

Module 05 – European Union Law MQF Level 5, 4 ECTS

Lecture 5 – The Four Freedoms

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Diploma in Law (Malta)



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The Four Freedoms



The Internal Market

- The internal market is an area of prosperity and freedom, providing access to goods, services, jobs, business opportunities and cultural richness.
- Continuous efforts are required to ensure the further deepening of the single market, which could yield significant gains for EU consumers and businesses.
- In particular, the digital single market opens up new opportunities to boost the economy (through e-commerce), while also cutting red tape (through e-governance and the digitalisation of public services).
- Despite the substantial moves towards a (digital) single market, challenges remain.

The Internal Market – Objectives

- The common market created by the Treaty of Rome in 1958 was intended to eliminate trade barriers between Member States with the aim of increasing economic prosperity and contributing to ‘an ever closer union among the peoples of Europe’.
- The Single European Act of 1986 included the objective of establishing the internal market in the European Economic Community (EEC) Treaty, defining it as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’.



What role do the Four Freedoms play in the EU?

1. The four fundamental freedoms have been legally guaranteed since 1986: They state that goods, services, capital and persons can move without restriction within the EU. Four out of five EU citizens believe that these four freedoms sit alongside peace on the continent as the greatest European achievement ever.
2. These freedoms are cornerstones of the European Single Market: They strengthen trade within the EU. Two-thirds of all goods produced in the EU are exported to another EU country. Since the EU is the world's largest single market, this free exchange generates positive welfare effects. Studies show that the EU's gross domestic product (GDP) has grown by several percentage points thanks to the Single Market.



What role do the Four Freedoms play in the EU?

3. The euro is also supported by the four freedoms: They contribute to evening out economic imbalances among the euro-area member states. Booms and downturns are mitigated, because goods and capital in particular can go wherever there is demand. These powers of adjustment apply to jobseekers and services as well provided that language barriers and regulations permit this. At the same time, the euro facilitates the integration of the Single Market, the exchange rate risk disappears and prices can be more easily compared.
4. The four freedoms set the EU apart from other free trade zones: for example, CETA, the free trade agreement between the EU and Canada, provides for the removal of tariffs but not for the free movement of people. In fact, the majority of international trade agreements, such as NAFTA – the North American agreement between the United States, Canada and Mexico – reduce trade barriers but do not create a single market.
- The four fundamental freedoms are controversial within the EU, even if the European Single Market serves as a model for many regions.

Can the four freedoms be separated?

- Technically speaking, it is possible to separate the four freedoms, but does it make political sense?
- *“European leaders have said many times that membership means accepting the “four freedoms” of goods, capital, services and people. [...] And that is why both sides in the referendum campaign made it clear that a vote to leave the EU would be a vote to leave the Single Market.”* Theresa May, British Prime Minister in her statement on the Brexit negotiations on 17 January 2017
- *“Access to the single market [is] only possible under the condition that the four fundamental freedoms are complied with. Otherwise, compromises need to be negotiated. There can be no cherry-picking when it comes to these [Brexit] negotiations, because that would have fatal consequences for the other 27 member states. We cannot allow such consequences to occur.”* Angela Merkel, German Chancellor in a speech at the dbb annual conference in Cologne on 9 January 2017

Free Movement of Goods



Free Movement of Goods

- The free movement of goods has been secured through the elimination of customs duties, quantitative restrictions and measures having an equivalent effect.
- The principles of mutual recognition, elimination of physical and technical barriers and promotion of standardisation gave additional momentum to the completion of the internal market.
- Legal basis: – Article 26 and Articles 28–37 of TFEU.

Free Movement of Goods - Objectives

- The right to the free movement of goods originating in Member States, and of goods from third countries which are in free circulation in the Member States, is one of the fundamental principles of the Treaty (Article 28 of the TFEU).
- Originally, the free movement of goods was seen as part of a customs union between the Member States, involving the abolition of customs duties, quantitative restrictions on trade and equivalent measures, and the establishment of a common external tariff for the Union.
- Later on, the emphasis was placed on eliminating all remaining obstacles to the free movement of goods, with a view to creating the internal market.

