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FREE MOVEMENT OF MONEY IN THE EUROPEAN UNION – THE ROLE OF EUROPEAN COURT OF JUSTICE IN THE FORMATION OF FREE MOVEMENT OF CAPITAL AND PAYMENTS

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Abstract

Free movement of capital and payments is one of four fundamental principles, whose undisturbed operation is vital for proper functioning of the Common Market. In the first stage of the European Community, this freedom served a rather ancillary function, facilitating the full use of the freedom of movement of goods, people and services. It was as late as at the beginning of the 1990s that this principle was considerably liberalized. The treaty regulations concerning free movement of capital and payments changed. These regulations obtained the status of direct effectiveness, which means that natural and legal persons may invoke them in courts and domestic institutions. However, the most essential role in forming the principle of free movement of capital and payments was played by European Court of Justice, whose judgments contributed to its present shape and allowed practically full liberalization of free movement of cash. The aim of this article is to show the evolution of the free movement of capital and payments flow under the influence of changing treaty regulations and the judgments of European Court of Justice.

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Introduction

Free movement of capital is one of four fundamental freedoms of the EU internal market and forms the basis of the economic integration phenomenon. There are five stages of integration, each of them having some specific features and properties: free trade zone, customs union, common market, economic union and full economic integration. Particular stages of the integration process may take place consecutively but may also overlap, influence and supplement each other and become the causal factors of further changes (Ładyka, 2001, pp. 11-23). One could ask why countries decide to liberalize their trade, why the free movement of capital is so important and what benefits it brings. Probably the main reason for economic integration are the benefits resulting from increased economic effectiveness, which are manifested in increased production level and more effective use of available resources.

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Another essential factor are also international trends concerning the development of industry and technological progress. In countries which decided to introduce the free movement of capital, the economic development has accelerated and intensified, which is of particular importance to developing countries, as it helps them break out of their economic backwardness. Moreover, integration aims may be found in political reasons, the desire to achieve common political aims or the desire to prevent common threats. There are also social and economic reasons, aiming at increasing the prosperity, reflected in increasing national income. International integration enables us to coordinate the development of joint research on the most revolutionary solutions. Economic integration offers the state a possibility of international cooperation.

The investment of capital on international markets by economic entities or natural persons who are EU citizens should not be surprising to anyone. Individual people have a possibility of purchasing a flat in Costa Brava in Spain or in any other place in the European Union, they can invest their savings in investment funds or inherit an estate from the family who lived in a foreign country. Enterprises or concerns, on the other hand, depending on their needs, may allocate capital so as to achieve the highest returns. All these actions are possible due to the principle of free movement of capital. However, before it became possible, several legal regulations and adjustments had to be made to remove the barriers to capital movement between the countries. It made it possible to create a common market of the European Union, where all its elements could spread in all directions depending on their economic aims. Taking into account the above considerations, it cannot be doubted that the free movement of capital along with free movement of goods and services, is a fundamental community right. Unfortunately, the speed at which this space is developing leaves a lot to be desired. This freedom was "imperfect" as it was as late as in the Treaty of Maastricht that properly formulated and directly effective legal basis appeared. Further steps towards liberalization of capital movement were taken when necessary and established by means of secondary legal acts, namely directives. Such slow actions aiming at full liberalization of free movement of capital account for the fact that other freedoms, mainly due to dynamic interpretation of treaty resolutions in judgments of European Court of Justice, became more important.

Free movement of capital and payments is the freedom which covers many areas of economy, especially the banking and insurance sector. It is connected with unrestricted import and export of capital in such forms as: trade in securities, direct investments, running bank accounts or purchasing property. In practice, this freedom guarantees the possibility of making payments in form of bank transfers abroad, opening bank accounts in other countries, setting up branches of the company outside the domestic market and taking active part in managing international enterprises.

