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Course: Law of the European Union

[7] Companies, services, capital - payments

Free movement of legal entities (companies)

Same chapter of Treaty establishing the European Community covers both individuals and legal entities: both individuals and legal entities enjoy right of establishment for continuous business according to host member state legislation.

This liberalization of continuous commercial presence in other Member States is more important – from economical point of view - than freedom of establishment of individuals as individual entrepreneurs (self-employed persons).

Corporations are essential legal instrument for majority of modern economic activities, individuals are not capable to perform them.

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

Modern state laws enable existence and activity of various legal entities (legal persons): companies, cooperatives, foundations, associations including churches and political parties, various state or public institutions or private charities. Nevertheless, there is big difference among countries in number and variability of forms of legal entities.

It should be borne in mind that states and international organisations (including the European Communities) are legal entities.

If compared with individuals, it is more difficult to define group of legal entities which shall enjoy community right to establishment.

Individuals must be nationals (citizens) of member states. Citizenship is an established institution of law and practice of all countries. European Union – foreigners (everybody who is not citizen of the European Union) are or will be entitled only in special circumstances: accompanying family members and long-term residents with residence permit according to national legislation.

Legal entities are entitled to establish only if they are based on (incorporated) legislation of some member states and have seat in some of them. Formal seat is sufficient. Only those legal entities enjoy the right of establishment which are created by law of particular member states for being profitable.

This group consist of companies - majority of European states allow creation of several types of companies (limited liability company, private / public limited companies by shares or stock companies, various unlimited companies etc.) - are generally covered by the Treaty and cooperatives expressly mentioned. On the other hand, other legal entities (associations, churches and various other

institutions) do not enjoy the right of establishment expressed in the Treaty (Art. 48).

The Member States companies are entitled to establish agency, branch or subsidiary („daughter companies“). Participation of residents / citizens of other member states in their capital (shareholders) enjoys same treatment.

The law of the European Community provides for extensive harmonisation of company legislation of member states, including their book-keeping (accounts) and holding taxation. There are numerous directives for this harmonization.

Nevertheless, different requirements persist. It could make attractive deliberate selection of foreign law for incorporation of company. The Court of Justice interpreted the freedom of establishment broadly (Centros) as requiring toleration of company established abroad for circumvention of more complicated requirements of domestic law.

Shall Europe fear so-called Delaware effect emerged in the United States of America? No, language barriers and legal differences are an important obstacle.

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

Freedom to Provide Services

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

Services are the most important part of economy of all modern rich countries. They provide for 2/3 of Gross Domestic Product. There are many types of services: banking and insurance, construction, transport, data processing, education and training, healthcare, social services, telecommunication, leasing, services for tourists, leasing of property, various business services including consultation and research and many other services. .

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

Treaty establishing the European Community prohibits every discrimination based on nationality or residence of both providers, consumers and sponsors of cross-border services.

The Court of Justice has added occasional refusals of restrictive measures which are without distinction based on above mentioned criteria. Case-law has condemned many state legal and administrative practices.

However, this – according to opinion of the Commission and many experts – has not removed artificial obstacles based on them. Therefore, Directive on Services in Internal Market was adopted in 2006. This directive shall remove obstacles existing in law of member states to interstate trade in numerous services in next several years.

Special Treaty provisions and rich secondary law cover financial services and transportation.

Financial services are subject of complicated harmonisation (exclusively directives). These directives provide for standard regulatory environment throughout the European Community. This regulatory environment ensures similar protection of consumers of financial services in whole European Community.

Transport is key service for all integration in the European Community (free movement of goods, persons, services, capital). Therefore, its law covers all modes of transport: road, rail, air, river and maritime transports. The law enhances liberalization of these sectors fully or almost fully monopolized several decades ago.

Another example of comprehensive legislative engagement of the European Community are telecommunication services. Communication is necessary for European economic, social and political integration of member states of the European Community / Union as transport is.

The interpretation of Treaty provisions on freedom to provide services by the Court of Justice touched many social services provided by states or reimbursed by them (actually healthcare – Kohll judgement), culture, potentially social services, education.

This approach can contribute to more competition and improvement. However, it can destabilize also these sensitive sectors. The powers of European Community are limited in this area. The Treaty recognizes (Art. 16) the importance of services of general interests and confirm the powers of member states to organize and finance their healthcare (Art. 152) and education services (Art. 149 and art. 150).

Payments and capital

European Community law provides for removal of all obstacles to cross-border payments. Freedom to pay for goods, services and labour is necessary for realization of free movement of goods, workers, right to establishment or freedom to provide services. Without possibility to pay without any obstacles these basic freedoms cannot be achieved.

Law allows and requires controls of payments - there are several methods of payment: cash, other printed instruments, bank electronic payments etc. - necessary for prevention of tax evasion or money-laundering. Freedom to pay covers also transactions with non-member states.

European (Economic) Community law has gradually liberalised movement of capital (freedom to invest). Full freedom was established in the beginning of 1990.

Broad definition of capital shall be taken into consideration. Capital is every property used for investment by any of wide range of legal instruments. The most important instruments are loans, bank savings, acquisition of shares, movable or immovable property etc. Usually, money is transferred from state to state. Therefore, rules of the European Community law are closely connected with rules on payments.

European Community law prohibits any obstacles of investment (prohibitions and barriers of entry), use (taxation) or withdrawal of investment.

Freedom to invest capital abroad is wider than other economic freedoms are. European Community law allows investment abroad and foreign capital. Only in exceptional circumstances temporary restriction of capital flows with the third countries could be introduced.