A. Prohibition of charges having an effect equivalent to that of customs duties: Article 28(1) and Article 30 of the TFEU

- Since there is no definition of the aforementioned concept in the Treaty, case law has had to provide one.
- The Court of Justice of the European Union considers that any charge, whatever it is called or however it is applied, 'which, if imposed upon a product imported from a Member State to the exclusion of a similar domestic product has, by altering its price, the same effect upon the free movement of products as a customs duty', may be regarded as a charge having equivalent effect, regardless of its nature or form.

B. Prohibition of measures having an effect equivalent to quantitative restrictions: Article 34 and Article 35 of the TFEU

- In its '*Dassonville*' judgment, the Court of Justice took the view that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade were to be considered as measures having an effect equivalent to quantitative restrictions.
- In the '*Cassis de Dijon*' judgment, the ECJ laid down the principle that any product legally manufactured and marketed in a Member State in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be allowed onto the market of any other Member State. This was the basic reasoning underlying the debate on defining the principle of mutual recognition, operating in the absence of harmonisation. Therefore, even in the absence of EU harmonisation measures, Member States are obliged to allow goods that are legally produced and marketed in other Member States to circulate and to be placed on their markets.
- The '*Keck*' judgment, states that certain selling arrangements fall outside the scope of that article, provided that they are non-discriminatory (i.e. they apply to all relevant traders operating within the national territory, and affect in the same manner, in law and in fact, the marketing of domestic products and products from other Member States).

C. Exceptions to the prohibition of measures having an effect equivalent to that of quantitative restrictions

- Article 36 of the TFEU allows Member States to take measures having an effect equivalent to quantitative restrictions when these are justified by general, non-economic considerations (e.g. public morality, public policy or public security).
- Such exceptions to the general principle must be interpreted strictly and national measures cannot constitute a means of arbitrary discrimination or disguised restriction on trade between Member States.
- Finally, the measures must have a direct effect on the public interest to be protected, and must not go beyond the necessary level (principle of proportionality).
- Member States have to notify national exemption measures to the Commission.

D. Harmonisation of national legislation

- The adoption of harmonisation laws has made it possible to remove obstacles and to establish common rules aimed at guaranteeing the free circulation of goods and products, and respect for other EU Treaty objectives, such as protection of the environment and of consumers, or competition.
- Harmonisation has been further facilitated by the introduction of the qualified majority rule, required for most directives relating to the completion of the single market, and by the adoption of a new approach, aimed at avoiding onerous and detailed harmonisation.
- Harmonisation must be restricted to essential requirements, and is justified when national rules cannot be considered equivalent and create restrictions.
- Directives adopted under this new approach have the dual purpose of ensuring free movement of goods through the technical harmonisation of entire sectors, and guaranteeing a high level of protection of the public interest objectives referred to in Article 114(3) of the TFEU.

E. Completion of the internal market

- The creation of the single market necessitated the elimination of all remaining obstacles to the free movement of goods.
- The Commission White Paper (1985) set out the physical and technical obstacles to be removed and the measures to be taken by the Community to this end. Most of these measures have now been adopted.
- However, the single market still requires substantial reforms if it is to meet the challenges of technological progress, and some non-tariff barriers still persist.

Free Movement of Capital & The Economic and Monetary Union



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.

Free Movement of Capital - Objectives

- The legal basis of the Free Movement of Capital is enshrined in Articles 63 to 66 of the TFEU.
- 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 and the introduction of the euro.



A. Prior to the Internal 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 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 on international capital flows followed in 1972.



B. Liberalisation in view of the Internal 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 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 Principle

- The Maastricht Treaty introduced the free movement of capital as a Treaty freedom.
- Today, Article 63 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 TFEU applies.

D. Exceptions & Justified Restrictions

- Exceptions are largely confined to capital movements related to third countries (Article 64 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 TFEU covers emergency measures vis-à-vis third countries, limited to a period of six months.

