

The Legislative Framework Corresponding to the Free Movement of Capital and Payments in the European Union

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Abstract

The liberalization of the movement of capital had to be achieved progressively, the member states were obliged to remove the restrictions to the extent necessary for the proper functioning of the Common Market. Full freedom of capital transactions was established in the first stage of the Economic and Monetary Union, to be later enshrined by the Maastricht Treaty. The principle of free movement of capital and payments does not require the adoption of additional regulations at the national level, being therefore directly applicable in the member countries.

Keywords: liberalization, capital, payments, member states, transactions, Common Market, internal market, single market.

JEL Classification: K22, K33

1. Advance specifications

The free movement of capital and payments is based on art. 63-66 Treaty Concerning the Functioning of the European Union² – TFEU (capitals and payments), art. 75, art. 215 TFEU (as regards sanctions) and the directives and jurisprudence of the Court of Justice of the European Union – CJEU in matters of capital and payments³.

To this legal basis⁴ we add its objective, that is, restrictions on the movement of capital and payments between member states and between member states and third countries must be eliminated (according to art. 63 TFEU).

Regarding the movement of capital between member states and third countries, the Council can:

— adopt safeguard measures in relation to third countries for a period of up to six months if these measures are strictly necessary, if the movement of capital originating from or destined for third countries causes or threatens to cause serious difficulties in the functioning of the economic and monetary union⁵;

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² The Treaty of Lisbon signed on December 13, 2007, entered into force on December 1, 2009, amending the following treaties: The Maastricht Treaty, called the Treaty on the European Union, signed in 1992, entered into force in 1993 and the Treaty with regarding the European Community renamed the Treaty on the Functioning of the European Union – TFEU. Consolidated version of 26.10.2012 Official Journal of the European Union C 326/49.

³ See, Ioana-Nely Militaru, *European Union Law, Chronology. Springs. Principles. Institutions. The internal market of the European Union. Fundamental freedoms*, Fourth Edition, revised and added, Universul Juridic Publishing House, Bucharest, 2023, p. 475 et seq.

⁴ In the legal literature, the opinion was expressed in the sense that ‘freedom of payments could be considered as the fifth freedom in the community space, see O. Manolache, *Treaty of Community Law*, ed. 5th, C. H. Beck Publishing House, Bucharest, 2006, p. 288.

⁵ At the Commission’s proposal and after consulting the European Central Bank; see art. 66 TFEU.

— adopt a decision to order that the restrictive fiscal measures adopted by a member state towards one or more third countries are considered to be in accordance with the treaties, provided that they are justified in relation to one of the objectives of the Union and compatible with the proper functioning of the domestic market. The Council decides, unanimously, at the request of a member state [art. 65 para. (4) TFEU];

— adopt the introduction of such restrictions only in very specific circumstances.

The single market can be achieved by complementing the freedoms related to the movement of people, goods and services, with the liberalization of the movement of capital. Also, ‘Even these freedoms cannot be considered fully assured if the goods and services can only be paid for with restrictions or prohibitions or there are no possibilities to transfer the amounts acquired to another country through an activity carried out according to community legislation’⁶ by this, the legal literature refers to the free movement of payments.

By achieving the free movement of capital and payments, indispensable freedom for the evolution of the economic and monetary union and for the introduction of the euro, the following objectives are pursued:

- encouraging economic progress;
- efficient capital investment;
- promoting the euro as an international currency⁷.

2. Payments

The circulation of payments involves a transfer of values (auxiliary) which is carried out as a result of an operation with a principal character⁸. The Court of Justice of the EU specified that ‘the physical transfer of banknotes cannot be considered as a movement of capital when it follows a payment obligation resulting from a transaction regarding the circulation of goods and services’⁹. Transfers related to tourism or travel for the purposes of trade, education or medical treatment are considered ‘payments’ and not capital movements, even if they are carried out by means of the physical transfer of banknotes. ‘Payments’ means those money transfers that constitute¹⁰

— a counterpart in a transaction, respectively, the exchange of goods and services;

— remuneration for a specific service performed, respectively wages for the activity carried out by the beneficiary of the right of the establishment in a member state, as a person who moved to that state by virtue of this right;

— the distribution of the profit or the payment of interest due to the creditor or the beneficiary;

— capital transfers, as a result of their free circulation.

