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Introduction

At start there was an idea of unified Europe without wars, functioning for the prosperity and well being of its citizens. It was not easy achieving such noble goal but even through some complications and hardships it eventually succeeded and European Union was created.

The greatest achievement of the European Union is its internal market. It is an area without internal borders securing free movement of persons, goods, services, capital and payments. Member states had to approximate their national legislature to be in order with the one of European Union thus liberalising the market and creating this area. There is a huge story behind liberalising the market but it is remarkable what has been achieved. Most important is that this has not been done in order for some privileged small group of people to gain power and poverty, but in fact it has been done for the well being of the citizens of the European Union and it has direct effect on their lives.

Internal market of the European Union is built on the pillars which are the fundamental freedoms. Freedom of movement of goods, persons, services, capital and payments. In this thesis I am going to focus on of these freedoms and it is freedom of movement of capital and payments. This freedom has been for the long time neglected. It served mostly as supplement for the other freedoms. Its significance has increased only in the last decade when the globalisation advanced and the international element has become part of our ordinary lives. In this thesis we are going to focus on the objective of this freedom in forming the internal market, on what is capital itself. We are going to focus also on its unique property opposed to other freedoms, which is its relation to third countries. At the end we will try to explain something about the current topic of abusing such freedom in form of money laundering and try to show how the European Union fights against it.

1. Definition of Capital and payments

1.1 Understanding the term capital

One of three (some sources state four) production factors, which are inserted into production to create the final product, is the capital. It can be of either tangible or intangible nature. Usually referred to as secondary capital, ie productive capital. It is the result of two primary factors of production (labor and land), it is not consumed, and re-enters production repeatedly. Furthermore, we divided it into circulating and financial capital. Here we can include, for example, bank savings, securities etc. It also has the form of fixed capital, which is consumed sequentially rather than simultaneously, and include, for example, buildings, machinery and so on. Then it's circulating capital, which is consumed once, for example, work in process, production, stocks and so on. Capital may be also investment capital and human capital. Under the investment capital can be included bulk savings to be converted into investments. Human capital is about, for example, investment in education of workforce. The prize is a return of capital or interest. According to the modern economy theories under the term capital we understand the notion of equity of capital goods, otherwise known as the real capital, ie goods that are not intended for consumption but for further production, such as buildings, machinery, equipment, patents and inventions, goodwill, reputation etc[1].

1.2 Understanding the terms payment and money

"Payment transfer is the most common means of payment to settle the asset or liability[2]". The payment may be performed by:

- Currency
- Bank payment
- Money remittance (combination of currency and bank payments)

Payment is actually providing any means of payment (most often it is money) to another entity for goods or services.

Money is the holding or goods that serve as a means of exchange for goods and services, performing the role of general equivalent drafted to the market. As a further

[1] Vladimír Baláž, *Kapitálový trh Európskej Únie* (vydavateľstvo VEDA, 1997)
[2] http://www.businessdictionary.com/definition/transfer-payment.html

means of payment which are used mainly in the past when there were no more money was used barter, which is direct replacement product for the product[3]. Money can act as either:

- Means of exchange
- Unit of account
- A store of value

1.3 Capital market and money market

Capital market is characterized by that, here meets supply and demand for long-term money, which are actually investment and marketing money and it is specific because you meet supply and demand for short-term money, which is actually money for exchange for goods or services[4].

"Capital market as part of the financial market serves not only to gather financial resources, but also their sustained and effective redistribution in capital investment". This means that the capital market serves not only to gather financial resources, such as capital and money but also to be divided into tangible or intangible capital, for example, in buildings or on research and development and so on. Capital market trades securities with a maturity of more than one year, or with those that have not a well-defined maturity. It is intended mainly to finance long-term investments by businesses, governments and households. Financial instruments range from small loans to millions in loans[5].

The capital market can be divided in different ways. In terms of the organization:

- Organised
- Disorganised

According to the issue of securities:

- Primary market
- Secondary market

In terms of time:

- Prompt

[3] Vladimír Baláž, *Kapitálový trh Európskej Únie* (vydavateľstvo VEDA, 1997)
[4] http://economictimes.indiatimes.com/definition/capital-market
[5] Veronika Piovarčiová, *Teória Kapitálového Trhu* (vydavateľstvo Wolters Kluwer Iura Edition, 2004)

- Terminated
- Optional[6]

In the money market business is made of short-term securities and loans due within one year. The money market is thus intended as opposed to the capital market mainly to provide short-term loans. One of its main tasks is to finance working capital and provide funds to governments. It also provides financial contributions for the purchase of securities or commodities. In contrast to the capital market there is no stock exchange.

Money market can be divided into:

- Discount market
- Interbank market
- The Inter market with commercial papers
- Market with trading in securities of autonomous regions
- Market with depositary receipts[7]

[6] Vladimír Baláž, *Kapitálový trh Európskej Únie* (vydavateľstvo VEDA, 1997)
[7] Veronika Piovarčiová, *Teória Kapitálového Trhu* (vydavateľstvo Wolters Kluwer Iura Edition, 2004)

2. Characteristics of capital market and money market in EU

2.1 Subjects of the capital and money market

Capital market consist of these subjects: Businesses, insurance companies, banks, asset management companies, public sector bodies, international and supranational institutions, as well as population. Money market consists of these subjects: Central and commercial banks, investors and the public sector[8].

Entities can act either as creditors or as debtors, but also as intermediaries. Creditor is an entity that may require from the other entity (debtor) a certain performance. Debtor is a person who is in direct relation to creditors. It undertakes to pay off the funds that he has borrowed. Intermediaries are financial institutions that create a financial document that they do business with on the market[9].

Actors on the capital market can have two positions, namely:

- Issuer - legal or natural person who has issued, produced, or decided to issue securities pursuant to legal Act
- Investor - also called a shareholder is a person who owns a security, through which it will have the right to participate in management of the company, profits and liquidation proceedings upon its expiry[10].

2.2 Investment instruments of capital market

Classical instruments of the capital market are:

- Shares
- Bonds
- Units
- Financial derivatives

From a legal point of view, shares are associated with the rights of a shareholder to participate in management, the company's profits and the liquidation proceeds upon its expiry.

[8] http://www.clearias.com/financial-market-money-market-and-capital-market/
[9] http://finanza.sk/aky-je-rozdiel-medzi-dlznikom-spoludlznikom-a-rucitelom
[10] http://www.clearias.com/financial-market-money-market-and-capital-market/

From an economic point of view shares for a joint stock companies are the main source of capital acquisition. Investor has the right to receive cash flow stemming from dividends (profit sharing) and also has the right to sell shares. We divide shares in to different categories[11].

Shares by the way of issuing:

- Certified
- Uncertified (dematerialized)

According to the method transferability:

- Issued on the bearer
- Issued on the name

According to the scope of rights and obligations:

- Common shares
- Preferred shares
- Employee shares[12]

Bond is sometimes called obligation, from legal point of view it is security, which is creating the right of a person (the issuer) that issued the bond for repayment of amount in nominal value of the bond at the date of redemption and payment of the proceeds to the owner (holder) of the bond. From an economic point of view the holder has the right to request the cash flow of a bond that has a coupon format. Bonds could be for example: bonuses, interest, etc[13].

Units are securities which gives the owner the right to participate in the assets and income of the mutual fund. Unitholders unlike shareholders are not entitled to participate in the management of mutual funds. Revenues are generated from income from securities[14].

Financial derivatives are securities that are the result of development of financial markets. Arose sometime between the 20th-21st century as a result of innovation of financial instruments. They are derived from underlying assets such as shares or by mortgages. A financial derivatives are: options, swaps, forwards, futures, credit

[11] http://www.businessdictionary.com/definition/share.html
[12] Ján Lisý *Ekonómia* (vydavateľstvo Wolters Kluver, 2016)
[13] http://www.investopedia.com/terms/b/bond.asp
[14] Ján Lisý *Ekonómia* (vydavateľstvo Wolters Kluver, 2016)

derivatives and other derivatives. Interesting to derivative transactions is that, that each time lapse between conclusion of the trade and its settlement[15].

2.3 Investment instruments of money market

Basic instruments of money market are:

- Treasury bills
- Depositary receipts
- Commercial securities
- Bills of exchange

Treasury bills are securities issued to cover the state budget deficit and are payable only to a few weeks. Are negotiable based discount and issued through auctions or through OTC trades. Depositary receipts are securities that contain proof of financial means in foreign or local currency. There must also be stated maturity and yield. They are not traded on a public market, but only transferable to another person, but only if it is made out to the bearer. They are issued by commercial banks, which use them to obtain short-term liquidity. It is not possible to trade commercial securities on the secondary market. They are issued by particularly large companies. When interest rates falls also falls their yield, which is mainly for the benefit of the issuer, which can gain credit from banks. When interest rates are rising, increasing the yield and therefore businesses trying to raise funds mainly through bank loans. Bills of exchange are documentary securities of the evidence by which the owner can claim against the issuer bills to pay for the bill. The note is a debt security. It makes the debtor obligation to pay the bill for a sum of money, which is listed on the bill[16].

[15] Mohammed Abdul Imran Khan, Syed Ahsan Jamil, Syed Azharuddin *Basic Finance* (Shabdadan Publication, 2015)
[16] Fabozzi, Frank J., Steven V. Mann, and Moorad Choudhry *The Global Money Markets* (John Wiley and Sons, 2002)

3. Internal market of the European Union

One of the reasons why countries wants the to join the European Union is the single internal market. It is one of the greatest achievements and goals of creating an area of freedom of trade and movement. Single internal market is thus the basis for European integration and should serve to create a place where good economic relations across the EU will be implemented. The main advantage of it is on the one hand a number of sellers, so a wider range from which the buyer may choose, on the other hand several buyers, thus more opportunities to sell. Therefore there have been created the four freedoms, namely the free movement of goods, capital, people and services. These four freedoms under the Lisbon Treaty makes special provisions of the Treaty on the Functioning of the EU, which determines the single market as an area without internal borders. Their common feature is the elimination of the economic protection of the domestic market between Member States. Besides eliminating tariffs, quotas and measures having equivalent effect in trade is also prohibited discrimination, so all companies and citizens must be treated equally[17].

In order to create a single EU internal market, it was necessary to remove legislative, and technical and administrative obstacles which prevents movement between EU member states. This contributed to the fact that from 1992 to 2008 millions of jobs were created and there was also an increase in the economic growth. By opening the possibility to freely do business in the EU it also supports the competition, enabling them to reduce prices and offer also extends to consumers. The EU is trying to make sure that under the freedoms consumer protection and environmental sustainability is not jeopardized. In several areas, however, some obstacles were left on the ground to not jeopardize the internal market[18].

Some EU countries have retained the original national tax system, the service sector, which is lagging behind the market of goods, as services in some countries are often utilized as the goods sector. In some countries there is still an isolated domestic market for financial services, transport and energy; It was allowed to leave electronic

[17] Friedl Weiss, Clemens Kaupa *European Union Internal Market Law* (Cambridge University Press, 2014)
[18] https://europa.eu/european-union/topics/single-market_en

commerce on national level, which is faster than on the level of EU. Across the EU qualifications, diplomas, professionals should be recognised[19].

3.1 Free movement of persons

Free movement of persons means to move and settle freely in the EU area. It is the basis for EU citizenship, which was listed in the 1992 Maastricht Treaty. First, under the Schengen Agreement it represented only the removal of internal borders for certain states. At present, the free movement of persons is managed under Directive 2004/38 / EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States. But there are still many obstacles to the free movement of persons within the EU[20].

Under the pillar of free movement of persons we can now classify the free movement of workers and right of establishment aswell.

Free movement of workers is regulated by Art. 45-48 TFEU. A prerequisite for the exercise of this freedom is the principle that must treat all the workers and there is a prohibition of discrimination on grounds of nationality. This freedom concerns the workers who live in at least one EU member state. It does not apply to persons outside of these countries. Also it applies to job seekers which are given certain rights to remain for a period of time in the EU country while they are actively seeking for a job[21].

The right of free establishment is governed by Article 49-45 of the TFEU, which provides that any self-employed person has the right to found a company with no regards as to what is the legal status in another Member State under the same conditions as the person of the another state. This concerns the economic activities of the person in the other country. This right is governed by Article 49-45 of the TFEU[22].

Once there was a problem to find a job in foreign countries, because some Member States did not recognize qualifications achieved in the country. In some professions, the requirements set out by the countries themselves, which makes it very difficult for freedom of movement for workers. Recognition of qualifications in other

[19] https://europa.eu/european-union/topics/single-market_en

[20] http://www.europarl.europa.eu/RegData/etudes/fiches_techniques/2013/020103/04A_FT(2013)020103_EN.pdf

[21] Friedl Weiss, Clemens Kaupa *European Union Internal Market Law* (Cambridge University Press, 2014)

[22] Friedl Weiss, Clemens Kaupa *European Union Internal Market Law* (Cambridge University Press, 2014)

Member States regulates Art. 53 TFEU, which is essential for the implementation of recognition of diplomas, certificates and other necessary documents[23].

