, as it impedes or renders less attractive the exercise of that freedom. However, as Fidium is established in a non-EU Member State, it cannot rely on this freedom.

As regards the free movement of capital, it is possible that by making financial services by companies outside the EEA less accessible for German clients, the rules effectively make these clients less inclined to make use of the services of such companies. However, the ECJ stated that this is merely an unavoidable consequence of the restriction of the freedom to provide services and that this freedom is the predominant consideration in the present case.

Given that Court found the restriction on the free movement of capital to be only an effect of the restriction on the freedom to provide services and that the latter freedom is primarily affected, it did not find it necessary to consider if the German rules were compatible with the free movement of capital. In the light of this, there was no need for the ECJ to answer the other questions referred by the German court.

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