D. Exceptions & Justified Restrictions Cont.

- The only justified restrictions on capital movements in general, including movements within the EU, are laid down in Article 65 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.
- Ex: Measure 3 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.
- The emergence of digital finance, especially blockchain-based cryptocurrencies, may challenge current concepts designed to ensure the free movement of capital.

D. Exceptions & Justified Restrictions Cont.

- Article 144 TFEU allows 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.
- Finally, Articles 75 and 215 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.
- Free movement of capital is restricted in relation with the economic sanctions imposed against Russia following its invasion of Ukraine.

E. Payments

- Article 63(2) 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, offering benefits for Member State residents by bringing down the fees for cross-border payments in euro practically to zero.
- That was then repealed and replaced in 2021, with the aim of bringing down the fees for cross-border payments between euro and non-euro Member States.

E. Payments – The Payments Services Directive (PSD)

- The Payment Services Directive (PSD) 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 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), 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.





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Free Movement of Workers



Free Movement of Workers

- One of the four freedoms enjoyed by EU citizens is the free movement of workers.
- This includes the rights of movement and residence for workers, the rights of entry and residence for family members, and the right to work in another Member State and be treated on an equal footing with nationals of that Member State.
- Restrictions apply for the public service.
- The European Labour Authority serves as a dedicated agency for the free movement of workers, including posted workers.

Free Movement of Workers – Objectives

- The Legal basis for the Free Movement of Workers is Article 3(2) of the TEU; Articles 4(2)(a), 20, 26 and 45-48 of the TFEU.
- Freedom of movement for workers has been one of the founding principles of the EU since its inception.
- It entails the abolition of any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment.
- Moreover, this article stipulates that an EU worker has the right to accept a job offer made, to move freely within the country, to stay for the purpose of employment and to stay on afterwards under certain conditions.
- Nationals of EFTA countries (Iceland, Liechtenstein, Norway and Switzerland) have the right to work in the EU with the same rights and obligations as EU workers. The EU also has special agreements with other non-EU countries.

Free Movement of Workers – Legislation

- The fundamental right of free movement of workers has been embodied in various regulations and directives since the 1960s.
- The founding regulation on freedom of movement of workers and the complementing directive on the abolition of restrictions on movement and residence have been modernised several times.
- Currently, the key EU provisions are:
 - Directive 2004/38/EC on the right of movement and residence,
 - Regulation (EU) No 492/2011 on free movement for workers,
 - Regulation (EU) 2019/1149 establishing a European Labour Authority, &
 - Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

Workers' Rights of Movement & Residence

- Directive 2004/38/EC introduced EU citizenship as the basic status for nationals of the Member States when they exercise their right to move and reside freely in EU territory.
- For the first three months, every EU citizen has the right to reside in the territory of another EU country with no conditions or formalities other than the requirement to hold a valid identity card or passport.
- For longer periods, the host Member State may require a citizen to register his or her presence within a reasonable and non-discriminatory period of time.

Workers' Rights of Movement & Residence Cont.

- The right of Union citizens to reside for more than three months remains subject to certain conditions:
 1. For those who are not workers or self-employed: the right of residence depends on their having sufficient resources in order not to become a burden on the host Member State's social assistance system, and on them having sickness insurance.
 2. Students and those completing vocational training also have the right of residence, as do (involuntarily) unemployed persons who have registered as unemployed.
- EU citizens acquire the right of permanent residence in the host Member State after a period of five years of uninterrupted legal residence.

Workers' Rights of Movement & Residence Cont.

- Prior to this Directive, what was the definition of 'Family Member'?
 - It was limited to spouse, descendants aged under 21 or dependent children, and dependent ascendants.
- The directive modernised family reunification by extending the definition of 'Family Member' to include registered partners. *If the host Member State's legislation considers a registered partnership to be the equivalent of a marriage.*
- Irrespective of their nationality, these family members have the right to reside in the same country as the worker.