3.2 Free movement of goods

Free movement of goods is the first and fundamental pillar of the internal market. Its rules are enshrined in Articles 28 to 37 TFEU. The main condition for free trade between EU countries is to remove all barriers concerning buying and selling goods. The treaty achieves this goal through these instruments:

- A customs union, where are prohibited all the customs in trade between member states and common tariff is established in relation to trade with third countries. Article 30 TFEU is very important because it prohibits any duties or charges that have equivalent effect on trade between Member States.
- Restriction of taxation which is discriminatory, on goods imported from other Member States
- Restriction of all quantitative restrictions and measures having equivalent effect on imports and exports between Member States.

Some measures restricting free movement of goods can be justified based on the Treaty provisions or based on the case law of ECJ.

All the articles apply regardless of nationality of traders. Also these articles apply on the movement of goods to third countries if those goods originated in the EU or the goods that were imported from third countries and are now circulating in the EU market[24].

The definition of goods by the court is: "goods are products that can be valued in money and which are capable, as such, of forming the subject of commercial transactions"[25]. However this definition have certain problems because some products are really hard to classify and thus this cannot be applied as a criterium of defining goods.

[23] http://www.sbagency.sk/sites/default/files/volne_poskytovanie_sluzieb_eu.pdf
[24] Friedl Weiss, Clemens Kaupa *European Union Internal Market Law* (Cambridge University Press, 2014)
[25] Commission v Italy 7/68 [1968] ECR 423

3.3 Free movement of services

Through this third freedom any subject of EU law can temporarily provide sales services in a Member State other than that in which the person resides, under the same conditions as nationals of other EU states in a concession which had been issued in the Member State in which It has its registered office. Free movement of services is adjusted on the basis of Articles 56-62 TFEU.

Article 56 TFEU is prohibiting any restrictions placed on the free movement of services. This was broadened by case law not only to provide but also receive services. Article 57 TFEU provides us with with a definition of services. A service is considered to be all activities which are renumerated, unless otherwise modified. Under the term services are classified mainly crafts, commercial, industrial activities and activities of the professions. Thanks to the article 59 TFEU measures of secondary law are authorised to liberalise providing of services. Important is article 62 TFEU because some provisions applicable to the freedom of establishment may also apply to freedom of providing and receiving services most importantly with the exceptions on grounds of excersising public authority, protecting public policy, security or health[26].

[26] Friedl Weiss, Clemens Kaupa *European Union Internal Market Law* (Cambridge University Press, 2014)

4. Free movement of capital and payments

Free movement of capital is one of the fundamental freedoms of the European Union, while it is also an important tool of the internal market. The importance of this freedom was first highlighted by the Court in *Casati*[27] case where it was identified as one of the basic freedoms of the Community, which made the free movement of capital to be on the same level as other fundamental freedoms, ie free movement of goods, and others. In particular the free movement of goods which is considered to be the most important, what can be concluded mainly due to the large amount of significant case law (*Dassonville*, *Cassis de Dijon*, etc.). Despite the fact that free movement of capital was already defined in the Treaty of Rome, it lacked more deep specification by secondary legislation and case law. Free movement of capital has long been considered as additional freedoms, that was used in the context of the other freedoms. After all, the transfer of capital is a prerequisite for other freedoms. So the freedom of capital movements affects all other freedoms, which distinguishes this freedom from others. Other freedoms do not overlap with each other. At the above-mentioned judgment (*Casati*) gave the free movement of capital a fundamental freedom status.

Free movement of capital and payments is defined in the Treaty negatively, therefore it is not defined what is to be done to implement it, but there is a general prohibition on measures which can limit it. Generally this issue is addressed by Article 63 TFEU and reads as follows:

1. "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.

2. 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"[28].

Similar to the free movement of goods, the Treaty does not specify the term restrictions so it is up to the Court of Justice to address this issue in its case law. In this context, we can use the analogy of broad dassonville formula of the *Dassonville*

[27] Casati 203/80

[28] Article 63 of *Treaty on fuctioning of the European Union*

decision which ruled on all of which can be considered as restrictive measures, especially so, "*All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade are to be considered as measures equivalent to quantitative restrictions*[29]*."* So these are measures that could, directly or indirectly, actually or potentially, restrict the free movement of capital. Ineligible are also short-term measures, or those that have only a transitory nature.

The most common measures by which States hindered the free movement of capital and payments include:

- "Control of the movement of foreign exchange
- Advertising ban on foreign capital products
- Requirements that the majority shareholders of certain specific undertaking may be only domestic entities; also the unacceptable measures restricting holding of shares which otherwise restrict the possibility to participate in the administration or in its control
- Special shareholder rights in privatized state companies (golden shares)
- Restrictions on foreign securities dealers for the acquisition of shares of domestic banks
- Exclusion of residents from acquiring foreign securities
- Unequal standards of investor protection in different Member States
- Restricted access to the stock market by imposing conditions for obtaining licenses or permits for access to the stock market or to issue bonds, investment funds and other by financial institutions"[30].

Such definition is based on the case law. For example in case *Bordessa* Spain required prior approval for banknotes in transit across their borders. This case falls under the control of the movement of foreign exchange, where approval was necessary if it was a cross-border transfer a higher amount as determined by law. The Court held that such a measure constitutes a restriction on the movement of capital because it is not following the objective which is a condition for imposing such measures. The aim here should be to prevent such illegal activities within the meaning of the directive such as

[29] Dassonville 8/74
[30] Viliam Karas, Andrej Králik *Právo Európskej Únie* (C. H. Beck, 2012)

tax evasion, money laundering, drug trafficking and terrorism[31]. Interesting is the direct effect of provisions of the Directive which states: "Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States"[32]. The Court's answer to the preliminary question of the national court so that this provision is precise and unconditional, it does not require further implementation, and therefore has direct effect. This judgment put movements in foreign exchange under the protection of free movement of capital freedom[33].

A unique feature of this freedom is that it includes third countries, the main difference between the freedom of the Member States and Member States and non-member countries is that the movement outside of member states has greater flexibility in terms of exceptions to the free movement of capital and payments .

In the case case *Skatteverket*, a Swedish national made his payment for services through a company in bitcions. A Swedish national authorities took this to court that by this measure he avoids tax (VAT). But under the Swedish law transactions for transferring currency to virtual currencies and selling them to clients are exempt from VAT since there is no issuer etc. and other costs rise in order for the transfer. The court ruled that those services are indeed exempt from the VAT and providing such services is indeed within the scope of the fundamental freedom. Similarly, it is also in other cases, where the Court had to acknowledge that it is a measure which prevents the free movement of capital and payments[34]. Member States are in their ingenuity very creative, and always are trying to find a way to circumvent the current treatment. Therefore, it is already in this field (in addition to other freedoms) many case law, and there is still more to come.

[31] Joined cases C-358/93 and C-416/93
[32] Council Directive 88/361/EEC article 1
[33] C-358/93
[34] C-101/05

5. Legislation on free movement of capital and payments

5.1 Primary Law

In the primary law is the free movement of capital and payments provided for in Article 63 of the Treaty on the Functioning of the European Union. In it, we can find the complete liberalization of that freedom. It is a key provision. The nature of primary law follows its primacy over the national law of each Member State and its direct effect. Direct effect was finally determined in the judgment *Sanz de Lera*, "Article 73b (1) of the EC Treaty (now 63 TFEU) provides a clear and unconditional prohibition for which there is no need for implementing any measures"[35]. It means that the Treaty provisions themselves produce effects - rights and obligations. The obligation is evident on the part of the state, the question is whether this provision also has direct horizontal effect. Although the horizontal effect of Article 63 TFEU has not yet been confirmed, it is not excluded that the European Court of Justice will confirm that Article excludes not only the restrictive measures taken by Member States but also any restrictive measures by private individuals. In addition to this general prohibition in primary law, the founding treaties regulate exceptions to that prohibition. They are defined by their nature in the various Treaty provisions. Articles 64 up to 66 TFEU in the chapter on free movement of capital, then Article 215 TFEU (when the limitation has the role of sanctions against third countries), and Articles 143 and 144 TFEU, which allow the introduction of exemptions on account of difficulties in balance of payments. Further, primary law includes individual exemptions under protocols to the Accession Treaties[36].

Rimbaud

CJEU in this case dealt with the issue of free movement of capital in relation to the EEA Member States. At issue is a tax on the commercial value of immovable property owned by legal persons in France.

[35] Joined cases C-163/94, C-165/94 and C-250/94
[36] Viliam Karas, Andrej Králik *Právo Európskej Únie* (C. H. Beck, 2012)

Facts:

The company Rimbaud was a company whose management was located in Liechtenstein. Rimbaud owned property located on French territory. French legislation provides that a legal entity with ownership rights over immovable property in France, whose head office management is situated in another EU Member State or in a country which has with France concluded an agreement on administrative assistance to combat tax evasion and avoidance are exempt to the obligation to pay an annual tax of 3% of the market value of such property. Liechtenstein is certainly one of the EEA Member States, but it is not in the EU. Therefore, Rimbauds priority obligation is to pay tax on the market value of immovable property situated in France. The French tax authorities were gradually recovering from Rimbaud disputed tax for the years 1988 to 1997 and then from 1998 to the 2000. Rimbaud was denied a request for exemption from the obligation to pay the tax. French tax administration justified its decision to the absence of a bilateral agreement between France and Liechtenstein on administrative assistance to combat tax evasion and avoidance or a contract containing a clause on non-discrimination. In the view of Rimbaud, however, such a decision is contrary to the free movement of capital guaranteed by Article 40 of the EEA Agreement, which provides that under the provisions of this Agreement, there are no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in a Member State of EC or the state of the European free trade association as well as there is no discrimination on grounds of nationality or place of residence of the parties or the place where such capital is invested[37]. Rimbaud appealed against that decision, which was rejected, and therefore appealed to the Court of Appeal. Action against tax authorities was denied and the court ruled against it. Rimbaud thereupon appealed to the Court of Cassation which stayed proceedings and referred to the ECJ the following questions: "Does Article 40 of the EEA Agreement preclude legislation such as that imposed by Article 990D et seq of the General Tax Code, as amended, which from the tax of 3% of the market value immovable property situated in France exempts companies established in France and that in case of a company based in a country that is part of the EEA, but is not a member of the European Union, makes this exemption conditional to existence of a agreement on administrative assistance concluded between

[37] http://ec.europa.eu/dgs/legal_service/arrets/09c072_en.pdf

the French Republic and that State in order to combat tax evasion and avoidance or to a fact that, under a treaty clause containing prohibition of discrimination on grounds of nationality should not be those legal persons taxed more heavily than companies established in France"[38]?

About the Question:

At this point, we would like to point out to the reader's attention the fact that in a relatively short period of time, the case *Rimbaud* was second in legal proceedings, in which the Court addressed the issue of EU restrictions on the free movement of capital by French tax treatment of real estate. In its judgment in the case of *Elisa*[39], from October 11, 2007, the CJEU ruled that in the event of transfers of capital between EU Member States, where between them there is a system of exchange of information and mutual assistance in the field of direct taxation, you can achieve the objective of combating tax avoidance with milder measures than those laid down by controversial French legislation. Response to that judgment was the change in French legislation for the purpose of non-discrimination of persons from other EU Member States. But, may the conclusions relating to the movement of capital between EU Member States apply to EEA Member States? According to the Advocate General Nill Jääskinen difference at the level of the legal framework for tax cooperation allows different treatment in relations between EU Member States with each other and the relationship between EU Member States on the one hand and the EEA countries on the other[40]. It is also necessary to take into account the arguments of the French, which considers the contested legislation to be necessary in the fight against tax evasion through a legal person having ownership of real estate in France, but its seat of management in the territory of the country which has not concluded with France an agreement on administrative help in the fight against tax fraud and evasion. The absence of such administrative agreements makes it impossible for the French tax authorities to obtain all the necessary information from the tax authorities of Liechtenstein. ECJ pointed out that the French tax rules do not allow companies which are not exempt from paying

[38] Paragraph 11 in C - 72/09
[39] C – 451/05
[40] Paragraph 65 of Advocate general proposal in C - 72/09

property tax to keep records of all required documents that the French tax authorities deem necessary. The consequence of that legislation is the fact that the companies concerned are not allowed to demonstrate that their objective is not tax evasion. European Court of Justice has in the judgment in *Elisa* recommended to the French Government adoption of less restrictive measures to achieve the objective of effective fight against tax evasion. While the facts of the case, *Elisa* apply intra-EU, the legal context is different in *Rimbaud*. For Liechtenstein, which is not an EU Member State is not Directive 77/799 on mutual assistance between Member States in the field of direct taxation and taxation of insurance binding. French tax authorities are therefore not able to obtain the necessary information to carry out an effective check on the veracity of information provided by the company[41]. In the opinion of the Court of Justice of the EU the tax legislation reduces the attractiveness of investment in real estate in France, which constitutes a restriction of the free movement of capital. Such restriction is prohibited by Article 40 of the EEA Agreement. The Court of Justice of the EU added that such restriction is justified by the pressing concerns of protecting the public interest, in combating tax evasion and the need to ensure the effectiveness of fiscal supervision[42].

