

Peter-Christian Müller-Graff / Erling Selvig (eds.)

European Law in an Era of Crisis



BWV • BERLINER WISSENSCHAFTS-VERLAG

Deutsch-Norwegisches Forum des Rechts
Skriftserie for Tysk-Norsk Rett
German-Norwegian Law Forum

Herausgegeben von Peter-Christian Müller-Graff / Erling Selvig
Redigert av Peter-Christian Müller-Graff / Erling Selvig
Edited by Peter-Christian Müller-Graff / Erling Selvig

Band 8
Bind 8
Volume 8

ISBN 978-3-8305-2777-0

Peter-Christian Müller-Graff / Erling Selvig (eds.)

European Law in an Era of Crisis



BWV • BERLINER WISSENSCHAFTS-VERLAG

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

ISBN 978-3-8305-2777-0

Dieser Band wurde gedruckt mit freundlicher Unterstützung des

Stipendienfonds E.ON Ruhrgas

im Stifterverband für die Deutsche Wissenschaft

© 2012 BWV • BERLINER WISSENSCHAFTS-VERLAG GmbH,
Markgrafenstraße 12–14, 10969 Berlin
E-Mail: bwv@bwv-verlag.de, Internet: <http://www.bwv-verlag.de>
Alle Rechte, auch die des Nachdrucks von Auszügen,
der photomechanischen Wiedergabe und der Übersetzung, vorbehalten.

Foreword

European law (EC law and EEA law) was suddenly confronted with the great global crisis of the financial markets in the autumn of 2008 in an intensity never experienced before. How flexible the rules on the internal market of the European Union and on the European Economic Area are shaped in order to cope with the challenges of such an era of crisis was the overarching topic of the Eighth German-Norwegian Seminar on European Law. It took place between March 17 and 21, 2010 in the old imperial town of Goslar and continued the reflections of the precedent Seminars on the inner structure of the law of European economic integration.

This volume presents the written and annotated versions of six lectures given at the Seminar and an additional text on Norway in the dynamics of European legal integration. The editors express once again their great gratitude to the E.ON-Ruhr-gas Scholarship Foundation, Essen, which made both the Seminar and the publication of this book possible.

July 2010

Peter-Christian Müller-Graff
Universität Heidelberg

Erling Selvig
Universitetet i Oslo

Contents

<i>Peter-Christian Müller-Graff/Erling Selvig</i> Foreword	5
---	---

I. Free Movement of Capital in an Era of Crisis

<i>Julia Lübke</i> Reactions to the Crisis and the Rules on the Free Movement of Capital in the EC/EU	11
<i>Eystein Kleven,</i> Reactions and Rules on the Free Movement of Capital in EEA-EFTA States in the Crisis Test	39

II. Free Movement of Services in an Era of Crisis

<i>Erling G. Rikheim</i> Homogeneity and Supremacy of the European Law of Free Movement of Financial Services – Reactions and Rules on the Free Movement of Services in the EEA-EFTA States in the Crisis Test.	57
--	----

III. Rules on Competition in an Era of Crisis

<i>Stefan Storr</i> State Aid and Public Enterprises in Times of Crises.	73
<i>Finn Arnesen</i> Challenges of the Crisis to the Rules of Undistorted Competition in the EEA . .	91

IV. The Development of the Relation between Norway and the European Union

<i>Fredrik Sejersted</i> Norges rettslige integrasjon i EU	103
<i>Peter-Christian Müller-Graff</i> Norway in the Dynamics of European Legal Integration	115
List of Authors and Editors	135
List of Participants	137

I.

Free Movement of Capital in an Era of Crisis

Reactions to the Crisis and the Rules on the Free Movement of Capital in the EC/EU

Introduction

The current economic crisis was triggered by a decline in the value of mortgage-backed securities (MBS) that had been widely sold by US banks: In an era of historically low interest rates, US banks increased their lending to homeowners, packaged the loans as MBS and sold them to investors all over the world. When property prices fell, the number of mortgage defaults rose, and the value of MBS declined rapidly. Banks in the US and elsewhere, which had invested heavily in this market, had to write down their assets, experienced difficulties in obtaining liquidity, and had to be bailed out by governments. The crisis then spread to the real economy.¹ Therefore, one might say that the crisis had been caused by capital flows, namely, the worldwide transfer of high-risk securities.

