FREE MOVEMENT OF CAPITAL

The free movement of capital is one of the four fundamental freedoms of the EU single market. It is not only the most recent one but, because of its unique third-country dimension, also the broadest. The liberalisation of capital flows progressed gradually. Restrictions on capital movements and payments, both between Member States and with third countries, have been prohibited since the start of 2004 as a result of the Maastricht Treaty, although exceptions may exist.

LEGAL BASIS

Articles 63 to 66 of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

All restrictions on capital movements between Member States as well as between Member States and third countries should be removed, with exceptions in certain circumstances. The free movement of capital underpins the single market and complements the other three freedoms. It also contributes to economic growth by enabling capital to be invested efficiently and promotes the use of the euro as an international currency, thus contributing to the EU's role as a global player. It was also indispensable for the development of Economic and Monetary Union (EMU) and the introduction of the euro.

ACHIEVEMENTS

A. First endeavours (before the single market)

The first Community measures were limited in scope. The Treaty of Rome (1957) required the restrictions to be removed only to the extent necessary for the functioning of the common market. The 'First Capital Directive'[1] from 1960, amended in 1962, ended restrictions on certain types of commercial and private capital movements, such as real-estate purchases, short- or medium-term lending for commercial transactions, and purchases of securities traded on the stock exchange. Some Member States went further by introducing unilateral national measures, thereby abolishing virtually all restrictions on capital movements (e.g. Germany and the Benelux countries). Another directive[2] on international capital flows followed in 1972.

[1]EEC Council: First Directive for the implementation of Article 67 of the Treaty, OJ 43, 12.7.1960, p. 921.
[2]Council Directive 72/156/EEC of 21 March 1972 on regulating international capital flows and neutralizing their undesirable effects on domestic liquidity, OJ L 91, 18.4.1972, p. 13.

B. Further progress and general liberalisation in view of the single market

Amendments to the 'First Capital Directive' in 1985 and 1986 brought further liberalisation in areas such as long-term lending for commercial transactions and purchases of securities not dealt on the stock exchange. Capital movements were fully liberalised by a Council Directive[3] in 1988 which scrapped all remaining restrictions on capital movements between Member State residents as of 1 July 1990. It also aimed to liberalise capital movements involving third countries in a similar way.

C. The definitive system

1. Principle

The Maastricht Treaty introduced the free movement of capital as a Treaty freedom. Today, Article 63 of the TFEU prohibits all restrictions on the movement of capital and payments between Member States, as well as between Member States and third countries. The Court of Justice of the European Union is charged with the task of interpreting the provisions related to the free movement of capital, and extensive case law exists in this area. In cases where Member States restrict the freedom of capital movement in an unjustified way, the usual infringement procedure set out in Articles 258-260 of the TFEU applies.

2. Exceptions and justified restrictions

Exceptions are largely confined to capital movements related to third countries (Article 64 of the TFEU). In addition to the option for Member States of maintaining restrictions on direct investment and other transactions which existed on a given date, the Council may also, after consulting the European Parliament, unanimously adopt measures which constitute a step backwards in the liberalisation of capital movements with third countries. In addition, the Council and the European Parliament may adopt legislative measures involving direct investment, establishment, provision of financial services or the admission of securities to capital markets. Article 66 of the TFEU covers emergency measures vis-à-vis third countries, limited to a period of six months.

The only justified restrictions on capital movements in general, including movements within the EU, are laid down in Article 65 of the TFEU. These include: (i) measures to prevent infringements of national law (namely for taxation and prudential supervision of financial services); (ii) procedures for the declaration of capital movements for administrative or statistical purposes; and (iii) measures justified on the grounds of public policy or public security. The latter was invoked during the European sovereign debt crisis, when Cyprus (2013) and Greece (2015) were forced to introduce capital controls in order to prevent an excessive outflow of capital. Cyprus removed all of the remaining restrictions in 2015 and Greece did so in 2019.

Article 144 of the TFEU allows, within the framework of the balance of payments assistance programmes, for protective balance of payments measures where difficulties jeopardise the functioning of the internal market or where a sudden crisis occurs. This safeguard clause is only available to Member States outside of the euro area.

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[3]Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988, p 5.

Finally, Articles 75 and 215 of the TFEU provide for the possibility of financial sanctions either to prevent and combat terrorism or based on decisions adopted within the framework of the common foreign and security policy.

3. Payments

Article 63(2) of the TFEU stipulates that 'all restrictions on payments between Member States and between Member States and third countries shall be prohibited'.

