



THE EUROPEAN UNION

Free Movement of Services & Free Movement of Capital

FREE MOVEMENT OF SERVICES

- Is considered one of the most progressive freedoms.
- [Article 56](#) that restricts prohibitions on freedom of services is complemented by [Article 57 of the TFEU](#) that clarifies what exactly is to be considered a “service.”
- A service is generally considered as being a task done for remuneration of an industrial, commercial, professional or craft variety.
- [Article 57](#) also arguably provides the service provider with free movement “temporarily” and under the same conditions as a national of that member state.

“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”

[Article 56\(1\)TFEU](#)

NEGATIVE INTEGRATION; PERSONAL SCOPE

Three Scenarios Protected by [Article 56](#):

- I. A professional (or company) established in one member state moving another and continuing to provide the same service.
 - II. [Luisi & Carbone \[1984\]](#) provides the opposite of this and protects the recipients right to go to another member state in order to receive a service.
 - III. [Alpine Investments \[1995\]](#) established that even where there is not an identifiable recipient of the service, [Article 56](#) will still operate and there can be no restriction from the host state of the service or the recipient state.
- [Van Binsbergen \[1974\]](#) established that [Article 56](#) was directly effective.
 - [Laval \[2007\]](#) applied a broad interpretation.
 - The central aim behind the freedom is to outlaw restrictions on economic activities.
 - Very broad, liberal concept of what a lawful service is has been established in the courts.
 - [Article 57](#) does not establish any order of priority or hierarchy between the freedoms. ([Fidium Finanz \[2006\]](#))
 - This subsequently intensifies delineation problems with the other three freedoms.

FREEDOM OF ESTABLISHMENT

- Subordinate nature of the service provisions.
- This can be seen when a Company establishes itself in a host State via freedom of establishment, it can therefore not avail itself of [Article 56/57](#) in another State.
- [Gebhard \[1995\]](#) accepted that a service provider is entitled to equip themselves with some form of infrastructure in the host State. (principle criteria is the permanence of the activities.)
- No time limit on when the provision of services becomes establishment.
- [Schnitzer \[2003\]](#) provides a wide definition of services with the only limitation being that the provider *“establishes their principal residence on a permanent basis in the territory of another State.”*
- Distinction between freedom of establishment and free provision of services important because the rights granted under freedom of services are wider.



MATERIAL SCOPE OF ARTICLE 56



- The provision covers regulatory and fiscal matters.
 - Text of the Article suggests only discriminatory restrictions are covered however [Article 61](#) allows a wider reading than this.
 - *Sager [1991]* confirms that [Article 56](#) goes beyond discrimination.
 - The Court limited the inclusion of non-discriminatory measures however in *Alpine Investment [1995]* that restricted cross border services.
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- The non-discriminatory measure must affect access to the market and hinder intra Union trade for it to be a restriction to [Article 56. \(market access test\)](#) (*Commission v. Italy [2009]*)
 - Market access test rejects the idea of host State control.
 - Federal model is embraced
 - Hindering effect caused by the national measure must be greater for inter-State rather than intra-State trade.

POSITIVE INTEGRATION: THE SERVICES DIRECTIVE

- [Article 59 TFEU](#) entitles the Union to adopt legislative measures such as directives to achieve the liberalisation of a specific service. (vertical integration)
- [Article 62 TFEU](#) establishes the legal competence of the Union to issue directives for coordination. (horizontal integration)
- Vertical approach has regulated a range of sector-specific industries such as health care services.
- Most important horizontal integration measure is [Directive 2006/123 \(Services Directive\)](#)

The original draft of the Services Directive was very controversial due to the Country of Origin Principle which was the Central pillar of the Draft.

Final version of the Services Directive is somewhat weaker in pursuing its objectives and does so in a less general means. Material scope has been reduced.

Chapter I & VIII; Sets out general and final provisions
 Chapter II; Administrative simplification
 Chapter III; Freedom of Establishment
 Chapter IV; Free movement of services ([Article 16\(1\)](#) key)
 Chapter V; Quality of services
 Chapter VI & VII; Concern administrative cooperation and a convergence programme

SERVICE PROVIDERS AND POSTED WORKERS

Are service providers entitled to bring their employed staff into the host State & if so what labour law is applicable upon them?