In this context, it is of interest to note that the free movement of capital was the last of the fundamental freedoms to be guaranteed unconditionally. In the early days of the European Economic Community, Member States were careful to preserve their sovereignty with regard to capital movements, and sceptical because of their potentially detrimental effects. First, due to the Bretton-Woods system of stable exchange rates which was in force until 1973, complete liberalisation of capital flows would at that time have posed a threat to Member States' sovereignty in the field of economic and monetary policy.² Secondly, capital movements may occur in the form of speculative transactions, which can endanger economic stability irrespective of the monetary system.³ Therefore, capital movements were liberalised in a

- 1 Cf. London Economics, Analysis of development in the field of direct investment and M&A, Part II 5–7 (2009) (http://ec.europa.eu/internal_market/capital/docs/fdi-study_en.pdf).
- 2 Gleske, Liberalisierung des Kapitalverkehrs und Integration der Finanzmärkte, in: Festschrift für v. d. Groeben 131, 133 et seq. (Mestmäcker, Möller & Schwarz eds., 1987); Schön, Europäische Kapitalverkehrsfreiheit und nationales Steuerrecht, in: Gedächtnisschrift für Knobbe-Keuk 743, 746 (Schön ed., 1997). See also the ECJ in *Casati*, Case 203/80, [1981] ECR 2614, para. 9.
- 3 Baines, 28 Review of Int'l Studies 348 (2002).

step-by-step approach, and full, that is: unconditional, liberalisation was only achieved with the entry into force of the Capital Movement Directive 88/361/EEC⁴.

With a view to the developments since 2007, one might argue that those fears were justified, that speculative capital flows have indeed shattered economies all around the world, that the rules on the free movement of capital have been too liberal, and that in the interest of common welfare, those rules need to be revised in a way that better control and restricted capital flows can be achieved. However, this was not the approach that governments took in their reactions to the crisis. Rather, they were careful not to reduce the banks' liquidity even further by restricting their access to capital, based on the experience of the Great Depression: In the 1930 s, countries had responded to the crisis by imposing capital controls and had thereby choked off international trade and investment.⁵

Indeed, the European Internal Market (Article 26(2) TFEU) rests on the assumption that obstacles to cross-border economic activities impede economic growth, reduce welfare in the Member States and need to be abolished in the common interest. Therefore, Article 63 TFEU prohibits "all restrictions on the movement of capital between Member States and between Member States and third countries". This poses a number of questions regarding the scope and application of the prohibition in the crisis: What kinds of restrictions are forbidden, and what exceptions are provided by EU law that can be used to deal with financial and/or economic difficulties? Are the EU rules on the free movement of capital designed to cope with a severe crisis in the first place? And has the European Union itself and have its Member States observed the limits set out by European law, or have they taken crisis response measures in violation of European law?

The following remarks endeavour to provide a few thoughts on these questions. In its first, theoretical part, the article will give a brief overview on the notion of "capital" under EU law, potential obstacles to the free movement of capital and exceptions that may be used in dealing with economic difficulties. It will be shown that EU law does indeed provide exceptions to the free movement of capital in the event of a severe economic crisis. The second, more practical part will focus on the application of those EU rules and especially rules by its Member States in the current financial and economic crisis. While it appears that few measures restrict the free movement of capital, some do raise issues. This is true in particular for measures conferring special rights on public bodies in deviation from general corporate and capital market law.

4 Council Directive of 24 June 1988, OJ L 178/5, 8.7.1988.

5 Cf. London Economics, *supra* note 1, at 8–9.

Part 1: The EU Rules on the Free Movement of Capital

The Scope of the Free Movement of Capital

Capital Movements

As indicated before, Article 63(1) TFEU prohibits all restrictions on the movement of capital between Member States and between Member States and third countries. The Treaty itself does not define “capital movements”, but a non-exhaustive list of examples is contained in the Capital Movement Directive 88/361/EEC and still serves to illustrate the term.⁶ Generally speaking, capital movements – as opposed to payments (cf. Article 63(2) TFEU) – occur when somebody transfers assets for investment purposes.⁷ Such an investment may either be a passive one, where the investor does not plan to become involved in the business that is the object of the investment, or it may be undertaken in order to obtain a certain degree of entrepreneurial influence on that business, i. e. “serve to establish or to maintain lasting and direct links”⁸ between the investor and the business. The former, passive kind of investment is commonly referred to as portfolio investment, whereas the latter, entrepreneurial kind constitutes a direct investment. The Capital Movement Directive lists examples for both types of investments, including the acquisition of shares, other securities or real estate, the granting of a commercial or financial loan or of a guarantee, operations in current or deposit accounts, and the admission of securities to the capital or the money market.⁹ This may serve to show that capital flows can occur in a wide variety of ways and can therefore be affected by very different kinds of measures.

Furthermore, the free movement of capital rules are unique among the EU fundamental freedoms, since they also apply where third countries are involved. This is owed to the necessity to create and preserve confidence in the Euro, by making sure that investors can invest in the common currency and divest their funds without restrictions.¹⁰ However, the notion of “capital movements” is the same for transactions involving third countries and for transactions within the EU. The different rea-

6 Settled case law since *Trummer and Mayer*, Case C 222/97, [1999] ECR I 1661, para. 21.

7 *Luisi and Carbone*, Joined Cases 286/82 and 26/83, [1984] ECR 377, para. 21.

8 See the explanatory notes on „Direct Investments” in Annex I of the Capital Movement Directive.

9 Nomenclature in Annex I of the Capital Movement Directive.

10 *Filc*, Geld und Währungspolitik 34 (1989); *Vigneron/Steinfeld*, La Communauté Européenne et la libre circulation des capitaux, Cahiers de droit européen 401, 403 (1996).