Judgement:

From the judgment in this case we can assume that Article 40 of the EEA Agreement does not preclude national legislation at issue in the main proceedings, which exempts the obligation to pay tax from the market value of immovable property of companies situated in the territory of an EU Member State, and in the case of companies established in the territory of a third country, which is part of the EEA Agreement makes that exemption conditional to existence of a convention on administrative assistance agreements between Member States and that third State for the purpose of combating tax evasion and avoidance or to the fact that under the agreement including a clause prohibiting discrimination on grounds of nationality, those legal persons may not be taxed more heavily than companies established in a Member State. *Rimbaud* demonstrates the consistency of the ECJ case law on matters of mutual assistance, and also notes the different legal framework that exists between the EU Member States on

[41] Paragraphs 44-50 in judgement of C - 72/09
[42] http://ec.europa.eu/dgs/legal_service/arrets/09c072_en.pdf

the one hand and third countries on the other. ECJ stressed the need to combat tax evasion. To avoid jeopardizing the effective tax supervision potentional restriction of excersising one of the fundamental freedoms is possible[43].

5.2 Secondary Law

To a large extent, the issue of free movement of capital is laid down in secondary law, whether by regulation or directive. In this respect, it was and still is important the Council Directive of 26 June 1988 implementing Article 63 of the TFEU. Its importance was confirmed in numerous decisions. Its importance is really great because it defined what should be understood by the term capital movement. Their vastly comprehensive calculation is outlined in the Annex to this Directive. The Court has also confirmed the direct effect of certain provisions mainly its first article, which states: "Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I". This provision follows a similar ban on restrictions which is in Article 63 TFEU, but it is more developed because it refers to Annex which already quite accurately listed the cases in which there may be restrictions on free movement of capital and what is a capital movement. Whether there is a restriction on the free movement, still will have to be probably subject to review by the Court[44].

Other sources of secondary legislation on the free movement of capital and payments include:

- Council Directive of 13 February 1989 on the obligations of branches of credit institutions and financial institutions established in a Member State having their head offices outside that Member State regarding the publication of annual accounting documents
- Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of application of legislation adopted by a third country outside its

[43] https://www.law.qmul.ac.uk/docs/staff/ccls/oshea/52169.pdf
[44] Council Directive 88/361/EEC

territory and from the effects of these measures on the foundation of or resulting there from

- European Parliament and Council Directive 97/9 / EC of 3 March 1997 on investor compensation schemes
- European Parliament and Council Directive 98/26 / EC of 19 May 1998 on settlement finality in payment and securities settlement systems
- Commission notice on technical adaptations to the method for setting the reference and discount rates Text with EEA relevance.
- Council Regulation (EC) No. 2488/2000 of 10 November 2000 maintaining a freeze of funds in relation to Mr Milosevic and persons associated with him and repealing Regulation (EC) No. 1294/1999 and. 607/2000 and Article 2 of Regulation (EC) No. 926/98
- Council Directive 2001/86 / EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees
- Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)
- European Parliament and Council. 2002/47 / EC of 6 June 2002 on financial collateral arrangements
- Council Directive 2003/48 / EC of 3 June 2003 on taxation of savings income in the form of interest payments
- Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation
- Directive of the European Parliament and Council Directive 2005/60 / EC of 26 October 2005 on the prevention of exploitation of the financial system for money laundering and terrorist financing
- Regulation of the European Parliament and Council Regulation (EC) No. 1889/2005 of 26 October 2005 on controls of cash in cash entering or leaving the Community
- Commission Decision of 4 December 2006 on the exploitation of information prepared under internationally accepted accounting standards issuers of securities of a third country

- European Parliament and Council Directive 2007/64 / EC of 13 November 2007 on Payment Services in the internal market, amending Council Directives 97/7 / EC, 2002/65 / EC, 2005/60 / EC and 2006/48 / EC and repealing Directive 97/5 / EC
- Guideline of the European Central Bank of 1 August 2007 on monetary statistics and financial institutions and markets
- Commission Decision of 12 December 2008 on the Use of national accounting standards to certain third countries and International Financial Reporting issuers of securities in third countries to prepare their consolidated financial statements
- Regulation of the European Parliament and Council Regulation (EC) No. 924/2009 of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No. 2560/2001
- Regulation of the European Parliament and of the Council (EU). 260/2012 of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euros and amending Council Regulation (EC) No. 924/2009

An important particularly in this field was Directive of the European Parliament and Council Directive 2004/39/EC of 21 April 2004 on markets with financial instruments and Directive 2006/49/EC of 14 June 2006 on the capital adequacy of investment firms and credit institutions. The first directive gave obligation on Member States to create universal conditions for companies that take place in the provision of investment services. Its aim was to create a regulatory system that covers all the financial instruments available to clients of financial institutions. The Directive defines a set of measures and procedures that financial institutions are obliged to observe in the provision of financial services and instruments. The basic duties include:

- Categorization of clients, financial institutions pursuant to this Directive shall assign clients into three groups (retail clients, professional clients, eligible counterparty). After listing the client in the relevant category, the directive defines the content and scope of information which must be given by financial institution the start of the operation itself.
- Testing the suitability and adequacy of financial instruments for clients. This means finding the information provided by the financial institution assesses the

particular financial product, its suitability being offered to consumers in terms of investment experience.

- Providing information to clients. This obligation establishes the obligation of financial institutions to provide information to client about the company, financial products, risks, charges, form of deposit protection, rights and obligations of the client.
- Execution policy (obligation to take all possible measures in order to ensure the best effect to achieve customer satisfaction)

The aim of this Directive is to improve market transparency in the services offered in the financial markets, improve the protection of investors in particular retail clients, to create a more efficient capital market, to create same conditions in investment services across all Member States of the European Union, to encourage competition and to raise awareness to clients in connection with the provision of investment services and ancillary investment services[45].

The second directive, Directive on capital adequacy of investment firms and credit institutions, sought to harmonize the rules for the marketing of investment firms. Another important feature was to establish a system to monitor the risks and protect clients. Its main goals were also the establishment of harmonized conditions for investment banking, establishment of harmonized conditions for own funds and funds of the investment companies, establishment of a uniform system of conditions for capital investment companies, definition of risks, removal of barriers between the general and investment banking and unification of minimum requirements for the creation of capital buffers[46].

5.3 The scope of the provisions of the free movement of capital and payments

5.3.1 Material Scope

The concepts of capital and payments are not directly specified in the treaty, it was therefore necessary to adopt a document which would give more precise guidance on what is meant by the term capital movement. Capital movements are set out in Annex 1 to Directive 88/361 of 24 June 1988 implementing Article 67 of the Treaty (subsequently repealed and replaced by Article 56 of the EC Treaty, and now renamed

[45] Council Directive 2004/39/EC
[46] Council Directive 2006/49/EC

63 TFEU). There are different types of capital movements divided and demonstratively enumerated. In terms of this Directive, capital movements relates to:

- "all the operations necessary for the purposes of capital movements: conclusion and performance of the transactions and related transfers. The transactions are generally between residents of different Member States although some capital movements are carried out by one person on his own account (eg. Transfers of assets belonging to emigrants)
- operations carried out by any natural or legal person [1], including operations related to assets or liabilities of Member States or other public administrations and agencies, if the Article 68 section 3 provides otherwise
- Market participants have access to all the financial techniques available on the market for the purpose of carrying out the operation. For example, the concept of acquisition of securities and other financial instruments covers not only spot transactions but also all the dealing techniques available: forward transactions, the option trades or trades with warrants, swaps (exchanges) other assets, etc. Similarly, the concept of operations in current and deposit accounts with financial institutions is not only opening of accounts and placing them on finances, but also the future foreign exchange transactions regardless of whether they are intended to cover the foreign exchange risk or to take a foreign exchange position
- operations to liquidate or assign assets built up, repatriation of the proceeds of liquidation thereof [2] or immediate exploitation of these results in the context of Community obligations
- operations to repay credits or loans[47]"

The Directive goes further in the specifications of different types of capital movements. They are divided into:

"I - Direct investments

· Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.

[47] Council Directive 88/361/EEC

· Participation in new or existing undertakings with a view to establishing or maintaining lasting economic links.

· Long-term loans with a view to establishing or maintaining lasting economic links.

· Reinvestment of profits with a view to maintaining lasting economic links.

· A - Direct investments of non-residents in a Member State.

· B - Direct investments made by residents abroad.

II - Investments in real estate

A - Investment by non-residents in real estate on national territory.

B - Investments in real estate by residents abroad.

III - Operations in securities, which are normally traded on the capital market

· Shares and other securities of a participating nature.

· Bonds

· A - Transactions in securities on the capital market

- Acquisition of domestic securities dealt in on a stock exchange by non-residents.
- The acquisition of foreign securities traded on a stock exchange by residents.
- Acquisition of domestic securities dealt in on a stock exchange by non-residents.
- Acquisition of domestic securities dealt in on a stock exchange by residents.

· B - admission of securities to trading on the capital market

· Placing on the stock exchange.

· Issue and placing on a capital market

- Receiving domestic trading securities in foreign capital markets.
- Acceptance of foreign securities to trading on the domestic capital market.

IV - operation in units of collective investment undertakings.

· Units of undertakings for collective investment in securities normally dealt in on the capital market (shares and other instruments of participation, other equities and bonds).

· Units of undertakings for collective investment in securities or instruments normally dealt in on the money market.

· Units of undertakings for collective investment in other assets.

· A - Transactions in units of collective investment undertakings

- Acquisition of units of national undertakings dealt in on a stock exchange by non-residents.
- Acquisition of units of foreign companies traded on the stock exchange by residents.
- Acquisition of units of national undertakings dealt in on a stock exchange by non-residents.
- Acquisition of units of foreign companies traded on a stock exchange by residents.

· B - Acceptance of units of collective investment undertakings to the capital market.

· Placing on the stock exchange.

· Issuing and placing on a capital market.

- Receiving of units of national collective investment undertakings to trading on a foreign capital market.
- Receiving of units of foreign collective investment undertaking to trading on the domestic capital market.

V - Operations in securities and other instruments commonly traded on the money market.

· A - Transactions in securities and other instruments on the money market

· Acquisition of securities and documents domestic money market non-residents.

· Acquisition of securities and money market documents of foreign residents.

· B - admission of securities and other instruments on the money market

- Placing on a recognized money market.
- Issuing and placing on a recognized money market.

· Receiving domestic securities and instruments to trading on a foreign money market.

· Acceptance of foreign securities and documents for trading on the domestic money market.

VI - Operations in current and deposit accounts with financial institutions.

· A - Operations carried out by non-residents with domestic financial institutions.

· B - Operations carried out by residents with foreign financial institutions.

VII - Credits related to commercial transactions or the provision of services, in which the resident participates.

· Short-term (less than one year).

· Mid-term (one up to five years).

· Long-term (five years or more).

· A - Loans granted by non residents.

· B - Credits granted by residents to non-residents.

VIII - Financial loans and credits

· Short-term (less than one year).

· Mid-term (one up to five years).

· Long-term (five years or more).

· A - Loans and credits granted by non-residents.

· B - Loans and credits granted by residents to non-residents.

IX - Liability, other guarantees and pledges

· A - Granted by non-residents.

· B - Provided by residents to non-residents.

X - Transfers in performance of insurance contracts

· A - Premiums and payments in respect of life insurance

· Contracts concluded between domestic life assurance companies and non-residents.

· Contracts concluded between foreign life assurance companies and residents.

· B - Premiums and payments in respect of credit insurance

· Contracts concluded between domestic credit insurance companies and non-residents.

· Contracts concluded between foreign credit insurance companies and residents.

· C - Other transfers of capital in respect of insurance contracts

XI - Personal capital movements

· A - Loans

· B - Gifts and endowments

· C - Dowries

· D - Inheritances and legacies

· E - Settlement of debts by immigrants in their previous country of residence

· F - Transfers of assets acquired by residents in the event of emigration, at the time of establishment or during their stay abroad

· G - Transfer of remittances immigrants to their country of previous residence

XII - Import and export of financial assets

· A - Securities

· B - Means of payment of every kind

XIII - Other capital movements

· A - Inheritance tax

· B - Damages (where it can be considered as capital)

· C - Restitution in case of cancellation of contracts and refund uncalled-for payments (if they can be considered as capital)

· D - Copyright: patents, designs, trade marks and inventions (transfers and payments resulting from these transfers)

· E - transfer of funds required for the provision of services (not under VI)

· F – Miscellaneous"[48].

This Directive reflects the principle of complete liberalization of capital movements between Member States. Probably the most common type of capital movements include investments with international element. In particular, the two types of investments, capital investments and portfolio investments[49].

5.3.1.1 Direct investments

Direct investments are mainly a kind of investment in the form of equity, giving the opportunity to participate effectively in the management and control of the company. Foreign direct investment is the category of international investment that reflects objective of an entity resident in one economy (direct investor) to obtain a lasting interest in an enterprise resident in another economy (direct investment enterprise). Lasting interest reflects the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence over the management of the company. In determining the existence of a direct investment relationship is in accordance with international standards using the criterion

[48] Council Directive 88/361/EEC

[49] Sideek Mohamed *European Community Law on the Free Movement of Capital and the Emu* (Martinus Nijhoff Publishers, 1999)

of 10% interest in the share capital or voting rights of the company. Important criterion in assessing the direct investment is, if it was made for the purpose of control. Control means the control of management of the company. Control criterion is important to distinguish from the portfolio investments[50].

