INTERNATIONAL LEGAL PRINCIPLES GOVERNING THE FREE MOVEMENT OF PEOPLE AND CAPITAL – A SUMMARY[1]

This paper provides a high-level outline of the international legal rules that determine how far people are legally able (a) to move from one state to another to live on a permanent or semi-permanent basis and (b) to move capital in or out of a particular state, for example, in the form of cash, loans, direct investment in economic production, investing in financial instruments or otherwise.

1. STATE SOVEREIGNTY OVER THE MOVEMENT OF PEOPLE AND CAPITAL

The idea that states are 'sovereign'

The starting point under international law is that individual states are 'sovereign'. The concept of state sovereignty is complex and contested. However, broadly, state sovereignty as a legal matter is the idea that a state has exclusive jurisdiction over its territory – i.e. a commonly accepted right to command and be obeyed within a particular geographical area. This has both an internal dimension (in relation to the citizens of the relevant state) and an international dimension (in relation to other states). Among other things, the idea of sovereignty means that each state can ordinarily be viewed as having ultimate political authority over whether people and capital are permitted to move in and out of its territory and on what conditions.

There has been some erosion of state sovereignty by international treaties and other forms of international cooperation, particularly since the Second World War. This has reduced states' sovereign control over free movement of people and capital. The following is a brief summary of these limits. The idea of state sovereignty has also been subject to philosophical challenge. However, state sovereignty (rightly or wrongly, often traced back to the 1648 Peace of Westphalia) remains a fundamental principle of the international legal and political order. In particular, it is enshrined in Article 2 of the UN Charter:

"The Organization is based on the principle of the sovereign equality of all its Members… All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[i]

Different limits on state sovereignty

There is an important difference between (a) the idea of sovereignty, described above, which concerns the state's legal and political authority and (b) the state's power to do things in practice. What follows concentrates on limits to the first of these. However, we can also think of a state's sovereignty as being limited by how far it can exert its will in practice. For example, a sovereign state may prohibit people entering its territory unless certain legal conditions are satisfied, but whether those conditions are complied with in practice will depend upon the state's ability to police its boarders. Separately, there is also a question about whether state sovereignty is limited by principles of justice that transcend the law of any individual state. The idea of an over-arching standard of justice can be thought of as challenging the concept of sovereignty itself or as defining the parameters within which sovereignty can be exercised. For example, to what extent is sovereign authority lost where a state acts unjustly? Standards such as these lie behind the emergence of internationally recognised statements of human rights, but go beyond them.

The international experience of unfettered state sovereignty in practice during the Second World War provided a significant impetus to attempts to curtail it as a legal matter. Two of

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the most notable adjustments have been in the area of human rights, considered in Section 2 below, and the development of the European Union ('EU'), considered in Section 3. In addition, as also discussed in Section 2, states have been willing to accept some reciprocal curtailment of their sovereignty in the interests of accessing international trading and investment networks. This has principally taken place under the international financial, trading and regulatory frameworks led and operated by bodies such as the G20, the International Monetary Fund ('IMF'), the World Trade Organisation ('WTO') and the Organisation for Economic Cooperation and Development ('OECD').

The broad effect of these measures is that:

- in the EU, extensive rights have developed on both movement of people and capital;
- outside the EU, the liberalisation of capital movements has gone substantially further than the liberalisation of people movements.

<u>Application to the UK</u>

Where the legal position on free movement of people or capital is governed by international or EU legal provisions, these limit the UK's ability to make its own rules on the matter. Broadly, therefore, if the UK wished to take an approach that is inconsistent with those legal provisions it would need to arrange for them to be amended or negotiate an opt-out.

2. INTERNATIONAL LIMITS ON STATE SOVEREIGNTY OVER FREE MOVEMENT OF PEOPLE AND CAPITAL

Outside the EU, the international legal framework establishing the freedom to move capital cross-border is substantially more developed than the framework for movement of persons. However, even outside the EU, a person wishing to move or who has in fact moved to another country may still be able to establish rights to remain under the law of that country.

<u>Free movement of people</u>

Human rights and free movement of people

There is no over-arching international legal right for people to move between different states. The most important international statement of human rights is the United Nations Universal Declaration of Human Rights, signed in 1948.[ii] It is not legally enforceable as a formal matter. However, it has influenced the formation of laws which are (for example, the European Convention for the protection of Human Rights of 1950). It also has a highly authoritative status in other ways, for example, in the context of decisions on UN intervention in individual states.