The main aim of the European Union, according to article 2 of the Treaty of Rome is to provide harmonious and sustainable growth on the area of the whole Community. To achieve this aim it is necessary to create an internal market which should be based on four freedoms. It will allow to create open, integrated and effective finance and service market, which will bring benefits to member states. Free movement of capital and payments is the subject of article 3 of the European Treaty, which establishes the European Economic Community. However, the provisions concerning capital movement were much more limited than those referring to the movement of goods and services. The treaty did not bring up the issues concerning the creation of common capital market. This state resulted from the attitude of member states, who were concerned that the creation of a common capital market will limit

their possibilities of influencing capital movements, which are one of the most effective tools of controlling the macroeconomic and monetary situation of a given country (Kawecka – Wyrzykowska, Synowiec, 2004, pp. 98-100). We should not forget that even in the 1980s the free movement of capital in most European Union countries practically did not exist. Most financial operations between member states were controlled and regulated by state authorities. Further liberalization was necessary to complete the functioning of the internal market, which was reflected in the provisions of the White Book. Full liberalization of the freedom was achieved with the adoption of regulations of article 56 of the Treaty Establishing European Community. This provision stated that all restrictions in movement of capital and payments between EU member states and third countries are forbidden. Thanks to this entrepreneurs could invest capital in any country, taking decisions based on the highest profit criterion and without experiencing any administrative or legal constraints.
Free movement of capital in the European Union also stimulates a wider process of economic cooperation concerning economic and currency integration. A strategic decision made by member states of the European Union to start the second stage of the Monetary Union was an important element influencing liberalization of free movement of capital. There are still some expectations concerning further freedom of capital movement between member countries and third countries, especially in issues connected with taxation, financial sanctions, money laundering or financial supervision. Although full freedom of capital movement was introduced, certain countries preserve some national barriers, resulting from tax law or cautionary procedures of the financial service sector. For example, within OECD, certain reservations were introduced concerning the freedom of operations and establishing foreign branches of banks, insurance providers and other financial institutions.

Free movement of capital and free movement of payments

It is essential to distinguish between two terms concerning free movement of capital and free movement of payments. In article 56 of the Treaty Establishing European Community, these two terms were distinguished. Free movement of capital consists in enabling financial operations based on one-sided movement of proprietary means to another country for investment purposes. Free movement of payments (also referred to as current payments), on the other hand, refers to mutual performances concerning free movement of employees, goods, services and entrepreneurship, and its nature is not autonomous (Barcz, Kawecka – Wyrzykowska, Michałowska – Gorywoda, 2007, p. 184). Free movement of payments is of accessorial type, as it consists in transfer of money within the payment for a given product or service. However, difficulties in interpreting these two terms led to their interpretation by European Court of Justice in two combined cases of Graziano Luisi and Giuseppe Carbone (C-286/82 i C-26/83 Luisi and Carbone versus Ministero del Tesoro [1984], ECR 377) . The case concerned the argument between Italian citizens and the Minister of Treasury. According to Italian regulations, a limit of 500 thousand Italian lira was imposed on currency exchange. This mainly referred to taking out foreign currency out of Italy by Italian citizens to finance their tourist, business, education or health treatment stays. Luisi and Carbone exceeded the limit stipulated by the law. In case of Luisi, there was exchange and export of 25 million lira without the authorities consent, while Carbone exceeded this limit by 14 million lira. These sums were taken out of Italy in Deutch marks, US dollars and French francs. Following the violation of law, the Italian Tax Office imposed on its citizens punishments being the equivalent of the difference between the amount of exported money and legally permitted

limit. This generated their objections, as the free capital movements provided in the Union legislature were never identical with Italian legislature. Luisi stated that the money taken out of Italy was needed for very expensive medical treatment, while Carbone claimed that the amount he took was spent during his 3-month tourist holiday. Therefore in both cases what really happened was the export of money in order to take advantage of free provision of services in another state country. According to the Court judgment, freedom in providing a service means the possibility of using this service by its customers (people receiving medical treatment, travelling on business or to study) on the territory of another country without any limits concerning the form of payment. European Court of Justice stated that current payment is a transfer of a foreign currency as a result of the contract made, while capital movement is a financial operation, whose aim is to deposit money or invest capital, and not to obtain reward for a given service. According to this ruling, taking some money out of the country to pay for the service obtained in another country is not treated as the movement of capital. Currently Movements of payments and capital are liberalized on the same principles (Mataczyński, 2007, p. 34).