⁶ See O. Manolache, *op. cit.*, p. 288.

⁷ See D. Kolassa, *European Union Fact Sheets, Free Movement of Capital*, December 2016, http://www.europarl.europa.eu/ftu/pdf/roFTU_3.1.6.pdf.

⁸ *Idem*.

⁹ C 358/1995 on February 23, 1995. See N. Diaconu, *European Union Law, Treaty*, ed. II revised, Lumina Lex Publishing House, Bucharest, 2011, p. 401; O. Manolache, *op. cit.*, p. 294.

¹⁰ See N. Diaconu, *op. cit.*, p. 401, O. Manolache, *op. cit.*, p. 294.

2.1. Regulation. Restrictions on payments

According to art. 63 para. (2) TFEU, ‘any restrictions on payments between member states, as well as between member states and third countries, are prohibited’. Any restriction, however, regarding the circulation of payments is prohibited, even with the first community regulation, by art. 106 TCEE, respectively, ‘unrestricted payment circulation’ could only be achieved under the conditions in which the other freedoms were ensured. According to art. 106 TCEE: “(1) Each member state undertakes to authorize payments related to the exchange of goods, services and capital, as well as capital and salary transfers, in the currency of the member state in which the creditor or beneficiary is based, to the extent that the movement of goods, services, capital and people is liberalized between member states in the application of this treaty. The member states declare themselves willing to liberalize their payments beyond what is provided for in the previous paragraph, to the extent that their economic situation, in general, and the balance of payments situation, in particular, allow them. (2) To the extent that the exchange of goods and services and the circulation of capital are limited only by restrictions regarding related payments, the provisions of the chapters relating to the elimination of quantitative restrictions shall be applied by analogy, in order to gradually eliminate these restrictions, to the liberalization of services and the free movement of capital”.

‘Liberalization of payments’ is achieved to the extent that the movement of goods, services, people and capital is liberalized, meaning that the evolution of the first freedom is conditioned by the evolution of the others.

It should be noted that the liberalization of payments remains at the disposal of the states, ‘if their economic situation, in general, and the balance of payments situation, in particular, allow them’.

According to the same art. 106 TCEE, (3) The member states undertake not to introduce in their relations new restrictions regarding transfers related to invisible transactions (listed in the list that is the subject of Annexe III to this treaty). The gradual elimination of existing restrictions is carried out in accordance with the provisions of articles 63–65’ (...).

Thus, the restrictions regarding the freedom of movement of payments were progressively suppressed, ‘according to a general program for the elimination of restrictions’¹¹, because, currently, art. 63 TFEU expressly state ‘the prohibition of any restrictions’.

If, mainly, the free movement of capital is closely related to the freedom of establishment – although the right of the establishment is not always accompanied by a transfer of capital, the person in question having the possibility, for example, to apply for a loan in the respective country¹² – free movement of payments is necessary to complete the free movement of goods, workers, services and capital¹³.

¹¹ *Idem*.

¹² See C 436/00, *X and Y v. Riksskatteverket*, hot. preliminary of November 21, 2002, in ECR, 2002, 11 (A)I 10,829 10,874; see O. Manolache, *op. cit.*, p. 288.

¹³ See P. Mathijssen, *European Law Compendium*, ed. 7th, Ed. Club Europa, Bucharest, 2002, p. 266.

3. The legislative framework corresponding to the 'free movement of payments' in the European Union¹⁴

The legislative acts of the Union regarding the costs of national and cross-border payments within the euro area¹⁵ have seen an evolutionary process, represented by the following normative acts at the level of the European Union:

— Regulation (EC) no. 2560/2001 of December 19, 2001, harmonized the costs of national and cross-border payments within the euro area;

— Regulation (EC) no. 2560/2001 was repealed and replaced by Regulation (EC) no. 924/2009 of the European Parliament and of the Council of September 16, 2009, regarding cross-border payments in the Community¹⁶, benefiting the residents of the member states by reducing to almost zero the commissions for cross-border payments in euros;

— In 2019, Regulation no. 924/2009 was amended by Regulation (EU) 2019/518¹⁷, regarding the reduction of commissions related to cross-border payments between member states in the euro area and those outside the euro area.