The UN Declaration addresses the movement of persons between states and their relationship with those states in Articles 13-15. Article 14 does address asylum from persecution by providing that *"everyone has the right to seek and to enjoy in other countries asylum from persecution"*. However, the Declaration does not recognise wider rights of movement between states, and even Article 14 does not impose an express obligation to provide asylum.

Article 13 provides for a right of free movement within a state and to leave it and return, but does not recognise a right to move between states.

Meanwhile, Article 15 provides that no one shall be arbitrarily deprived of their nationality nor denied the right to change nationality. However, it does not create an obligation on another state to recognise a person's nationality where the person wishes to change it.

Other articles of the Declaration could also be relevant to the question of people's ability to move between different states. Most famously, Article 1 provides that, "All human beings are born free and equal in dignity and rights. The are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". In addition, Article 25 provides that everyone has the right to a standard of living adequate for the health and well-being of himself and his family, but does not stipulate whose responsibility it is to ensure that it happens. However, Article 29 provides that everyone has duties to the community in which alone the free and full development of his personality is possible.

While the Declaration of Human Rights is not formally legally enforceable, a framework of treaties made under it elaborating on specific areas of human rights binds states that have signed them. One of these is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in 1990 and entering into force in 2003 when the requisite number of signatories had been reached. However, those ratifying the treaty so far are generally migrant sending states (seeking protection for their migrant nationals). No major migrant receiving state has so far ratified.[iii]

The WTO and free movement of people

The WTO is a forum of 164 member states (comprising all major economies and most of the smaller ones). Its aim is to reduce obstacles to international trade (such as tariffs) and end discriminatory treatment in international trading relationships with the objective of facilitating global economic development. It is not intended to address free movement of people or capital except where relevant to that objective.

None of the WTO agreements covers the free movement of people seeking access to employment, citizenship or residence in a WTO member state. However, under the General Agreement on Trade in Services[iv] ('GATS') the temporary movement of staff to another WTO member state is one of four ways in which a company can provide services in other WTO member states (referred to as 'Mode 4').[v] This only applies where those services are covered by GATS (GATS only applies to certain service sectors), and only to those to the extent the relevant WTO member has allowed it. Essentially, WTO members may enter into 'specific commitments' applying to the supply services under GATS, including the movement of people under Mode 4. The movement of those people into the relevant WTO member state is then limited to what is needed to supply the relevant service in that state accordance with the terms of the relevant commitment. Broadly, access conditions conceded to one WTO member must then be extended to all members so that the benefit is not limited to those WTO members with sufficient bargaining power to forge the agreement in the first place.

Rights of this sort are limited. They only extend to movement of people to other countries for the purpose of supplying a service rather than more generally, and only on a temporary basis. It is not thought that much use has been made of this mechanism in practice.

Free movement of capital

The international framework for free movement of capital is principally a mixture of (a) policy and surveillance work undertaken by the G20 and IMF, resulting in member states choosing to work together to liberalise their own rules on capital flows, and (b) formal legal rules, particularly the OECD Code considered below.

Capital movement and the role of the G20

The G20 is a group of 19 countries and the European Union, representing the world's largest economies (on one measure, 85% of global economic output). It is a forum within which member states meet to discuss and coordinate policy in relation to the world economy, financial markets, trade and development.

It has not made rules on capital movement. Its impact results from decisions by member states to align their policy with G20 positions. In the case of capital movement, its policy position is set out in the 'G20 Coherent Conclusions for the Management of Capital Flows Drawing on Country Experiences'.[vi] While noting the risks of international capital flows, that document concludes that, *"An important long-term goal for G20 countries should be to put in place … the conditions that allow members to reap the benefits from free capital movements, while preventing and managing risks that could undermine financial stability and sustainable growth, and avoiding protectionism."*

Capital movement and the role of the IMF

The IMF is an international organisation comprising 189 member states. It describes its role as seeking to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high unemployment and sustainable economic growth and reduce poverty world-wide. IMF members have agreed to abide by liberalising rules on foreign exchange restrictions in relation to short-term payments and transactions. However, these do not generally extend to the liberalisation of capital flows. Capital flow liberalisation is nonetheless addressed in the context of IMF policy work relevant to its members and the IMF has played an important role in the liberalisation process.