The significance and role of European Court of Justice judgments concerning free movement of capital

The period when the free movement of capital was dynamically developed was the decade of 1990s. Apart from the obligation to use liberalization of free movement of capital by member states following Directive 88/36, the Treaty of Maastricht was introduced and acclaimed to be directly effective by European Court of Justice. Since then the cases decided by European Court of Justice have become more important for the free movement of capital. It is an institution established on the basis of stipulations in the Treaty on European Coal and Steel Community in 1951, and in 1957 it became a joint institution of three Communities. Until 1989 it was the only judicial institution and instance of the Communities. After 1989 it operated together with the newly created Court of First Instance which received part of obligations and powers of Court of Justice. The main aim of Court of Justice is to assure respect for law, including the law of free movement of capital on the area of the European Union, following the treaty resolutions. These powers are extremely broad, and their observance provides coherence and uniformity of the community law (Barcz et al., 2007, pp. 95-96). Court of Justice may decide in issues concerning free movement of capital in arguments between Communities institutions, between communities and member states, between member states, and in cases petitioned by legal and natural persons (Kenig – Witkowska, Łazowski, Ostrihansky, 2007, p.143).

Court of Justice is undoubtedly one of the most important union institutions, as its task is to implement the community regulations concerning free movement of capital into legal orders valid in particular states. Due to its independence it is to guard equal law observance in the EU. However, we should remember that formally the judgments of Court of Justice do not have the power to set a precedent and do not create law. In some cases, when the existing legal norms are not very clear, they are treated as important and basic source of law (Wystrychowski, 2005, p. 446-447).

The judgments of Court of Justice allowed to create and define a general term of "capital movement", which was not defined in the Treaty Establishing European Community. According to article 220 of the Treaty on European Community, it is Court of Justice which has the power to interpret terms included in the Treaty and it also refers to Directive 88/361.

Its appendix contains the so-called nomenclature of capital movements, which facilitates the application of existing law. Although Court of Justice has issued so many judgments concerning the definition of free movement of capital, it has not been clearly defined yet. According to the judgments of Court of Justice, the term of free capital movement incorporates the following operations (B. Wawrzyńczak – Jędryka et al, 2007):

1) physical export to third countries of coins, banknotes and checks, which are not exported in order to pay for goods and services,
2) physical import or export of cash, including gold and silver coins as long as they are a legal means of payment,
3) capital share of an already established or planned partnership in another member state, as well as a guaranty,
4) establishing a mortgage in order to secure a loan taken out in a currency of another member state,
5) guarantee granted by non-residents to residents and by residents to non-residents,
6) purchasing euro-bonds issued by another member state,
7) loans offered by non-residents to residents and the other way round,
8) purchasing property by non-residents,
9) direct investment made by non-residents in another member state,
10) obtaining dividend from shares in a partnership whose registered office is in another member state.

According to the judgments of European Court of Justice, free movement of capital may be defined as a one-way transfer of proprietary means in monetary form (loans, securities) or in material form (shares in partnerships, property) for the investment purposes, which takes place between at least two member states. Analyzing the above definition we should notice that it is essential that the purpose of the transfer should be investment, that is, it should lead to generating some profit, and what is more, it cannot be conditioned by the flow of goods and services. A more precise definition of this term is only possible when we thoroughly analyze the judgments of European Court of Justice.

Legal aspects of free movement of cash in the European Union.

Four freedoms constitute the foundation of common market in the European Union: freedom of movement of goods, services, people and capital and payments. Even though these principles are not organized in any hierarchy, it is clearly visible that initially member states paid more attention to the proper functioning of free movement of goods, services and employees. Free movement of capital and payments, on the other hand, was treated more as a supplementary principle, supporting the proper functioning of the other three principles. Such approach was presented both in community legal acts and in judgments of European Court of Justice until 1990. It was only in the last decade of the 20th century and the beginning of the 21st century that free movement of capital and payments gained in significance, which enabled practically full liberalization of the movement of cash in the European Union. European Court of Justice played a vital role in shaping this principle. "The judgments issued by European Court of Justice in cases initiated by the European Commission have permanently changed the situation concerning free movement of capital" (Mataczyński, 2007, p. 1)