In relation to direct investment CJEU held that a restriction on the free movement of capital may be regarded as any national measure which prohibits investors from other Member States to acquire a holding in a company above the threshold or to have expressible percentage share. Member States adopted such legislation to protect national interests and their own businesses. In Case C-357/98 (*Commission v Portugal*) CJEU stated: Regarding the prohibition to investors from other Member States to acquire more than a certain number of shares in certain Portuguese undertakings, it is not disputed, and moreover it is not disputed by the Portuguese government that it is the unequal treatment of nationals of other Member States, and will limit the free movement of capital[51].

As the restrictions of direct investment, the CJEU also incorporate the obligation of the investor to obtain a permit from the national public authority for the acquisition of shares in the target company above a certain threshold. Even if that condition is not to discriminate against investors from other Member States, ie the same also applies to domestic investors. In the same case (*Commission v Portugal*), the Court went even further and dealt also with this question. The Portuguese Government argued that the non-discriminatory treatment is thus in line with the provisions of the Treaty. The court, however, was of another opinion: "That argument can not be accepted. Article 73b of the EC Treaty (now Article 63 TFEU) provides for a general prohibition of restrictions on the movement of capital between Member States. This prohibition goes beyond the stripped discrimination on grounds of nationality between operators in the financial markets[52].

[50] https://www.ecb.europa.eu/pub/pdf/annrep/ar2015en.pdf?51b9735eed394d1acf8eecf58bb0452e
[51] Paragraph 43 in judgement of C-367/98
[52] Paragraph 44 in judgement of C-367/98

5.3.1.2 Golden Shares

Member States have sought to retain influence in privatized companies so they have started inventing different ways for it. Extended form of influence over the current framework, which recognizes the business right of partners are the specially authorized shares or so-called golden shares. Based on the case law of the CJEU we can say that these measures fall within the set of measures restricting the free movement of capital, irrespective of whether it is discriminatory or not and also whether it results from legislation or acts of private law, such as bylaws.

Important decision in this regard was C-98/01 (*Commission v United Kingdom*). The fact that the restrictions on the acquisition of shares apply without distinction to residents and non-residents does not mean that they are outside the scope of Article 56 EC (63ZFEU), because they affect the position of a person acquiring shares as such, and are thus responsible for deterring investors from other Member States from such investments and thus affect market access. A Member State which maintains in force rules limiting the possibility to acquire shares with voting rights in the company as well as the procedure requiring consent to the disposal of property of the company, to manage its subsidiaries, is failing to fulfill its obligations under Article 56 EC (63 TFEU)[53].

From the judgement: "The claim of the Government of the United Kingdom, that's what this is about is only use of mechanisms of private company law and can not be accepted. Problematic restrictions do not arise as a result of normal use of company law. Statutes BAA (British Airports Authority) should be approved by the Secretary of State according to Airports Act 1986 and that's what's happened. Under these circumstances, that Member State has acted in his capacity as a public authority"[54].

According to the case law of CJEU the rights that the Member States has in privatized companies are, in particular:

- "Law of the country (or persons controlled by him) to veto abolition, division or company mergers"[55]
- "The right of the State to veto strategic decisions regarding the company, for example disposal of business property"[56]

[53] C - 98/01
[54] Paragraph 48 in judgement of C - 98/01
[55] C - 463/00

- "Exclusion / limitation of voting rights of the private investor, if his participation in the company exceeds a certain threshold"[57]
- "Special authorizations concerning the state representatives in the organs of the company"[58]
- "The right of the state to veto changes in the incorporation documents of the company that would disturb or alter the special rights of the state in the company"[59].

European commission v Federal republic of Germany

The most famous example of a golden shares provisions codified in national law is the case *Volkswagen*[60]. Volkswagen was partially privatized in 1960. The controversial law (referred to as "VW" Act) contains two measures aimed at ensuring the impact of the Federal Government and the government of Lower Saxony (the land in which the company Volkswagen has seat). Both governments have 20% participation in the capital of Volkswagen. Currently, Germany is no longer a shareholder of that company and the government of Lower Saxony continues to keep the 20% participation. VW Act originally allowed Germany and the government of Lower Saxony to appoint two members of the supervisory board, if they owned shares in the company. According to the provisions of this Act, the voting rights of each shareholder is limited by the number of votes conferred upon 20% share in the capital. Moreover, the Act provides for a reduced VW blocking minority, which allowed minority which owns 20% of capital prevent the adoption of important decisions of the company, while the German Companies Act requires atleast 25% of ownership[61]. The European Commission considered that the provisions of the VW Act are contrary to the fundamental freedom of free movement of capital and in 2005 filed action in the EU Court of Justice against Germany for failure to fulfil its obligations. In the opinion of the Court of Justice of the EU "This situation is by limiting the possibility of participation of other shareholders in

[56] C - 503/99
[57] C - 174/04
[58] C - 58/99
[59] C - 98/01
[60] C - 112/05
[61] C - 95/12

that company with a view to establishing or maintaining lasting and direct economic links with it and facilitate effective participation in the management or control it is likely liable to deter direct investors from other Member States"[62]. In a judgment delivered in 2007, the EU Court of Justice ruled that Germany by leaving the said provisions of the VW Act in force, breached its obligations under the free movement of capital[63]. Germany subsequently canceled the first two contested provisions, but maintained in force the provisions concerning reduction of threshold of the blocking minority. According to the European Commission, Germany has infringed the free movement of capital with each of the three disputed provisions of the VW Act, so then again the Commission turned to the European Court of Justice with the requirement that Germany should be imposed with financial sanctions because of incomplete execution of the judgment of 2007. The European Commission called for the imposition of financial sanctions in the amount of 282.725,10 Euros each day for the delay from the moment of issue of judgment in 2007 until the implementation of the judgment of 2007. At the same time the European Commission proposed a fine, the amount of which would it was calculated by multiplying the daily amount of 31,114.72 euro by the number of days during which the violation continues since the judgment of 2007 until the date when that Member State terminated the infringement[64]. By judgment of 22 October 2013 European Court of Justice dismissed the action. From the opinion of the ECJ judgment in 2007 we can assume that the European Court of Justice did not find a failure to fulfill obligations arising from individually assessed provisions for impairment blocking minority threshold, but only in relation to combine this with provisions for fixing a limit of the voting rights[65].

The said measures known as golden shares are not necessarily implemented by national legislation, they may be a part of the bylaws or the Association Agreements of the shareholders.

European Commission v Portugal

The company GALP Energy, is the company that traded oil and gas

[62] Paragraph 52 in judgement of C - 112/05
[63] Paragraph 82 in judgement of C - 112/05
[64] C - 95/12
[65] Paragraph 127 in judgement of C - 95/12

Gas and was established as a public limited company, through which Portugal was involved directly in some public enterprises. The company subsequently underwent partial privatization, while Portugal has retained the 8% share capital. 7% through the company Parpublica and 1% through CGD company. By agreement CGD shareholders and other investors of the company had the right to appoint CGD director of Galp Energy, who was also a chairman of the board. Although the shareholders agreement is a private agreement to which a party is not Portugal, according to the ECJ the measures in question are attributable to Portugal. CJEU stated that Portugal acted via the CGD, as it was its sole shareholder. Furthermore bylaws of Galp Energy were developed at a time when Portugal held the majority of the share capital of the company. Portugal's national legislation on company law prohibits making the right to vote Director to a number of shares, however, the company GALP Energy constitutes an explicit exemption[66]. EU Court of Justice ruled that the right to appoint the chairman of the board creates a restriction on the free movement of capital, where such specific right derogates from general company law regulations and is established by national legal provisions only in favor of public entities. The right to appoint the chairman of board can be recognized by law as a right of a qualified minority, but it is necessary to emphasize that in this case it must be open to all shareholders and must not be reserved exclusively for the State, as this violates the free movement of capital[67].

As we have mentioned, measures known as golden shares are located mainly in the bylaws. Article 63 TFEU is applicable only if such measures can be attributed to the State, as the European Court of Justice did not confirm horizontal direct effect of this article. If the European Court of Justice upheld the horizontal direct effect of Article 63 TFEU, such decision would have significant consequences for those companies that are not under state control. From a brief look at the European business environment can be said that there are several restrictions that prevent shareholders from exercising their rights, these restrictions stem from private agreements and bylaws in the benefit of certain private shareholders. According to the Report on the application of the proportionality principle in the EU it is up to 44% of joint stock companies that have in the bylaws measures to strengthen control over the management of a certain shareholder

[66] Friedl Weiss, Clemens Kaupa *European Union Internal Market Law* (Cambridge University Press, 2014)
[67] Paragraph 59 in judgement of C - 212/09

of a joint stock company. Such measures are shares with different voting rights or veto right[68]. If the ECJ would apply equally broad definition as it applies to the provisions on the free movement of persons, by which compliance with Articles 52 and 59 of the Treaty on the Functioning of the EU are also required in cases which are not public in nature but which are designed to regulate collective or self-employment activities or services and the bylaws of the company or the shareholders agreement, would belong under Article 63 of the Treaty on the Functioning of the EU, despite the fact that these agreements could not be attributed to the State[69].

5.3.1.3 Acquiring real estate

Acquisition of real estate has been by the Directive of 24 June 1988 included among the capital movements which falls under the freedom of movement of capital. So here too there is a general prohibition from Article 63 of the Treaty "All restrictions on the movement of capital between Member States and between Member States and third countries are prohibited". This provision applies to all national provisions which prohibit or subject the transfer of property to specific conditions[70].

CJEU addressed this issue in Case C-213/04 *Burtscher*. It was about such national provision that envisaged for acquisition of title to the property of a citizen of another country, the declaration made by the acquirer. Where the later declaration has the effect of invalidity on the property transfer, with retroactive effect. The judgment of the Court: "The purpose and effect of such regime is therefore restriction on freedom of movement of capital"[71].

Member States are also in this direction very creative. Over time it emerges various specific requirements for acquiring ownership of real estate, which consisted mainly in a variety of formal obligations. For example, the declarations made in advance as in the already mentioned case. Here it was developed further, so that national legislation required by the purchaser to make a statement about what will be the acquired property used for, and in this respect was also bound by the statement. Or cases where there is obligation to obtain a permit from the national administration, as

[68] http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf
[69] Paragraph 120 in judgement of C - 309/99
[70] Article 63 of Treaty on Fuctioning of the European Union
[71] Paragraph 43 in judgement of C - 213/04

was the case for example in the case of *Salzmann*, where there was a condition for acquiring the property to get prior authorisation by the authorities. The Court stated: "Article 73b (1) of the EC Treaty (now Article 63 TFEU) precludes an administrative authorization procedure prior to acquisition of estates, such as that established by the relevant national legislation of Austria"[72].

Even in acquisition of real estates, it is irrelevant whether the measure is applied against a national of the state concerned or a citizen of another country. There is no requirement for the provisions to be discriminatory to violate the provisions of the Treaty. As was in the case *Konle*. Similarly as was in the case for restrictions on direct investments, Member States can apply only such restrictions that are strictly defined by primary law and the case law of the Court which allow states to limit the free movement of capital[73]. The issue of restrictions on the free movement of capital will be addressed below. Important to mention is that many countries when they were accessing the European Union has negotiated transitional period relating to the transfer of real estate. This transitional period is under review, three years after accession, upon presentation of the report by the Commission to the Council. A transitional period is also possible to extend, on a proposal from the Member State. The Commission decides on this proposal but its possible to extend only by a maximum of three years.

5.3.1.4 Payments

Primary treatment of the freedom of payments is established in Article 63 TFEU, paragraph 2, which states: "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". As noted above, this provision directly establishes rights and obligations thus there is no need for further implementation. This provision contains quite clear and unconditional prohibition of restrictions on payments. It must be applied without any further specifications[74].

Under the term movement of payments we can understand current payments and transfer of the payments (real money or cash in the books) by the economic units of one Member State to the economic units of another Member State, for the settlement of

[72] C - 300/01
[73] C - 302/97
[74] Article 63 section 2 of Treaty on Fuctioning of the European Union

payment obligations on transactions in the field of movement of goods, services and capital this definition implies cross-correlation of movement of payments (and capital) with other freedoms of the internal market. Freedom of payments guarantees, the prohibition of any restriction and is in principle absolute. It excludes any form of limitation, direct or indirect, and restricted are also measures with equivalent effect. Freedom payments include in particular:

- implementation of domestic fund transfers,
- implementation of cross-border fund transfers,
- issuance and use of electronic means of payment, establishment and operation of payment systems[75]

Interesting case took place before the ECJ with regard to the question on payments. In this case, the Italian legislation is set so it did not allow non-residents to export from Italy larger amount of money than was announced at the entrance to the country or that was legally acquired in Italy. Mr. *Casati* did not fulfil this obligation when he tried to export the money back to Germany he committed a crime under Italian law. The national court referred to the ECJ with a number of questions, those are the most interesting:

- Must be restrictions regarding the movement of capital provided for in Article 67 of the Treaty at the end of the transitional period to be revoked notwithstanding the provisions of Article 68?
- Does the fact that the Italian Government failed to take in to account the consultation procedure referred to in Article 73 of the Treaty in relation to Decreto Legge No. 31 of March 4, 1976, which was issued as Act No. 159 of 30 April 1976, as a violation of the Treaty?
- Is there a basic guarantee or contractual provision that guarantees to non-residents the right to re-export cash which had been previously imported and not used, even if it was changed into Italian lira[76]?