Employment

- Regulation (EU) No 492/2011 lays down rules for employment, equal treatment and workers' families.
- Any national of a Member State has the right to seek employment in another Member State in line with the relevant regulations applicable to national workers.
- Member States are not allowed to apply any discriminatory practices, such as limiting job offers to nationals or requiring language skills going beyond what is reasonable and necessary for the job in question.
- Furthermore, a mobile worker is entitled to receive the same assistance from the national employment office as nationals of the host Member State, and also has the right to stay in the host country for a period long enough to look for work, apply for a job and be recruited.
- This right applies equally to all workers from other Member States, whether they are on permanent contracts, are employed as seasonal or cross-border workers, or provide services.

Employment Cont.

- However, these rules do not apply to posted workers, as they are not availing themselves of their free movement rights: instead, it is employers who are making use of their freedom to provide services in order to send workers abroad on a temporary basis.
- Posted workers are protected by the Posting of Workers Directive (Directive (EU) 2018/957 amending Directive 96/71/EC), which provides for the same rules on remuneration as local workers in the host country and regulates the period after which the labour law of the host country applies (2.1.13).

Employment Cont.

- As regards working and employment conditions in the territory of the host Member State, nationals of one Member State working in another have the same social and tax benefits and access to housing as national workers.
- Moreover, they are entitled to equal treatment in respect of the exercise of trade union rights.
- Anti-discrimination rules apply also to the children of a mobile worker. Member States should encourage these children to attend education and vocational training in order to facilitate their integration.
- Finally, Article 35 of Directive 2004/38/EC expressly grants Member States the power, in the event of abuse or fraud, to withdraw any right conferred by the directive.

Restrictions on Freedom of Movement for Workers

- The Treaty allows a Member State to refuse an EU national the right of entry or residence on the grounds of:
 - public policy,
 - public security or
 - public health.
- Such measures must be based on the personal conduct of the individual concerned, which must represent a sufficiently serious and present threat to the fundamental interests of the state.
- Under Article 45(4) TFEU, free movement of workers does not apply to employment in the public sector, although this derogation has been interpreted in a very restrictive way by the CJEU.

Restrictions on Freedom of Movement for Workers Cont.

- During a transitional period after the accession of new Member States, certain conditions can be applied that restrict the free movement of workers from, to and between those Member States. There are currently no transitional periods in force.
- Brexit put an end to the freedom of movement of workers between the UK and the EU on 31 December 2020.
- The rights of the EU citizens already living and working in the UK and those UK citizens who were living and working in the EU are covered under the Withdrawal Agreement, which allows for their continued right to remain or work, ensures non-discrimination and protects their social security rights.
- All new cross-border situations starting on or after 1 January 2021 are covered by the EU-UK Trade and Cooperation Agreement with respect to social security.

Measures to Support Freedom of Movement of Workers

- The EU has made major efforts to create an environment conducive to worker mobility. These include:
 - Reform of the system for recognition of professional qualifications completed in other EU Member States in order to harmonise and facilitate the procedure. This includes the automatic recognition of a number of professions in the health sector and of architects;
 - The issuing in 2016 of a European Professional Card for selected regulated professions;
 - The coordination of social security schemes, including the portability of social protection;
 - A European Health Insurance Card (2004) as proof of insurance and a directive on cross-border healthcare;
 - Improvements in the acquisition and preservation of supplementary pension rights;
 - The obligation to ensure judicial procedures providing redress for workers discriminated against and to nominate bodies promoting and monitoring equal treatment.



Measures to Support Freedom of Movement of Workers Cont.

- The establishment of the European Labour Authority (ELA).
- Its main aims are:
 - to ensure better enforcement of EU rules on labour mobility and social security coordination,
 - to provide support services for mobile workers and employers,
 - to support coordination between Member States in cross-border enforcement, including joint inspections and mediation to resolve cross-border disputes, and
 - to promote cooperation between Member States in tackling undeclared work.
- The agency integrates or absorbs various previous European initiatives of relevance for labour mobility, in particular the job mobility portal, EURES (European Employment Services) and the European platform tackling undeclared work.

