

FREE MOVEMENT OF CAPITAL

Free movement of capital is so called the “fourth freedom” of the single market. Compared to other freedoms, the free movement of capital was marginalized for a long time. Limits on its free movement were necessary as the Member States had not been integrated in the area of monetary and economic cooperation. As the Member States intended to introduce the Economic and Monetary union all obstacles to free movement had to be removed. Full liberalization of this freedom was achieved in the early 1990s. Nowadays, all restrictions on the movement of capital between Member States and between Member States and third countries are according to the EC Treaty strictly prohibited.

The abovementioned prohibition of all obstacles to the free movement of capital is, however, not absolute. There still exist some exceptions which allow Member States to limit the flow of capital among them or to third countries. These are two main categories of such permitted exceptions:

- 1) general time unlimited exceptions and
- 2) temporary specific exceptions.

The first category can be further divided as there are written justifications of restrictions to the free movement of the capital which are laid down in Art. 58 EC and the unwritten justifications based on overriding requirements of the general interest¹. Other permitted restrictions are set out in Art. 57 of the EC Treaty. Under this provision Member States are permitted to maintain² and/or introduce restriction against third countries.

1 See Case C-367/98, *Commission v. Portugal* para. 49, Case C-483/99, *Commission v. France* para. 45 or Case C-503/99, *Commission v. Belgium* para. 45 where the ECJ held 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 Article 73d(1) of the Treaty or by overriding requirements of the general interest and which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, 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”.

2 Stand still clause against third countries.

I am not going to further deal with the above mentioned justifications in this article as the given volume for this article does not allow me to sufficiently elaborate on such a wide topic³. However, I would like to focus on the second category which I labeled as the temporary specific exceptions as they are relevant to the topic of this article.

When the Czech Republic and other new Member States were preparing themselves for the EC/EU accession it was generally believed that the full and unlimited acceptance of all Community freedoms might result in serious disturbances in the economy of new Member States. To prevent this, the Czech Republic has negotiated some exceptions from the EC common rules⁴. One of such exceptions is relevant to the free movement of capital⁵.

According to negotiated exceptions the Czech Republic may maintain in force for five years from the date of accession its current rules on the acquisition of secondary residences by nationals of the Member States non-resident in the Czech Republic and by companies formed in accordance with the laws of another Member State and being neither established nor having a branch or a representative agency in the territory of the Czech Republic.

The Czech Republic may also maintain in force for seven years from the date of accession its current rules on the acquisition of agricultural land and forests by nationals of the Member States and by companies formed in accordance with the laws of another Member State which are neither established nor registered in the Czech Republic.

However, self-employed farmers who are nationals of another Member State and who wish to establish themselves and reside in the Czech Republic are not subject to the abovementioned restrictions. As such, they shall be treated equally with Czech nationals.

The transitional periods might be extended by the decision of Commission at the request of the Czech Republic in case that there is sufficient evidence that, upon expiry of the transitional periods, there will be serious disturbances or a threat of serious disturbances on the agricultural land market of the Czech Republic. Maximum length of such extension is three years.

3 For further reading see C. A. Grünwald, *The German Volkswagengesetz and the free movement of capital* [cited on January 14, 2008] available at [http://www.jur.lu.se/internet/english/essay/masterth.nsf/0/831CB63F3CBB4792C1257013005147C9/\\$File/xsmall.pdf?OpenElement](http://www.jur.lu.se/internet/english/essay/masterth.nsf/0/831CB63F3CBB4792C1257013005147C9/$File/xsmall.pdf?OpenElement).

4 See Art. 24 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

5 See Annex V: List referred to in Article 24 of the Act of Accession: Czech Republic.

In the Czech national law the rules on acquisition of real estate by foreigners are laid down in the Foreign Exchange Act No. 219/1995 Sb. as amended (hereinafter referred to as the “FEA”)⁶.

The conclusion is that the transitional period negotiated by the Czech Republic allows it to maintain regulation which into certain extent limits foreigners from acquiring real estate. The free movement of capital is therefore not fully achieved yet in case of the Czech Republic. Restrictions are stronger in case of agricultural land and foreigners who are not citizens of Member State⁷ trying to acquire such land. Their purpose is to limit foreigners from wealthier Member States to buy all relatively cheap real estate. It was believed that during the transitional period the prices and purchase power of Czech citizens will approximate with the EU average and Czech citizens and economy will be less vulnerable. The recent Czech regulation is, however, often circumventing as the foreigners who live abroad and want to invest here can use the loophole in the FEA and found a company in the Czech Republic. Such company is considered to be a Czech resident and can therefore acquire real estate here. The disadvantage of such option is rather complicated paperwork and additional larger funding and operating costs.

6 See more in P. Mrkývka, P. Schillerová, in chapter Acquisition of Real Estate in the Czech Republic by Non-residents.

7 Further restrictive regulations that regulate only state agricultural land and woods are included in two special acts: in Act No. 95/1999 Coll. which created the basis for privatization of state agricultural land and woodland and Act No. 229/1991 Coll. on Land, as amended. For further information see Acquisition of Immovable Property in Czech Republic, <http://www.czechembassy.org/www/default.asp?ido=1451&idj=2&amb=58&ParentIDO=104>

Streszczenie

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