USUFRUITS, THE FREEDOM OF MOVEMENT OF CAPITAL AND ITS TAXATION IN THE EU

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"The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." In French « Les traités ne préjugent en rien le régime de la propriété dans les États membres. »- article 345 Treaty on the Functioning of the European Union (TFEU).

The point of this paper is to argue that the Union cannot function, either as a capital market or as a single currency market combining with other non Euro currencies, when conflicting rules of taxation treat and assess property rights differently from the substance attributed to them in the Member State where they are situated and whose laws govern the very nature of the property concerned. The Euro cannot be issued and maintained on a fiat basis when the asset base against which it is issued is subject to erosion from foreign administrations, including those of other Member States. In fact, article 345 TFEU is not the main principle concerned, but it is part of the architecture which should constrain the fiscal and legal disorder which these differing treatments imply within the rapidly consolidating area of private law that now constitutes the Union. The article will also discuss the recent preliminary rulings emanating from the CJEU to elucidate where the Court may be going in its guardianship of these principles.

The historic background

The articles in the Treaties leading to Article 345 TFEU have always been a subject of controversy. That controversy is now extended by the differences in

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meaning of the terms used in each of the official languages in relation to the source article, Article 83, originally solely in French, produced during the ECSC Treaty negotiations. That article replicated the wording of the Schumann Declaration of 9th May, 1950, and the ensuing inclusion of the same and then more generalised wording in each of the succeeding Treaty versions through to the TFEU and the EEA agreement, in which the amended article also figures. That extension therefore leaves open the question of tits scope and organic development within the expanded scope of the treaties, from the original ECSC, a highly intelligent first attempt within a limited defined market, through to the now extended effects on private citizens.

The Schumann declaration[2], in French, was as follows:

'L'institution de la Haute Autorité ne préjuge en rien du régime de propriété des entreprises'.

Article 83 ECSC, which implemented it, read, in French[3]: '*L'institution de la communauté ne préjuge en rien le régime de propriété des entreprises soumises aux dispositions du présent Traité'.*

Translated, informally, as Article 83: *The establishment of the community does not in any way prejudice the regime of ownership of the enterprises [better undertakings] subject to the provisions of the present Treaty.*

I also agree that, whilst the French word "*préjuge*" can be translated by "prejudice", its Latin root, part of its full meaning in French, can also be translated in English by "prejudge", which is in fact an integral part of the meaning of the term in English. Prejudice, here, includes the concept of "deciding beforehand". That term is present in the preliminary ruling procedure of the CJEU, which in French is a *renvoi préjudiciel.* It is in that sense that the term takes its full meaning within the context of the treaties. The terms *préjudiciel, préjuge* or *préjudice* comprehend a substantive meaning in the context of a community law definition, and not merely a French notion.

That is important in the development of the provision and the substantive argument of its effect.

Article 222 of the Treaty of Rome omitted or rather removed the term and reference to "*des entreprises*" or undertakings: this was an important change, but

2 *9th May 1950 http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_fr.htm*,

3 *For reasons of diplomacy, the ECSC Treaty was signed in one original document, in the French language alone.*

does not diminish the scope of the subsequent interpretation of articles 222 and then 345 TFEU by the CJEU. It serves rather to increase it:

In English: *This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*.

In French : *Le présent traité ne préjuge en rien le régime de la propriété dans les États membres*.

This change is substantive and extends the application and therefore the effect of the initial Schumann declaration, and its prior implementation through the ECSC Treaty. However, a number of academic lawyers, in a search for unwritten conceptual purity and coherence, remain rooted in the concept that the provision remains enclosed in the idea of nationalisation, and therefore in terms of the property rights over companies and undertakings, as subjects to that . I do not share that view, as the term *entreprises* or undertakings[4] was removed; deliberately, as the scope of the Treaties and the freedoms which they contained had evolved and was intended to evolve further.[5] Whilst the effect is clearer in English than perhaps in German, the original French sense has also been fundamentally amended when taken semantically. It is no longer limited to *entreprises* or undertakings, and therefore takes on an expanded and more general meaning in relation to individuals, whether in a business or commercial activity or not. I hesitate before overreaching to the other official languages of the Union in which I am not fluent, but would assert that as the initial scope of the official French language ECSC article has necessarily been extended -German was not employed- must mean that the change in that language is therefore a fundamental and an evolutionary change, not mere semantics.

