SOME CONSIDERATIONS ON FREE MOVEMENT OF CAPITALS

Lecturer Cristian DRĂGHICI, PhD.
Titu Maiorescu University, Faculty of Law and Economics Tg-Jiu, Romania
cristidrg@yahoo.com

Abstract:
To the extent necessary for the proper functioning of the common market, the participating States shall gradually eliminate, in their relations, restrictions on the movement of capital belonging to residents of the Member States and discriminatory treatment on grounds of nationality or residence or registered office of the parties, capital. The Maastricht Treaty introduced the free movement of capital as a freedom enshrined in the treaty. This principle has paved the way for cooperation in the field of capital and payments policy at the international level. For citizens, the free movement of capital means the ability to make several operations abroad, namely opening bank accounts, buying shares of foreign companies, investing in areas that provide the best profit and real estate transactions. For companies, this principle gives them the right to invest in foreign companies and take part in their management. The evolution from a common market to a domestic market was determined by the need to delimit a space which could offer the chance of free competitive competitions based on classical economic principles of supply and demand, event space from manifestation freedoms at the union level.
Keywords: *freedoms, capital, movement, states, European Union*

Regulation

The provisions of art. 67 - 73 (ex Article 73b-73g) of the Treaty of Rome (EEC was signed on March 25, 1957, and entered into force in January 1958) were less imperative as regards the free movement of capital than those applicable to the free movement of goods, workers, services and to establish.

Article 67 of the EEC provided as follows:

(1) Member States shall, in the course of the transitional period and to the extent necessary for the proper functioning of the Common Market, progressively abolish as between themselves restrictions on the movement of capital belonging to persons resident in Member States and also any discriminatory treatment based on the nationality or place of residence of the parties or on the place in which such capital is invested.
(2) Current payments connected with movements of capital between Member States shall be freed from all restrictions not later than at the end of the first stage.

Article 71 of the EEC also provided:

Member States shall endeavour to avoid introducing within the Community any new exchange restrictions which affect the movement of capital and current payments connected with such movement, and making existing rules more restrictive.

In the Treaty establishing the European Economic Community, Articles 67-73 have been replaced by Articles 73b-73g.

Article 73b TFEU introduced a ban on traffic restrictions in the following terms:

(1) Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

(2) Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

The prohibition in Article 73b is not absolute, as Article 73c provides:

The provisions of Article 73b shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

According to Article 73d:

The provisions of Article 73b 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.

Currently, the provisions on the free movement of capital are contained in Chapter IV entitled "Capital and payments" of the TFEU, respectively in Articles 63 to 66. The Treaty separately regulates "current payments" and "movement of capital".

Concepts of “*capital*” and “*payments*”

The two concepts, “*capital movement*” and “*payments*”, were not defined by the provisions of those articles in the TFEU. The role of defining these two notions fell to the Court of Justice and doctrine.

In that matter, 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 (Case C-222/97 Trummer and Mayer [1999] ECR I-1661, paragraphs 20 and 21).

Regarding to **capital**, the doctrine considers that this notion means “*scriptural values, whether or not incorporated in securities, as well as metallic coins that have a legal tender at the time of the operation performed*” [1] .

Current payments were defined by the Court of Justice in the case of Luisi et. C. Carbone [2], more by the elements that differentiate them from capital movements.

The case is about two Italian residents, G. Luisi and C. Carbone, who were fined by the competent Italian authority for violating legal regulations, exchanging in foreign currency between 1975 and 1976 an amount exceeding the allowed limit for each resident. Italian during a year. Under Italian law, an Italian resident could not exchange more than 500,000 Italian pounds in foreign currency per year for sightseeing, business, study, or medical care in other countries. The two Italian residents used foreign currency for tourism and health care in other Member States. They challenged the compatibility of the Italian legal provisions which were applied with the Community legal rules on the freedom to provide services and the free movement of payments for services provided, and the competent court in Genoa asked the European Court of Justice to rule on the interpretation of the provisions. relevant Community legislation.

In response, the Court stated:

- transfers corresponding to a payment obligation arising from a transaction in the field of exchange of goods or services cannot be qualified as capital movements;

- payments for travel within the Community, for business, study and tourism, are current payments corresponding to the purchase of goods or services;

- capital transfers do not have as their object the remuneration of a benefit but the investment and investment, for example the payment of the damage or liability insurance premium falls into the category of current payments, while the payment of the life insurance premium or the purpose of raising capital is a capital transfer operation.

In conclusion, the Court held that *current payments* are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service. For that reason movements of capital may themselves give rise to current payments, as is implied by Articles 67 (2) and 106 (1).

Therefore, the physical transfer of bank notes may not therefore be classified as a movement of capital where the transfer in question corresponds to an obligation to pay arising from a transaction involving the movement of goods or services. (Joined Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro, § 21-22) [3].

First of all, capital transfers concern direct investments, which are very important for economic development, and second of all, capital accumulations, which provide for the creation of funds to finance investments [4] .

Movements of capital for the purposes of Article 56(1) EC thus include in particular direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control (‘direct’ investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking (‘portfolio’ investments) (see, to that effect, Case C-222/97 Trummer and Mayer [1999] ECR I-1661, paragraph 21; Commission v France, paragraphs 36 and 37, and Commission v United Kingdom, paragraphs 39 and 40). (C-282/04 - Commission v Netherlands, § 19) [5].

