

Legal basis for the free movement of capital

1. Provisions of the Treaty on the Functioning of the European Union (TFEU)

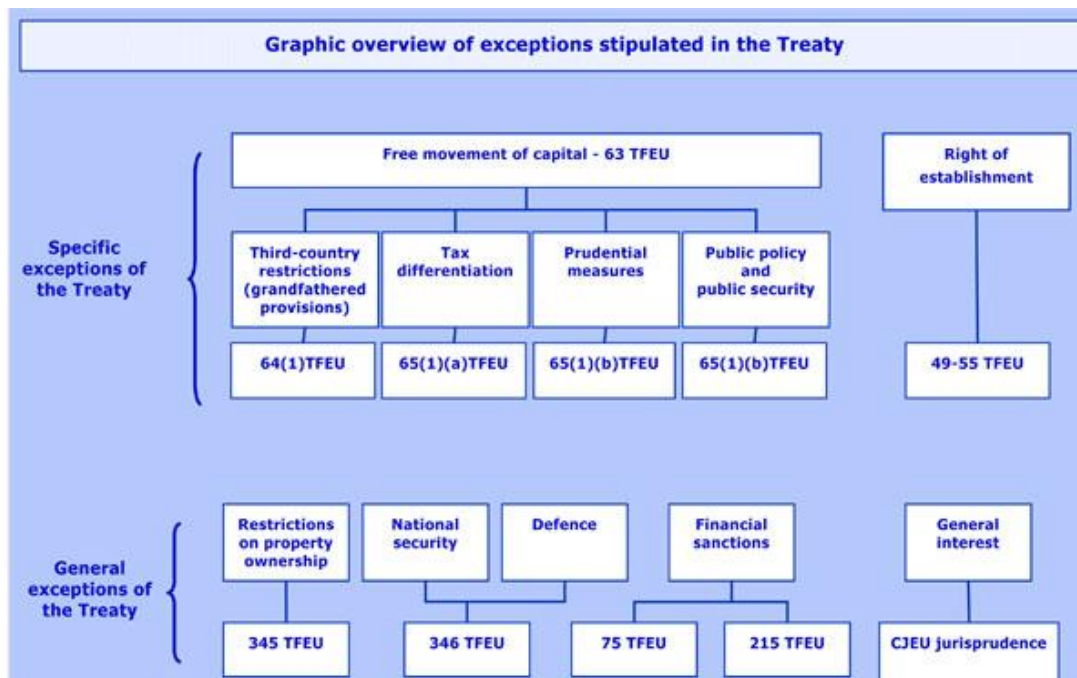
General principle of the free movement of capital

The general principle about free movement of capital is defined in [Art. 63 TFEU](#). This Article stipulates that "...all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." The wording of the Treaty provision defines the **fundamental features of this principle**:

- "...all restrictions..."
- "...between Member States..." / "between Member States and third countries": capital movement concerned must contain a **cross-border** element
- "third countries": this freedom also concerns third countries
- "movement of capital": the wording of Article 63 TFEU contains no limitation as to who has the right to invoke this freedom
- "...prohibited": Art. 63 TFEU has **direct effect**; it does not need any implementing legislation at Member States' level and it directly confers rights on individuals which they can rely on before national courts (see e.g. case [C-101/05](#), Skatteverket v A, §21).
- "...all restrictions... shall be prohibited": Art. 63 TFEU prohibits all obstacles, not just discriminatory ones. It lays down a general prohibition, which **goes beyond the mere elimination of unequal treatment on grounds of nationality** (see case [C-367/98](#), Commission / Portugal, §44).
- On **payments**, Art. 63(2) TFEU stipulates that "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."

Exceptions to the free movement of capital

Exceptions stipulated in the Treaty



Third-country restrictions (grandfathered provisions)

[Art. 64 TFEU](#) allows Member States to apply restrictions that existed before a certain date to [third countries](#) and certain categories of capital movements and it provides a basis for the introduction of such restrictions – but under very specific circumstances.

Tax differentiation

[Art. 65\(1\) TFEU](#) allows for different tax treatment of non-residents and foreign investment, but with the reservation that this must not represent a means of arbitrary discrimination or a distinguished restriction in the sense of [Art. 65\(3\) TFEU](#).

Prudential measures

[Art. 65 \(1b\) TFEU](#) allows Member States "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 declaration procedures for purposes of administrative or statistical information (e.g. cash controls at the border), or to take measures which are justified on grounds of public policy or public security. However, these measures must not represent a means of arbitrary discrimination or a distinguished restriction in the sense of [Art. 65\(3\) TFEU](#).

Public security

[Art. 65\(1b\) TFEU](#) stipulates that "The provisions of Article 63 shall be without prejudice to the right of Member States...to take measures which are justified on grounds of public policy or public security." The CJEU has decided that the difficulty in identifying and blocking capital once it has entered a Member State may in principle justify differential treatment of transactions involving **foreign direct investment** (see case [C-54/99](#), *Église de Scientologie*, §20).