- Freedom of services does cover posted workers; *Rush Portuguesa* [1990] but the application of local labour laws to these workers could violate [Article 56 TFEU](#) unless there was an overriding reason relating to the public interest/protection of workers to do so.
- National labour laws need to be proportionate.
- [Posted Workers Directive \(Directive 96/71\)](#) aimed to coordinate national labour law to lay down mandatory rules for minimum protection to be observed in the host State. (See [Article 3](#))
- *Laval* [2007] examined the implementation of Article 3 of the directive as did *Commission v. Luxembourg* [2008]
- The Court has provided a **minimalist definition** of the exceptions provided for in Article 3 in order to maximise its liberalising effect.



SERVICE RECIPIENTS & PUBLIC SERVICES

- [The Service Directive](#) excludes public services from its scope. ([Article 2\(2\)](#))
- The Treaties have been less clear; public services have a special place of general economic interest ([Article 14 TEU](#)) but non-economic public services are beyond the scope of Union Law. ([Article 2](#))
- Public services not covered by [Article 51](#) will be subject to [Article 56](#). (*Sacchi* [1974])
- If the Public services are not to be paid for, these will be out-with the scope of the treaty as per [Article 57](#).
- *Humbel* [1988] established that State schools could not be considered a service for the purpose of [Article 56](#) as it didn't meet the remuneration criteria. (All publicly funded services excluded from [Article 56 TFEU](#) as seen in *Wirth* [2010])
- Public health services do not fall under this general exclusion. (*Peerbooms* [2001], *Watts* [2006])

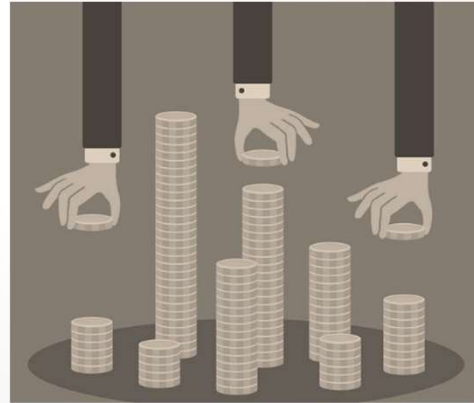


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FREE MOVEMENT OF CAPITAL

- Capital is very fluid.
- Free movement of capital always been a key freedom protected by the EU ([EEC ex Article 67\(1\)](#))
- The removal of capital restrictions was seen to be a matter for positive integration rather than Treaty amendment. And only to the extent necessary.
- Initial provisions on free movement of capital were vague and lacked direct effect.
- [Directive 88/361](#) was the first legislative measure to incorporate free movement of capital within the Union. (This had direct effect as per [Bordessa \[1995\]](#))
- Today the provision establishing the free movement of capital is found in [Chapter 4 of Title IV TFEU](#).
- **The central Article to this is [Article 63 TFEU](#).**

Capital is the defining characteristic of the modern economic system. [Directive 88/361](#) provides the basis for the Union definition of Capital.



DIRECT EFFECT OF ARTICLE 63

- [Article 63](#) has direct effect, what was debated was whether it applied to situations involving third countries as the Directive only applied intra-state.
- The extension of [Article 63](#) is conditional by [Article 64](#) as it leaves the degree of capital liberalisation via 3rd countries to the Union Legislature.
- This qualification is complemented by [Article 64\(2\)](#) in regards to backwards measures as well.
- [Sanz de Lera \[1995\]](#) found the extended application of [Article 63](#) did have direct effect & that the entire provision conferred directly enforceable rights on to individuals.



CAPITAL RESTRICTIONS

- [Article 63](#) prevents all restrictions.
- Restrictions prevented goes beyond national discrimination with the arguable exception of direct taxation.



- *Sandoz* [1999] confirmed that [Article 63](#) extended to non-discriminatory measures.
- This was confirmed later in the *Golden Share cases* [2002 – 2010] when States privatised many nationalised companies but wanted to keep a degree of control so restricted sale of shares/issued golden shares.
- The implication of these cases are still to be seen but they strongly suggest that such actions would constitute a breach of [Article 63](#).