From Treaty of Rome to Directive 88/361

Free movement of capital and payments was originally regulated in the Treaty establishing European Economic Community (Treaty of Rome), which became effective on 1st January 1958. The issues of free movement of money were included in article 67 and next articles of the Treaty. As we mentioned earlier, the regulation of free movement of capital and payments in this Treaty was rather ancillary to the functioning of the other three freedoms. Article 67 of the Treaty in its original wording was different from respective regulations on principles of application of other freedoms. Although it said about gradual elimination of domestic restrictions in the transition period, but only to the extent which is necessary for the functioning of common market (Emmert, Morawiecki, 2001, p. 385). Although in some member states, such as Germany and Great Britain, the movement of money was liberalized as early as in the 1970s. This, however, was more thanks to the decision of those governments than to the regulations of the community law. The first derivative acts passed by the Council referring to free movement of capital and payments are the following:

1) First Directive from 11th May 1960 (Official Journal, 1960, No 921, p. 60), which obliged community countries to issue general permits for four kinds of capital transfer specified in this Directive,
2) Second Directive from 18th December 1962 (Official Journal, 1963, No 9, p. 62), which introduced further liberalization of foreign currency regulations.

These Directives did not constitute any breakthrough, though. They originated from the approach of community countries to the principle of free movement of capital and payments at that time. It should also be added that the regulations of the Treaty (article 67 and next articles), on the basis of which these Directives were issued, did not constitute clear, sufficiently determined and unconditional obligations of member states and therefore were not directly effective. It means that legal and natural persons could not refer to these regulations directly before their domestic court. In 1970s, after the first oil crisis, many countries experienced problems with their balance of payments. Member states, on the basis of article 73 of the Treaty establishing European Economic Community applied for the permission to limit free movement of capital and were granted acceptance in this matter. Only in mid-1980s liberalization of capital movement became important.

„The Commission, in its White Paper on the Completion of Internal Market in 1985, established a list of measures concerning free movement of capital, and together with Single European Act, the aim of completing the internal market was declared, also with reference to capital transfer" (Emmert, Morawiecki, 2001, p. 387).

The period described above, namely from coming into force of Treaty establishing European Economic Community to the end of 1990s was also characterized by rather low activity of European Court of Justice regarding free movement of capital and payments. The most important judgments of the Court regarding movement of financial means are the following cases: Thopmson [1978], Casati [1981] and the already described case of Luisi and Carbone [1984]. In the first case (7/78 her Majesty vs. Thompson [1978], ECR 2247) European Court of Justice tried to solve the dilemma of when the money transfer is made within free movement of goods and when movement of money should be regulated by the rules of capital market. The facts of a case were the following: the party which appealed to the judgment of domestic organs exported, without having appropriate license, British gold and silver coins

and imported the Krugerrands, which were a legal means of payment in South Africa. The party claimed that the British ban on importing gold and silver coins minted before 1947 was a violation of the principle of free movement of goods in the Community. The suing party referred to article 30 and article 34 of the Treaty establishing European Economic Community, which regulated the prohibition of using quantity limits and similar means in trade between member states. European Court of Justice faced a dilemma of differentiating between the "goods" which are subject to the principle of free movement of goods, and "means of payment". Finally, in the conclusion of a judgment, the Court stated that the movement of coins which are a means of payment anywhere in the world, is a movement of capital according to the Treaty. If these coins are 'exported' or 'imported' in order to pay for the goods or services, this can be classified as the movement of payment. In the subject matter, the Krugerrands, which were still a legal means of payment, could not be treated as goods.