With respect to a system of **prior administrative approval**, the CJEU has explicitly ruled (see cases [C-463/00](#), *Commission v Spain*, §69 and [C-367/98](#), *Commission v Portugal*, §50) that "such a system must be based on objective, **non-discriminatory** criteria which are known in advance to the undertakings concerned..." [Art. 65\(3\) TFEU](#) additionally stipulates that "measures and procedures" under Article 65(1b) and (2) TFEU shall not constitute a means of arbitrary discrimination (e.g. measures targeting specific individual investors) or a disguised restriction. In addition, assuming such difficulty in identifying and blocking capital once it has entered a Member State for every case of **indirect control** by third country entities (e.g. blanket reference to the requirement of prior authorisation for third country entities) would seem to contradict [Art. 54\(1\) TFEU](#).

The CJEU has established (see e.g. case [C-423/98](#), *Albore*, §19) that the requirements of public security cannot justify derogations from the Treaty rules such as the freedom of capital movements unless the principle of **proportionality** is observed, which means that any derogation must remain within the limits of what is **suitable** for securing the objective which it pursues and must not go beyond what is **necessary** in order to attain the pursued objective.

Regarding specifically third countries, the Court has furthermore established (see case [C-101/05](#), *Skatteverket v A*, §37) that it may be "...that a Member State will be able to demonstrate that a restriction on the movement of capital to or from **third countries** is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States...".

Third country restrictions (economic and monetary union)

[Art. 66 TFEU](#) allows for restrictions regarding third countries to safeguard against serious difficulties for the operation of economic and monetary union. Financial sanctions

[Art. 75 TFEU](#) provides for the possibility of financial sanctions against individuals, groups or non-state entities to prevent and combat terrorism.

Pursuant to [Art. 215 TFEU](#) financial sanctions may be taken against third countries, or individuals, groups or non-state entities, based on decisions adopted within the framework of the common foreign and security policy.

Balance of payment

[Art. 143 TFEU](#) and [Art. 144 TFEU](#) allow for the taking of protective balance of payments measures, where difficulties jeopardise the functioning of the Internal Market or where a sudden crisis occurs.

Restrictions on property ownership

Privatisation

- According to [Art. 345 TFEU](#), "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership", a principle that is of particular importance in the context of **privatisation** measures. CJEU case law on Art. 345 TFEU is limited and mostly relates to expropriation. (see Communication of the Commission on **intra-EU investment** (1997), fn. 1 below). On privatisation see [IP/01/872](#).
- The privatisation of a firm (from the public to the private sector) is an economic policy choice which, in itself, falls within the exclusive competence of Member States (see e.g.
- However, the CJEU stated in its landmark decisions on special rights of public authorities that "Member States are not entitled to plead" Article 345 TFEU "by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty" (emphasis added). Member States thus need to operate within the limits of the Treaty freedoms in the **post-privatisation phase** of an enterprise. For more information, see cases [C-58/99](#), [C-367/98](#), [C-483/99](#), [C-503/99](#), [C-463/00](#), [C-98/01](#), [C-174/04](#), [C-112/05](#), [C-326/07](#), [C-274/06](#), [C-207/07](#), [C-171/08](#), [C-543/08](#), [C-212/069](#).
- In case [C-174/04](#), Commission/Italy, §32, the CJEU ruled that "The Treaty provisions on the free movement of capital do not draw a distinction between private undertakings and public undertakings..."

Exceptions established by the case law of the Court of Justice of the European Union based on exceptions stipulated in the Treaty

The CJEU has established that the free movement of capital, as a fundamental principle of the Treaty, may be restricted only by national rules which are justified by reasons referred to in [Art. 65\(1\) TFEU](#) or by **overriding requirements of the general interest** (see e.g. cases [C-463/00](#), Commission v Spain, §68 and [C-174/04](#), Commission v Italy, §35, where the Court further notes that "...in order to be so justified, the national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality").

Whilst these general interest considerations are not explicitly stated in the TFEU, some have been **established by CJEU case law**. Some examples:

- On **services of general interest** the Court acknowledged with regard to safeguarding the solvency and continuity of the provider of the universal postal service, "that the guarantee of a service of general interest, such as universal postal service, may constitute an overriding reason in the general interest capable of justifying an obstacle to the free movement of capital" (see joined cases [C-282/04](#) and [C-283/04](#), Commission v the Netherlands, §38, §39).
- Regarding the **petroleum, telecommunications and electricity** sectors, the CJEU has ruled, that "...it is undeniable that the objective of **safeguarding supplies** of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reason...and therefore may justify an obstacle to the free movement of capital." (case [C-463/00](#), Commission v Spain, §71). In joined Cases [C-388/00](#) and [C-429/00](#), Radiosistemi, §44 (for the free movement of goods), the Court found that "It is true that the national type-approval for radio equipment is of such a nature as to be justified by considerations of public security and imperative requirements relating to the proper functioning of the **public telecommunications network**..."
- Furthermore, [Art. 21\(4\) of the Merger Regulation](#) (Council Regulation (EC) No 139/2004) specifically qualifies the **plurality of the media** as a "legitimate interest" next to considerations qualifying as notions covered by [Art. 65\(1b\) TFEU](#) (public security, prudential rules).

