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Course: Introduction to the European Union Law

[7] Companies, services, capital - payments

Free movement of legal entities (companies)

The same chapter of EC Treaty covers both individuals and legal entities: both individuals and legal entities enjoy right of establishment (to do continuous business according to host state legislation).

The liberalisation of continuous commercial presence in other Member States is more important – from economical point of view - than freedom of establishment of individuals as entrepreneurs. Corporations are essential legal instrument for majority of modern economic activities, individuals are not capable to perform them.

In general, legal entities are an instrument for collective action. However, every legal entity meets human needs. Individuals or groups of individuals are behind all legal entities.

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. Nevertheless, there is big difference among states in variability of forms of legal entities. It should be borne in mind, that states and international organisations (including European Communities) are legal entities.

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

Individuals must be nationals (citizens) of the Member States. Establishes citizenship. EU-foreigners are or will be entitled only in special circumstances (family members, long-term residents with residence permit)

Legal entities are entitled to establish only if they are based on (incorporated) legislation of some member states and have seat in some of them (formal seat is sufficient). Only legal entities enjoy the right of establishment if the law creates them for making profit: i.e. 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 EC Treaty (Art. 48).

The 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.

The law of the European Community provides for extensive harmonisation of company legislation of member states, including their book-keeping (accounts) and holding taxations. Nevertheless, different requirements which persist. It makes attractive deliberate selection of law for incorporation of company. The Court of Justice interpreted the freedom broadly (Centros) as requiring toleration of company established abroad for circumvention of more complicated requirements of domestic law.

Shall Europe fear so-called Delaware effect of the United States of America?

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

Freedom to provide services

The freedom to provide services fulfills the internal market. It covers all economic activities which cross the borders of the Member States which are not delivery of goods, movement of workers, right to establishment or investment or payment (negative definition in Art. 50 EC Treaty). The treaty additionally provides non-exhaustive list of services (positive definition).

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, leasing of property, various advises and consultations and many other services. .

However, international trade in services is less important if compared with trade with goods. Nevertheless, it increases significantly in last decade. 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.

EC Treaty prohibits every discrimination based on nationality or residence both of provider and consumer of cross-border services. The Court of Justice has added occasional refusals of restrictive measures which are 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“ of services.

Special EC Treaty 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 European Community. It ensures similar protection of consumers of financial services throughout the Europe.

Transport is key service for all integration in the European Community. Therefore, its law covers all modes of transport: road, rail, air, river and maritime

transports. The law enhances liberalisation of these sectors fully or almost fully monopolized several decades ago.

The interpretation of EC Treaty provisions on freedom to provide services by the Court of Justice touched many social services provided by states or reimbursed by them (actually healthcare – Kohll judgement), culture, potentially social services, education). It contributes to more competition and improvement. However, it can destabilize these sensitive sectors. The powers of European Community are limited in this area. EC Treaty recognizes (Art. 16) the importance of services of general interests and confirm the powers of member states to organize and finance their healthcare (Art. 152) and education services (Art. 149 and art. 150).

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). Full freedom was established in the beginning of 90ties. 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.