The Casati case (203/80 penal proceedings against Casati [1981], ECR 2595) brings on one hand, the statement of the court that free movement of capital, together with movement of people and services, is one of the fundamental guarantees of proper development of the Community, and on the other hand, it brings the statement that article 67 of the Treaty Establishing European Economic Community differs from the regulations concerning free movement of goods, persons and services, as the obligation to liberalize the capital movement exists only if "it is necessary for the functioning of the common market". The case concerned Mr. Casati, an Italian citizen living permanently in Germany. Going on holiday to Italy, he took 650 thousand Italian lira and 24 thousand German marks without declaring the money. He was stopped on his way home on the Italian and Austrian border. According to the valid Italian law, taking foreign currency abroad was only possible after declaring possession of it, while taking Italian currency in the amount exceeding 500 thousand lira out of Italy required special permit. Casati argued that he took this money to Italy in order to purchase some machines for his business. The transaction, however, was not made. For the above-described deed he could be punished with severe penal sanctions. Legal proceedings were instituted against him in Italy, and the court asked European Court of Justice some prejudicial questions concerning the conformity of Italian law with the Treaty and direct effect. The decision as to the merits was the following:

„The regulations concerning free movement of goods must also cover movement of payments connected with trade. This does not concern the situation when some amount of money is taken back into the country after it was taken out of this country in order to make a trade transaction which did not take place".

European Court of Justice also stated in this case that:

„[…] At present state we cannot rule out that full freedom of capital movement may threaten economic policy of a country or disturb its balance of payments, which may lead to violation of proper functioning of the Common Market".

This judgment unequivocally indicates lack of direct effectiveness of regulations from article 67 and next of the Treaty Establishing European Economic Community. Therefore, the consequence of this case was definitely deprivation of private entities of the possibility of

effective resistance to various administrative restrictions concerning movement of capital in member states (Mataczyński, 2007, p. 23).
Since mid-1980s liberalization of the movement of capital and payments gained new significance. The breakthrough step was when the Council passed Directive 88/361 (Official Journal of European Community, 1988, No L 178/5) on the basis of article 76 of the Treaty Establishing European Economic Community.

From Directive 88/361 to the present state of free movement of capital and payments.
Directive 88/361 had one basic aim – to implement article 67 of the Treaty Establishing European Economic Community in all member states. According to article 1 of this directive, members of the community were obliged to abolish all restrictions concerning movement of capital between permanent inhabitants of member states. This was supposed to come into effect on 1st July 1990. The effect of this directive was granting people residing in member states free access to financial markets of other member states.

„The Directive aimed at removing all restrictions concerning transfers connected with movement of capital (foreign currency control) and all regulations limiting the access of citizens of a given state to financial system of any other member state, for example for investment or loan purposes" (Edited by Skubisz, Skrzydło-Tefelska, 2008, p. 313).

Also Appendix 1 to the Directive 88/361 was important, as it contained the nomenclature concerning the movement of capital. This nomenclature illustrated what kind of transaction should be liberalized. The appendix listed for example direct investments (long-term loans aiming at establishing or maintaining regular economic ties), purchase and sale of property, purchase and sale of securities available at the capital market, actions connected with units of investment funds, operations on current and deposit accounts in financial institutions or loans connected with trade transactions or providing services in which a resident participates.
The significance of this directive was confirmed by European Court of Justice in its judgment in Bordessa case (Judgment of the Court C-358/93 and C-416/93, 1995). European Court of Justice gave the article 1 of the Directive direct effectiveness, which constituted a breakthrough in application of the principle of free movement of capital. In this case the Court dealt with conformity of the Spanish Royal Decree No 1816/91 from 20th December 1991 with the community law. The decree obliged the people who took out of Spain the amount exceeding 1 million pesetas to complete the declaration form. If this amount exceeded 5 million pesetas, a person had to obtain a permit. The accused, Aldo Bordessa, Italian citizen was stopped at the French and Spanish border as he attempted to bring in 50 million Spanish pesetas. Criminal charges were laid against him. The court asked European Court of Justice a question concerning the conformity of Spanish law with community law. The judgment of the Court turned out to be a landmark, as it stated:

„[…]the requirement of authorization cannot be regarded as requisite measure because it would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory".

and:

„The requirement under Article 1 of the Directive for Member States to abolish all restrictions on movements of capital is precise and unconditional and does not require a specific implementing measure”.

