

Internal regime



- The basic freedom
- Concepts and principles
- Relationship to other Treaty freedoms
- Exceptions

Article 56: The basic freedom



- 1 Within the framework of the provisions set out in this Chapter, all restrictions on the *movement of capital* between Member States and between Member States and third countries shall be prohibited.**
- 2 Within the framework of the provisions set out in this Chapter, all restrictions on *payments* between Member States and between Member States and third countries shall be prohibited.**

Concepts and principles



- **”Capital movement” vs ”payment”**
- **Direct application**
- **Extension to third countries**
- **Absence of all obstacles**
- **Freedom vs non-discrimination**
- **Nationality vs residence**
- **Enforcement**

Nomenclature of capital movements

(Annex to Directive 88/361)



- Direct investments (establishing of and participation in undertakings)
- Investment in real estate
- Operations in securities and other instruments dealt in on the capital market (shares, bonds, etc.) and on the money market (portfolio investment)
- Operations in units of collective investment undertakings
- Operations in current and deposit accounts with financial institutions

Nomenclature of capital movements (cont.)

(Annex to Directive 88/361)



- Credits related to commercial transactions or to provision of services
- Financial loans and credits
- Guarantees, etc.
- Transfers in performance of insurance contracts
- Personal capital movements (loans, gifts, inheritance)
- Physical import and export of financial assets
- Other (list is not exhaustive)

Cross border aspect !

Relationship to other Treaty freedoms



- **Right of establishment**
 - (Art. 43 ff.)
- **Freedom to provide services**
 - (Art. 49)

Capital movements ↔ establishment



- **Art. 43:** abolition of restrictions on cross-border establishment of nationals within the EC. This includes the right to set up and manage undertakings in the form of agencies, branches or subsidiaries, in particular companies within the meaning of Article 48:
 - “ *companies or firms constituted under civil or commercial law, including co-operatives societies, and other legal persons governed by public or private law, save for those which are non-profit-making* ”
- **Establishment is a form of capital movements** (form of foreign direct investment).

Capital movements ↔ establishment cont.)



- **Dividing line is thin**
- **Implications:** limited in practice within the EC. The difference is larger in relation to third countries.
- The **EC Treaty** deals with the relationship of the two freedoms in Art. 43, last sentence and Art. 58(2).

Capital movements ↔ services



- **Principle:** these two types of transactions are distinct and covered by different EC Treaty provisions (Art. 56, Art. 49).
- **De-facto,** often capital movements coincide with the provision of (financial) services. Hence, often, restrictions affect both capital movements and services.
- **GATS vs Treaty:** “commercial presence” is one mode of cross-border services, but the **establishment of a services provider in another country** falls under the EC Treaty provisions on capital movements and establishment.

General exceptions (1)



... provided by Art. 58(1) and (3)

1. Taxation (+ Declaration to Art. 58)

2. Prudential supervision

3. Measures for statistical and reporting purposes

4. Public policy (order) and public security

General exceptions (2)



5. **Secondary residences**

(Protocols on the acquisition of property in DK and Malta)

6. **Land**

(Åland Islands, Finland - Special Protocol)

7. **Balances-of-payments measures**

Safeguard measures (**Art. 119, 120**)

8. **Property ownership (Art. 295)**

9. **National security and defence (Art. 296)**

Article 58



1. The provisions of Art. 56 shall be without prejudice to the right of Member States:

a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regards to the place where the capital is invested;

b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and **the prudential supervision of financial institutions,** or to lay down procedures for the **declaration of capital movements for purposes of administrative or statistical**

Article 58 (cont.)



information, or to take measures which are justified on grounds of **public policy** or **public security**.

2. The provisions of this chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.
3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.

Observations on Art. 58



Prudential supervision

- ❖ **Provision to allow prudential supervision of financial institutions (but only those!)**
- ❖ **Typical applications:**
 - Conditions on direct investment in financial services (investor has to be “fit and proper”);
 - Publication requirements for securities issues;
 - Rules on the asset allocation of institutional investors (e.g. currency matching rules in insurance and pension funds directives);
 - Rules on open currency positions of commercial banks.

Observations on Art. 58 (cont.)



Declaration procedures for statistical and reporting purposes

- ❖ such procedures are, to different degrees, common practice for Member States and the Community;
- ❖ prior notification requirements generally not compatible with Treaty.

Observations on Art. 58 (cont.)



Public policy (order), public security

- ❖ **Exceptions rarely used by Member States in the field of capital movements**
- ❖ **partly necessary (“safeguard”), as freedom of capital movements is an “absolute right”**
- ❖ **Jurisprudence of the ECJ narrowly defined this exception. Two important principles:**
 - measures have to be proportionate;
 - measures are permitted, if at all, only for non-economic reasons.