Correct reading of the text

The term *préjuge* was initially and remains employed in French, and I would suggest that the term retains its sense of prejudging the issue, rather than merely "harming" which is where certain academic commentators would leave it. It is difficult to target the exact meaning in French of the phrase *le régime de la propriété*, as the insertion of *la* renders it significantly different from the more

4 *I will abstain from comparing these analyses to those of President Bush. Article 345 TFEU simply does not contain the term "entreprises", and therefore must be taken to have increased its scope of application.*

5 *In its Paper at http://ec.europa.eu/internal_market/capital/framework/treaty/index_en.htm, the Commission has left this door open, deliberately, whilst concentrating on the question of nationalisations. the CJEU has also gone further than containing the application of Article 345 TFEU merely to nationalisation.*

generalised term *le régime de propriété*. The insertion of the term "*la*" here is important as, along with the German rendering, it has been called in aid to support the theory that it is the ownership of the property in question, as a subject, which is the issue, not the overall property legislation of any given Member State concerned. I do not share that view, which in effect makes an unjustified assumption as to the removal of the term *des entreprises* from what became Article 222 Treaty of Rome, ignoring the effective extension of the scope of the Treaties which the followed that excision. It also does not correctly translate the French term "*régime de",* which by definition is a generalisation, and does not refer to specifics. That differential needs to be born in mind for the remainder of this argument.

I do not therefore concur that Article 345 TFEU, as it now stands in French can merely refer to ownership as a specific subject, rather than to the general *régime* of property ownership. That is certainly not the case in the English version of Article 222 of the Treaty of Rome, where the phrase 'system of property ownership' is a generalised concept. In either case, for the purposes of this debate, the reading could still be treated as indifferent in that it does not affect the main thrust of the following argument. The outcome on the side of the generalised extension of scope from Article83 ECSC to Article222 Treaty of Rome, and the subsequent extensions to the TFEU does however render my thesis more acceptable within the Treaty structure as it presently stands.

Protection of property laws

I would suggest that its main sense now goes to the protection of the property laws as part of the system of property, of each Member State, and that the effect of Article 345 TFEU as its stands now, is to protect the property legislation of a given Member State, in particular against incursions by other Member States, and also from third countries within the freedom of movement provisions. I use the term "incursion" widely to include legal interpretations and changes to the foreign law's domestic concept within the Union's internal legal order, and also fiscal and administrative interpretations, and reclassifications. I suggest that the substantive effect of Article 345 TFEU, whether through its wording or by its positioning within the Treaty and in relation to the Freedoms of movement is therefore wider than may be currently thought, particularly by the Dutch and Germanic school. Assuming that elementary *posit* to be the case, then it becomes clear that the Treaty provision states that each Member States property laws and legislation would remain untouched and indeed protected by the Treaty, and I would also suggest that it cannot be requalified by other Member States to suit their own administrations requirements, for example in tax matters, as that, in the context of freedom of movement would be to completely destabilise the economic 'currency'

upon which the current Union is now based. If a given property right, an objective legal *posit*, is treated differently in law in another Member State, there is inevitably an economic distortion, and what is more a loss of real value or even the creation of an artificial value, or even a destruction of a given value within a common capital regime, and in the Eurozone a common currency régime. That is a serious issue. It is one that needs to be addressed. To deploy an apt Americanism, there is no full faith and credit given by one member state to another's internal property legislation. My *posit* is that that in itself is prohibited by Article 345 TFEU, if not directly, at least when taken in its context alongside the protection of the freedom of movement of capital.