<u>International payments in relation to 'current international transactions'</u>

One of the purposes of the IMF is to assist in establishing a multilateral system of payments for 'current transactions' between IMF member states and eliminating foreign exchange restrictions on the basis that these inhibit the growth of world trade.[vii] 'Current transactions' for these purposes are those that do not involve the transfer of capital - i.e. they are short-term payments such as those relating to foreign trade and service provision, interest on loans and income on investments and moderate remittances for family living expenses.[viii]

Under Article VIII of the IMF's Articles of Agreement,[ix] IMF member states undertake not to impose restrictions on the making of payments and transfers for current international transactions. There are various exceptions, but the effect of this rule is to prohibit restrictions on the conversion of one currency into another for short-term payment purposes. 165 out of 184 IMF members have now notified the IMF that they adhere to Article VIII.

<u>Liberalisation of capital movement</u>

By contrast, the IMF's Articles of Agreement expressly recognise the right of IMF members to exercise controls as necessary to regulate international capital movements.[x] This right is restricted in some respects, but these are limited.

The IMF has nonetheless had an important role in encouraging member states to liberalise their rules on capital movement (a) through its bilateral and multilateral economic and financial surveillance activities, and (b) in the context of its policy work. The framework it applies to these is the IMF's 'Institutional View on the Liberalization and Management of Capital Flows' adopted in 2012.[xi] In particular, this influences the policy recommendations it makes to member states.

Capital movement and the role of the OECD

The Code of Liberalisation of Capital Movements[xii] of the OECD provides a more comprehensive international legal framework for the progressive removal of barriers to the movement of capital. However, the Code only applies to the 35 OECD members, so does not cover all IMF members. Nonetheless, the 35 include 12 G20 members, and adherence to the Code is also open to G20 states that are not OECD members (e.g. China).

The Code covers most sorts of international current and capital transactions and related payments and transfers, ranging from investment in economic activity, the purchase and liquidation of other assets and financial instruments such as shares and bonds, and advancing loans. It therefore goes far beyond simply abolishing exchange controls. Under its terms, adherents undertake progressively to remove as against other Code adherents restrictions on these movements of capital *"to the extent necessary for effective economic co-operation"*. In other words, adherents undertake to abolish measures (such as laws and regulations and even policies and practices) which may restrict the conclusion of transactions and transfers of the sort mentioned above between a person in one adherent state and a person in another. It allows businesses and people in one adhering state to benefit from liberalisation measures undertaken by other adherents regardless of the extent of first state's own openness.

Once liberalisation has taken place, the introduction of capital controls is still permitted in some circumstances, for example, in the interests of public order or safety or where there is serious economic or financial instability. However, their application is subject to principles of transparency, non-discrimination, proportionality and accountability.

The 50 years since the introduction of the Code has seen a substantial liberalisation of capital flows, including a progressive expansion of the sorts of payments covered by the Code, allowing capital to move ever-more freely between people and businesses based in states that are Code adherents.

The WTO and the movement of capital

As with free movement of people, none of the WTO agreements specifically covers free movement of capital. However, GATS does stipulate that one of the four ways in which a company in one WTO member state should be able to provide services within another WTO member state is through a locally-established affiliate, subsidiary or representative office (referred to as 'Mode 3'[xiii]). Since it would be necessary to make some form of investment in the 'host' WTO member state in order to provide services on this basis, provision of services under Mode 3 would effectively involve a cross-border movement of capital. The basis upon which this right can become available is similar to that for Mode 4 (provision of services by natural persons), considered above.

3. FREE MOVEMENT AND THE EU[xiv]

<u>Introduction</u>

As noted above, rights on free movement of persons and capital are substantially more developed within the EU than under more global treaty frameworks. EU membership therefore results in a material curtailment (or 'pooling') of state sovereignty as between EU members. The European Treaties give each member state the right to leave and there is scope for various 'opt outs' in several areas of EU legislation. However, subject to that, membership brings various restrictions on sovereignty as a consequence of seeking to realise the benefits of the European project. In particular, member state sovereignty over trade and investment is materially circumscribed.