The Court has ruled on these issues so that the free movement of capital and payments is one of the fundamental freedoms of the European Community (now the European Union), together with other freedoms. It is essential for proper

[75] TICHÝ, L and collective *Evropské právo* (C.H.BECK, 2006)
[76] C - 203/80

implementation of the other freedoms. All measures must be therefore annulled which restrict the free movement of capital and payments between Member States.

It is also important to consider the difference between the movement of payments and capital movements, when it comes to payments and movement of capital. ECJ looked into this issue in joined cases *Luisi* and *Carbone*. "Transfers in connection with tourism, travelling or for the means of business, education or medical treatment constitute payments and not movements of capital, even if they are through the physical transfer of cash[77]. Thus, the Court commented on the issue on payments in the above case. In principle, however, the rules of free movement of capital and payments are very similar, and therefore in the Treaty on the Functioning of the European Union are addressed in the same chapter.

5.3.1.5 Single European payment area (SEPA)

Single Euro Payments Area (or 'SEPA' for short) is where over 500 million people, more than 20 million European businesses and public authorities can make and receive payments in euro under the same basic conditions, rights and obligations, regardless on their location[78]. SEPA was introduced by Regulation 260/2012/EC establishing technical and business requirements for credit transfers and direct debits in euros. Its purpose is to create an integrated market for electronic payments in euro, with no distinction between national and cross-border payments, and it is necessary for the proper functioning of the internal market[79].

This regulation also includes an appendix in which the technical requirements which supplement Article 5 of this Regulation. Regarding the liberalization of payments is a big step forward. In addition to the euro area countries it includes countries that have not yet adopted the euro, as well as some other countries.

5.4 Personal, temporal and geographical scope

5.4.1 Personal Scope

So the question for whom provision prohibits restrictions on the free movement of capital and payments relate and to whom on its basis incurs obligation. Prohibition is

[77] Joined cases C - 286/82 and 26/83
[78] http://ec.europa.eu/internal_market/payments/sepa
[79] Regulation 260/2012/EC

directed mainly towards the Member States and the bodies which exercise public authority, particularly in the area of capital and payments. The horizontal effect of the provisions of the ban has not yet been confirmed by the Court. But it is not excluded that in the future ECJ will confirm that Article excludes not only the restrictive measures taken by Member States but also of restrictive measures by private individuals. In this regard, however, it is important to assess by whom this ban raises some rights, so who can rely on the free movement of capital and payments. Here appears a unique feature of this freedom with respect to the other, and it is its erga omnes effect, ie so it applies also for capital movements and payments to or from third countries. Beneficiaries are:

- Nationals of Member States irrespective of their place of residence (which may be outside the Union)
- Legal entities established in a Member State of the Union
- Citizens or legal persons from non-member countries[80]

The relevant provisions of the TFEU, namely Article 63 produce direct effect, as confirmed by the Court in its decision in the case of *Sanz de Lera* "Exercise of the right reserved to the Member State under Article 73d (1) (b) is subject to judicial review, and therefore the fact that Member State is able to rely on it does not preclude Article 73b (1) of the Treaty, which lays down the principle of free movement between Member States and between Member States and third countries from which confers on individuals rights which are enforceable by them and which the national courts must respect[81].

The difference between the legal regime of free movement of capital between Member States and Member States and third countries is primarily in the fact that primary law is providing a broader range of options that will help to limit this freedom. This issue will be addressed in the chapter on the permitted exceptions to the prohibition of restrictions on the free movement of capital.

[80] TICHÝ, L and collective *Evropské právo* (C.H.BECK, 2006)
[81] Joined cases C - 163/94, C - 165/94, C - 250/94

5.4.2 Geographical scope

Treatment is the same for Member states and between Member States and third countries. Territorial application itself is not defined in the Treaty in no way, an important element is the fact that there is a European cross-border element, ie exchange across borders of at least one Member State. A complication is the fact that free movement of capital and payments is closely linked to other freedoms. As the CJEU said even in case *Fidium Finanz*, the dispute must be considered also in terms of other freedoms. The question the court asked is: "By the first question, the referring court asks whether a company established in a third country that is providing loans to citizens of a Member State may rely on the free movement of capital within the meaning of Article 56 EC or whether acquiring clients, provision and performance of such financial services is solely covered by the freedom to provide services under Article 49 and further of EC. In other words, whether such business activity falls under the freedom to provide services or freedom of movement of capital. Given that this is a company established in a third country and it is favorable for it if it could rely on the freedom of movement of capital, because it falls into the activity of third countries. The Court of Justice has coped with this issue despite the stated overlap of several freedoms, namely the freedom of services and free movement of capital. In this case it held that the capital movements occur only as a result of the provision of a service, so it is primarily about the freedom of services which is not absolute in nature (not active against non-member States). Thus, it is subject to national legislation[82].

Another important thing which is clear from this case is that as in its analysis of the relationship between those two freedoms, the Court stated that, although closely linked, those provisions were designed to regulate different situations and they each have their own field of activity. The Court has clearly stated that there was no order of priority between them and rejected the theory that the provisions concerning the free movement of services are less important than those governing the free movement of capital. Such considerations are particularly important because they are often situational where is the seemingly overlapping freedom of movement of capital, with other

[82] C - 452/04

freedoms. And given the uniqueness of freedom of movement of capital, that assessment is for a person from a third country extremely important[83].

5.4.3 Temporal scope

Temporal scope is time during which the provisions on the free movement of capital and payments takes effect. A simple question of from when, until when. Since when it is quite clear from the application of the provisions guaranteeing free movement of capital and payments. The first time such a provision was in the Treaty of Rome (1957), ie the creation treaty of the European Economic Community. But their application was problematic due to lack of secondary legislation and case law. This situation has gradually improved[84].

In terms of temporal scope it is important to mention to further address the issue of temporal scope of certain temporary restrictive measures. Member States took various measures to temporarily restrict the free movement of capital but they were contrary to primary law. The only acceptable temporary measures were those negotiated by individual states, particularly through the Accession Treaty.

5.4.4 Which fundamental freedom prevails? EU case law in cases of intra-EU and in relation to third countries

As mentioned above, in accordance with the Treaty on the Functioning of the EU, none of the fundamental freedoms generally prevails. For the first time the issue of superiority of one of the fundamental freedoms over the other freedoms was examined in the case of *Cadbury-Schwepps*. Trading company Cadbury Schwepps registered and been doing business in the United Kingdom has established two subsidiaries with majority ownership based in Ireland. Subsidiaries were established primarily for the purpose of financial management and the distribution of funds among the other branches of Cadbury Schwepps worldwide. In accordance with UK tax legislation parent company is not subject to taxation of the profits of the subsidiary at the reaching condition that its head office is located in a country with a lower level of tax burden. The parent company has an obligation to prove that the main reason, or one of the main

[83] C-452/04
[84] Treaty establishing the European Economic Community

reasons for the existence of subsidiaries established outside the United Kingdom is not to achieve a reduction of tax in the UK through the diversion of profits[85]. According to that legislation the diversion of profits would be illegal, if it is reasonable to assume that if the subsidiary, which is a member of the same group based outside the United Kingdom would not exist, the receipts would have been received by a person resident in the United Kingdom and they would be taxed by that person as a taxpayer[86]. Under that provision was the parent company obliged to pay the overdue tax profit tax in the amount of 8 638 633.54 pounds for the financial year ending 28 December 1996. Cadbury Schwepps lodged an appeal against the decision[87]. The national court, in proceedings appealed for a preliminary ruling to the Court of Justice of the EU and asked two questions. The first one asks whether Cadbury Schweppes establishment of subsidiaries in order to obtain favorable tax payment scheme such as that in the UK is abusing the freedoms guaranteed by the EC Treaty[88]. The second question regards any situation that would have existed if the European Court of Justice ruled that Cadbury Schweppes only used guaranteed freedoms effectively. In that case would it be in question that UK tax regulations are restrictive or discriminatory in relation to the freedoms guaranteed by the EC Treaty? European Court of Justice in that case held that national rules that are applied to subsidiaries owned by a parent company established in a Member State where those subsidiaries have a certain influence on their decisions and enable them to make independent decisions about their activities fall within the scope of the EC Treaty provisions on freedom of establishment.[89]

5.4.5 Eu case law in relation to third countries compared to case law in cases intra-EU

The fact that the European Court of Justice acknowledged that one of the fundamental freedoms may in a particular case prevail over any other fundamental freedom has a specific meaning to its earlier case-law relating to third countries, which thus takes on a new dimension. Given the fact that in a relatively short time the ECJ

[85] C-196/04
[86] Paragraph 11 in judgement of C - 196/04
[87] Paragraph 20 in judgement of C - 196/04
[88] Now Treaty on Fuctioning of the European Union
[89] Paragraphs 23,24,31 in judgement of C - 196/04

debated series of cases in which it was deciding on the superiority of the free movement of capital in relation to the freedom to provide services and freedom of establishment, we have decided to further pursue this topic.

Free movement of capital and payments is the only fundamental freedom applying erga omnes. This aspect of the free movement of capital and payments is an important criterion for determination of the prevailing freedom.

Lasertec

In Case 492/04 European Court of Justice asseses the compatibility of national German law with union law in the context of a third country as the parent company was located in Switzerland. ECJ reiterated that in each individual case must be taken into account the objective pursued by national law[90]. European Court of Justice in accordance with consistent case law ruled that that the German national provisions concerning ownership of controlling interest, allowing a definite influence on the decision-making activities of that subsidiary company and determining its activities fall within the scope of freedom of establishment. Any restriction on the movement of capital is merely a consequence of the inevitable restrictions on freedom of establishment. The scope of freedom of establishment is not erga omnes, so it is applicable only to citizens of EU Member States, and therefore its application in the context of third countries is excluded.[91]

Test Claimants in the Thin Cap Group Litigation

In Case 0524/04 CJEU ruled by a total, on ten preliminary questions. The dispute in the original proceedings is a dispute known as "group litigation" concerning thin capitalization and consists of several actions for restitution or for damages brought by the Company against a number of Commissioners of Inland Revenue before the High Court of Justice (England and Wales)[92]. The ECJ took inspiration for its ruling from the case *Lankhom-Hohorst* in which the court held that the provisions of the German thin capitalization rules are contrary to Article 43 of the EC Treaty (now Article 49 TFEU). Two of the main concerning issues has to be considered in the context of third countries. In deciding which of the fundamental freedoms should be applied, the Court

[90] Paragraph 19 in judgement of C - 492/04
[91] Paragraph 25 in judgement of C - 492/04
[92] Paragraph 16 in judgement of C - 524/04

of Justice has proceeded in accordance with settled case-law. The laws that apply to the holdings belonging to the company - a resident in an EU Member State with a particular impact on the decision-making activities of the company - holding falls within the scope of the provisions on freedom of establishment[93]. National provisions relating to thin capitalization only covers those situations where the parent company decides on the activities of other group companies. Given that in the case of parent companies own at least 75% of subsidiaries, should be approached with the provisions on freedom of establishment. Any restrictions on the freedom to provide services and free movement of capital are the unavoidable consequence of such freedom of establishment and do not justify an examination of the disputed tax legislation with respect to Articles 49 and 56 of the EC Treaty. Thin capitalization legislation is usually focused on a group of undertakings and applies only where the parent company provides loans to subsidiaries. Thus has some influence over the subsidiaries. In the context of third countries, the application of the provisions on freedom of establishment is excluded, as it does not have erga omnes effect[94].

Holböck

Mr Holböck, resident in Austria, holds two thirds of the share capital in a company established in Switzerland, of which he subsequently receives dividends. According to Mr Holböck national legislation relating to the taxation of dividends paid to individuals is discriminatory, since the decisive criterion for determining the tax rate is the seat of the company. If a company is established in Austria, dividends paid to individuals are taxed at half the rate but dividends paid by companies established abroad are taxed at the full rate. The disputed provisions of Austrian tax law therefore constitute unequal treatment for which there is no justification[95]. The Governments of France and the Netherlands suggested that the Austrian tax legislation should be considered only in the provisions on freedom of establishment. However, the Commission took the view that the contested legislation constitutes a restriction on the free movement of capital. First, the European Court of Justice takes into account the purpose of the disputed legislation, noting that, unlike the situation in the cases *Cadbury*

[93] Paragraph 27 in judgement of C - 524/04
[94] Paragraphs 33-34 in judgement of C - 524/04
[95] Paragraph 14 in judgement of C - 157/05

Schweppes and *Test Claimants in the Thin Cap Group Litigation*, the legislation in *Holböck* is not intended for application for participation, which confer a definite influence on the company's decisions and determine its activities[96]. ECJ concurred with Mr. Holböck at that point that the tax treatment may apply both to Article 43 of the EC Treaty concerning freedom of establishment and Article 56 of the EC Treaty on the free movement of capital[97]. ECJ subsequently reiterated that freedom of establishment applies only intra-EU. The scope of the freedom of establishment therefore do not have a situation where a citizen of an EU Member State or a company incorporated under the law of an EU Member State settle in a third country. In relation to the free movement of capital CJEU held that the contested tax legislation, which treats less favorably with foreign dividend payments constitutes a restriction on the movement of capital within the meaning of Article 56 EC, but because of the derogation of Article 57 section 1 of the EC Treaty, Article 56 must be interpreted in such a way that does not prejudice the right of Member States legislation which existed on 31 December 1993[98].

