

Course: Law of the European Union
[7] Free movements of
companies, services, capital
and payments

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Legal entities in contemporary society

- Legal entities (legal persons) are legal instrument for collective action (corporations) or action with use of separated property (funds).
- However, every legal entity meets human needs.
- Action of any legal entity is action of individuals and groups of people behind them.

National laws on legal entities

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

Freedom of establishment of legal entities within the EU

- One chapter of TFEU (Art. 49-55) covers both individuals and legal entities. They both enjoy right of establishment for permanent business according to host member state legislation.
- Liberalization of commercial presence in other member states is more important from economical point of view than freedom of establishment of individual entrepreneurs.

Companies and cooperatives

- Legal entities established for business only are entitled to establish in other member states.
- Most European states allow creation of several types of companies (limited liability company, private / public limited companies by shares etc.) - are generally covered by the Treaty.
- Cooperatives are expressly included.

Non-commercial legal entities

- Other legal entities (associations, churches and various other institutions for non-profit economic and social activities and structures of government with legal personality) do not enjoy the right of establishment for conducting of business.
- Nevertheless, they enjoy other basic economic freedoms.

Connection of legal entities with member state

- All nationals (citizens) of the member states enjoy free movement.
- Companies are entitled to establish if they are based on (incorporated according to) legislation of some member state.
- Furthermore, they must have seat in some member state. Formal seat is sufficient.
- On the other hand, control of such company by foreign persons is irrelevant.

Types of establishment

- Firstly, subsidiary (branch) without independent legal personality can be established by above defined companies and cooperatives.
- Secondly, daughter company (shares held by mother company) can be established.
- Thirdly, cross-border change of seat is allowed under some circumstances.

Freedom to select law of member state for incorporation of company

- Different requirement on capital for establishment of company makes attractive deliberate selection of foreign law for incorporation of company.
- The Court of Justice interpreted the freedom of establishment broadly (judgement Centros) as requiring toleration of company established abroad for circumvention of domestic law.
- Shall Europe fear so-called *Delaware effect* of the United States of America? Language barriers and legal differences form obstacle.

Legal entities based on EU law

- Regulations enable establishment of „legal entities of the European Union“,
- „Societas Europea“ (European public limited company) for bussiness.
- European economic interest groupings can be formed for cooperation of companies and institutions belonging to various member states.

Capital and its investment

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

Free investment of capital

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

Payments

- Freedom to pay for goods, services and labour is necessary for realization of free movement of goods, workers, right to establishment or freedom to provide services.
- Without possibility to pay these cross-border activities would be hindered.
- Payments can be carried with or without cash.
- Payments constitute special service by banks and other providers.

Free payments in the EU

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

Services in modern economy

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

Limited international trade in services

- However, international trade in services is less important if compared with trade with goods.
- There are natural obstacles (language barriers, distance for accompanying movement of good and persons) and legal obstacles.
- New technologies - especially Internet - enable new services to be provided internationally (cross-border supply).

Position of freedom to provide services

- The freedom to provide services finalizes the internal market of the EU.
- It covers all economic activities crossing borders of the Member States which do not constitute delivery of goods, movement of workers, right to establishment, or investment of capital and payment (negative definition in Art. 57 TFEU).
- The Treaty additionally provides non-exhaustive list of services (positive definition).

General rules for liberalization of trade in services in the EU

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

Financial services

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

Transportation

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

Communications and media

- Communication is also necessary for European economic, social and political integration of member states of the EU as transport
- Comprehensive legislative engagement of the EU touch both telecommunications and post.
- There is some harmonization for television which can be easily aired internationally. Public involvement is respected broadly.

Involvement in health care

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

Importance of services of general economic interest

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

Further liberalization of services

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