DISCRIMINATION TEST IN RELATION TO DIRECT TAXATION

- National measures on taxation can directly or indirectly discriminate against foreign capital.
- Dual tax burdens can possibly be viewed as an obstacle to free movement of capital.
- *Verkooijen* [2000] provides a good example of how this can occur. Ruling didn't address whether dual taxation itself could be seen as a restriction on the free movement of capital.
- *Kerckhaert* [2006] resulted in the court refusing to extend [Article 63](#) to cover dual fiscal barriers as it insisted that only discriminatory taxation would fall within the scope of the article.
- This was repeated in *Test Claimants (II)* [2012].



CAPITAL & THE OTHER FREEDOMS

Capital & Freedom of Establishment

- Potential overlap acknowledged.
- Court tends to apply one freedom only in cases where they may overlap.
- Establishment where the investor has gained definite influence in the foreign company. (*Baars* [2000])
- When the restriction concerns ordinary shareholders, capital will principally apply. (*Verkooijen* [2000])
- Exclusive application of one freedom over the other dependent on which is the primary freedom affected.
- Parallel application of both freedoms confined to intra-Union capital movements. (*Test Claimants (II)* [2012])



CAPITAL AND FREE MOVEMENT OF SERVICES

- It is unknown whether free movement of services and capital can be applied in parallel.
- A centre of gravity approach is applied in determining which freedom to apply when both overlap as can be seen in *Fidum* [2006].
- *Fidum* [2006] also rejected the parallel application of both freedoms.



Freedom of capital movement is another essential element for the proper functioning of the large European internal market. The liberalisation of payment transactions is a vital complement to the free movement of goods, persons and services.

JUSTIFICATIONS & DEROGATIONS

- [Article 65\(1\)](#) provides for express justifications for capital restrictions.
- Any derogations from the principle must be interpreted strictly and in particular their scope cannot be determined unilaterally by each Member State without any control of the Union institutions.

Tax Discrimination under [Article 65\(1\)\(b\)](#)

- National tax measures generally tend to determine their rates based on residency rather than nationality. (indirect discrimination)
- [Schumaker \[1995\]](#) established that a residency criterion is not necessary an unjustified restriction.
- Not all indirect discriminatory tax measures can be justified as established in [Verkooijen \[1995\]](#) and [Manninen \[2004\]](#).
- Only objectively comparable situations could fall within the scope of the justification.
- Despite this limitation to the application of the justification, the Court has offered the constitutional avenue of “*overriding reason in the general interest.*”

EXPRESS JUSTIFICATIONS UNDER ARTICLE 65(1)(B)

- Public policy and public security justification.
- Two additional restrictions as well in the form of Member states being able “*to take all requisite measures to prevent infringements of national law and regulations*” (especially taxation) and to lay down procedures for the declaration of capital movements for administrative or statistical information.
- [Sandoz \[1999\]](#); Court reads these special grounds broadly and clarified that the preventative measures are not just applicable for tax. ([Bordessa \[1995\]](#))
- A proportionate restriction is strictly interpreted as seen in [Bordessa \[1995\]](#) and [Konle \[1999\]](#)



IMPLIED JUSTIFICATIONS UNDER ARTICLE 65(1)(B)

- The cohesion of national tax system is one of the most important overriding requirements in the context of capital restrictions via national taxation. (*Bachmann v. Belgium* [1992])
- There needs to be a **direct link**.
- What constitutes this is restrictively interpreted. (*Verkooijen* [1995])



SPECIAL DEROGATIONS FOR THIRD-COUNTRY RESTRICTIONS

- The Union demonstrates a lesser degree of liberalisation to third countries than its own member states.
- The Union allows member states to maintain national restrictions on capital movements from third countries that would not be allowed in an intra-Union context.
- [Article 64\(1\)](#): grandfather clause- time bar allowing any agreements pre 1994 to remain in place.
- [Article 65\(4\)](#): Allows the Union to adopt an administrative decision to justify a Member States restriction even if a judicial decision would be different.
- [Article 66](#): safeguard clause allowing the union to adopt temporary measures in an economic emergency situation.
- [Test Claimants \(II\)](#) [2006] Established a general reasonableness justification.
- Cannot impose the same strict proportionality rules that are intra-Union externally.
- National restrictions can be justified where an intra-Union restriction would not be.

CONCLUSION

- Free movement of services and capital were initially very underdeveloped freedoms.
- In recent decades there has been a major shift from this; they are now both well established and directly effective.
- Directives have been applied to ensure the integration of these freedoms into national states
- *Is there still room for development in both areas?*