From the ECJ case law discussed above, we can deduce the following formulas in decisions that apply in different situations:

l.) Cross-border real estate purchase

European Court of Justice in its judgment in the case *Stauffer* confirmed that the free movement of capital guarantees ownership and use of immovable property. The condition of application of the provisions on freedom of establishment is to have a permanent presence of EU citizen in the host Member State and, in the case of the acquisition and possession of immovable property ensuring the active property management[99]. A necessary complement to the implementation of the freedom of establishment is the right to acquire, use or dispose of property in the territory of the host Member State. Freedom of establishment causes movements of capital[100]. In such cases, the European Court of Justice examines the applicability of the two freedoms, and should take into account the fact that freedom of establishment does not apply to

[96] Paragraph 23 in judgement of C - 157/05
[97] Paragraphs 11 and 24 in judgement of C - 157/05
[98] Paragraphs 31 and 32 in judgement of C - 157/05
[99] Paragraphs 19 and 24 in judgement of C - 386/04
[100] Paragraph 59 in judgement of C - 451/05

third-country nationals. If both freedoms are applicable, the Court must determine the prevailing EU freedom.

2) Investment income

The case law implicates that the income from investments may fall within the freedom of establishment, as well as the scope of the free movement of capital. Settled ECJ case law shows that in such cases a dominant freedom is appointed regardless of the element of third countries. If the shareholder has a definite influence on the critical activities of the company, the freedom of establishment outweighs the freedom of capital movements.

3) Financial Services

In certain specific cases, national regulations may apply to the freedom of establishment as well as the free movement of capital, so it is necessary to determine the prevailing freedom[101].

Free movement of capital and payments guarantees to natural and legal persons right to establish an account with a financial institution to purchase real estate or shares in companies in any Member State. Entrepreneurs are entitled to acquire ownership rights of foreign trade companies and engage in their management. Based on the facts above we assume that the freedom of capital movements and payments is a prerequisite for the effective exercise of other fundamental freedoms and the internal market as an area without internal borders[102].

[101] http://193.62.18.232/postgrad/courses/docs/MA_Tax_Working_papers/Bernhard%20PUBLICATION%20Final.pdf

[102] Viliam Karas, Andrej Králik *Právo Európskej Únie* (C. H. Beck, 2012)

6. Permissible exceptions

Prohibition on restrictions on the free movement of capital and payments is provided for in Article 63 TFEU, the following articles governing the free movement of capital includes a derogation from that freedom. As Articles 64 and 65 which concern the movement of capital in general and Article 66 which touches only movement from and to third countries. And Articles 144 and 145 which deal with restrictions in the face of imbalances of a Member State in its balance of payments. Interesting is the scheme of the fourth chapter of the TFEU which deals with free movement of capital and payments. There is only one very general provision which limits all the measures restricting free movement. Other provisions that are complex are devoted solely to the issue of possible exemptions. So liberalizing spirit of the fourth chapter of the TFEU is defined in a negative way. Thus permissible exceptions can be divided into four main groups and exception that is only true for Denmark.

- Unwritten exceptions as such restrictions of fundamental character
- Exceptions due to problems in the balance of payments
- Allowed restrictions in relation to third countries
- Rights of Member States
- Individual exceptions (the case of Denmark)[103]

6.1 Unwritten exceptions

Unwritten exceptions are those that do not result from primary or secondary law but rather from the case law. The Court has determined exceptions to the prohibition of restrictions on movement of capital that can be used for specific and highly exceptional circumstances under certain criteria. Common criterium for these exceptions is the public interest. So these unwritten exceptions are permitted only in the public interest.[104]

There is an important case *Veronica Omroep Organisatie*[105] where the Court pointed out the essential similarity of structures of permitted exceptions in the area of fundamental freedoms. It is the de facto development of case law in the area of

[103] TICHÝ, L and collective *Evropské právo* (C.H.BECK, 2006)
[104] TICHÝ, L and collective *Evropské právo* (C.H.BECK, 2006)
[105] C - 148/91

exceptions where was important case *Cassis de Dijon*[106], where the Court recognized public interest as a possible argument for authorizing exceptions to the free movement of goods, and now it was extended to free movement of capital. Provisions of the Treaty must be interpreted so as not to conflict with the rules of the Member State which prohibits that radio equipment based in one country participated in the capital of another radio company based in another country, and that the company has provided a bank guarantee, unless these activities which focuses on establishment of a commercial television transmitter that broadcast will be accessible, in particular to the first State, and if the obligation is necessary to do in order to guarantee a pluralistic non-commercial nature of radio broadcasting system.

In this case, it was also about the protection of cultural policy, which guarantees freedom of expression of different social, religious and spiritual currents in audiovisual broadcasting. This is about protection of the objectives which the Member States protect with the domestic law in the public interest.

The concept of public interest is very broad, fortunately, its definition is constantly engaged by the Court. From its case law, we can further integrate protection of public health, consumer protection, fair trade relations according to the decision in the case *Cassis de Dijon*. Gradually among the unwritten exceptions to the free movement of capital under the criteria of public interest were added more exceptions such as environmental protection (*Commission v Kingdom of Denmark*[107]), protection of historical and artistic heritage (*Commission v France*[108]), protection of archaeological and cultural values and disseminating knowledge on archaeological and cultural heritage (*Commission v Greece*[109]). Also we can say that here belongs the requirements of monetary policy, namely to ensure the solvency of banks and others.

6.2 Exceptions due to problems in the balance of payments

Member State which is experiencing, or is seriously threatened with difficulties in their balance of payments, has the right to take protective measures under the conditions laid down in Articles 143 and 144 TFEU.

[106] C-120/78
[107] C-302/86
[108] C-154/89
[109] C-198/89

"Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take.

If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Economic and Financial Committee, recommend to the Council the granting of mutual assistance and appropriate methods therefor"[110].

Furthermore, the article states: "If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorise the Member State with a derogation which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine"[111]. This is about actions which are *ultima ratio*, they can be used only after exhausting other possible measures leading to remedy the problems in the balance of payments[112].

"The Council shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

(a) a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse;

(b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;

[110] Article 143 section 1 of Treaty on Functioning of the European Union
[111] Article 143 section 3 of Treaty on Functioning of the European Union
[112] TICHÝ, L and collective *Evropské právo* (C.H.BECK, 2006)

(c) the granting of limited credits by other Member States, subject to their agreement"[113].

In case of sudden difficulties in balance of payments, the Treaty gives Member States the possibility of taking protective measures autonomously on the basis of Article 144 of the Treaty.

"1. Where a sudden crisis in the balance of payments occurs
and a decision within the meaning of Article 143(2) is not immediately taken, the Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.
2. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. The Commission may recommend to the Council the granting of mutual assistance under Article 143.
3. After the Commission has delivered a recommendation and the Economic and Financial Committee has been consulted, the Council may, acting by a qualified majority, decide that the Member State concerned shall amend, suspend or abolish the protective measures referred to above"[114].

Also the directive which was adopted to implement Article 67 of the Treaty and which is generally devoted to the free movement of capital, has provisions which more specifically address the problems facing balance of payments and necessary measures to help prevent it. "Member States shall notify the Committee of Governors of the Central Banks, the Monetary Committee and the Commission, by the date of their entry into force at the latest, of measures to regulate bank liquidity which have a specific impact on capital transactions carried out by credit institutions with non-residents. Such measures shall be confined to what is necessary for the purposes of domestic monetary regulation. The Monetary Committee and the Committee of Governors of the Central Banks shall provide the Commission with opinions on this subject"[115].

[113] Article 143 section 2 of Treaty on Functioning of the European Union
[114] Article 144 of Treaty on Functioning of the European Union
[115] Council Directive 88/361/EEC Article 2 section 1

There is also the possibility for changes in these measures that the Commission adopted, by a qualified majority of the Council. A length of the measures adopted under these provisions may not exceed six months.

In the annex II to the Directive, there is calculation of operations on which the said provision applies. It is therefore a:

- Operations in securities and other instruments normally dealt with on the money market
- Operations with basic and deposit accounts in financial institutions
- Operations in units of collective investment undertakings (undertakings for investment in securities or instruments normally dealt in on the money market)
- Financial loans and credits (short term)
- Personal capital movements (loans)
- Import and export of financial assets (securities normally dealt in on the money market, payment instruments)[116]

Restrictions which Member States may apply to such capital movements must be defined and applied in such a way as to place the smallest possible obstacles to the free movement of persons, goods and services.

6.3 Restrictions in relation with third countries

As already stated, the basic rules applicable to the free movement of capital and payments (Article 63 TFEU), does not apply only to movements within Member States but also to movements from and to third countries. Movement of capital within the third country is not subject to such liberalization as is the case between Member States, as evidenced by a greater range of possibilities for the application of measures restricting the free movement of capital. Options how to restrict the free movement of capital to and from third countries are provided for in Articles 64, 65 and 66 of the Treaty on the Functioning of the European Union.

6.3.1 Restriction under Article 64, paragraph 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

[116] Annex 2 of the Council Directive 88/361/EEC

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"[117]. The provisions of this article must be interpreted strictly. These concepts which are incorporated, direct investment and their subsections, must be interpreted in the light of European law and CJEU case law, they are not subject to the interpretation of individual states. Direct investments we have already discussed above.

It is also significant here to note that the measures adopted by Member States or the EU to third countries before a certain date, in this case is crucial December 31, 1993 or December 31, 1999 for some countries that negotiated it in the accession treaties. It is not about retroactivity, but about the declarations provided for in the same field as valid even though the seemingly contradict freedom of movement of capital and payments.

6.3.2 Restriction under Article 64, paragraph 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"[118].

This article gives the possibility to introduce additional restrictions that go beyond the first exception in relation to third countries. Fundamental difference is that this measure is not constituted by a Member State or constituted in the past as it is in the first paragraph of Article 64. However, those measures are to be decided by qualified majority by the Council. For their adoption, Council is in no way limited, in terms of form or content. However, it is necessary to pay attention to two fundamental principles, namely the principle of subsidiarity (It is not an exclusive competence of the EU, so that the Union can take action only then if the goals can not be well achieved at national level) and the principle of proportionality as stated in Article 5 of Treaty of

[117] Article 64 section 1 of the Treaty on Functioning of the European Union
[118] Article 64 section 2 of the Treaty on Functioning of the European Union

European Union[119]. In adopting such restrictions its goal must be monitored and all the efforts must be made in order to achieve it. An example of such measure is Council Regulation No. 2271/96 on the protection against the effects of application of legislation adopted by a third country outside its territory and from the effects of actions based them[120].

This regulation was adopted in response to the legislation of the United States, which with its extra-territorial effects may have potentially negative impact on a person under the jurisdiction of Member States that are engaged in international trade and capital movements. When adopting such measures, it is important to strive to achieve its goal, and be careful to not to interfere with the free movement of capital in disproportionate manner to achieve the goal pursued[121].

6.3.3 Restrictions under Article 66

"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"[122].

This provision implies that, in exceptional cases as they arise or threaten to arise serious difficulties in the functioning of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may adopt protective measures[123]. When adopting such measures it is necessary to ensure the fulfillment of certain conditions, and those are:

- Extraordinary circumstances
- Problems (also potential) for the functioning of Economic and Monetary Union
- The use of such measure is necessary
- The principle of proportionality
- A safeguard measure may not be effective for more than 6 months

[119] Article 5 section 3 and 4 of Treaty on European Union
[120] Regulation 2271/96
[121] Radoslav Procházka, Juraj Čorba *Právo Európskej Únie* (Euro Kódex, 2006)
[122] Article 66 of Treaty on Functioning of the European Union
[123] Viliam Karas, Andrej Králik *Právo Európskej Únie* (C. H. Beck, 2012)

6.3.4 Capital restrictions as sanctions

In the area of common security and foreign policy, the Council may adopt measures in the form of economic sanctions. Causing restriction of free movement of capital between Member States and third countries. The adoption of such measures is justified on a union level, as well as Member States. These measures are taken in accordance with Article 215 TFEU: "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"[124].

"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"[125].

An example of such measures is Regulation 1264/94 prohibiting the satisfying of claims by the Haitian authorities with regard to contracts and transactions the performance of which was affected by measures imposed by or pursuant to resolutions of the Security Council of the United Nations. Just a UN resolution is often the basis for the adoption of such measures within the meaning of the Treaty articles relating to the common foreign and security policy[126].