The EU is governed by two key treaties:

- The Treaty on the European Union ('TEU');[xv] and
- The Treaty on the Functioning of the EU ('TFEU').[xvi]

These consolidate provisions from a number of previous European treaties, especially the Treaty of Rome (1957) which established the European Economic Community and the Treaty of Maastricht (1992) which established the European Union and the idea of European 'citizenship'.

The core of the European project was and remains a 'common market'. While the preamble to the Treaty of Rome positioned the common market in a broader context of *"ever closer union between the peoples of Europe"* the substance of the treaty concerned the formation of this common market. However, particularly in the run up to the Treaty of Maastricht and since, there has also been a move towards greater political union and the development of the idea of EU 'citizenship'.

Under the TEU, *"Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and shall not replace national citizenship."*[xvii] The TFEU then provides for a number of freedoms consistent with this, in particular in the current context, four 'economic' freedoms and a citizen's right to freedom of movement.

The 'economic' freedoms

The four founding economic freedoms underpinning the common market where originally established by the Treaty of Rome, but now appear in the TFEU. The idea of the common market as an area in which there is to be free movement of goods, services people and capital is now set out in Art 26 TFEU. In economic terms, the first two of these concern the movement of the fruits of economic activity and the second two the 'means' by which those fruits are produced, also referred to as 'factors of production'. The nature of these freedoms and the steps to be taken to realise them is elaborated upon in succeeding Articles of TFEU:

- <u>Fruits of production:</u> free movement of goods (Arts 28-37 and 110); and free movement of services (Arts 56-62);

- <u>Means of production:</u> free movement of capital (Arts 63-66); and free movement of those engaged in economic activity - workers pursuing an occupation in another member state (Arts 45-48), individuals engaging in self-employed activity in another member state or companies establishing local operations (Arts 49-55) and the movement of service providers between member states (Arts 56-62).

The nature and extent of these rights has been elaborated upon at length by the Court of Justice of the European Union (the 'European Court') and it has generally sought to adopt a consistent approach across all four freedoms.

- Very broadly, member states can restrict the enjoyment of these freedoms (a) where it is justifiable in the public interest, the restriction is suitable for achieving the relevant objective and does not go beyond what is necessary, and is applied in a non-discriminatory manner and (b) in other cases, where expressly provided under the TFEU or otherwise.

- There is an important distinction between restrictions applied by a member state which are discriminatory as between its own nationals and those of other member states, and those which are not discriminatory but still restrict these freedoms. Non-discrimination between a state's own citizens and nationals of other member states is fundamental to the four freedoms. However, the European Court has also been willing to hold that restrictions that do not discriminate in this way breach the freedoms if their effect is nonetheless to restrict the market access of nationals of other member stages. Among other things, this has important implications for individual state autonomy since it involves the Court potentially intervening in a broader range of member state laws.

The EU citizen's right to move

As noted above, there is also now a broader EU citizen's right of free movement (now Arts 20-21 TFEU), established by Treaty of Maastricht 1992 at the same time as the concept of EU citizenship. This change was part of the evolution of the European project into a process of greater political union, moving beyond the creation of a European common market.

<u>Freedom of movement of people and the EU</u>

There are three aspects to the movement of persons within the EU:

- **EU nationals**: movement of nationals of member states exercising the EU Treaty rights to free movement;

- **Non-EU nationals**: movement of non-EU nationals who migrate to the EU to take up economic roles (i.e. 'economic migrants'), principally governed by Association Agreements between the EU and states of origin, but non-EU nationals may also acquire derivative rights by reference to EU citizens exercising their rights of movement under the TFEU; and

- **Asylum seekers**: the growing numbers of non-EU nationals seeking 'asylum' in EU member states (i.e. seeking to escape persecution and violence).

The position of EU nationals

A number of the economic rights and the citizen's right to move, enable EU nationals to move between EU member states. In practice, the second of these, the citizen's right to move, has largely now absorbed the others.

<u>'Economic' rights of movement: Art 26 TFEU and freedom of movement of workers (Arts 45-48 TFEU), the self-employed/companies (Art 49 TFEU) and service providers (Arts 56-62)</u>

These rights can be exercised by nationals of EU member states (including companies), who engage in more than marginal economic activity with some cross-border element. Member states grant nationality and it is they who therefore control access to these rights, but they must have regard to EU law in doing so.

