EEA LAW

Free movement of capital

and

Financial Services

PART ONE

- Internal Market
- https://ec.europa.eu/commission/priorities/internal-market_en

FREE MOVEMENT OF CAPITAL

Unilateral transfer of assets from one Member State to another

- unique third-country dimension

represents a prerequisite for the free movement of services

The term "free movement of capital" includes

movement of “material” capital (right to property, business participation)

money capital (securities, loans).

Free movement of payments is complementary to freedom of free movement of capital.

Articles 63 to 66 of the Treaty on the Functioning of the European Union (TFEU), supplemented by Articles 75 and 215 TFEU for sanctions. (earlier art. 56-60)

MOVEMENT OF CAPITAL

- **financial operations, aiming to locate and invest capital, which represents a significant support for the applicability of the freedom of capital movement**.
- **cross-border transfer (acquisition, monetization or transfer) values, either in the form of investment capital (eg. real estate, company shares), or in the form of money capital (eg. the Securities and medium- and long-term loans).**
- Joined Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro, § 21-22.
- The principle was directly effective, i.e. it required no further legislation at either EU or Member States' level. (horizontal effect)

LEGAL BASIS

- First step was **Directive 88/361/EEC** of 24 June 1988, which scrapped all remaining restrictions on capital movements between residents of the Member States as of 1 July 1990
- This constitutes a unique third-country dimension of this particular Treaty freedom. It prohibits all obstacles, not just discriminatory ones. It lays down a general prohibition which goes beyond the mere elimination of unequal treatment on grounds of nationality (see Case C-367/98, *Commission* v *Portugal*, paragraph 44).

OBJECTIVES

All restrictions on capital movements between Member States as well as between Member States and third countries should be removed.

However, for capital movements between Member States and third countries, Member States also have:

(1) the option of safeguard measures in exceptional circumstances;

(2) the possibility to apply restrictions that existed before a certain date to third countries and certain categories of capital movements; and

(3) a basis for the introduction of such restrictions — but only under very specific circumstances.

ZÁSADA VOLNÉHO POHYBU KAPITÁLU

- Article 65(1) TFEU allows for different tax treatment of non-residents and foreign investment, but this shall not constitute a means of arbitrary discrimination or a disguised restriction, Article 65(3) TFEU.
- Even in relation to third countries, the principle of free movement of capital prevails over reciprocity and maintaining Member States' negotiating leverage vis-à-vis third countries (see Case C-101/05, *Skatteverket* v *A*)

EXCEPTIONS AND JUSTIFIED RESTRICTIONS

- **exceptions** are largely confined to **capital movements related to third countries** (Article 64 TFEU).
- Article 66 TFEU covers emergency measures vis-à-vis third countries; however, these are limited to a period of six months.
- The only justified restrictions on capital movements in general, including movements within the Union, which Member States may decide to apply, are laid down in Article 65 TFEU and include:
  - (i) measures to prevent infringements of national law (namely in view of taxation and prudential supervision of financial services);
  - (ii) procedures for the declaration of capital movements for administrative or statistical purposes;
  - (iii) measures justified on the grounds of public policy or public security.

TREATMENT OF VIOLATIONS AND COURT DECISIONS

In cases where Member States restrict the freedom of capital movement in an unjustified way, the usual infringement procedure according to Article 258-260 TFEU applies.

Important infringement cases concerned, inter alia, special rights of public authorities in private companies/sectors

e.g. *Commission* v *Germany* (Case C-112/05 *Volkswagen*); in a case brought against Portugal (Case C-171/08) in 2010, the Court confirmed earlier jurisprudence on special rights and highlighted that the free movement of capital includes both 'direct' investments and 'portfolio' investments; and a third-country case (Case C-452/04 *Fidium Finanz*).

PAYMENTS

On **payments**, Article 63(2) TFEU stipulates that '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 Directive on Payment Services (PSD) 2007/64/EC provides the legal foundation for the creation of an EU-wide single market for payments by 2010

- cross-border payments as easy, efficient and secure as 'national' payments

- more competition by opening up payment markets to new entrants

The PSD provides the necessary legal framework for an initiative of the European banking industry, called the 'Single Euro Payments Area' (SEPA)

PART TWO

FINANCIAL SERVICES

- legal basis for the financial services sector is Articles 49 and 56 of the Treaty on the Functioning of the European Union which provides for freedom of establishment and freedom to provide services

BANKING AND PAYMENT SERVICES

- The Capital Requirements Directive 2013/36 / EU (CRD) and Regulation (EU) no. 575/213 on prudential requirements (CRR together CRD IV)
- For example, expressly requires the measurement of operational risk and enables better risk management in allowing internal systems for risk assessment (rating).
- In connection with subsequent amendments (CRD II-IV) were introduced eg. Regulations regarding the re-securitization and remuneration principles, as well as higher capital requirements. Capital Requirements Regulation should ensure uniform application (a single set of rules).

OBJECTIVES

- The aim of the directive and the regulation is to establish a modern legal framework for credit institutions, which are able to react to risks and takes into account the international framework agreement of the Basel Committee on Banking Supervision (Basel Committee on Banking Supervision) on capital requirements for credit institutions (Basel III)

WHAT IT BRINGS

- Through CRD IV were transferred the Basel framework agreement into EU law and has been adapted to the European financial services sector, taking into account the priorities of the European Parliament 2010
- improve the capital base, liquidity standards, counter-cyclical measures, a leverage ratio and counterparty credit risk coverage)

PAYMENT SERVICES

- Directive 2007/64 / EC on payment services in the internal market (Payment Services Directive, PSD, lifted in autumn 2015); Directive (EU) 2015/2366 (PSD 2). PSD 2 entered into force on 12. 1. 2016 and the national legislation must be applied by early 2018.

