

LEGAL FRAMEWORK CONCERNING THE EXERCISE OF FREE CIRCULATION CAPITAL IN THE EUROPEAN UNION

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Abstract

The free movement of capital is a basic pillar of the Internal Market of the European Union, along with three other pillars, namely the free movement of goods, persons and services.

The liberalization of capital movements in the European Union was achieved gradually, initially enshrined in the provisions of the Single European Act (1986), then in the Treaties of Maastricht (1992) and Lisbon (2009).

At present, the content of this freedom is also extended in relations with third countries.

The free movement of capital contributes to the overall economic development of the European Union and involves the use of the euro as an international currency.

Keywords: *capital; payment; European Union; third countries; taxation; money laundering.*

1. Legal basis

The free movement of capital is a fundamental element of the Internal Market of the European Union along with three other pillars, namely the free movement of goods, persons and services.

The Internal Market is the economic engine of the European Union, the driving force behind the entire economic, social and financial system of the European Union.

The liberalization of the capital market was achieved through an evolutionary process, coordinated with the other Internal Market objectives.

The Single European Act (1986) provided for the liberalization of payments, lending and investment operations.

Subsequently, through the provisions of the Maastricht Treaty (1992), the full liberalization of capital movements, both in relations between Member States and in relations with third countries, was made as a necessary measure for the introduction of the single currency in the European Union.

The provisions of the Treaty of Lisbon provide for unitary regulation of capital and payment issues.

The legal basis for the free movement of capital within the European Union is the provisions of Articles 63-66 TFEU on "Capital and payments".

The Green Paper on "Building a Capital Markets Union" in 2015[1] sets out the main objectives of developing, by 2019, a "capital market union" for the 28 EU countries. The document explores ways to encourage the use of European financial markets and ensure their better integration.[2]

2. Free movement of current payments

The EC Treaty originally regulated only "current payments" in relation to "capital movements". It follows that freedom of payments was qualified by the Treaty as a distinct freedom in the process of realizing the Internal Market, but it must be borne in mind that the freedom of payments derives from the other Community freedoms, not having a stand-alone existence, freedom with a derived character. Freedom of payments is in a relationship of interdependence with other freedoms, interconditioning and influencing each other.

The concept of free movement of capital is not defined by the provisions of the Treaty, giving the Court of Justice the task of providing some criteria for the legal qualification of these notions. According to European Community case-law, the expression "movement of capital" means those financial transactions which essentially reflect the placement or investment of amounts of money and not the remuneration for a benefit, while "payments" mean those money transfers that constitute a counterparty within a transaction, a remuneration for a given benefit.

It follows that the movement of capital is a transaction of an autonomous nature, whereas the movement of payments entails a transfer of ancillary amounts as a result of another principal operation.

The Court of Justice has stated that the physical transfer of banknotes can not be considered as a capital move when it corresponds to a payment obligation resulting from a transaction in the movement of goods and services[3] ; also, transfers resulting from

tourism, commerce, education or medical treatment activities must be qualified as payments and not capital movements[4] .

The concrete distinction between the flow of current payments and the movement of capital is difficult to achieve.

Thus, in practice, the payment of insurance premiums for material damage or civil liability insurance was considered as a current payment whereas the payment of life insurance premiums was qualified as capital movement.

Payments can include:

- payment of the consideration for the exchange of goods, services and capital (such as, for example, the distribution of profits or the payment of interest);
- transfers of wages for work done in a Member State by persons who have moved to that State by virtue of the free movement of persons

The Treaty contains express rules on current payments by art.63 (2) TFEU according to which all restrictions on payments between Member States and third countries are prohibited.[5]

In the "capital" category, the following operations can be included: [6]

- Real estate investments;
- Investments made for the purpose of establishing or extending the business of a company (or in other terms investments linked to freedom of establishment);
- Securities acquisitions;
- Long-term financial placements (creation of bank deposits abroad);
- Capital transfers in the personal interest (donations, successions, transfer of savings from one state to another).

The 2007 Payment Services Directive[7] provides the legal basis for establishing a set of rules applicable to all payment services in the EU so that cross-border payments become as simple, efficient and secure as "national" payments, and to promote efficiency and reduction of payment costs through greater competition and thus opening up payment services markets to new entrants.

3. The legal regime of the free movement of capital

The free movement of capital entails moving them through financial transactions concluded for the purpose of investing those funds.

By the provisions of Article 63 (1) TFEU, all restrictions on capital movements between Member States and between Member States and third countries are prohibited.