Covid-19 & Free Movement of Workers

- The COVID-19 pandemic, which hit the EU in early 2020, led to unprecedented restrictions on free movement of labour across EU Member States, notably as a result of the re-introduction of border controls at internal borders.
- Consequently, cross-border, seasonal and posted workers experienced barriers to mobility and increased unemployment.
- In March 2020, the Commission issued guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak.
- On 13 October 2020, the Council adopted a recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic with provisions on waiving quarantine requirements for essential workers, following by an update to the recommendation on 1 February 2021.

Russia – Ukraine & Free Movement of Workers

- Following the Russian invasion of Ukraine, millions of people fled Ukraine for the European Union.
- The Commission immediately proposed a Temporary Protection Directive to provide effective assistance. The Directive grants people fleeing Ukraine a residence permit and access to education and the labour market.
- The Commission has produced guidance to help people access jobs, training and adult education.
- This guidance aims to ensure the rapid and effective integration of Ukrainian refugees into the European labour market and to facilitate the recognition of their academic and professional qualifications.
- Figures from July 2023 indicate that more than 4.1 million people from Ukraine are currently benefiting from the temporary protection mechanism.

Freedom of Establishment & Freedom to Provide Services



Freedom of Establishment & Freedom to Provide Services

- The freedom of establishment and the freedom to provide services guarantee the mobility of businesses and professionals within the EU.
- Expectations concerning the full implementation of the Services Directive are high, as the (full) freedom to provide services is of crucial importance for the completion of the internal market.
- The Legal basis of these freedoms are Articles 26 (internal market), 49 to 55 (establishment) and 56 to 62 (services) of the TFEU.

Freedom of Establishment & Freedom to Provide Services

- Self-employed persons and professionals or legal persons within the meaning of Article 54 TFEU who are legally operating in one Member State may:
 - i. carry out an economic activity in a stable and continuous way in another Member State (freedom of establishment: Article 49 TFEU); or
 - ii. offer and provide their services in other Member States on a temporary basis while remaining in their country of origin (freedom to provide services: Article 56 TFEU).
- This implies eliminating discrimination on the grounds of nationality and, if these freedoms are to be used effectively, the adoption of measures to make it easier to exercise them, including the harmonisation of national access rules or their mutual recognition.

Fundamental Freedoms – The Right to Establishment

- The right of establishment includes:
 - the right to take up and pursue activities as a self-employed person, and
 - to set up and manage undertakings, for a permanent activity of a stable and continuous nature,
 - under the same conditions as those laid down by the law of the Member State concerned regarding establishment for its own nationals.

Fundamental Freedoms – Freedom to provide services

- Freedom to provide services applies to all services normally provided for remuneration, insofar as they are not governed by the provisions relating to the freedom of movement of goods, capital and persons.
- The person providing a 'service' may, in order to do so, temporarily pursue their activity in the Member State where the service is provided, under the same conditions as are imposed by that Member State on its own nationals.

Exceptions

- Under the TFEU, activities connected with the exercise of official authority are excluded from freedom of establishment and provision of services (Article 51 TFEU).
- This exclusion is, however, limited by a restrictive interpretation: exclusions can cover only those specific activities and functions which imply the exercise of authority.
- Furthermore, a whole profession can be excluded only if its entire activity is dedicated to the exercise of official authority, or if the part that is dedicated to the exercise of public authority is inseparable from the rest.
- Exceptions enable Member States to exclude the production of or trade in war material (Article 346(1)(b) TFEU) and to retain rules for non-nationals in respect of public policy, public security or public health (Article 52(1)).

Services Directive – towards completing the internal market

- The Services Directive strengthens the freedom to provide services within the EU.
- This directive is crucial for the completion of the internal market, since it has huge potential for delivering benefits to consumers and SMEs.
- The aim is to create an open single market in services within the EU, while at the same time ensuring the quality of services provided to consumers.
- The directive contributes to administrative and regulatory simplification and modernisation. This is achieved not only through the screening of the existing legislation and the adoption and amendment of relevant legislation, but also through long-term projects (setting up the Points of Single Contact and ensuring administrative cooperation).
- The implementation of the directive has been significantly delayed in a number of Member States in relation to the original deadline. Its successful implementation calls for sustained political commitment and widespread support at European, national, regional and local levels.



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