With this judgment, European Court of Justice introduced the principle that member states cannot make the circulation of foreign currencies dependent on administrative permits. However, the obligation to fill in the declaration form could still be valid. Moreover, the Bordessa case confirmed direct effectiveness of article 1 of the directive, giving individuals the possibility of referring to this regulation without the necessity of implementation.
In the 1990s, the free movement of capital also evolved in treaty regulations. On 1st January, 1994 the Treaty of Maastricht came into effect with some regulations concerning free movement of capital and payments. The treaty introduced totally new regulations providing full freedom of cash circulation. The articles 67-73 of the Treaty establishing European Economic Community were replaced with article 73b-73g of the Treaty establishing European Community. In spite of the introduction of new regulations, European Court of Justice declared in favor of preserving the legal status of Directive 88/361. “Moreover, new regulations of primary law are direct continuation of the stipulations of the Directive” (edited by Skubisz, Skrzydło-Tefelska, 2008, p. 314). The next treaty (Amsterdam) changed the numbering of the regulations concerning movement of capital. Articles 73b-73g were changed into articles 56-60 of the Treaty establishing European Community, while article 73e was abolished. In this shape the treaty regulations functioned until 2009, when the Treaty of Lisbon came into effect. This treaty transferred the regulations concerning capital and payments to articles 63-66 of the Treaty on the Functioning of the European Union (TFEU).
At present article 63 of TFEU (old article 56 of the Treaty on establishing of the European Community) clearly states that all restrictions concerning movement of capital between Member States as well as between Member States and third countries are forbidden. This regulation is clear, unconditional, and what is most important, directly effective. This was confirmed by European Court of Justice in the case of Sanz de Lera (C-163, 165 and 254/94 Criminal proceedings v. Lucas Emilio Sanz de Lera and others [1995] ECR I-4821). The case concerned two citizens of Spain and one citizen of Turkey who attempted at bringing into Switzerland and Turkey the amount of 60 million Spanish pesetas, without a permit required under Article 4, section 1 of the already mentioned royal decree No 1816/91. Spanish citizen Lucas Emilio Sanz de Lera, travelling from France to Geneva, was carrying 20 million Spanish pesetas, which was found by a French official. The other Spanish citizen, Díaz Jiménez, was carrying over 30 million Spanish pesetas in banknotes, travelling by plane from Madrid to Zurich. The money was found at the airport in Spain. Turkish citizen, Figen Kapanoglu, found himself in a similar situation, attempting at carrying 12 million Spanish pesetas by plane from Madrid to Istanbul. All of them were charged with violating the law. However, they referred to the Treaty regulations concerning free movement of capital. The Spanish court could not decide on this issue and asked European Court of Justice prejudicial questions concerning the conformity of Spanish law with the Treaty. The judgment of European Court of Justice in this case clearly stated that the necessity of obtaining permits for taking out coins, banknotes or bearer checks limits the free movement of capital. The exercise of this freedom cannot be subject to the discretion of the administrative authorities and thus be

such as to render that freedom illusory." In this judgment, European Court of Justice confirmed direct effectiveness of article 56 of the Treaty establishing European Community (currently article 63 of the Treaty on the Functioning of the European union). It stated that this article contains clear and unconditional prohibition, and its realization does not require any specific implementing measures, therefore it is directly effective. Granting individuals the possibility of referring to article 56 directly before courts and financial institutions in their home country made it possible to fully apply the principle of free movement of capital and payments. Article 63 of the Treaty on the Functioning of the European Union (old article 56 of the Treaty on establishing European Community) states that free movement of capital also refers to third countries. This regulation does not differentiate between the transfer of capital on the internal market and the transfer of capital to countries outside the Union. It is forbidden to use any restrictions in this area. Prior regulations did not cover this aspect.

„It should be noted that former regulations included only political obligation of member states to achieve the highest possible level of liberalization in movement of capital to or from third countries (art. 70 Treaty on European Economic Community) or the same degree of liberalization which is applied in operations with residents of other member states (art. 7 of the Directive 88/361)" (edited by Skubisz, Skrzydło-Tefelska, 2008, p. 314).