— Regulation (EU) no. 260/2012 of the European Parliament and of the Council of March 14, 2012, establishing the technical and commercial requirements applicable to credit transfers and direct debit operations in euros.

The current legislative framework regarding payments includes¹⁸:

1) Directive 2007/64/EC (DSP 1¹⁹) on payment services constitutes the legal basis for the creation of a single market for payments at EU level by 2010.

The directive includes rules applicable to all payment services in the EU; it aims to:

— that cross-border payments become as simple, efficient and secure as 'national' payments made within a member state;

— to promote the efficiency and reduction of costs related to payments through greater competition, opening the payment markets to new participants;

— to provide the necessary legal framework for an initiative of the European banking sector, called the 'single euro payments area' (SEPA).

At the end of 2010, SEPA instruments were available but not widely used. In these circumstances, the Commission (2010) presented a proposal for a regulation²⁰ setting EU-wide deadlines for the migration of old national credit transfers and direct debit systems to SEPA instruments, thus phasing out national credit transfer systems and direct debits, 12 months and 24 months, respectively, after the entry into force of the regulation.

2) Regulation (EU) no. 260/2012 of the European Parliament and of the Council

¹⁴ D. Kolassa, *op. cit.*, December 2016.

¹⁵ *Idem.*

¹⁶ Regulation (EC) no. 924/2009 of the European Parliament and of the Council of September 16, 2009, regarding cross-border payments in the Community and repealing Regulation (EC) no. 2560/2001, OJ L 266, 9.10.2009, p. 11.

¹⁷ Regulation (EU) 2019/518 of the European Parliament and of the Council of 19 March 2019 amending Regulation (EC) no. 924/2009 regarding certain fees for cross-border payments made within the Union and currency conversion fees, OJ L 91, 29.3.2019, p. 36.

¹⁸ D. Kolassa, *op. cit.*, December 2016.

¹⁹ Payment Services Directive

²⁰ COM(2010)0775.

of March 14, 2012, **establishing the technical and commercial requirements** applicable to credit transfers and direct debit operations in euros and amending Regulation (EC) no. 924/2009, adopted in 2012, is the result of the Commission's proposal from December 2010.

3) In 2015, a revised version of the Payment Services Directive (DSP 2)²¹ was adopted, by which the directive in force (the one from 2007) was repealed. This new legislation increases transparency and consumer protection and adapts the rules to encourage innovative payment services such as mobile and internet payments²².

4. The legislative framework corresponding to the 'free movement of capital' in the European Union

Although there has been progress in the liberalization of capital flows in the EU, the capital markets have remained fragmented²³, which is why, since 2015 (September), the Commission had the initiative of the 'Capital Markets Union', proposing those measures to create a truly integrated single capital market by 2019. In order to achieve this objective, in 2017 the Commission published an interim evaluation of the Action Plan on the Capital Markets Union, setting up for this purpose the Expert Group for dealing with obstacles to the free movement of capital. The Commission published a report on the situation in the Member States at the time, so that in March 2019 the Commission published a communication entitled 'Capital Markets Union: Progress towards a Single Capital Market for an Economic Union and solid monetary'.

A new communication followed, which includes 16 priorities²⁴. The capital markets union, according to the communication, has acquired an urgent character following the crisis caused by COVID 19. The commission specified that the capital markets union is even more important, in the current period, coming up with the following proposals²⁵:

1. Rectification; The Commission has therefore proposed Next Generation EU – a temporary emergency recovery instrument to help repair the immediate economic and social damage caused by the COVID-19 pandemic, kick-start the recovery and prepare a better and greener future for the next generation.

2. Green transition and digital transformation; The European Green Deal is the EU's new growth strategy and roadmap to ensure the sustainability of the EU economy. The European Green Deal Investment Plan aims to boost sustainable investment.