In order to progressively achieve the free movement of capital, it was necessary to adopt internal Community rules implementing the provisions of the Treaty.[8] The most important issues covered are:

- liberalization of capital movements between Member States,
- the suppression of all transfer authorizations, even those that were automatically granted;
- the right of Member States to take measures to regulate bank liquidity, even if those measures may have consequences for capital transactions by credit institutions with natural or legal persons who are not resident in a Member State of the Community;
- administrative control measures, principally designed to prevent tax evasion or to ensure compliance with prudential rules in the banking system or for statistical purposes;
- a specific safeguard clause in relations between Member States or between Member States and third countries on short-term capital movements in case of strong tensions or disturbances in the exchange markets. Where disruption affects only one State, safeguard measures must be adopted by the Commission, except in emergencies. When disturbances originate in relations with third countries and affect one or more Member States or intra-EU trade relations, only a simple consultation is foreseen.

The Maastricht Treaty emphasized the process of capital movements, with the provisions of the Treaty being directly applicable.

The basic principle enshrined in the Treaty entails total liberalization of capital movements between Member States but also in relations between Member States with third countries.

Although the established rule concerns the total liberalization of capital movements in relations between Member States with third countries, however, some exceptions to this rule have been provided.

A Member State may take restrictive measures on the free movement of capital for reasons of its own general interest, but such measures may be applied in a non-discriminatory manner. Any person to whom such a measure applies must have an appeal.

The regulated exceptions are as follows:

a) Under the provisions of Article 64 TFEU[9] , restrictions were maintained in relations with third countries until 31 December 1993. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, were responsible for adopting measures concerning the movement of capital with as a destination or coming from third countries, where they involved direct investment, including real estate investments, the establishment, provision of financial services or the admission of securities on the capital markets.

b) The provisions of Article 66 TFEU provide for a safeguard clause, stating that if, in exceptional circumstances, capital movements originating in or destined for third countries cause or threaten to cause serious difficulties for the functioning of the Economic and Monetary Union, acting by a qualified majority on a proposal from the Commission and after consulting the European Central Bank, may adopt safeguard measures for a period not exceeding six months in relation to third countries where such measures are strictly necessary.

c) Under the provisions of Article 75 (1) TFEU, the European Parliament and the Council, acting through regulations in the ordinary legislative procedure, on the prevention and combating of terrorism and related activities define the framework for administrative measures on capital movements and payments, such as be the freezing of funds, financial assets or economic benefits belonging to natural or legal persons, groups or non-State entities.

The text creates the legal framework for the adoption of urgent measures necessary for capital movements and payments.

As long as no such measures have been taken, a Member State may, for serious political and emergency measures, take unilateral measures against a third country in respect of capital movements and payments.

The Council, on a proposal from the Commission, shall adopt measures for the implementation of the legal framework established by the Treaty.

d) Other provisions concerning restrictive measures with regard to the liberalization of capital in relations between a Member State and third countries are laid down in Article 215 TFEU (replacing Article 301 TEC) and Article 346 TFEU.

- In accordance with the provisions of Article 215 (1) TFEU, where a decision provides for the interruption or restriction, in whole or in part, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from High Representative Representative of the Union and of the Commission shall take the necessary measures. The Council shall inform the European Parliament thereof.

- By virtue of Article 366 (b) TFEU, the right of any Member State to take the measures it deems necessary to protect the essential interests of its security in relation to the production of or trade in arms, ammunition or war material is established; those measures must not distort the conditions of competition in the common market in respect of products which are not intended for specifically military purposes.

Unilateral measures taken by a state must not violate the provisions of Art. 347 TFEU requiring Member States to consult with a view to jointly adopting the necessary provisions to prevent the functioning of the common market from being affected by measures which a Member State may be required to take in the event of internal disturbances serious damage to public order in the event of war or serious international tension constituting a threat of war or to meet the commitments made to maintain international peace and security.

With regard to the Community provisions governing the free movement of capital, the Court of Justice has ruled that they have direct unconditional effect, being immediately applicable throughout the Union, without the need for any national implementing measures. [10]

4. Relationship between free movement of capital, taxation and prevention of money laundering

Article 65 (1) TFEU provides that the free movement of capital is without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax legislation which distinguish between taxpayers who are not in the same situation as regards their place of residence or the place where their capital is invested;

(b) take all necessary measures to combat offenses against their laws and regulations, in particular in the area of taxation or prudential supervision of financial institutions, to provide for procedures for the declaration of capital movements for the purpose of administrative or statistical information, or to take measures justified on grounds of public policy or public security.

The measures in question must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments.