The scope of Article 345

It is therefore more than arguable that the scope of Article 345 was extended during the extension of the scope of application of the Treaties. I am indebted to a very useful summary in the European Law Journal, Volume 16 n° 3 May 2010 at pp 292-314 by Bram Akkermans and Eveline Ramaerkers.

Link http://www.cesruc.org/uploads/soft/130306/1-130306141501.pdf

That article is very clear on the process of semantic interpretation and other principle adopted by the CJEU, and provides a thorough summary of the development of the article through each Treaty. However, its conclusion as to the scope of Article 345 TFEU is limited, and in my view more limited than necessary or appropriate. Its labyrinthine logic certainly fails to address adequately the fundamental change in the French language version by the removal of *"des entreprises''* and its effect upon the originally scope of the original Article 83. From the purely semantic view, it cannot now be restricted to questions of nationalisations, as Akkermans and Ramaerkers project. They do not however, include the notion of "prejudge" in their article[6], and that omission does not support the restrictive byzantine interpretation which Akkermans and Ramaeckers are attempting to justify and assert. Their doubtless well intentioned argument has simply had the effect of blocking the assertion of rights under article 63 TFEU, rather than encouraging the development of those rights and the remedies needed to assert them.

Article 345 TFEU has capacity on the face of its wording through its previous development, to create rights and obligations with direct effect. That is reinforced by its evolution through the CJEU's interpretation and application. It is essential in the increasing evolution of European Private Law to grasp that this article is capable of dynamic interpretation by the CJEU, and some indication of a possible

6 *No mention is made of this sense of the term "to prejudge" at their page 298, even at its §3*

opening up can be found in Akkermans and Ramaecker's article, although they do not appear to have followed this through.

On 16th October, 1997, the then Commissioner for the internal market Monti responded to this question from MEP Watts – whether 'there are any restrictions placed on the purchase of a property in EU Member States for non-nationals of that State?' in the following terms:

> …
>
> *While the EC Treaty in no way prejudices the system of ownership in Member States (Article 222), rules will remain subject to the fundamental rule of non-discrimination at the basis of Articles 6, 48, 52 and 59 and measures to give effect to certain of these Articles, as well as the prohibition of all restrictions, subject to the usual exceptions, on cross border capital movements (which includes the acquisition of real estate) provided in Article 73b.*

This statement, like Article 345 TFEU, has a double edge to it, particularly when the term *préjuger* is used in its Treaty context, as in a *renvoi prejudicial*. What the Commissioner can legitimately be taken as saying is that whilst Article 345 TFEU (ex 222 TEC) does not alter the Member State's regimes of property law, or of the law of property, is he not also saying that the area extra-Treaty is itself circumscribed by the fundamental rights in the acquisition of real estate to the freedom of movement of capital and persons?

In other words, one Member State cannot requalify, arbitrarily, another Member States' property régime or property ownership, e.g. a unitary régime by a non-unitary property process, without contravening that dividing line.

For example, such a requalification could take the form of a deemed arbitrary interpositioning of a trust, in fiscal matters, relating to unitary private law systems of ownership. That is frequent, as is the requalification of a trust as a contract, where a unitary system of law has to address the concept. Note here that every single legislative act of the Communities within the private international law field has had to address the Irish and the English concept of a trust as a separate property law system and issue.

Both incursions scandalise both a unitary and a non-unitary definition of property. In other words, mine, whilst on the surface, Article 345 TFEU may appear not to, its wording and its mere presence actually serves to reinforce rights elsewhere in the Treaty.