- This Directive facilitates cashless payments throughout the EU and create a single area for euro payments area (Single European Payment Area, SEPA).
- Directive complements Regulation (EU) no. 924/2009 and Regulation (EU) no. 260/2012

PAMENT SERVICES

- Some provisions of the Directive on payment services in the internal market was criticized : eg. missing comparison (relevant) IBAN number with the name of the account holder, resulting in the situation when the transfer of funds will be implemented also in the event, when these data's are inconsistent.
- It is also impossible to limit the direct debit mandate of high financial value and there is no possibility to cancel the payment after its adoption.
- PSD 2 raised concerns about security and data protection.

THE AREA OF SECURITIES

- Directive 2014/65 / EU and Regulation (EU) no. 600/2014 (Directive on markets in financial instruments, MiFID). Following the revision of the directive, launched in 2011, was adopted in the form of a recast of the Directive ("MiFID II") and Regulation ("MiFIR").

OBJECTIVES

- introduces Europe-wide uniform standards for securities trading, which develops the competition and increase protection for depositors,
- including through new provisions to protect depositors,
- greater transparency in the provision of advisory commissions on deposits and better integrated service offerings from providers of financial services

IRREGULARITIES

- Proponents of depositors have reservations eg. The fact that the burden of incorrect or incomplete advice borne by the depositor, while the documentation obligation holds adviser.
- Violation of legislation on the control also has no civil consequences, so no depositor can not claim compensation.
- This is called. Lamfalussy directive and to its implementation is necessary to adopt a series of planned implementing provisions. The same applies to the new directive, respectively regulation.

COLLECTIVE INVESTMENTS

- Directive 2009/65 / EC on investment funds (Undertakings for Collective Investment in Transferable Securities, UCITS)

OBJECTIVES

- Since 1985, units of the harmonized investment funds under the UCITS Directive could obtain a "European passport" allowing them to be, after obtaining an authorization in one Member State may be marketed in all other Member States, if they have made a notification to the competent authorities.
- removes administrative barriers to cross-border marketing and lays down rules for linking funds, Structures of "master-feeder", requirements for depository banks, liability rules and remuneration policies, respectively sanctions.
- Improve the provision of information to investors and the cooperation between national supervisory authorities.

INSURANCE

- Directive 2009/138 / EC on the insurance and reinsurance business (Solvency II)
- Directive 2014/51 / EU amending Solvency II (Omnibus II)

- The Solvency II Directive entered into force. January 1, 2016 From the moment of approval of the drafting of the directive itself, it took "only" six years

VERY LONG TIME PROCEDURE FROM SUBMISSION TO APPROVAL OF SOLVENCY II

- The legislative procedure for the Solvency II directive is a vivid evidence of the difficulties associated with a two-stage legislative procedure, for which it is necessary to introduce enforcement measures for the implementation and application of the Framework Directive:
- only in 2011, the Commission presented a draft "Omnibus II" to reflect the new supervisory structure, and especially the establishment of the European Insurance and Occupational Pensions (EIOPA), which occurred at the beginning of 2011.

OBJECTIVES

- **Improved consumer protection:** It will ensure a uniform and enhanced level of policyholder protection across the EU. A more robust system will give policyholders greater confidence in the products of insurers.
- **Modernised supervision:** The “Supervisory Review Process” will shift supervisors’ focus from compliance monitoring and capital to evaluating insurers’ risk profiles and the quality of their risk management and governance systems.
- **Deepened EU market integration:** Through the harmonisation of supervisory regimes.
- **Increased international competitiveness of EU insurers.**

CONTENT OF SOLVENCY

- covers, among other things…
- assets and liabilities valuation, including the so-called long-term guarantee measures
- how to set the level of capital for asset classes an insurer may invest in
- the eligibility of insurers' own fund items to cover capital requirements
- how insurance companies should be managed and governed
- assessing the equivalence of non-EU countries' solvency regimes with EU rules
- rules on the use of 'internal models' to calculate requirements on solvency capital
- specific rules related to insurance groups
- simplified methods and exemptions to make Solvency II easier to apply for smaller insurers

CONTENT OF SOLVENCY

- 'qualifying infrastructure investments' will form a distinct asset category and will benefit from an appropriate, lower risk calibration
- investments in European Long-Term Investment Funds (ELTIFs) and equities traded on multilateral trading facilities (MTFs) will also benefit from lower capital charges
- Equivalence decisions recognize that the supervisory regime for insurers in force in certain non-EU countries is equivalent to the Solvency 2 regime.
- After receiving equivalence, EU insurers can use local rules to report on their operations in these countries, while third country insurers are able to operate in the EU without complying with all EU rules.

ESD DECISIONS

- **Most important decision**

- CASATI – ESD decision nr.. 203/80 z r. 1981
- Scientologists – ESD decision of 14. March 2000, C-54/99 Church of Scientology
- Golden shares cases: C-58/99 Commission vs. Italy; C-463/00, Commission vs. Spain; C-174/04, Commission vs. Italy; C-463/04 and C-464/04 - Federconsumatori and others and Associazione Azionariato Diffuso dell'AEM SpA a others vs. Comune di Milano; C – 112/05 Commission vs. Germany (Volkswagen), C-212/09 Commission vs. Portugal;

ESD DECISIONS

- Taxation area

C-342/10 Komise v. Finsko; C-383/10 Komise v. Belgie; C-600/10 Komise v. Německo; C-364/01 Barbier; C-256/06 Jäger; C-11/07 Eckelkamp, C-43/07 Arens-Sikken; C-510/08 Mattner; C-132/10 Halley