Essentially, the rights allow a national in one member state: (a) to take up employment (and to establish themselves to engage in economic activity); and (b) to pursue economic activity, in another member state.

The presence of economic activity is essential to exercise rights under these freedoms. Broadly, economic activity involves satisfying a request of a beneficiary in return for consideration. The consideration need not be financial, but could be 'in kind'. The economic activity need not be overtly commercial, but can include elements of guardianship, social welfare and even training if directly related to the pursuit of an occupation.

<u>EU citizen's right to free movement</u>

Citizens of the Union have a further, more general, right to move and reside freely within the territory of the member states (Art 21 TFEU).

This right is separate from and broader than the workers' rights to move outlined above. Unlike those, the Art 21 right of movement extends rights of movement and residence to the non-economically active - generally, as long as they have health insurance and sufficient resources not to become an 'unreasonable burden' on the host state.

Who determines who is a 'citizen' of the EU with access to this right? As noted above, citizenship is conferred upon 'nationals' of member states under TEU. Member states grant nationality and therefore control access to EU citizenship, but they must have regard to EU law in doing so. In the case of Malta, nationality is essentially for sale under the so-called 'Malta Citizenship by Investment Program', subject to limited residence requirements.[xviii]

<u>Definition of these rights in the EU Citizenship (Free Movement) Directive</u>

The EU Citizenship (Free Movement) Directive 2004/38/EC now provides a consolidated treatment of all of these rights of movement, elaborating upon what they mean and the terms upon which they can be exercised in practice (in many respects, as previously elaborated by the European Court).[xix] It covers the rights of EU citizens (whether engaging in economic activity or otherwise) and their family dependents (whether or not EU citizens). However, there is some differential treatment where the latter are not EU citizens.

Key provisions include the following:

- A right of residence in other EU member states for up to three months without the need to satisfy any conditions or formalities except having a valid passport, not becoming an 'unreasonable burden' on the relevant member state;

- A right of residence in other EU member states for more than three months where a citizen is (a) a worker or self-employed in the relevant EU member state,[xx] or (b) where they have sufficient resources so that they and their family will not become a burden on it, or (c) where they are pursuing a course of study, or (d) are family members accompanying an EU citizen in (a)-(c); member states may require those exercising this right and their family dependents to satisfy registration formalities;

- A right of permanent residence in another EU member state following continuous residence for a period of five years in the relevant state for both EU citizens and their family members, which can be lost only as a result of permanent absence for over two years (however, the right to permanent residence arises sooner in some cases for those who have moved to the member state in exercise of their rights as workers or self-employed persons under the 'economic freedoms' described above).

Once the conditions for residence rights are established by an EU citizen, a member state can only refuse admittance on grounds of public policy, security or health. These must be individually assessed and cannot be invoked to serve economic ends. Any steps taken by a member state in the interests of public policy or security must be 'proportionate' to the issue. The personal conduct of the relevant individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

<u>How does the Schengen Agreement fit in?</u>

The Schengen Agreement was signed in 1985 between five of the ten EU member states.[xxi] It was followed by an implementing convention in 1990,[xxii] which led to the creation of the 'Schengen area' in 1995. The Schengen initiative originally developed in parallel with the EU, but outside the EU framework. However, it has now been incorporated into the rules governing all EU members (as a result of the 1997 Treaty of Amsterdam), with exceptions for a number of states including the UK and Ireland. The EEA states are also covered. Broadly, states subject to the Schengen framework agree (a) to the abolition of passport checks at their common borders and (b) to apply harmonised checks at any border with a non-Schengen state (supported by information sharing and cooperation between security services in member states). As a result, a person within the Schengen area may cross common borders without the need for border checks and regardless of their nationality. However, a right remains to apply police checks falling short of border checks, for example, in cases of heightened national security or in order to undertake spot checks on suspects.

In recent years, the level of migration into the EU and the heightened terrorist threat has led to the reintroduction of border controls by some Schengen area states.[xxiii]

The position of non-EU nationals

Here there are three basic groups.

First, the EU free movement rights are also extended to nationals of states that are members of the European Economic Area (Iceland, Lichtenstein, Norway and Switzerland).