Other interpretations

Here I take issue with the restrictive interpretations postulated by Akkermans and Ramaekers. Whilst the posit "*Article 345 TFEU does not confer any exclusive powers to deal with property law to the EU or the Member States. Instead, the Institutions only use the Article to confirm the neutrality of the EC Treaty to questions of private or state ownership of companies*"[7] is acceptable in itself, it should not be taken as removing the fundamental freedoms that the Institutions are required to protect, and which in fact influence the very essence of those freedoms. The term *entreprises,* companies or undertakings does not figure in Article 345 TFEU. It had already been removed. It is therefore equally possible that the actual scope of articles 222 Treaty of Rome and then Article 345 TFEU must have been extended, and the interdict on "*prejugement*" extended. That removes the debate from the issue of any asserted neutrality of the Commission as to Institutional interference, and leaves the issue as to whether one Member State can distort another Member States' system of property ownership by interpretative an d administrative incursion open, particularly where a fundamental right to freedom of movement is concerned, over which the Institution has jurisdiction and what is more a Treaty obligation to intervene. I would suggest that the Commission, the Council and the Parliament all have a duty to act where an individual citizen's rights under one Member State's property laws are entirely eroded if not destroyed by reclassification by the administration of another Member State, particularly where the fiscal exceptions enabling such destructive interference are not applicable.

Despite omitting the full French terminology "*le régime de la propriété*" , which is wider, Akkermans and Rameakers go further to the German version of the Article and assert that[8] "*it provides the same results: the German version differentiates between the term Eigentumsordnung (system of property ownership) and the term Idem page 3030 (right of ownership). The system of property ownership concerns the entire body of rules that regulates the way in which the right of ownership is held, whereas the term ownership—or droit de propriété/Eigentumsrecht—refers to the (content of) the right of ownership itself. 57*

57 See to this effect Von der Groeben, op cit n 28 supra, at 5/386–5/387. The same is true for the Italian version, which differentiates between il regime di proprietà and un diritto di proprietà.

For them, Article 345 TFEU is therefore only concerned with the subjects of the property relationship, namely undertakings. "*Article 345 TFEU excludes application of the Treaty to the question whether these undertakings are held in*

7 *European Law Journal Vol 16 n° 3 May 2010 pp 292-314 p. 308*

8 *Idem page 303*

private ownership—by shareholders—or in public ownership—by a Member State government.

Given the limitation to undertakings, Article 345 TFEU is concerned only with legal persons and not natural persons as the subjects of the property relationship, which means that it has no bearing on consumers. Most importantly, the Article does not concern the content of the right of ownership, nor the objects of a right of ownership.

Concluding, on the basis of the foregoing, that 'system of property ownership' refers not to the right of ownership itself, but only to the way in which it is held, the continued reference to undertakings and whether they are held in public or private ownership becomes easier to understand."

That might be understandable if the Treaty article actually contained the term *entreprises,* or undertakings, but it simply does not: "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."*
The freedoms of movement

Reversing one's competence by asserting neutrality is an abnegation of responsibility, and an effective surrender of Treaty jurisdiction. Now, let us move our attention from Article 345TFEU, to that of the freedoms of movement which the Commission is required to supervise and uphold. The answer may not lie in a sterile technical argument over the signification of Article 345 TFEU, but within the application of a wider Union principle, which Article 345 can be taken to complement rather than restrict, and alongside which Article 83 EFCSC had to develop, and evolve into Article 222 Treaty of Rome.

From the capital and financial point of view it is not possible to run a currency on a fiat basis without having a set of definable property rights that are not subject to reassessment, requalification or even economic modification by another Member State[9]. That Member State cannot, itself, necessarily take action to defend that usurpation and it is therefore within the scope of shared competence of the Union's Institutions to regulate that issue under Article 4 TFEU, which defines the shared competence over the internal market, and what is more, for those states concerned, for the Eurozone.

That platform of private law, and in particular the law of property, is essential to any banking system, as an arbitrary re-categorisation of property within a ban king system renders any form of fiat currency unworkable, as the ownership of the assets upon which it is based are uncertain as to their form but even more so their content. The same applies within a currency union. That is why the US Federal

9 *In the context of a general assumption as to full faith and credit.*

organisation gives full faith and credit as to other federalised states' property legislation within the US Dollar environment, not "denaturisation"; however that principle is not limited to a federalised system. I would suggest that in fact it is part of any form of capital market structure in which freedom of movement is a right: *a sine qua non*.