3. Economy more favorable to inclusion; The Capital Markets Union is also important for creating a more inclusive and resilient economy and society.

²¹ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services within the internal market, amending-Directive 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) no. 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, p. 35.

²² The directive entered into force on January 12, 2016, becoming applicable on January 13, 2018. See, Christian Scheinert, <https://www.europarl.europa.eu/factsheets/ro/sheet/39/libera-circulatie-a-capitalurilor>, 09.2022.

²³ *Idem*.

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A capital markets union for citizens and businesses – a new action plan. Brussels, 24.9.2020, COM(2020) 590 final.

²⁵ The 4 considerations are presented in 'Introduction', Brussels, 24.9.2020, COM(2020) 590 final.

4. Global competitiveness and open strategic autonomy of the EU; A capital markets union allows smaller capital markets to catch up with larger and more developed ones.

5. Actions; The Commission has broadly achieved the actions announced in the 2015 Capital Markets Union Action Plan and in the 2017 midterm review. The Commission's actions in this regard are:²⁶

Action 1: The Commission will propose the creation of an EU-wide platform (European single point of access) to provide investors with seamless access to financial and sustainability information about businesses.

Action 2: To promote and diversify access to finance for small and innovative businesses, the Commission will aim to simplify the rules for listing on public markets.

Action 3: The Commission will review the legislative framework for European long-term investment funds with the aim of channelling more long-term funding to businesses and infrastructure projects, especially those contributing to the smart growth objective, sustainable and inclusive.

Action 4: The Commission will aim to remove regulatory obstacles that prevent insurance companies from investing for the long term, without affecting financial stability and policyholder protection.

Action 5: The Commission will assess the benefits and feasibility of introducing a requirement for banks to direct SMEs whose credit applications have been rejected to alternative finance providers.

Action 6: To expand the EU securitization market, the Commission will review the current securitization regulatory framework to improve the provision of bank credit to EU businesses, especially SMEs.

Action 7: The Commission will carry out an assessment on the feasibility of developing a European framework in the field of financial skills²⁷.

Action 8: The Commission will assess the applicable rules on incentives and disclosure and, where appropriate, propose amending the existing legal framework to ensure that retail investors receive objective advice as well as clear and comparable product information.

Action 9: The Commission will facilitate the monitoring of pension adequacy in Member States by developing dashboards with pension indicators.

Action 10: To reduce costs for cross-border investors and prevent tax fraud, the Commission will propose a common, standardized EU-wide system for reducing withholding tax.

Action 11: To make the outcomes of insolvency proceedings more predictable, the Commission will present a legislative or non-legislative initiative for minimum harmonization or increased convergence in precisely defined areas of non-banking insolvency law.

Action 12: To facilitate cross-border investor engagement, the Commission will consider introducing an EU-wide definition of the term 'shareholder', as well as further

²⁶ The 16 priorities are actually the actions of the Commission which are developed in the 'Introduction', Brussels, 24.9.2020, COM(2020) 590 final.

²⁷ E. N. Vâlcu, „EU Invest Program” – Financing union mechanism of member states for post-pandemic economic recovery, „Perspectives of Law and Public Administration”, vol. 11, Issue 2, June 2022, pp. 252–260, <http://www.adjuris.ro/revista/articole/An11nr2/5.%20Valcu%20Elise%20EN.pdf>.

clarifying and harmonizing the rules governing the interaction between investors, intermediaries and issuers.

Action 13: The Commission will consider changing the rules to improve the cross-border provision of settlement services in the EU.

Action 14: The Commission will propose the creation of an effective and comprehensive centralized post-trade reporting system for equity and similar financial instruments.

Action 15: The Commission will propose strengthening the EU investment protection and facilitation framework.

Action 16: The Commission will work towards an improved single regulatory framework for capital markets by assessing the need for further harmonization of EU rules and monitoring progress towards supervisory convergence. The Commission will take stock of the results achieved in Q4 2021 and consider the possibility of proposing measures to strengthen supervisory coordination or direct supervision by the European Supervisory Authorities.

