

CHAPTER XIII

FREEDOM OF MOVEMENT OF CAPITAL

A- TREATY PROVISIONS (ARTS. 67-73)

According to the Treaty the member states are obliged to abolish as between themselves all restrictions on the movement of capital belonging to persons resident in their territory and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. To that end they must liberalize their domestic rules governing the capital market and the credit system. Movements of capital to and from third countries remain within the power of the member states but they have to keep the Commission informed of such movements.

B- IMPLEMENTING LEGISLATION

In view of the programmatic nature of the Treaty provisions the community had to enact implementing measures to keep pace with the development of the common market.

Thus:

a) The combined effect of the First and Second Directive¹ was the elimination of exchange controls in respect of current transactions, transfers of personal funds, investments in real estate and transfers in connection with the movement of goods and the provision of services. They were, however, inapplicable to stock exchange dealings².

b) The Third Directive³ standardized the measures to be taken by the member states in order to rectify disturbances of the capital markets, control international capital flows and minimize the detrimental effects of these measures upon domestic liquidity.

c) After a long interval Directive 85/583⁴ amending the First Directive brought about the liberalization of Unit trusts and gave investors a more effective protection and uniform safeguards within the Community.

d) Directive 86/566⁵ imposed upon the member states a duty to grant authorization and exchange facilities for transactions related to long-term commercial credits, acquisition of securities (i.e. bonds, shares and units) which are not dealt with on the stock exchange and admission (i.e. introduction, issue and placing, of securities to the capital markets.

e) Directive 88/361⁶ purported to remove the remaining restrictions on capital movements between the member states as a corollary to the completion of the internal market. It imposed, in particular, an obligation upon the member states to abolish restrictions on the movement of capital between persons resident in the Community and to ensure that capital transfers are made at the same rate of exchange as those applicable to current transactions. It also laid down procedures under which member states may protect themselves against short-term capital movements leading to serious disturbances in member states' monetary and exchange rate policies. It also counselled the member states to liberalize the movement of capital to and from third countries and consult among themselves in this respect.

f) Developments towards the establishment of the monetary and economic union have been discussed above⁷.

C- EFFECT ON BANKS AND CREDIT INSTITUTIONS

The development of services in the capital sector goes hand in hand with the liberalization of capital movements. It has, as we have observed earlier⁸, a profound effect upon the banking system and insurance. A further effect can be seen in the legislation on transactions in securities.

D- TRANSACTIONS IN SECURITIES

a) Three Directives⁹ relevant to stock exchanges purported to establish a coordinated information policy on listed securities designed to facilitate access to financing and investment on the capital markets of the member states and to protect investors.

b) Directive 87/345¹⁰, amending Directive 80/390, specifies which authorities should check and approve stock-exchange particulars in cases where application for listing is made in more than one member state. Such listing particulars must be

drawn up in the member state where the issuer's registered office is situated. If it is not in any of the member states, the issuer must choose one of them. There must be mutual recognition of one member state's approval of listing particulars of the others.

c) Directive 88/267¹¹ applies to persons who acquire or dispose of major holdings in a company whose shares are officially listed on a stock exchange and is registered in a member state. Such person must notify the company if the single holding goes above or falls below 10% of the subscribed capital and the company must publish the information.

d) Directive 85/611¹² co-ordinates national laws governing unit trusts (UCITS). UCITS are undertakings whose sole object is the collective investment in transferable securities of capital raised from the public and the units of which are, at the request of the holders, re-purchased or redeemed out of the undertaking's assets. UCITS require authorization from the member state in which it is situated and this authorization is valid for all member states. Units are marketed throughout the EC on the basis of a single licence. Directive 85/611 has been amended by Directive 88/220¹³ to introduce a derogation for private-sector bonds similar to that for bonds issued or guaranteed by a state.

e) Directive 88/220¹⁴ amends Directive 85/11 extending the limit of investment in transferable securities issued by a single body from 5% to 25 % of its assets and enabling unit trusts and comparable bodies to treat certain bonds neither issued nor guaranteed bonds.

f) Directive 89/298¹⁵ co-ordinates the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when securities are offered to the public.

g) Directive 89/592¹⁶ purports to control "insider dealings". Thus primary insiders, i.e. persons who have acquired inside information in the course of their employment, the exercise of their profession or duties, may not take advantage of that information to buy or sell on their territory, directly or indirectly, securities traded on their stock exchange market. The same prohibition applies to persons who have obtained inside information from a primary insider.

This Directive envisages co-operation between the national authorities and penalties (to be fixed by the member states) to be a sufficient deterrent.

There is a proposed Directive¹⁷ to promote a single market in investment services in accordance with an authorization procedure on the basis of which the investment firm having obtained a licence in one member state (home country authorization) will be allowed to set up branches in the entire EC and provide services across the frontiers without further authorization. The Directive will define the qualified providers of these services and will lay down rules for the grant and withdrawal of the authorization process of capital movements and the establishment of services in the capital market.

NOTES

- 1 OJ 1959-62 SP.Ed. p.49 and OJ 1963-64 Sp. Ed. p.5
- 2 Case 143/86: East v Cuddy (1988) 1CMLR 1
- 3 OJ 1972, p.296
- 4 OJ 1985, L.372
- 5 OJ 1986 L.332
- 6 OJ 1988, L.178
- 7 See , Chapter VI, D
- 8 See, Chapter XIII,C
- 9 Dir. 79/279, OJ 1979, L.66/21; Dir. 80/390, OJ 1980, L.100/1; Dir. 82/121, OJ 1982, L.48/26
- 10 OJ 1987, L.185
- 11 OJ 1988, L.348
- 12 OJ 1985, L.375
- 13 OJ 1988, L 100
- 14 OJ 1988, L.100
- 15 OJ. 1989, L.124
- 16 OJ 1989, L.334
- 17 COM (88) Final 778, OJ. 1988, C.43