Although articles 56-60 of the Treaty establishing European Community (at present articles 63-66 of the Treaty on the Functioning of the European Union) practically fully liberalized the Union regulations concerning the movement of capital and money between Member States and between EU Countries and third countries, in many cases European decision-makers tried to maintain some domestic legislature which hindered free movement of money. European Court of Justice decided in its judgments on the conformity of such regulations with the article 56 of the Treaty. In 2002 and 2003, European Court of Justice made important judgment concerning the so-called golden share. In the Commission vs. United Kingdom case (C-98/01 Commission vs. United Kingdom [2003] ECR I-4641) the Court concluded that domestic regulations on the so-called golden share may discourage investors from other countries from making investments, and in this way limit the access to the market. In another case, Commission vs. Portugal (367/98 Commission vs. Portugal [2002] ECR I-4731] the judgment was similar. European Court of Justice stated that Member States are obliged not only to eliminate the measures discriminating against citizenship of the entities operating on the financial market.
In a former judgment (C-484/93 Peter Svensson and Lena Gustavsson v Ministre du Logement et de l'Urbanisme [1995]) the Court ruled that contrary to the treaty are the domestic law regulations which make the housing allowance, especially subsidy of loan installments dependent on the condition that the loan allocated to financing the construction or purchasing of a flat was contracted in a loan institution accepted by this Member State, which is tantamount to the situation when this institution has its registered office in this country.
In cases of Annelise Lenz [2004] and Mannienen [2004] European Court of Justice dealt with the conformity of tax law with the treaty principle of free movement of capital and payments. The case of Annelise Lenz (C-315/02 Lenz EU Official Journal C 228 from 11.09.2004, p. 27) concerned differentiation of tax on capital income in Austria. The Austrian legislature stated that only people obtaining income from the capital of Austrian origin may choose between the 25% rate and ordinary income tax with the application of the rate lowered by

half. However, the income from the capital originating in other countries was subject to income tax without the possibility of lowering the rate to 50%. European Court of Justice stated that such regulations are contrary to article 56 and article 58, sections 1 and 3 of the Treaty on establishing the European Community.

The case of (C-319/02 Perti Mannienen EU Official Journal C 262 from 23.10.2004, p. 4) concerned inconformity of the tax relief referring to taxation of dividends from shares of the companies with registered offices in Finland with the community law. Partners who had shares in companies in other member countries could not take advantage of this tax relief. European Court of Justice stated that such regulations discourage people from investing in companies outside Finland and are an obstacle in gathering capital in Finland by such companies.

Another important judgment referred to the case of Volkswagen (C-112/05 Case C-112/05 Commission vs. Germany [2007]) in which the Court very generally stated that "as constraints" in the meaning of article 56, section 1 we should qualify those domestic regulations which may constitute an obstacle or limit the acquisition of shares in particular companies or which may discourage investors from other member states from investing in their capital".

Not all regulations of financial law of Member States which European Court of Justice analyzed to decide on their conformity with article 56 and next of the Treaty on European Union turned out to be inconsistent with free movement of capital and payments. As an example we could quote here two quite new cases from 2006. In the case of Kerckhaert and Morres (Case C-513/04 Mark Kerckhaert and Bernadette Morres versus Belgium [2006]) the Court ruled that the community law (article 56) is not contrary to the Belgian tax law, which states that within the income tax, the same uniform tax base is applied to dividends from shares of companies which have their registered offices in this country and dividends from shares of the companies which have their registered office in another member state, without the possibility of including taxes paid in another member state.

The case of Test Claimants (C-524/04 Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue [2006]) brought the Court's statement that it is possible to grant the company with its registered office in a member state a tax relief being equivalent to part of the tax paid by the company which makes payments on paid out profits. Such relief is not granted to companies receiving dividends, which have their registered offices in another member country and who are not subject to taxation on received dividends.