In one fundamental sense, I would suggest that Article 345 TFEU draws one line; and the Treaty, and its freedoms, deal with what is on the Treaty side of that line. However, what is clear from Commissioner Monti's statement, and the jurisprudence of the CJEU, is that that line may lie elsewhere than is currently assumed, particularly those giving faith and credit to the thesis of Akkermans and Rameakers.

However, that is only the tip of the iceberg. Its underlying mass and dangers for uncharted navigation within the EU are more significant. As usual, working within the unofficial dark matter of the subsidiarity "let out", Member States do not accept this basic limitation of what is little else than mere comity on what they appear to consider to be their right to dictate what happens outside their jurisdiction in other Member States, asserting that the EU Treaty does not address those incursions. My point is that the TFEU, taken within its full scope and intendment, and by reference to article 345, currently does in effect forbid such behaviour, and that neither the Commission nor the Parliament appear to be fulfilling their role in bringing Members of the Consilium to heel before the CJEU.

Examples

An example of the non-respect of that system of general principle in relation to other fundamental Treaty rights would be the reclassification by HMRC of a French *usufruit* as a settlement, i.e. a form of trust, for taxation purposes, in direct contradiction to the qualification of a *usufruit* over real estate as protected capital in the Annex II to Council Directive 88/361/EEC. It is consistent jurisprudence of the CJEU that administrative practice, including interpretation of legal provisions falls with the scope of an obstacle to freedom of movement. The April Newsletter 2013 , published by HMRC is final evidence of that.

May I summarise the position taken by Akkermans and Ramaekers as follows. According to the CJEU the meaning of Article345 TFEU is not to exclude the application of the Treaty from questions of state or private ownership, at all, but rather to emphasise how, according to the Treaty, these powers may belong to the Member States, but not to the regulate the exercise of those powers. That implies that Article345 TFEU can in, one sense, be restricted to a Member State's right to

absolute dominion over its own property laws and rights. It therefore follows, as the other side of that coin or principle, that that implies that a Member State has no right to apply legal duress and misinterpretation to another Member State's legislation and laws, the other system of property ownership, from out of its own domestic legislation and its internal application.

In other words, mine perhaps, the CJEU has effectively drawn a line between Article345 TFEU and the remainder of the Treaty, as to competence, but has also thereby rendered the exercise of Member State's administrations powers and interpretation, within a transnational context, subject to the fundamental freedoms, and Treaty rights. There is no flaw in that conceptual logic, as to hold otherwise would render absolute freedoms of movement capable of being compromised otherwise than by a Treaty exception. It is not therefore a question of subsidiarity, and goes to an underlying full faith and credit principle within the EU, which has to be a necessity within an area where there is freedom of movement of capital, irrespective of the currency union.

Another example would be the self interested French attempt to requalify a trust as a form of fiduciary contract under a contractual *mandataire* under article792-0 bis, and incidentally the refusal by the German administration to recognise an English trust imposed by the English law of property as having legal force when applied to English property.

This position is reinforced by *Case 235/89 Commission v Italy [1992] ECR I-777:* the summary of the judgement is clear:

> 1. *As Community law stands, the provisions on patents have not yet been the subject of unification at Community level or in the context of approximation of laws and in those circumstances it is for the national legislature to determine the conditions and rules regarding the protection conferred by patents.*
>
> *However, the provisions of the Treaty, and in particular Article 222 according to which the Treaty in no way prejudices the rules in Member States governing the system of property ownership, cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the common market as provided for in and regulated by the Treaty.*

Attempted subversion of property rights

If a Member State is not entitled to breach the freedoms within the application, its own legislation, how can another Member State be justified, whether under the non-application of Article345 TFEU or under the general freedoms in attempting to subvert a legal right of property in another Member State? The argument that there is no fiscal approximation or harmonisation in the fiscal area has been shown on several occasions to be a chimera, when attempts to subvert freedoms are concerned.

