

Course: Law of the European Union

**[7] Other economic freedoms:
companies, services, capital
and payments**

Filip Křepelka, (krepelka@law.muni.cz)
Masarykova univerzita

Legal entities in contemporary society

- Legal entities (legal persons) are legal instrument for collective action.
- However, every legal entity meets human needs. Individuals or groups of individuals are directly or indirectly behind all legal entities.
- Corporations are essential legal instrument for majority of modern economic activities, individuals are not capable to perform them.

National laws on legal entities

- Countries enable existence and activity of various legal entities: companies, cooperatives, foundations, associations including church entities and political parties, various state or public institutions, or private charities.
- Nevertheless, there is big difference among countries in forms of legal entities.
- States and international organisations (including the European Communities) are also legal entities (persons) of both domestic and international law.

Freedom of establishment of legal entities within the EU

- One chapter of EC Treaty (Art. 43-48) covers both individuals and legal entities both individuals and legal entities enjoy right of establishment for permanent business according to host member state legislation.
- This liberalization of commercial presence in other member states is more important from economical point of view than freedom of establishment of individual entrepreneurs. The freedom is used frequently.

Companies and cooperatives

- Legal entities established for business only are entitled to establish in other member states.
- Most European states allow creation of several types of companies (limited liability company, private / public limited companies by shares etc.)
 - are generally covered by the Treaty
- Cooperatives are expressly included.
- Other legal entities (associations, churches and various other institutions for non-profit economic and social activities and structures of government with legal personality) do not enjoy the right of establishment.

Connection of legal entities with member state

- If compared with individuals, it is difficult to define companies and cooperatives which shall enjoy community right to establishment.
- Nationals (citizens) of member states enjoy free movement.
- Companies are entitled to establish if they are based on (incorporated according to) legislation of some member states and have seat in some of them.
- Furthermore, they must have seat in some member state. Formal seat is sufficient.
- On the other hand, control of such company by foreign persons is irrelevant.

Types of establishment

- Firstly, subsidiary (branch) without independent legal personality can be established by above defined companies and cooperatives.
- Secondly, daughter company (shares held by mother company) can be established.
- Both types are used in the EU frequently.

Freedom to select law of member state for incorporation of company

- Different requirement on capital for establishment of company makes attractive deliberate selection of foreign law for incorporation of company.
- The Court of Justice interpreted the freedom of establishment broadly (judgement Centros) as requiring toleration of company established abroad for circumvention of domestic law.
- Shall Europe fear so-called Delaware effect emerged in the United States of America? No, language barriers and legal differences are an important obstacle.

Legal entities based on EU law

- New regulations enable establishment of „legal entities of the European Community“,
- „Societas Europea“ (European public limited company) for business.
- European economic interest groupings can be formed for closer cooperation of companies and institutions of member states.

Capital and its investment

- Capital is every property which creates profit.
- There is wide range of legal instruments for investment of capital.
- The most important instruments for investment are loans, bank savings, acquisition of shares, movable or immovable property etc.
- Usually, money is used for transformation of capital on both national and international level.

Free investment of capital

- E(E)C law has liberalised movement of capital slowly. Full freedom was established in the beginning of 1990.
- Any obstacles of investment (prohibitions and barriers of entry), use (taxation) or withdrawal of investment are prohibited.
- Equal treatment of capital is required in general.
- EU law allows investment abroad and foreign capital in the EU. In exceptional circumstances temporary restriction of capital flows with the third countries could be introduced.

Payments

- Freedom to pay for goods, services and labour is necessary for realization of free movement of goods, workers, right to establishment or freedom to provide services.
- Without possibility to pay without any obstacles liberalization cannot be achieved.
- Payments can be carried with or without cash.
- Payments constitute special service by banks and other providers.

Free payments in the EU

- EC law provides for removal of all obstacles to cross-border payments.
- Law allows and requires controls of payments - there are several methods of payment: cash, other printed instruments, bank electronic payments etc. It is necessary for prevention of tax evasion, frauds, or money-laundering.
- Freedom to pay covers also transactions with non-member states.

Services in modern economy

- Services are the most important part of economy of all modern rich countries. They provide for 2/3 and more of gross domestic product.
- There are many types of services: banking and insurance, construction, transport, data processing, education and training, health care, social services, telecommunication, leasing, services for tourists, leasing of property, various business services including consultation and research and many others.

Limited international trade in services

- However, international trade in services is less important if compared with trade with goods.
- There are several natural obstacles (language barriers, distance for accompanying movement of good and persons) and legal obstacles.
- Nevertheless, it increases significantly in last several decades.
- New technologies - data transmission, namely Internet - enable some services to be provided internationally (cross-border supply).

Position of freedom to provide services

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

General rules for liberalization of trade in services in the EU

- Any discrimination of foreign and providers and consumers of services is prohibited.
- Discrimination based on both nationality and residence is excluded.
- The Court of Justice has labelled many requirements on services as unnecessary obstacles for free movement of services.
- Similar exceptions as exceptions related to goods and persons are identified.

Financial services

- There are special rules for financial services and their cross-border trade.
- Financial services are subject of complicated harmonisation (exclusively directives). These directives provide for standard regulatory environment throughout the EU.
- This regulatory environment ensures similar protection of consumers of financial services in whole EU.

Transportation

- Transport is essential service for integration in the EU (free movement of goods, persons, services, capital).
- Therefore, its law covers all modes of transport: road, rail, air, river and maritime transports.
- The law enhances liberalization of these sectors fully or almost fully monopolized several decades ago.
- Standards for security and quality of services are set by the EU.

Communications and media

- Communication is also necessary for European economic, social and political integration of member states of the European Community / Union as transport
- Comprehensive legislative engagement of the European Community are telecommunication services and postal services.
- There is some harmonization for television which can be easily aired internationally. Public involvement is respected broadly.

Involvement in healthcare

- Freedom to provide services is interpreted as including healthcare and social services provided by states or reimbursed by them (health care – Kohll judgement).
- Reimbursement of such services sought abroad is required.
- Such approach touches competence of member states for financing and organization of these services. Member states have objected it strongly, compromise was achieved.

Importance of services of general economic interest

- This approach can contribute to more competition and improvement. However, it can destabilize also these sensitive sectors. The powers of European Community are limited in this area. The Treaty recognizes (Art. 16) the importance of services of general interests.
- Legislation and case-law on this field, however, requires more and more liberalization and competition.

Further liberalization of services

- According to opinion of the Commission and many experts – has not removed artificial obstacles based on them.
- Therefore, Directive 2006/123 on Services in Internal Market was adopted.
- Obstacles existing in law of member states to interstate trade in numerous services in next several years shall be removed with its implementation.