In 2001, a regulation harmonising the costs of domestic and cross-border payments within the euro area was adopted. It was repealed and replaced in 2009[4], offering benefits for Member State residents by bringing down the fees for cross-border payments in euro practically to zero. It was then amended in 2019[5], with the aim of bringing down the fees for cross-border payments between euro and non-euro Member States.

The Payment Services Directive (PSD)[6] provided the legal foundation for establishing a set of rules applicable to all payment services in the EU to make cross-border payments as easy, efficient and secure as 'national' payments, and to foster efficiency and cost reduction through more competition by opening up payment markets to new entrants. The PSD provided the necessary framework for an initiative of the European banking and payments industry, called the 'Single Euro Payments Area' (SEPA). SEPA instruments were available, but not much in use by the end of 2010. Consequently, in 2012, a regulation[7] was adopted, setting EU-wide end-dates for the migration of the old national credit transfers and direct debits to SEPA instruments. In 2015, the co-legislators adopted the revised Payment Services Directive (PSD 2)[8], which repealed the existing directive. It enhances transparency and consumer protection and adapts the rules to cater for innovative payment services, including internet and mobile payments. The directive entered into force on 12 January 2016 and took effect on 13 January 2018.

D. Further developments

Despite the progress achieved in liberalising capital flows in the EU, capital markets have remained, to a large extent, fragmented. Building on the Investment Plan for Europe, the Commission launched, in September 2015, its flagship initiative: 'Capital Markets Union'. This includes a number of measures aimed at creating a truly integrated single market for capital by 2019. A mid-term review of the Capital Markets Union Action Plan was published in June 2017. In addition, the Commission and the Member

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[4]Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001, OJ L 266, 9.10.2009, p. 11.
[5]Regulation (EU) 2019/518 of the European Parliament and of the Council of 19 March 2019 amending Regulation (EC) No 924/2009 as regards certain charges on cross-border payments in the Union and currency conversion charges, OJ L 91, 29.3.2019, p. 36.
[6]Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319, 5.12.2007, p. 1.
[7]Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009, OJ L 94, 30.3.2012, p. 22.
[8]Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 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.

States are working on eliminating obstacles to cross-border investment which fall within national competences. The expert group on barriers to free movement of capital was set up to examine this issue. In March 2017, by way of follow-up to the work of the expert group, the Commission published a report outlining the situation in the Member States. In March 2019, the Commission published a communication entitled 'Capital market union: Progress on building a single market for capital for a strong economic and monetary union'. This was followed by a second CMU action plan, with 16 priorities, in September 2020.

The Commission is also working towards discontinuing the existing intra-EU bilateral investment treaties (BITs), many of which existed before the most recent rounds of EU enlargement. These agreements between Member States are considered by the Commission to be an impediment to the single market as they both clash and overlap with the EU legislative framework. For example, the arbitration mechanisms which are integrated into the BITs exclude both the national courts and the Court of Justice of the European Union, thus preventing the application of EU law. BITs may also result in more favourable treatment being given to investors from certain Member States which concluded intra-EU BITs. An agreement was reached on 24 October 2019 which paves the way to terminating these. On 29 May 2020, 23 Member States signed an agreement for the termination of BITs between the Member States of the EU. The Commission also publishes yearly reports and studies on capital flows within the EU and in the global context. During the COVID-19-induced crisis, it appeared that, despite the extreme stress exerted on the financial system, no EU Member State resorted to capital controls on financial outflows.

ROLE OF THE EUROPEAN PARLIAMENT

Parliament has strongly supported efforts to encourage the liberalisation of capital movements. However, it has taken the view that such liberalisation should be more advanced within the EU than with the rest of the world, to ensure that EU savings fuel EU investment as a priority. It has also pointed out that capital liberalisation should be backed up by full liberalisation of financial services and the harmonisation of tax law in order to create a unified EU financial market. It was thanks to political pressure from Parliament that the Commission was able to launch legislation on the harmonisation of domestic and cross-border payments.

Parliament has supported the launch of the Capital Markets Union. It adopted a resolution which stressed the need for a level playing field among participants in order to improve the allocation of capital in the EU. The resolution called for existing barriers to cross-border financing to be removed, in particular for small and medium-sized enterprises, and for a stronger role for the European Securities and Markets Authority in improving supervisory convergence. In April 2019, Parliament agreed on a series of legislative acts putting in place the building blocks of a Capital Markets Union.

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