The underlying idea is also supported by *Case C-350/92, Kingdom of Spain v Council of the European Union [1995] ECR I-01985, paras 18–22* and further by Advocate General Jacob's opinion at § 20 :

> *"The case-law cited by Spain does indeed distinguish between the existence of intellectual property rights and their exercise. It does so, however, in relation to the application of substantive Treaty rules, such as Articles 30, 36, 85 and 86, and not with a view to determining the scope of the Community's competence to harmonize national legislation, or to introduce new rules. Such is the tenor of Consten and Grundig v Commission, Parke, Davis v Centrafarm, Deutsche Grammophon v Metro, Commission v United Kingdom and Commission v Italy [references omitted], and numerous other cases which could be cited, most of which are dealt with by the Commission in its observations'. See further W. Drasch, 'Die Rechtsgrundlagen des europäischen Einheitsrechts imBereich des gewerblichen Eigentums (Artt.100a, 235, 36 und 222 EGV)', (1998) 6(1) ZEuP 128."*

Rather than limiting that principle to the issue of intellectual property rights and their harmonisation, I would go further and propose that it applies throughout the Treaty and, particularly though the application of the freedoms it incorporates, in particular that of the freedom of movement of capital in Article 63 TFEU. The fiscal exception in Article65 TFEU when read in plain English does not justify the reclassification by one administration of a property right in another jurisdiction merely to obtain tax.

> *Article 65*
>
> *(ex Article 58 TEC)*
>
> *1. The provisions of Article 83 shall be without prejudice to the right of Member States:*
>
> *(a) 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;*
>
> *(b) 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, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.*

Article 65 (1) only permits a fiscal obstacle by distinction between taxpayers by way of reference to residence[10]; it does not apply so as to reclassify property rights as something else. The requalification by one administration of another Member State's property laws is simply not permitted by Article 63 (1) (b), as the term national law can only apply to their own national law, not that of other Member States. The exception in effect reiterates the requirement of respect of the other Member States' property right. It does not compromise it.

That principle could severely curtail France's use of article 792-0 bis CGI as a mechanism to tax trusts, with property within the EU, outside the actual definition of these structures in several European regulations in the property and jurisdictional area, and would also compromise HMRC's current practice of reclassification of foreign EU property rights as settlements to obtain tax.
Such fiscal initiatives in fact totally corrupt the foreign property right, and its ownership, and therefore impede the freedom of movement both of capital and what is more, of persons.

The ECJ has consistently held that, just because there is no positive harmonisation, yet, in the area of property law, that did not authorise Member States to adopt legislation, including therefore indirect administrative practice, that violated freedom of movement. See the *Fearon* Case 182/83 [1984] ECR 3677, where the Court decided in a manner contrary to that proffered by the Commission, and stated:

> *7. Consequently, although Article 222[11] of the Treaty does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the Chapter of the Treaty relating to the right of establishment.*

10 *NOT domicile in the United Kingdom sense of that term.*

11 *Now article 345 TFEU*

In short, whilst the potential interpretation of Article345 TFEU as creating rights of direct effect as its face might suggest is not followed[12], which is a pity; that does not render its actual presence of less jurisprudential effect. Put another way, has it not been interpreted by the CJEU, as in fact reiterating one of the tips of the underlying iceberg of fundamental principles? My answer would be yes, and that those tax administrations currently scrabbling to take money in by hook and, here, by crook, using such unilateral reclassifications, leads to several layers of double taxation without credit, in most cases, should be brought to account and shown to be what those obstacles are: contrary to the fundamental principles which the European citizen, and third country nationals, are entitled to have respected.