Secondly, the scope for non-EU nationals that are family members of EU citizens to move cross-border was outlined above. These rights are 'derivative' in the sense that they depend upon the rights of the EU citizen. It would also be possible for companies exercising their right to provide services under the economic freedoms to do so using staff who are not EU citizens on a temporary basis as long as they are able to live in the home member state.

Thirdly, in terms of immigration into and within the EU more generally, Article 79 TFEU provides that the EU shall develop a common immigration policy. However, thus far EU policy on non-EU migrants (as opposed to asylum seekers, touched on below) has proceeded on a piecemeal basis and there is no common EU migration regime. These include the Blue Card Directive on the admission and treatment of high-skilled migrants and a Seasonal Workers Directive (aimed to protect the interests of those coming to work in the EU on a seasonal basis). The UK has not opted into these.

Subject to various conditions, those who have been permanently and lawfully resident in an EU member state for five years or more can apply for permanent residence under the Long-Term Residents Directive. The UK has opted out of this Directive, but has its own rules.

The position of asylum seekers

EU asylum is available to those fleeing persecution or serious harm in their own country. Particularly because of the existence of the Schengen area, it is necessary for EU member states to have a harmonised approach to this.

The EU's approach to asylum seekers falls under the umbrella of the Common European Asylum System ('CEAS') which seeks to establish common standards for the reception and processing of asylum claims. However, there have been considerable divergences of practice between EU member states. The approach of EU member states to asylum originally developed outside the EU framework. In an attempt at harmonisation, the 1997 Amsterdam Treaty gave the EU the power, for the first time, to make law in this area that binds member states. Article 78 TFEU now provides that the EU shall develop a common policy on asylum. The UK opted into the first phase of measures made under these arrangements. However, in the light of the levels of asylum claims over recent years, the EU has been undertaking a series of reforms and the UK has not opted in to this 'second phase' of asylum legislation involving the revision of the asylum Directives mentioned below.

Among other EU measures, the Dublin Regulation determines which member state is responsible for processing an asylum application (broadly, the state of the applicant's entry to the EU), the Asylum Procedures Directive establishes common standards for the asylum procedure, the Reception Conditions Directive seeks to secure basic welfare for applicants and the Qualification Directive establishes common grounds for granting protection.

Free movement of capital and the EU

Article 63 TFEU establishes that all restrictions on the movement of capital between EU member states and between member states and non-member states are prohibited. There is a similar requirement in relation to cross-border payments. The extension of the provision to cover capital movements to and from third countries goes beyond the other EU freedoms, which only apply between EU member states. The prohibition on restricting capital flows and payments is directly effective; it does not require further legislation from individual member states to take effect in their jurisdictions. This means that people can rely upon it in national courts to cut down offending restrictions. As a result, there is a limit to what, for example, the UK can do to control capital flows in and out of the UK while it remains a member of the EU.

What is now Article 63 was introduced by the Treaty of Maastricht 1992. It contrasts with the original Treaty formulation of the freedom of capital; because of concerns about the potential adverse impact of uncontrolled cross-border capital movements, that earlier provision relied upon member states taking the initiative to abolish capital restrictions between themselves rather than imposing a ban. Similarly, the measure also goes further than the OECD Code on liberalisation of capital flows, outlined above, which simply requires states that are adherents to work towards the progressive removal of restrictions on capital flows. The requirement in Article 63 is subject to limited exceptions, summarised below.

Note that, as with GATS (see above), the right of establishment under Article 49 TFEU also potentially facilitates cross-border capital flows. That is because, in order to make use of the right by creating a business establishment in another member state, it is likely to be necessary to commit capital to it. Further, exercising the freedom to provide services (Article 56 TFEU) will also sometimes necessarily involve the movement of capital, for example, in the provision of banking and investment services.

What is a capital movement?

This is not defined in TFEU. However, the European Court has consistently treated Directive 88/361/EEC (especially Annex I) as indicative of what constitutes a capital movement.[xxiv] The Directive specifies various types of capital movement that member states wished to liberalise under the predecessor to Article 63 TFEU. The list is broad, extending to a range of payments and transactions including direct investment in businesses, purchasing real estate, trading in financial instruments such as shares, bonds and funds, loans to companies and individuals, and 'personal capital movements' such as gifts.