Article 75 TFEU provides a legal basis for administrative measures
on the movement of capital and payments in connection with preventing and combating crime and terrorism. Before the adoption of the Lisbon Treaty, the issue was addressed by Article 60 of the EC Treaty, which had to be interpreted in the light of Article 301 of the EC Treaty. The differences between "new" Article 75 TFEU and Article 60 of the EC Treaty are significant. The original article does authorise not only the Council but also the Member States for serious political reasons to accept restrictions on the movement of capital and payments. According to the diction of the original article,

[124] Article 215 section 1 of the Treaty on Functioning of the European Union
[125] Article 215 section 2 of the Treaty on Functioning of the European Union
[126] Regulation 1264/94

measures are taken to third countries. In the new Article 75 of the Treaty on the Functioning of the EU legislature has departed from this structure and replaced it as follows: The European Parliament and the Council under the ordinary legislative procedure through regulations define a framework of administrative measures such as the freezing of funds, financial assets or economic gains that are owned or held by natural or legal persons, groups or non-state subjects[127].

Following substantial changes in European legislation were in response to the terrorist attacks in 2001. The original legislation has been shown to be ineffective, since there was no legal basis to adopt restrictions on movements of capital and payments to individuals. Another milestone in this field is the judgment of the European Court of Justice in the *Kadi* case, that judgment is a breakthrough in many areas, because it fundamentally expresses a series of questions. Importance of the decision of the ECJ in this case can be seen in a variety of levels: in terms of relations with European and international law in general; in terms of recognizing the authority and binding nature of the UN resolutions to other international institutions and from the view on the international policy to combat terrorism.

Kadi

UN Security Council in 2002 adopted a Resolution 1390, which included the decision that all States shall take restrictive measures against Usama bin Laden, members of Al-Qaeda and the Taliban and other individuals, groups, undertakings and entities on the list created pursuant to Resolution no. 1267 (1999) and no. 1333 (2000), to be updated regularly by the Sanctions Committee established by the UN Security Council[128]. In order to implement that resolution, the Council adopted a Regulation under Articles 60, 301 and 308 of the Treaty establishing the European Community and Council Regulation no. 881/2002. Under this Regulation all funds and economic resources belonging to, or are owned or held by, natural or legal person, group or entity identified by the Sanctions Committee and listed in Annex 1 of this Regulation, shall be frozen. In the Appendix 1 have been listed Mr Yassin Abdullah Kadi and Al Barakaat which is an International Organisation. Mr Kadi was a multimillionaire of Saudi origin who was suspected of financing terrorist acts through charity Muwafaq. Al Barakaat

[127] http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/measures_en.pdf
[128] Paragraph 4 in judgement of C - 340/08

was an international organization established under Swedish law, which provided important services, such as banking services, money transfers, telecommunication services in Somalia. Both individuals brought an action for annulment to the Court of First Instance. In the case *Kadi* there was a question asked whether the EU should possess the power to adopt economic sanctions against individuals, and what is the correct legal basis allowing their adoption. The Court also had to deal with the issue of alleged violation of fundamental rights of the applicants, in particular the infringement of the right to be heard, the right to property and the right to judicial review[129]. According to the Courts opinion any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law on the protection of fundamental rights implies, that the Court will examine indirectly the legality of the above mentioned resolution. In the case of such review, the source of illegality to which the applicant refers should not be seeked in the adoption of the contested regulation, but in resolutions adopted by UN security council which imposed the sanctions[130]. With regard to compliance with higher standards of international law belonging to ius cogens, the Court of First Instance is indirectly entitled to examine the legality of UN Security Council resolutions and concluded that there was no breach of ius cogens and dismissed the action. Both indigenous applicants appealed to the Court of Justice of the EU. Applicable pleas were identical to those before the Court of First Instance. European Court of Justice upheld the verdict of the Court of First Instance which pointed out that the legal basis for the adoption of economic sanctions against individuals are designated by Articles 60 and 301 in conjunction with Article 308 of the EC Treaty, but the European Court of Justice disagrees with that of Article 308. The Court of the first instance argued that Article 308 of the EC Treaty represents the bridging clauses between the Treaty on European Union and the Treaty establishing the European Community, in the sense that it affects not only the objectives necessary to achieve the objectives of the Community, but also the EU[131]. As regards with the second plea, the European Court of Justice upheld the findings of the Court of First Instance. The fact that the contested regulation affecting

[129] http://www.ejil.org/pdfs/23/4/2343.pdf
[130] Paragraph 215 in judgement of T - 315/01
[131] Paragraph 213 in judgement of joined cases C - 402/05 and C - 415/05

the person named does not exclude the general scope within the meaning of Article 249 of the EC Treaty[132].

While the judgment given by the Court in the first two pleas, the CJEU confirmed their views on the third complaint, relating to fundamental Freedoms are diametrically opposed. With regard to the case law, the CJEU in this case to concluded that the right to judicial review was not respected, as the Community institution concerned has failed to fulfill its obligation to notify the reasons for the adoption of restrictions against the natural or legal person to the fullest extent possible either in the moment it decided on the inclusion, or at least as quickly as possible after the decision so those persons can exercise their right to bring an action within the prescribed period[133]. Given that the regulation was adopted without any guarantee that individuals would allow to bring the case to the competent authorities, the CJEU held that the imposition of restrictive measures by the contested regulation in respect of Mr Kadi, by including him in the list contained in Annex 1 constitutes an unjustified restriction of his right to own property. The contested measure could seriously and irreversibly infringe the fundamental rights, and therefore the CJEU on the extent to which it concerned the appellants had it canceled[134].

Judgment of the European Court of Justice in *Kadi* represents a strong commitment for the respect of fundamental rights and the principle of reason. In our opinion, *Kadi* could be summarized in the following sentence which was said by Advocate General Maduro: "Acts that are incompactible with human rights are not acceptable in the Community"[135]. With regard to international law, the European Court of Justice and the Advocate General Maduro perceive the relationship between the European and international law from the position of dualism. For the European institutions, this means that they do not give priority to norms of international law before by the primary rule of European law[136].

[132] Paragraph 135 in judgement of joined cases C - 402/05 and C - 415/05
[133] Paragraph 336 in judgement of joined cases C - 402/05 and C - 415/05
[134] Paragraphs 369-372 in judgement of joined cases C - 402/05 and C - 415/05
[135] Paragraph 31 in Advocate Maduro proposal in joined cases C - 402/05 and C - 415/05
[136] http://www.ejil.org/pdfs/23/4/2343.pdf

6.4 Rights of the member states

Generally, this issue is covered by Article 65 TFEU. It is not so much the exception rather than the variation in the area of free movement of capital. They should not undermine overall liberalization of capital movements. It is important to stress here that these deviations are not intended to protect national interests of the state concerned and must be applied without discrimination: "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"[137]. Nor may it be used as a protectionist tool to overcome the economic difficulties caused by the removal of restrictions in the sector (the free movement of capital and payments)[138].

6.4.1 Restrictions under Article 65/1 letter a)

The provisions of Article 63 shall be applied without prejudice to the right of Member States: "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"[139]. This exemption is unique to the free movement of capital and is narrowly construed: although taxation is in a national competence, but this right must be exercised within the framework of EU law[140]. In this sense, it is expressed by CJEU in *Manninen* decision which stated: "In that respect, it should be noted that Article 58(1)(a) (now 65) of the Treaty, which, as a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly, cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to the place where they invest their capital is automatically compatible with the Treaty. The derogation in Article 58(1)(a) (now 65) EC is itself limited by Article 58(3) (now 65) EC, which provides that the national provisions referred to in Article 58(1) (now 65) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56 (now 63)"[141].

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[137] Article 65 section 3 of Treaty on the Functioning of the European Union
[138] TICHÝ, L and collective *Evropské právo* (C.H.BECK, 2006)
[139] Article 65 section 1 letter a, of Treaty on the Functioning of the European Union
[140] Josephine Steiner, Lorna Woods *EU Law* (Cambridge University Press, 2009)
[141] C - 319/02

In applying this exemption it is necessary that a Member State has demonstrated that the difference in treatment is objectively justified. Such treatment is permissible only if there is a legitimate reason of protecting the integrity of national tax systems. The European Union is seeking to adopt secondary legislation in this area, to gradually achieve complete harmonization in the field of direct and indirect taxes. From the context its implied that provisions will apply until such time as this harmonization is complete, after that such wording will not be justified[142].

6.4.2 Restrictions under Article 65/1 letter b)

The provisions of Article 63 of the Treaty shall be without prejudice to the right of Member States to take all necessary measures, in particular in the field of taxation and the prudential supervision of financial institutions in order to prevent infringements of national law or to lay down procedures for the declaration of capital movements for administrative or statistical purposes, or to take measures which are justified on grounds of public policy or public security[143].

This provision differs in several cases, especially in that financial institutions are also covered, demonstrated are the means how to use this provision and also the reasons why to use it. Important here is the word "especially" which means that it is an open set of measures, not just those that are explicitly written in the contract. This provision is also important for the fight against money laundering, drug trafficking and terrorism. Key terms are public policy and public security.

In the case *Commission v Belgium*, the Belgian government issued a regulation which excluded residents from subscription of shares issued abroad. They have argued with mentioned Article 65/1 b). The Court was of another opinion: "such a measure can not be justified under Article 73d (1) (b) of the EC Treaty (now Article 65/1 b) due to the need to prevent tax evasion and ensure the effectiveness of fiscal supervision, as a general presumption of tax evasion or tax fraud can not justify a tax measure which is based on the total prohibition of the exercise of a fundamental freedom guaranteed by Article 73b (now 63 TFEU) "[144].

[142] Viliam Karas, Andrej Králik *Právo Európskej Únie* (C. H. Beck, 2012)
[143] Article 63 of Treaty on Functioning of the European Union
[144] C- 478/98

Different but similar case is *Scientology International* where the state establishes the permitting requirement for direct capital investment within the meaning of Article 65 / 1b, for protection of public safety and public interest. The Court in that case ruled: "Article 73d (1) (b) of the EC Treaty (now 65 / 1b TFEU) must be interpreted as precluding a system of prior authorization for direct foreign investments which confines itself to defining in general the investment concerned as investments that may be a threat to public order and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorization is required"[145].

The provisions of the Article make a direct reference to public policy and public security. However, there is clearly defined exactly what the terms are and what is their scope. States in the application of exemptions under that provision usually refer to them. It was therefore important to address this issue and the Court has addressed it in detail. In the interpretation of these terms, the Court shall proceed as with other freedoms, especially freedom of movement of goods where this issue is relatively elaborated, in particularly in the cases *Cassis de Dijon*[146], *Keck*[147] and others. These terms fall under the term public interest that is protected by the Treaty and thus refers to the protection of public safety, public order, public health, consumer protection, fair trade and other receivables. If the state wants to already introduce authorization or other exception on grounds of public interest and security, it must be made on the basis of objective, non-discriminatory and transparent criteria[148]. As the Court said in the case *Commission v Spain*[149], where it is stated: "such a system must be proportionate to the objectives pursued since the same objective can not be achieved by less restrictive measures". And he went even further when he said: "Such a system must be based on objective, non-discriminatory criteria which are notified in advance to the undertakings concerned, and all persons affected by the restrictive measure of that type must be provided with remedies for them"[150].

[145] C - 54/99
[146] C - 120/78
[147] C - 267/91
[148] Viliam Karas, Andrej Králik *Právo Európskej Únie* (C. H. Beck, 2012)
[149] C - 463/00
[150] C - 463/00

6.5 Individual exceptions

Some states have negotiated in the accession treaties or protocols, special arrangements concerning the exceptions to the free movement of capital. These exceptions are primarily related to the acquisition of immovable property, as is the case in Denmark and Malta they have had and continue to have a permanent character. States have always tried to negotiate some exceptions, but these were mostly of a temporary nature, only lasted for some time, for example 5 or more years.

Denmark has an exeption on the acquisition of real property, and in particular the acquisition of holiday homes. Holiday home in this sense is each apartment, which is not a permanent place of residence of the citizen. Denmark is authorized to maintain existing legislation which restricts the acquisition of these objects by foreign citizens. The Kingdom of Denmark is not authorized to adopt new regulations liable to amend the acquisition of holiday homes[151].

[151] TICHÝ, L and collective *Evropské právo* (C.H.BECK, 2006)

7. Combating Money Laundering

7.1 The definition of money laundering

Money laundering is essentially the conversion of illegally obtained money, usually obtained through drug trafficking, arms trafficking, prostitution, tax fraud and the like, and then turn them into legal property values, which are expressed as a legally obtained property. It is a criminal offense in the criminal law also called as the laundering of the proceeds of crime. Most often this crime affects the financial sector - banks, insurance companies, securities dealers, fund management companies, etc[152].

Dirty money may not be regarded as money itself, but also as:

- Movable and immovable property
- Rights obtained by criminal means
- Assets that came from such assets (interest, profits and dividends)
- Property that served or was used to commit or facilitate crime (vehicles, gifts serving for corruption, etc.).

The causes of this crime to be found in the so-called. "Dark" or in other words "the informal economy", which is not taken into account in the national-economic balance. Its not captured by accounting, tax or statistics systems[153].

7.2 The process of money laundering

The process of money laundering can be divided into three stages:

1. Placement - at this stage it leads to the insertion of illegal income in financial institutions and then it is subsequently transferred to other accounts in different countries. Victims of this crime are usually many times blameless persons who have no criminal history. It is mostly people who owned businesses and businesses that are characterized by the fact that there is little cash handling money, such as car washing facilities, department stores, restaurants, casinos and so on. Then are the money from crime stirred with legally obtained money from the business.

