

JUDr. Jan Exner, Ph.D.

Free Movement of Capital and Payments



Co-funded by
the European Union



MINISTRY OF EDUCATION,
YOUTH AND SPORTS

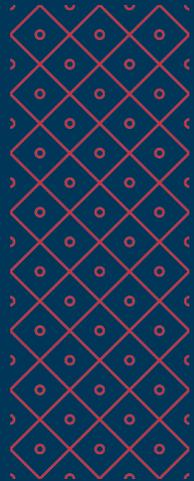


**Charles
University**



Content

1. Introduction
2. History
3. Legal basis, prohibited restrictions
4. Exceptions and justified restrictions
5. Conclusion



Chapter 1

Introduction



Abbreviations used:

CJEU – Court of Justice of the European Union

MS – Member States

TFEU – Treaty on Functioning of the European Union

FMC – Free movement of capital



Introduction

One of the biggest benefits of integration in the European Union was undoubtedly the introduction of the internal market and the associated free movement of persons, goods, services and capital.

Free movement of capital is **not only the youngest** of all Treaty freedoms, but — because of its unique third-country dimension — **also the broadest**.

Free movement of capital is an **essential condition** for the proper functioning of the EU Single Market. What are the reasons?



Cross-border transfer of value for the purpose of

FMC

- Investments
- Direct investment in a company by means of shareholding
- Inheritance
- Banknotes and coins
- Free movement of payments
 - Remuneration for a service, goods,...



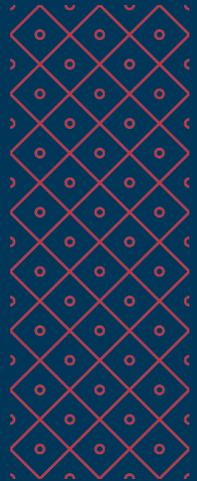
FMC advantages:

Better allocation of resources within the EU,

Facilitates trade across borders,

Favours workers mobility, and

Makes it easier for businesses to raise the money they need to start and grow.



Chapter 2

History

Historical development



Direct effect:

- A. Traditional approach: FMC is one of the fundamental freedoms, but does not have direct effect (case 203/80 Casati)
- *Complete freedom of movement of capital could undermine the economic policy of one of the Member States or create an imbalance in its balance of payments*
 - *Difference from free movement of goods, persons, and services – obligation to liberalize capital movements “to the extent necessary to ensure the proper functioning of the common market”*
- X 286/82 and 26/83 Luisi and Carbone
- B. Modern approach: FMC has direct effect (C-163/94, C-165/94 and C-250/94 Sanz de Lera; C-101/05 Skatteverket)

Historical development

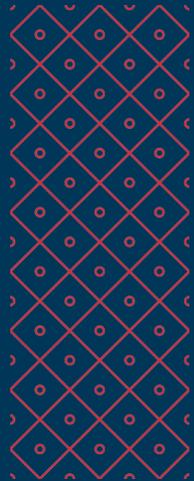


Directive 88/361/EEC – Annex I:

- foreign direct investments
- real estate investments or purchases
- securities investments (e.g. in shares, bonds, bills, unit trusts)
- granting of loans and credit
- other operations with financial institutions, including personal capital operations such as dowries, legacies, endowments, etc.

Maastricht Treaty (1992/1993)

- FMC is one of fundamental freedoms



Chapter 3

Legal basis, prohibited restrictions

Legal basis - Art. 63 TFEU



Art. 63(1) TFEU:

“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“.

Fundamental features of this principle:

- “all restrictions“,
- “between Member States“; “between Member States and third countries“
- “third countries“
- “movement of capital“
- “prohibited“ → direct effect (e.g. the case C-101/05 Skatteverket)
- “all restrictions shall.... be prohibited“ → general prohibition (e.g. the case C-367/98 Commission v. Portugal).