Therefore it appears up to individuals to take their tax administrations to task or have these issues referred to the CJEU by a *renvoi préjudiciel*[13], or to seize the Commission as the Guardian of the Treaties to take action against the intrusions of one Member State on other Member State's property laws within the context of the freedom of movement of capital or in that of the freedom of establishment. It would certainly simplify the acquisition and disposal of immovable property in another Member State, and remove unnecessary hindrances so that the differential between property laws can be addressed objectively.

A recent case

Moving now to recent cases, perhaps the point is best illustrated by the CJEU's statement in 2009 in Case C-35/08 *rundstücksgemeinschaft Busley and Cibrian Fernandez v Finanzamt Stuttgart-Körperschaften* in a preliminary ruling application.

> 18 *The Court – noting, in particular, that inheritances consisting in the transfer to one or more persons of assets left by a deceased person come under heading XI of Annex I to Directive 88/361, entitled 'Personal capital movements' – has held that an inheritance, including one of immovable property, is a movement of capital for the purposes of Article 56 EC, except in cases where its constituent elements are confined within a single Member State (see, inter alia,*

12 *See in this respect the necessarily convoluted arguments developed by Akkermans and Ramaekers at page 303 to accommodate German, Dutch and Italian thinking to arrive at the intermediate conclusion that "Article 345 TFEU is therefore concerned with the subjects of the property relationship, namely undertakings. Article 345 TFEU excludes application of the Treaty to the question whether these undertakings are held in private ownership—by shareholders—or in public ownership—by a Member State government." They omit to recognize that the term "entreprises" or undertakings was deliberately omitted from article 345 TFEU and article 295 EC.*

13 *a preferable term to a preliminary ruling in this case*

Case C-513/03 van Hilten-van der Heijden [2006] ECR I-1957, paragraphs 40 to 42; Case C-43/07 Arens-Sikken [2008] ECR I-6887, paragraph 30; Case C-318/07 Persche [2009] ECR I-0000, paragraphs 26 and 27; and Block, paragraph 20).

19 *Consequently, a situation in which natural persons residing in Germany and liable to unlimited taxation in that Member State inherit a house situated in Spain is one that is covered by Article 56 EC. It is therefore not necessary to consider whether Articles 39 EC and 43 EC apply, as argued by the applicants in the main proceedings.*

20 *With regard to the existence of restrictions on the movement of capital within the meaning of Article 56(1) EC, it should be noted that the measures prohibited by that provision include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see Case C-370/05 Festersen [2007] ECR I-1129, paragraph 24; Case C-101/05 A [2007] ECR I-11531, paragraph 40; and Case C-377/07 STEKO Industriemontage [2009] ECR I-0000, paragraph 23).*

21 *It is not only national measures liable to prevent or limit the acquisition of an immovable property situated in another Member State which may be deemed to constitute such restrictions, but also those which are liable to discourage the retention of such a property (see, by way of analogy, STEKO Industriemontage, paragraph 24 and case-law cited).*

22 *It is apparent from the order for reference that, first, for the purposes of establishing the basis of assessment for income tax for a taxable person in Germany, the losses incurred in respect of the income from, inter alia, the letting of an immovable property situated in Germany can be taken into account in full in the year in which they arise. By contrast, under point 6(a) of the first sentence of Paragraph 2a(1) of the EStG, rental losses from an immovable property situated outside Germany are deductible only from subsequent positive income derived from letting that property.*

Tax treatment of a usufruit

Whilst superficially an income tax case, the CJEU had to address the classification of the issue in the context of inheritance on death succession as that is how the two taxpayers had become entitled to the property concerned. Its reasoning is therefore applicable *a fortiori* to the issue of whether for example, in the dismemberment of