Community law regulated differently the subject matter of indirect taxes in relation to direct taxes.

In the case of indirect taxes, a number of directives have been adopted to lift tax obstacles that hinder productive investment[11] . These Directives include measures on:

- the cancellation of the stamp duty levied by certain States on the issue or circulation of foreign securities on their territory;

- the harmonization of national legislation on the tax on the formation of capital companies or the execution of assimilated operations. Harmonization aims at defining capital companies, determining the tax base, tax reductions or exemptions, designation of the competent State to levy the tax.

Unlike indirect taxes, in the field of direct taxation regulation is less significant. The directives adopted in this area aim in particular at avoiding double taxation.[12]

In the field of money laundering prevention, directives have been adopted which are particularly important:

- Council Directive 91/308 / EEC[13] on the prevention of the use of the financial system for the purpose of money laundering of 10 June 1991;

The 1991 directive contains measures to combat money-laundering operations, in particular by imposing an obligation on banks to verify the identity of customers performing operations with amounts exceeding certain thresholds. Under the directive's

regulations, Member States are required to carry out inspections and controls to ensure that banks implement the established measures.

□ Directive 2001/97/EC[14] of the European Parliament and of the Council of 4 December 2001 amending Directive 91/300 / EEC contains provisions on:

- Defining the notion of money laundering;
- detailing the obligations on Member States for the purpose of controlling financial and credit institutions in identifying clients for whom they provide services;
- Obligation of obligatory banks to identify customers performing banking operations exceeding the minimum threshold of EUR 15,000.

□ Directive 2005/60 / EC of the European Parliament and of the Council of 26 October 2005[15] on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance)

The directive seeks to prevent the use of the financial sector and certain non-financial sectors for the purposes of money laundering and terrorist financing. The Act provides for measures to establish the real identity of clients, to report suspicious transactions and to set up preventative systems within organizations in these sectors.[16]

□ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015[17] on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing. (amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60 / EC of the European Parliament and of the Council and Commission Directive 2006/70 / EC (Text with EEA relevance) EEA).

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[1] COM(2015) 63 final, 18.2.2015]

[2] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=legissum:2405_4 (15.04.2018)

[3] ECJ, Judgment of 23 February 1995, C 358.

[4] CJEU - Judgment of the Court of 31 January 1984, Joined Cases 286/82 and 26/83 - Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro (Article 106 of the Treaty is interpreted as meaning that: - transfers for travel business or study and medical care are payments and not capital flows, even when carried out by banknote material transfer) <http://ier.ro/sites/default/files/traduceri/61982J0286.pdf>;

[5] Article 73H (repealed by the Treaty of Amsterdam) contained express provisions on the liberalization of payments, these provisions being applicable until 1 January 1994.

[6]<https://dreptmd.wordpress.com/cursuri-universitare/dreptul-comunitar-al-afacerilor/libera-circulatie-a-capitalului/>

[7] Directive 2007/64 / EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7 / EC, 2002/65 / EC, 2005/60 / EC and 2006/48 / EC and repealing Directive 97/5 / EC, OJ L 319, 5.12.2007, p. 1.

[8] The liberalization of capital movements in the EU has been stepped up by several directives (18 December 1962, JOCE, L49, 22 January 1963, 1986, 86/566, JOCE, L332 of 26 November 1986 and 88/361 24 June 1988, JOCE, L 178, 8 July 1988) and subsequently by the Treaty of Maastricht.

[9] The Lisbon Treaty replaces the procedure for the adoption of legislative measures by the Council (by a qualified majority), with the ordinary legislative procedure being introduced, involving the European Parliament in this procedure.

[10] ECJ - Judgment of 14.1.1995, Sanz de Lera - Diez Jimenez - Kapanoglu.

[11] Council Directive 69/335 EEC of 3 October 1969 (as amended by Council Directive 2008/7 / EC on indirect taxes on the raising of capital of 12 February 2008) was adopted in this area.

[12] Council Directive 90/435 / EEC on the prohibition of double taxation of distributed profits between companies in one Member State and their subsidiaries situated in another Member State have been adopted in this area; Council Directive 90/434 / EEC; Council Directive 90/436 / EEC on the avoidance of double taxation relating to the adjustment of profits of associated enterprises in different Member States.

[13] JO L 166/1991, p. 77 – 83

[14] JO L 344, 28.12.2001, p. 76–82

[15] JO L 309, 25.11.2005, p. 15–36

[16]<https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=legissum:l24016a> (15.04.2018).

[17] JO L 141, 5.6.2015, p. 73–117.

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