Prohibited restrictions – Case law



The most typical examples of prohibited restrictive measures:

1. Golden shares (*C-171/08 Commission v Portugal*)

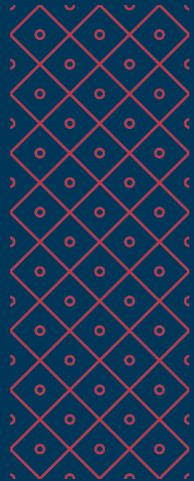
- State golden shares in Portugal Telecom – discourages investment

2. Taxation (*C-315/02 Lenz*)

- Difference in taxation based on origin of revenue

3. State control over the capital and payment flows (*C-163/94, C-165/94 and C-250/94 Sanz de Lera*)

- Prior authorisation of export of coins, banknotes,...



Chapter 4

Exceptions, justified restrictions



Exceptions and justified restrictions to the free movement of capital

Exceptions stipulated in the Treaty – written exceptions

Exceptions established by the case law of the CJEU based on exceptions stipulated in the Treaty

Art. 64 TFEU



1. The provisions of Article 63 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. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.
2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.
3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

Art. 65 (1, 2, 3) TFEU



1. The provisions of Article 63 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.
 2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.
 3. 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.
- **Tax differentiation, Prudential measures, Public policy and security.**

Art. 66 TFEU



Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

(ex. Cyprus, Greece)

→ **Third country restriction (economic and monetary union)**

Art. 75 TFEU



Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards.

(ex. Sanctions in reaction to war in Ukraine)

→ **Financial sanctions**

Art. 215 TFEU



1. *Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.*
2. *Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.*
3. *The acts referred to in this Article shall include necessary provisions on legal safeguards.*

→ **Financial sanctions against third countries, or individuals, groups or non-state entities, based on decision adopted within the framework of the common foreign and security policy**

Art. 143 & Art. 144 TFEU



Allow taking of protective balance of payments measures, where difficulties jeopardise the functioning of the Internal Market or where a sudden crisis occurs.



Art. 345 TFEU

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

→ **Restriction on property ownership**

Case law



Exceptions established by CJEU case law:

The CJEU has established that the free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to TFEU or by overriding requirements of the general interest. Whilst these general interest considerations are not explicitly stated in the TFEU, some have been established by CJEU case law.

case C 283/04 Commission v. the Netherlands
cases C-463/00 Commission v. Spain

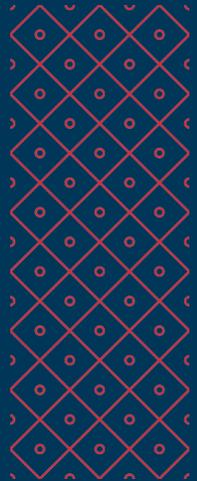
The EURO



Free movement of capital contributes to the introduction and strengthening of the European currency and European Monetary Union

The euro is the most tangible proof of European integration – the common currency in 19 out of 27 EU countries and used by more than 300 million people every day.

Euro coins, banknotes
European Central Bank



Chapter 5

Conclusions



- 1) What is movement of capital? (Examples)
- 2) What are the advantages and disadvantages associated with the free movement of capital?

Essentials:



FMC – fundamental freedom

The youngest

The broadest

Erga omnes (towards all – only freedom going beyond borders of EU)

All restrictions prohibited; but a lot of exceptions

Direct effect

Complete liberalization of capital movements is a precondition of the implementation of the other 3 freedoms.

Additional case law: https://finance.ec.europa.eu/system/files/2018-11/160223-guide-case-law-free-movement-capital_en.pdf



Literature

- Barnard, C. (2025) – The Substantive Law of the EU: The Four Freedoms (8th ed., OUP)
- Jaeger, T. (2021) – Introduction to European Union Law: Foundations, Institutions, Enforcement, Internal Market Rules (1st ed., Facultas)
- Sufrin, B., Dunne, N., Jones, A. (2023) – EU Competition Law: Text, Cases & Materials (8th ed., OUP)



The project “ESF+ na UK“, reg. no. CZ.02.02.XX/00/23_022/0008957,
is supported by the [Programme Johannes Amos Comenius](#).

Faculty of Law
nám. Curieových 901/7
116 40 Prague 1
www.prf.cuni.cz

 **Charles University**