a *usufruit* and the *nue-propriété* over a French immovable, that disposition is to be protected under article 63 TFEU and excluded from the restrictively interpreted fiscal exception in article 65. There is no doubt that few English advisers currently feel sure enough of their ground to advise an English domiciled client to dismember his French property in the form of a *usufruit* or *droit d'occupation* retained on a gift of the *nue-propriété*, and that French notaries cannot take the risk of advising it, given their lack of familiarity with s 43 (2) IHTA 1984, and the wrongful interpretation of it by HMRC in relation to this form of dismemberment. The CJEU could not have been clearer: "*It is not only national measures liable to prevent or limit the acquisition of an immovable property situated in another Member State which may be deemed to constitute such restrictions, but also those which are liable to discourage the retention of such a property* ". Consider in this context the Newsletter published by HMRC Inheritance Tax in April 2013[14] which evidences the national measures being taken which discourage such dismemberments, by reclassifying them as being in the nature of assets held in trust for persons in succession, rather than what they are in the law governing the immovable rights created. Curious that HMRC Trusts and Estates took that risk, in that they have reinforced the obstacle preventing or limiting the acquisition of immovable property through a *usufruit*, protected as that specifically is.

The publication of the April 2013 Newsletter is final evidence that the restriction exists, in relation to the *usufruit* over French immovable property owned by an English resident or domiciliary.

Multiple charges on immovables

The use of the private international law concept of an immovable or *immeuble*, which is recognised throughout the EU, and in particular within the United Kingdom as a classification mechanism should be encouraged, rather than the term "real estate"[15], which is an unfortunate Americanism that slipped into the Annexes of Council Directive of 24 June 1988, for the implementation of Article 67 of the Treaty (88/361/EEC.

That would also assist in bringing some order into the current scandalous anarchy of double if not quadruple taxation on successions to foreign immovables, without credit, within the EU. For example, simply stating that there will only be one tax point that of the *situs* of the immovable, would remove the rights of the other member States involved to "gatecrash" the foreign jurisdiction and then spoliate indigenous capital within that jurisdiction. The concept of a trust of land within

14 *http://www.hmrc.gov.uk/cto/newsletter-apr13.pdf*

15 *English « realty »*

England and Wales would enable that form of holding of realty, and the necessary statutory trusts imposed by the Law of Property Act 1925, the Settled Land Act 1925, and now the Trusts of Land Act 1996 to be considered immovable rights by other Member States. It is only by that type of initiative that there will be a citizen's Europe worthy of the appellation of a democracy, and the assurance of a citizen's or for that matter anyone's rights to property under the Charter of fundamental human rights:

> *Article 17*
>
> *Right to property*
>
> 1. *Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.* [16].

The Union Institutions appear at present not to be capable of providing it themselves, largely through the inertia of academic commentary, rather than concentrating on the principles that they are meant to uphold. It is not a mere recommendation that will change entrenched forms of bad habit.

If the property has been acquired by an individual under the law of another Member State, then what right does another Member State have to say that they do not own them, or to requalify that right into something else, for tax purposes? The reply to the question is clear, but has yet to be given by the CJEU.

Finally, it is clear, in the wider context, that the CJEU in its recent judgements[17] in relation to succession taxation within the EU itself is bringing a rigorous and pragmatic test to bear on whether the obstacles created discourage investments protected under the freedom of movement of capital rules. If approached on a preliminary ruling basis the CJEU is likely to hold that the National Court requesting the preliminary ruling should set aside such forms of legal "errorism" such as reclassification of property rights into other forms of "capital", thereby eroding the capital basis "moved", simply for tax purposes.

To take a practical example, a *usufruit* defined under the French Civil code is a usufruct, defined as such under the Freedom of movement of capital Nomenclature and is not an interest in possession in settled property, as there is no trust under

16 *Charter of Fundamental Rights of The European Union (2010/C 83/02) EN 30.3.2010 Official Journal of the European Union C 83/389*

17 *Case C-35/08*

the law of the situs of the immovable right, France, and therefore no succession to the *usufruit* right, unless expressly created as successive "by the will of man", as it extinguishes on its term under article 627 Code civil and is not transmissible. The widow's constitutional right to a *usufruit* in certain circumstances is therefore not a settlement. The argument that is its settled property advanced by HMRC in its Newsletter of April 2013 is therefore entirely specious, under a higher authority.