If current payments have been subject to immediate liberalization, depending on the actual liberalization of goods and services, capital transfers have been progressively liberalized.

The free movement of capital was gradually ensured by the appearance of three important directives.

The first Directive is of March 11, 1960, which was slightly amended in 1962. This directive classifies capital movements in an annex, providing for four different degrees of liberalization. Thus, liberalization was unconditional on direct investment in the right of establishment [6] .

The second important **Directive** is of November 17, 1986, namely Council Directive 86/566/EEC of 17 November 1986, which liberalized long-term loans related to non-exchange traded securities. The second directive amended the first directive of 11 March 1960.

The third Directive is Council Directive 88/361/EEC of 24 June 1988 on the complete liberalization of the movement of capital and in particular the liberalization of short-term movements. Directive 88/361 replaced Council Directive 72/156 / EEC of 21 March 1972 on the regulation of international capital flows and the neutralization of their undesirable effects on domestic liquidity.

The Maastricht Treaty, without repealing Directive 88/361, emphasized the liberalization of capital movements. The principle established by the Treaty was that of full liberalization between the Member States, but also vis-à-vis third countries.

Even if the EC Treaty does not define the term "movement of capital", Directive 88/361 / EEC1 and its nomenclature can be used, according to settled case-law, to define a movement of capital.

According to Annex 1 on the Nomenclature of Capital Movements, the areas of capital provided for in the Directive refer to [7]:

- all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers. The transaction is generally between residents of different Member States although some capital movements are carried out by a single person for his own account (e.g. transfers of assets belonging to emigrants);

- operations carried out by any natural or legal person (1), including operations in respect of the assets or liabilities of Member States or of other public administrations and agencies, subject to the provisions of Article 68 (3) of the Treaty;

- access for the economic operator to all the financial techniques available on the market approached for the purpose of carrying out the operation in question. For example, the concept of acquisition of securities and other financial instruments covers not only spot transactions but also all the dealing techniques available: forward transactions, transactions carrying an option or warrant, swaps against other assets, etc. Similarly, the concept of operations in current and deposit accounts with financial institutions, includes not only the opening and placing of funds on accounts but also forward foreign exchange transactions, irrespective of whether these are intended to cover an exchange risk or to take an open foreign exchange position;

- operations to liquidate or assign assets built up, repatriation of the proceeds of liquidation thereof (1) or immediate use of such proceeds within the limits of Community obligations;

- operations to repay credits or loans.

Exceptions to the principle of free movement of capital and payments

Article 65 TFEU moderates, under certain aspects, the regulations provided by art. 63 of the same treaty.

According to the provisions of art. 65 of the TFEU (former art. 58 of the TEC) para. (1), Member States are entitled:

(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 [8] .

Article 65 (1) (a) refers to taxation and is one of the main exceptions to Article 63 of the same Treaty.

The provisions contained in the chapter on capital and payments in the TFEU do not preclude the application of restrictions which are compatible with this Treaty in respect of the right of establishment.

Capital movements themselves involve financial operations that mainly involve investments and investments of a certain amount and not the remuneration of a service.

The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments, as defined in Article 63 [9] .

Conclusions

The free movement of capital has as its starting point the need to invest in the Community market without restrictions, so as to contribute to the achievement of the objective of promoting the harmonious and balanced development of economic activities throughout the Community, sustainable and non-inflationary growth, a high degree of convergence of economic performance, a high level of labor use.

Capital movements themselves involve financial operations that mainly involve investments and investments of a certain amount and not the remuneration of a service.

The free movement of capital was gradually ensured by the appearance of three directives. The Maastricht Treaty, without repealing Directive 88/361, emphasized the liberalization of capital movements. The principle established by the treaty was that of full liberalization between Member States, but also towards third countries.

There are, however, certain exceptions related to the free movement of capital, both within the EU and in third countries, which cover the following areas: taxation, prudential supervision, public policy considerations, money laundering and financial sanctions covered by the Foreign and Security Policy. common. On these issues, the Commission communicates with national monitoring authorities to ensure the correct application of these exceptions, and where there are differences of interpretation the EU seeks the support of the European Court of Justice.

References:

[1] Gavalda, Christian, Parleani, Gilbert, Traité de droit communautaire des affaires, 2e édition, Litec, Paris, 1992, p.116
[2] Joined Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro
[3] European Commission, Case law guide of the European Court of Justice on articles 63 et seq. TFEU, p. 8
[4] Duşcă, Ileana Anca, Drept comunitar al afacerilor, Universitaria Publishing House, Craiova, 208, p. 151-152

[5] European Commission, Case law guide of the European Court of Justice on articles 63 et seq. TFEU, p. 9
[6] Fuerea, Augustin, Drept comunitar al afacerilor, ediţia a II-a, revăzută şi adăugită, Universul Juridic Publishing House , Bucharest, 2006, p. 155
[7] Council Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (88/361/EEC)
[8] Treaty on the Functioning of the European Union - part three: Union policies and internal actions - title iv: free movement of persons, services and capital - Chapter 4: Capital and payments - Article 65 (ex Article 58 TEC)
[9] Tutunaru, Mircea, Dreptul Uniunii Europene, Scrisul Românesc Publishing House, Craiova, 2019, p.152