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Course: Introduction to the European Union Law

[7] Companies, services, capital - payments

Free movement of legal entities (companies)

Same chapter of ECT covers both individuals and legal entities: both enjoy right of establishment (to do continuous business according to host state legislation).

The liberalisation of continuous commercial presence in other states is more important – from economical point of view - than freedom of establishment (of individuals). Corporations are key tool for modern economic activities individuals are not capable to perform.

In general, legal entities are legal instrument for collective action: modern state laws enable existence and activity of various legal entities (legal persons): companies, cooperatives, foundations, associations including churches and political parties, various state or public institutions or private charities. There is big difference among states in variability of forms of legal entities. However, every legal entity serves human needs: individuals or groups of individuals are behind all legal entities. Even states and international organisations (incl. ECs) are legal entities.

If compared with individuals it is more difficult to describe the group of legal entities enjoying community right to establishment.

Individuals = member state citizenship (nationality): EU citizenship. EU-aliens are entitled only in special circumstances (family members)

Legal entities = only if based on (incorporated) legislation of some member states and with seat in some of them (formal seat is sufficient). Only legal entities enjoy the right of establishment if the law creates them for making profits: companies (majority of European states allow creation of several types of companies) are generally covered and cooperatives expressly mentioned. On the other hand, other legal entities (associations, various institutions) do not enjoy the right of establishment expressed in ECT.

Member states companies are entitled to establish agency, branch or subsidiary („daughter companies“), participation of citizens of other member states in their capital enjoys same treatment.

EC law provides for extensive harmonisation of company legislation of member states, including their book-keeping (accounts) and holding taxations. This harmonisation enables far-reaching right to establishment. Nevertheless, different requirements open the door to deliberate selection of law for incorporation (Delaware effect?)

New EC regulations enable establishment of „EC legal entities“, including „Societas Europea“ (European stock company).

Freedom to provide services

The freedom to provide services fulfills the internal market. It covers all economic activities crossing borders of member states which are not delivery of goods, movement of workers, right to establishment or investment or payment. ECT additionally provides non-exhaustive list of services.

Services are the most important part of economy of all modern rich countries. There are many kinds of services: banking and insurance, construction, transport, data processing, education and training, healthcare, social services, telecommunication, leasing, tourism services, various advises and consultations etc. etc.

However, international trade in services is limited, although it increases significantly. There are several natural obstacles (language barriers, distance) and legal obstacles. New technologies (data transmission, Internet) enable new kinds of services to be provided internationally.

ECT prohibits every discrimination (based on nationality or residence) of providers or consumers of cross-border services or these services in general. The Court of Justice has added occasional refusals of restrictive measures applied without distinction. Case-law condemns many state legal and administrative practices. However, this – according to opinion of the Commission and many experts – has not removed artificial obstacles based on them. Therefore, there is proposal of „services directive“ for final „liberalisation“.

Special ECT provisions and rich secondary law cover financial services and transport.

Financial services are subject of complicated harmonisation (exclusively directives). These directives provided for standard regulatory environment throughout the EU, ensuring similar protection of consumers of financial services.

Transport is key service for all EC integration. Therefore, EC law covers all modes of transport: road, rail, air, river and maritime transports. EC law enhances liberalisation of these sectors, usually monopolized several decades ago.

The interpretation of ECT provisions on freedom to provide services by the Court of Justice touched many social services provided by states or reimbursed by them (actually healthcare, culture, potentially social services, education). It contributes to more competition and improvement. However, it can destabilise these sensitive sectors. The powers of ECs are limited, ECT recognizes the importance of services of general interests and confirm the powers of member states to organize and finance their healthcare and education services.

Payments and capital

EC law provides for removal of all barriers to payments. Freedom to pay for goods, services and labour is necessary for realisation of free movement of goods, workers, right to establishment or freedom to provide services. Without possibility to pay without any obstacles these basic freedoms cannot be achieved. EC law allows controls of payments (various types: cash, bank transfers etc.) necessary for prevention of tax evasion or money-laundering. Freedom to pay covers also transactions with non-member states.

EC law gradually liberalised movement of capital (freedom to invest). Broad definition of capital shall be taken into consideration. Capital is property used for investment by any of wide range of legal instruments (loans, bank savings, acquisition of shares, movable or immovable property etc.). Usually, money is transferred from state to state. EC law prohibits any obstacles of investment, use (taxation) or withdrawal of capital. EC law allows – in exceptional circumstances – temporary restriction of capital flows with the third countries.

Homework: read judgement Kohll (C-158/96), ECR, 1998, I-1931