What restrictions are prohibited?

The European Court has taken a broad approach. It has treated the prohibition as extending not just to discrimination on the grounds of nationality but also to other provisions that have the effect of restricting the movement of capital, and not just to restrictions on a transaction itself but also fetters on the full enjoyment of the fruits of that transaction. So, among other things, free movement of capital is about:

- the accessibility of a particular economic or financial sector to market operators – i.e. whether they can (a) invest in it and (b) buy and sell in it; and

- whether those operators can enjoy the benefits that are central to the transaction.

Potential restrictions therefore include any limitation on profit-making activity such as:

- A measure that discourages investment in or loans to persons in another member state, whether on in-bound or out-bound investment (e.g. discriminatory tax treatment of internal investment as against cross-border investment), since this involves discrimination against transnational activities;

- A direct restriction on investment in a member state by a person outside it (e.g. by requiring that an investor goes through an authorisation process in order to invest), since this involves discrimination on the basis of nationality;

- Measures that impede control over an investment (e.g. the VW 'golden shares' case involving a 20% holding in VW by Saxony which together with various governance restrictions was held to be a fetter on free movement[xxv]).

What exceptions are there?

Where there is a restriction on the movement of capital, it is also necessary to consider whether it (a) falls within one of the Treaty exceptions to the prohibition on restricting capital movement or (b) is otherwise permissible because of the overriding requirements of the general interest.

There are various express exceptions from the requirement not to restrict free movement of capital including:

- Certain restrictions on capital movements between member states and third countries that existed prior to 31 December 1993 in the areas of direct investment, establishment, provision of financial services and the admission of securities to capital markets. There is the possibility of the EU Council and Parliament introducing new restrictions in limited circumstances;

- Subject to various conditions, there is some scope for differential tax treatment of non-residents and of foreign investment;
- There is an exception for steps necessary to prevent infringements of national law and regulation on the prudential supervision of financial institutions; and
- Restrictions can also be justified for public policy or security reasons.

However, these cannot be relied upon in order to discriminate arbitrarily or to impose disguised restrictions on free movement of capital.

Further, where in exceptional circumstances movements of capital to or from third countries could cause serious economic or monetary difficulties, the EU Council may take steps to address that for a period up to six months (Article 66 TFEU). In addition, the EU Parliament and Council may introduce restrictions on capital flows (such as sanctions and asset freezing) in the interests of combating international crime and terrorism (Article 75 TFEU).

The European Court has also established that restrictions are permissible in a number of cases in the general interest, but the restrictions must be suitable for securing the relevant objective and be proportionate, not going beyond it. These include, for example, safeguarding national petroleum, telecommunications and electricity sectors which is relevant to national security and the desirability of plurality in the media.

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[i] Article 2(4).
[ii] http://www.un.org/en/universal-declaration-human-rights/.
[iii] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en.
[iv] https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.
[v] See Article I(2).
[vi] http://www.g20.utoronto.ca/2011/2011-finance-capital-flows-111015-en.pdf.
[vii] Article I(iv) of the IMF Articles of Agreement.
[viii] Article XXX(d) of the IMF Articles of Agreement.
[ix] https://www.imf.org/external/pubs/ft/aa/.
[x] Article VI(3).
[xi] http://www.imf.org/external/np/pp/eng/2012/111412.pdf.
[xii] https://www.oecd.org/daf/inv/investment-policy/Code-Capital-Movements-EN.pdf.
[xiii] Article I(2).
[xiv] See generally, *The Substantive Law of the EU – The Four Freedoms*, Catherine Barnard, 5th edn Oxford 2016; and European Union Law: Text and Materials, Damian Chalmers et al. 3rd edn Cambridge 2014.
[xv] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=EN.
[xvi] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN.
[xvii] Art 9 TEU.
[xviii] http://europa.eu/rapid/press-release_MEMO-14-70_en.htm.
[xix] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0038&from=en.
[xx] The Directive also addresses the situation where these workers are temporarily out of work or become unemployed.
[xxi] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922(01)&from=EN.
[xxii] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922(02)&from=EN.
[xxiii] https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en.
[xxiv] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31988L0361&from=EN.
[xxv] http://ec.europa.eu/dgs/legal_service/arrets/05c112_en.pdf.