2. Layering - The point is that the illegal profits that were stored in legal savings, are in a form of various transactions that move between companies and institutions in different

[152] http://www.investopedia.com/terms/m/moneylaundering.asp
[153] http://www.tellermate.com/news-and-resources/what-is-dirty-money/

countries. The aim is to destroy the origin of those profits. Nowadays financial transactions are made through electronic payments to countries where banking secrecy is kept, and there is a very low probability for the police authorities to obtain information about the client.

3. Integration - at this stage there is a legalization of illegally obtained money. After many operations, financial capital is introduced into the economy so they have the impression that they have been obtained legally through trade and business. If the layering process is successful then in this third stage the money can be used as eligible and can be further used for the purchase of real estate, gold for investment in securities and so on. They can also return to their country of origin as lending, investments, loans to foreign companies. In most cases, criminals seek to create companies that can repeatedly produce or conceal the proceeds of crime[154].

7.3 Methods and forms of money laundering

The oldest and most common method of money laundering are banks. They are places where they can easily manipulate the accounts of clients. They are often led to false person or persons of integrity. The money laundering in banks can be divided in to 3 stages:

In the first stage, banks are a place where people can put cash from criminal activity or change small bills for greater, take advantage of the safe deposit boxes, safes and so on. While also money can be exported through transactions to other places in different countries. In the second stage, the bank can through various financial services mask the origin of illegal income. And in a short period of time it is possible through wire transfer to transfer money anywhere abroad. In the third stage, the banks provide various loans, bills of exchange, checks and other securities that integrate the dirty money into the economy. The disadvantage of different countries is the banking secrecy. In countries where this secrecy is respected, this method is used more, than in the countries where it can be broken by the law[155].

The second method is the use of so-called illegal banks. It's about companies that are not subject to banking supervision, in general do not meet the criteria,

[154] http://people.exeter.ac.uk/watupman/undergrad/ron/methods%20and%20stages.htm
[155] https://www.moneylaundering.ca/public/law/3_stages_ML.php

conditions and actions that all banks should meet. These companies most often deal with trade in gemstones, jewelery, operating travel agencies, the provision of exchange services and so on. Examples include banking stash house, Chita banking, hawala banking, Chop Shop Banking, Hund banking and the like. They originated in Asian countries like India, China and Pakistan. Sometimes these systems are referred to as alternative or shadow banking. People who do business in those banks are belonging to family clans.

Among the measures that banks or institutions take to prevent money laundering are:

- Respect and enforcement of legislation concerning the fight against money laundering
- Identification of the client
- Active cooperation with institutions that fight against this crime
- Training the staff working in the field of finance about combatting money laundering[156].

Recently, the world's most spread method of money laundering based on tax havens is known under the name of offshore centers. Off shore centers refer to the area known as tax havens or Offshore company. These are the places where there are favorable tax conditions and regulations, favorable regulations for the activities of banks. An essential feature of these companies is that they are created to make financial transactions which are not a subject to the internal jurisdiction of the country where the capital came from. Companies such as off shore are registered nationally, but their capital comes from another country. In the world there are hundreds of such areas where it is possible to register offshore companies. There is a network of so-called offshore banking units. In these territories there is spreading fast throughput of illicit money. Off shore can be divided into several categories. In each territory there is to be taken into account a registration of company by type of its activity. For example, Isle of Man, Bermuda, and the Guerseney. They are known to deal with the registration of insurance companies. Panama, Bahamas, Cyprus, Belize, Liberia and Malta deal with the registration of passenger ships and yachts. The second criterion is the binding rules of

[156] http://www.iefweb.org/es/finanzas/visordocumentospdf/53

operation of companies. There is a group of territories where, according to this criterion it is not required to pay the profit tax at the end of each year. The Company is required to pay only a flat fee instead of profit tax. There are countries where it is required to submit financial statements and they must also be reviewed by an auditor. However, there are countries that have more stringent rules. They require the annual accounts, the proper management accounts and the repayment of capital. They even must have its own local statutory representative. In general, these countries have a simple legal system, the tax is minimal, does not exist or is replaced by a flat-rate fee[157].

Another method for money laundering is the non-banking sector, in which belongs:

- Other financial institutions such as insurance companies, credit institutions
- Currency exchange
- Intermediary companies
- Casinos
- Tax advisors and lawyers
- Investment companies

This method in non-banking sector provides criminals with a place to hide income obtained from criminal activities in financial institutions and other professional occupations and business activities[158].

7.4 The influence of money laundering on the free movement of capital and payments in the EU

This issue relates to the free movement of capital and payments in the EU, because the whole process of money laundering is done through payment systems.

EU regulates money laundering in Articles 56 and 58 (now 63 and 65 TFEU) of the Treaty establishing the European Community and in Council Directive. 91/308 / EEC of 10.6.1991 on prevention of the use of financial systems for money laundering. Directive applies in particular to the financial and credit institutions.

[157] http://www.oecd.org/tax/exchange-of-tax-information/43841099.pdf
[158] https://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/archive/2012/08/09/anti-money-laundering-for-the-non-banking-entity.aspx?Redirected=true

The EU fights money laundering to prevent the misuse of financial market mainly for financing of terrorism. In the EU-wide cooperation there are 4 main bodies which takes part. Those are:

- "An Expert Group on Money Laundering and Terrorist Financing meets regularly to share views and help the Commission define policy and draft new legislation.
- A Committee on the Prevention of Money Laundering and Terrorist Financing may also be convened to give its opinion on implementing measures put forward by the Commission.
- The European Commission takes part in the informal network of Financial Intelligence Units (the EU FIUs Platform).
- The Joint Committee of European Supervisory Authorities works on measures to combat money laundering.

The European Comission is also involved in international cooperation fighting these crimes as:

- The Commission belongs to the Financial Action Task Force (FATF), the main international body concerned with combating money laundering, the financing of terrorism and other threats to the integrity of the international financial system.
- It also has observer status on the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (Moneyval) „[159]

On the EU level we can find many directives used for combating the money laundering. Those are:

- Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering
- Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration

[159] http://ec.europa.eu/justice/civil/financial-crime/index_en.htm

- Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

Important secondary law are also a Council decisions concerning this issue. Those are:

- Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro
- Council framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment
- Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

In this area of crime there have been adopted other measures, such as the fight against terrorism. For that reason was adopted 4 December 2001 Directive of the European Parliament and Council Directive 2001/97 / EC. The list of crimes has widened and today the fight against money laundering covers a wide range of offenses through corruption to terrorism.

Conclusions

We can assume from this thesis that free movement of capital is quite complicated freedom, mainly due to many exemptions which we have tried to get a close look on and tried to explain them to the reader. Freedom of movement of capital and payments has huge content and is in close relation with all the other freedoms. This freedom influences other freedoms but people as well.

This relationship and influence on the other freedoms and its unique property the relation to third countries have been developed and explained thanks to the case law. CJEU plays an important role for better understanding and application of this freedom. That's why we have picked and discussed most relevant and interesting case law in this thesis. Also CJEU plays an important role alongside the Commission in fighting against infringement of this freedom which is mainly caused by measures known as golden shares or by money laundering. Restriction of this freedom by national laws is slowly diminishing and coming more close to harmonisation.

This freedom should be understood as a dynamic freedom, which is changing constantly with the advancement in the society, mainly electronic one. Advancement of electronic technologies and internet has made quite big challenge for the legislators to keep up with. Nowadays it is part of our lives that we normally use internet and electronic means for carrying out payments and other matters in our lives. Big step forward in liberalisation of this freedom was creating SEPA. It is admirable how the European Union keeps up with legislation in the area of free movement of capital and payments and we think it is heading in the right direction.

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ABSTRACT

The purpose of this thesis is to give comprehensive knowledge of the fundamental freedom of movement of capital and payments in the European Union to the reader. For this thesis I have mostly used information from law and economic books, internet sources like dictionaries, official websites of the European Union, treaties and of course case law. My methodology was mainly using the theoretical knowledge from the treaties, regulations and directives and supplemented it with practical implementation, using case law to explain it or to widen it. This freedom is quite complicated one, it inteferes with all the other fundamental freedoms and has an unique element of interacting towards third countries. The fact is that it has been the least developed one from the start of the European Community leading to European Union, and has been quickly developing in the past few decades. In the first chapters I have focused mainly on theory as to explaining the terms and meanings mostly from economic point of view. Then I have explained internal market a bit and the other fundamental freedoms, so the reader can get an idea of a whole picture and the placement of free movement of capital and payments in it. Then I have moved on to the freedom it self. Where I have explained the legislation, mostly secondary legislation, which plays huge role in implementing and using the freedom in the present. It is not so easy to comprehend this freedom because it has many exceptions. That is why I have spent significant time in my thesis in explaining them. It is very important to pay attention to the case law, as it explains and widens the provisions from treaties and provides necessary means for practical application. Provisions from the treaty must be interpreted in the light of the case law and the exceptions. In the end I have tried to explain what is money laundering and how the European Union is combating it. Money laundering is definitely a huge infringement of this freedom and is very dangerous as well because it is used mostly by criminals to finance their illegal activities. I have concluded that the European Union is doing good job in legislation and case law on the free movement of capital and payments since this freedom is in the present very important and globalisation and advancement in this field is very quick. Implementing SEPA is the proof of this good job, and an important step in to achieving the goal of single and unified market.

Key words: Capital, payments, European Union, Money Laundering

ABSTRACT

Das Ziel dieser Diplomarbeit ist, dem Leser komplexe Informationen zu dem Grundrecht des freien Kapital- und Zahlungsverkehrs im Rahmen der Europäischen Union zu bieten. Beim Schreiben dieser Diplomarbeit habe ich Informationen vor allem aus den juristischen sowie auch aus ökonomischen Büchern, aus dem Internet, wie zum Beispiel Wörterbücher, offizielle Webseiten der Europäischen Union, Verträge und selbstverständlich auch aus der Judikatur verwendet. Meine Methodik war, die theoretischen Informationen aus den Verträgen, Verordnungen und Richtlinien zu nutzen und diese mit der praktischen Implementierung in den Rechtsprechungen darzulegen und zu erweitern. Diese Grundfreiheit ist ziemlich kompliziert, da sie mit allen sonstigen Grundfreiheiten zusammenhängt und auf eine einzigartige Weise mit den Drittländern interagiert. Tatsache ist, dass diese Grundfreiheit seit der Gründung der Europäischen Gemeinschaft, die zur Gründung der Europäischen Union führte, zu den am wenigsten entwickelten Grundfreiheiten gehört. In den letzten Jahrzehnten kam es jedoch zur ihrer raschen Entwicklung.

In den ersten Kapiteln meiner Diplomarbeit konzentriere ich mich vor allem auf die theoretische Grundlage, damit ich die Terminologie überwiegend aus der ökonomischen Sicht erklären kann. Anschließend habe ich teilweise den Europäischen Binnenmarkt als auch die weiteren Grundfreiheiten erläutert, damit der Leser die Zusammenhänge und die Position des freien Kapital- und Zahlungsverkehrs im Rahmen der Europäischen Union ein bisschen besser versteht. Danach habe ich mich mit der gegebenen Grundfreiheit befasst.

Ich habe die Gesetzgebung erklärt, vor allem die sekundäre Gesetzgebung, die bei der Implementierung und beim Nutzen dieser Grundfreiheit heutzutage eine große Rolle spielt. Es ist nicht so einfach, diese Grundfreiheit vollständig zu begreifen, da sie viele Ausnahmen beinhaltet. Daher habe ich mich in meiner Diplomarbeit ausführlich der Erläuterung dieser Ausnahmen gewidmet. Es ist sehr wichtig, auf die Judikatur zu achten, da die Judikatur die Bestimmungen aus den Verträgen erklärt und erweitert und zugleich auch die notwendigen Mittel zur praktischen Anwendung zur Verfügung stellt. Die Bestimmungen aus den Grundverträgen müssen unter Berücksichtigung der Judikatur und der Ausnahmen gedeutet werden.

Zum Schluss habe ich versucht zu erklären, was Geldwäsche bedeutet und wie die Europäische Union dieses Problem angeht. Geldwäsche stellt jedenfalls eine groβe Verletzung dieser Grundfreiheit dar und auβerdem ist es auch sehr bedrohlich, da durch Geldwäsche vor allem illegale Aktivitäten von Straftätern finanziert werden. Ich kam zu der Schlussfolgerung, dass die Europäische Union gute Arbeit im Bereich der Gesetzgebung und Judikatur zu dem freien Kapital- und Zahlungsverkehr leistet, da diese Grundfreiheit heutzutage eine sehr wichtige Rolle spielt und die Globalisierung und Fortschritt in diesem Bereich sehr schnell vorangeht. Das Implementieren von SEPA ist Beweis dieser guten Arbeit und stellt einen wichtigen Schritt zur Realisierung des Ziels des einheitlichen Binnenmarkts dar.

Schlüsselwörter: Kapital, Zahlungen, Europäische Union, Geldwäsche.