Having analyzed article 56 of the Treaty on European Union (at present article 63 of the Treaty on the Functioning of the European Union), it is worth referring to the next treaty provisions connected with free movement of capital and payments. The next regulation of the Treaty – article 64 of the Treaty on the Functioning of the European Union (old article 57 of the Treaty on the European Union) contains several constraints on free movement of capital to and from third countries. According to Poździk, the aim of this regulation in the treaty was to guarantee that the liberal article 56 does not harm the current policy of the European Union (edited by Skubisz, Skrzydło-Tefelska, 2008, p. 316). Therefore two types of constraints were introduced concerning third countries. In section 1 of this article, the Treaty states that article 56 does not constitute any restriction in movement of capital and payments between Member States and third countries which exist on 31st December, 1993. This provision refers to direct investment, including investment in real estate, establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing

under national law in Bulgaria, Estonia and Hungary, the relevant date is 31st December 1999. The second exception regulated in article 64 (former article 57 of the Treaty on European Union) states that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the measures on the movement of capital to or from third countries. However, if such measures constitute a step backwards in Union law as regards liberalization of the movement of capital, they must be adopted unanimously in accordance with a special legislative procedure, and after consulting the European Parliament. Article 65 of the Treaty on the Functioning of the European union (old article 58 of the Treaty on the European union) is an exception from the principle of free movement of capital and payments within the European Union. According to this article, the community law does not prejudice the rights of Member States to apply the relevant provisions of their law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested. In section 1, point b of this article, it is stated that Member States may take all requisite measures to prevent infringement of national law and regulation, in particular in the field of taxation and the prudential supervision of financial institutions. In addition, Member States may lay down procedures for the declaration of capital movements for purposes of administrative or statistical information. The last restriction mentioned in this point is the possibility to make measures which are justified on grounds of public policy or public security. The possibility of using declarations of transferred capital was confirmed in the above-mentioned case of Bordessa. This case expressed the principle formed by European Court of Justice that such declarations are consistent with the provisions of the Treaty. The community law, on the other hand, does not allow for the use of permits for transferring foreign currency. Section 2 of article 65 of the Treaty on the Functioning of the European Union (ex article 58 of the Treaty on the European Union) also constitutes the principle concerning the applicability on the right of establishment which are compatible with the Treaties.
Section 3 of this article is vital, stating that: "The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63". Therefore such actions cannot be of only economic kind. Unfavorable balance of payments or high budget deficit do not justify the application of such restrictions. An example of the judgment in which European Court of Justice ruled against using measures from this article which are only economic, is the case of Campus Oil (C-72/83 Campus Oil versus Ministry of Industry and Energy [1984] ECR 2727).
The last article of the Treaty referring directly to free movement of capital and payments in the European Union is article 66 of the Treaty on the Functioning of the European Union (ex article 59 of the Treaty on the European Union). It states that in exceptional circumstances, where movements of capital to and from third countries causes or threatens to cause serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission, and after consulting the European Central Bank, may take safeguard measures with regard to third countries. These measures should not exceed six months.

Conclusions

The aim of this paper is to present the evolution of one of four fundamental principles governing the functioning of the common market – free movement of capital. This freedom was mainly shaped after 1990. On the one hand, it was a consequence of more serious

approach of the Union decision-makers to this freedom, and on the other hand, its liberalization can be attributed to the changing social relations. The development of technology, and the popularity of cashless exchange of money and the possibility of acquiring securities in electronic form eliminated the need to control the transfer of foreign currencies at the border. According to Emmert and Morawiecki: "the non-cash transactions are almost unlimited all over the world through international stock exchange transactions and transfers of securities, usually beyond the control of state authorities or central banks" (Emmert, Morawiecki, 2001, p. 393). Technological progress had tremendous impact on easy movement of capital and money, however we should not forget the role that the European Court of Justice played in shaping the present freedom of movements of capital and payments. It was the judgments of the Court that allowed full application of this principle. Originally this principle was not granted direct effect, that is the possibility of direct referring to it by natural and legal persons in domestic courts and institutions. However, in the 1990s, the Treaty changes and judgments of the Court of Justice gave this principle the attribute of direct effectiveness. This was a significant breakthrough in liberalization of free movement of money between Member States and between Member States and countries outside the European union. The principle of free movement of capital and payments formed in this way is closely connected with the functioning of financial markets, as it constitutes the foundation of the European integration (Gawlikowska-Hueckel, Zielińska-Głębocka, 2004, p. 119).

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