In addition to its interest in the capital markets union, the Commission is also concerned about the elimination of bilateral investment treaties in force within the EU, many of which predate the most recent waves of EU enlargement. It considers that the said agreements between member states are an obstacle to the single market, as they conflict with and overlap with the EU's legislative framework. For example, the arbitration mechanisms provided for in bilateral investment treaties exclude both national courts and the Court of Justice of the European Union, thus preventing the application of EU²⁸ legislation. Also, bilateral treaties can lead to a favorable treatment of investors coming from the member states that concluded the respective treaties²⁹, which is why on May 29, 2020, 23 member states signed an agreement on the cancellation of bilateral investment treaties between the member states of the EU³⁰. More than that, the annulment agreement, in the introduction, recalls, among other things, as a starting point in the jurisprudence of the CJEU³¹, making express reference to it, according to whose judgment, "the provisions provided for in an international agreement concluded between two member states cannot be applied in the relations between the two member states if it is found that they are contrary to the EU treaties.

Also, the member states, by virtue of the obligation to ensure compliance of their legal orders with Union law, must assume the consequences deriving from Union law as interpreted in a judgment of the CJEU, to which the agreement makes express reference³².

The agreement is welcome in the conditions where "the compromise clauses regarding the settlement of disputes between investors and states provided for in the bilateral investment treaties concluded between the member states of the European Union (intra-EU bilateral investment treaties) are contrary to the EU treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the

²⁸ Christian Scheinert, <https://www.europarl.europa.eu/factsheets/ro/sheet/39/libera-circulatie-a-capitaluri> lor, 09–2022.

²⁹ An agreement was reached on October 24, 2019, which paves the way for the elimination of these treaties.

³⁰ Agreement Concerning the Termination of Bilateral Investment Treaties between the Member States of the European Union SN/4656/2019/INIT; OJ L 169, 29.5.2020, pp. 1–41.

³¹ Case C-478/07 *Budějovický Budvar*.

³² Case C-284/16 *Achmea* judgment.

parties to a bilateral intra-EU investment treaty became a member state of the European Union”³³. The Commission also publishes annual reports and studies on capital flows within the EU and in a global context. During the crisis caused by the COVID-19 pandemic, it was found that, despite the extreme pressure on the financial system, no EU member state resorted to measures to control capital outflows³⁴.

5. Conclusions

The Commission’s efforts to encourage the liberalization of capital movements were supported by the European Parliament, which considered that liberalization should be more advanced within the Union than between the Union and the rest of the countries, in order to guarantee that the European economies feed with priority European investments. The European Parliament specified that the liberalization of the circulation of capital should be supported by the full liberalization of financial services and the harmonization of tax legislation in order to create a unified European financial market, which is why the Commission, under the political pressure exerted by the European Parliament, initiated the legislation on the harmonization of national and cross-border payments (Parliament Resolution of June 17, 1988).

In this sense, the European Parliament supported the creation of an efficient, integrated and safe market for the compensation and settlement of securities in the European Union and organized a workshop on the aspects related to securities legislation. Through **its non-legislative Resolution of 7 July 2005 on clearing and settlement in the European Union, the Parliament thus supported the creation of an efficient market.**

On 9 July 2015, a resolution was adopted regarding the creation of a capital markets union, the Parliament thereby in support of the launch of a capital markets union, “which emphasizes the need for a level playing field among participants to improve capital dispersion in the EU³⁵ .

The resolution calls for the removal of obstacles to cross-border financing, with a special focus on small and medium-sized enterprises. It also strengthens the role of the European Securities and Markets Authority in improving supervisory convergence³⁶.

In April 2019, the Parliament approved a series of legislative acts³⁷ that represent the constituent elements of the capital markets union. The common denominator of these pieces of legislation is A strong capital markets union is also needed to complement the banking union, to strengthen the economic and monetary union and the international role of the euro.

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³³ Argument invoked in the agreement, to which it makes express reference.

³⁴ Christian Scheinert, *op. cit.*, 09–2022.

³⁵ *Idem.*

³⁶ *Idem.*

³⁷ https://ec.europa.eu/commission/presscorner/detail/ro/IP_19_2130, consulted on 5 May 2024.

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