2. Protocols & declarations

- [Protocol Nr. 32](#) to the Treaty on the European Union allows Denmark to maintain existing legislation which restricts the acquisition of second homes by non-nationals.
- [Protocol Nr. 6](#) to the Act of Accession 2003 allows Malta to restrict the acquisition of secondary residences.
- [Protocol Nr. 2](#) to the Act of Accession Finland 1994 allows for specific restrictions regarding the Åland islands, including e.g. the acquisition of real estate

3. Acts of accession

The acts of accession foresee transitional measures (allowing new Member States to keep certain temporary restrictions in some areas, e.g. the acquisition of real estate by non-nationals) and other provisions.

Act of Accession 2011

- Annex V: [Croatia](#)

Act of Accession 2005

- Annex VI: [Bulgaria](#)
- Annex VII: [Romania](#)

Act of Accession 2003

- Annex V: [Czech Republic](#)
- Annex VI: [Estonia](#)
- Annex VII: [Cyprus](#)
- Annex VIII: [Latvia](#)
- Annex IX: [Lithuania](#)
- Annex X: [Hungary](#)
- Annex XI: [Malta](#)
- Annex XII: [Poland](#)
- Annex XIII: [Slovenia](#)
- Annex XIV: [Slovakia](#)

A few years after the accession of the new countries, the Commission started to review the relevance of restrictions on the acquisition of agricultural land and forest. In some cases, it granted an extension to the transitional period.

- [Commission Decision of 14 April 2011 extending the transitional period concerning the acquisition of agricultural land in Slovakia](#)
- [Commission Decision of 14 April 2011 extending the transitional period concerning the acquisition of agricultural land in Lithuania](#)
- [Commission Decision of 7 April 2011 extending the transitional period concerning the acquisition of agricultural land in Latvia](#)
- [Commission Decision of 20 December 2010 extending the transitional period concerning the acquisition of agricultural land in Hungary](#)

4. Secondary legislation with impact on the free movement of capital

The CJEU has established (e.g. case [C-101/05](#), Skatteverket v A, §21) that the Treaty principle of free movement of capital has **direct effect**, i.e. it does not need any implementing legislation at Member States' level. [Art. 63 TFEU](#) directly confers rights on individuals which they can rely on before national courts. However, some secondary legislation nevertheless has an impact on the Treaty freedom, e.g.:

- [Directive 88/361/EEC](#) for the implementation of Article 67 of the Treaty. Although the TFEU does not define the term 'movements of capital', the CJEU has held that Directive 88/361/EEC and the nomenclature annexed to it can be used to define that term (see e.g. in case [C-](#)

[112/05](#), §18: "In the absence of a Treaty definition of 'movement of capital'..., the Court has previously recognised the **nomenclature** set out in Annex I to Council Directive 88/361/EEC for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam] as having indicative value."). Transactions representing capital movements are listed in Annex I of the Directive.

- Exceptional circumstances with regards to Member States' **balance of payments** can have an impact on the free flow of capital: Member States which have not adopted the Euro and which are experiencing, or are seriously threatened with, difficulties in their current payments or capital movements can benefit from a **medium-term financial assistance**. At present, [Council Regulation \(EC\) n° 332/2002](#) governs the medium-term financial assistance for Member States' balance of payments up to a maximum of EUR 12 billion. In the past, Community loans for balance of payments support were granted by way of Council Decisions based on [Council Regulation \(EEC\) n° 397/1975/EEC](#), [Council Regulation \(EEC\) n° 682/1981](#) and [Council Regulation \(EEC\) n° 1969/1988](#). See also [MEMO/01/67](#).
- The principle of free movement of capital does not exclude that Member States and/or the European Union have a monitoring role on capital movements. Protection of citizens against misuse of the financial system and against activities for **money laundering** purposes is necessary. Controls of cash entering or leaving the Community are regulated by [Regulation \(EC\) n° 1889/2005](#).

5. Interpretative communications

Caveat: None of the Interpretative Communications below prejudices the interpretation that could be given by the CJEU to the issues addressed.

- [Communication from the Commission on Intra-EU investment in the financial services' sector \(2005\)](#)
- [Communication of the Commission on certain legal aspects concerning on intra-EU investment \(1997\)](#)