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Freedom of Establishment and Freedom of Capital Movement as a Limitation to Excessive Regulation of the Financial Market

Abstract

This paper aims to analyze the interconnection between the regulation of the financial market and the principles of freedom of establishment and freedom of capital movement. In particular, the author seeks to determine whether the aforementioned principles can limit the EU legislator in the way he attempts to regulate the financial sector. This question is of significant importance, as protectionist phenomena are increasingly visible in the EU, especially in times of crises such as the pandemic or the war in Ukraine. The existence of freedom of establishment and freedom of capital movement has a positive impact on the development of the internal market, as it protects cross-border investors from excessive national regulation. However, the author would like to underline that this also constitutes a regulatory challenge for the legislator who wants to introduce certain restrictions or a certain higher level of supervision on the financial market. Consequently, it can be posited that the freedoms that define the EU internal market are a further rationale for the existence of the so-called incomplete law on the financial markets, given that this specific sector cannot be fully regulated at the national and supranational level. In this context, this article may serve as a catalyst for initiating a discourse on the responsiveness of national and European legislators in times of financial crises and the efficacy of financial market regulation.

KEYWORDS: financial market, European freedoms, cross-border, regulation

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HTTPS://DOI.ORG/10.36128/PRIW.VI49.845

1 Introduction: the specificity of the financial market

The modern financial market is no longer only a place to exchange capital between participants. Still, it is a specific legal environment marked by technological innovation within which the norms of private law interpenetrate with the norms of public law. Additionally, the financial market is not only a place of cooperation between law and economics but also a specific platform where the regulator, when ensuring the principle of legal security and certainty, has to consider the principles of freedom of establishment and freedom of capital movement.

This article aims to analyze the interconnection between the regulation of the financial market and the principles of freedom of establishment and freedom of capital movement. Namely, the author would like to verify whether the principles mentioned above have the potential to limit the EU legislator in the way that he is trying to regulate the financial sector. This question is fairly important, as protectionist phenomena are increasingly visible in the European Union, where policies and regulations are trying to limit foreign investors' access to markets or serve to protect its economy, its interests, or internal entities[1]. The principle of legal security and certainty is also a source of increased protection for the consumer in the financial market[2], legal qualification and formal requirements of many contracts concluded in this market[3], and an increased role of the national and EU supervision authorities[4]. The creation of a supervision system at the European Union level was preceded by a long debate that started after the financial crisis that occurred in 2007 as a result of the collapse of the high-risk mortgage loan market in the United States. This crisis made us

1 Tomasz Długosz, „Kontrola inwestycji zagranicznych w Unii Europejskiej. Podstawowe zasady i tendencje" *Prawo i Więź*, No. 2 (2022): 11.

2 Edyta Rutkowska-Tomaszewska, *Ochrona prawna klienta na rynku usług bankowych* (Warszawa: Wolters Kluwer, 2013), 197.

3 Andrzej Jakubiec, „O zasadności kodyfikacji niektórych umów zawieranych na rynku kapitałowym", [in:] *Instytucje prawa handlowego w przyszłym kodeksie cywilnym*, red. Teresa Mróz, Mirosław Stec (Warszawa: Wolters Kluwer, 2012), 479.

4 Aleksandra Nadolska, *Komisja Nadzoru Finansowego w nowej instytucjonalnej architekturze europejskiego nadzoru finansowego* (Warszawa: Wolters Kluwer, 2014), 201.

realize the need for a new approach to the institutional regulation of the financial market that would take into account the cross-border aspect[5].

However, as in the EU, we can observe some limits related to the principles of freedom of establishment and freedom of capital movement; not all of the previous ideas of higher regulation of the financial market were introduced. Assessing the effectiveness of the statutory law of the financial market is a complicated process because every financial market issue is not isolated from the international aspect and does not have only a national dimension. The gradual removal of barriers between markets, mutual recognition of entities, single passports, and other techniques serve as some kind of limitation for the projects that are trying to regulate the market very strictly. That is why the author, in one part, will analyze the interaction between financial market regulation and freedom of capital movement and, in another part, the interaction between financial market regulation and freedom of establishment.

2 Freedom of capital movement and financial market regulation

Already in the Casati judgment of 1981[6], the European Court of Justice (further as ECJ)[7] stated that the free movement of capital, combined with other freedoms, constitutes the basis for the development of the EU and a tool for implementing other freedoms. Then, in the Carbone case of 1984[8], the ECJ interpreted the concepts of movement of capital and payments, defining them as financial operations aimed at the deposit or investment of capital

5 Tomasz Nieborak, „Unia rynków kapitałowych UE – jako kolejny etap federalizacji rynku finansowego Unii Europejskiej?", [in:] *Praktyczne i teoretyczne problemy prawa finansowego wobec wyzwań XXI wieku,* ed. Jolanta Gliniecka, Anna Drywa, Edward Juchniewicz, Tomasz Sowiński (Warszawa: CeDeWu, 2017), 491.

6 Judgement of 11.11.1981, case ref. 203/80 *Casati.*

7 The European Court of Justice (ECJ), is the supreme court of EU in matters of European Union law and a part of the Court of Justice of the European Union.

8 Combined cases: C-286/82 i 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* (Luisi and Carbone) 1984.

and not remuneration for a service, which are ancillary to another obligation relationship.

The influence and interaction between freedom of capital movement and financial market regulation are also related to the fact that we have the phenomenon of fragmentation of law at the supranational level, which is reinforced by the horizontal model of law-making, the mutual and consensual nature of obligations, the interactivity, diversity and informality of sources.

European law, especially after the entry into force of the Treaty of Amsterdam, also seems to notice the increasing role of conflict of law regulations. Article 10 of the EC Treaty states that the application of conflict-of-law rules should not be detached from the current state of European law and should ensure the greatest possible effectiveness of this law. It was claimed that indirectly, such conflict rules are the provisions relating to the principle of free movement of persons, goods, and services and, in the field of the financial market, the provisions relating to the free movement of capital and payments, including those resulting from the already cited Casati and Carbone judgments. Additionally, the above-described process of fragmentation and specification of norms at the supranational level is increasingly accompanied (especially in financial market law) by referring to soft law rules and customs as a source of law. This custom, a general practice recognized as law, is much more important in the common law system than in the EU continental law. However, the financial market regulations and institutions are more frequently based on the case law system than the European one. The above statement is especially visible in financial instruments, where many solutions or legal structures refer to custom[9], which causes numerous problems related to the analysis and transposition of some Anglo-Saxon legal structures into continental law[10]. The above issue, concerning financial market regulations, is even more interesting due to the possibility of transposing almost any undefined norm of international law into the European order in the form of secondary law to interpret them in their way. The possibility described above generates the phenomenon of „penetration" of European law by certain norms having their source in broadly understood international law.

9 That is also one of the sources of law in European Union, see more Elżbieta Karska, „Prawo zwyczajowe", [w:] *Wielka Encyklopedia Prawa*, ed. Brunon Hołyst, Roman Hauser, t. III, *Prawo Unii Europejskiej*, ed. Zdzisław Brodecki (Warszawa: Fundacja „Ubi societas, ibi ius", 2014), 186.

10 Thierry Bonneau, Thibault Verbiest, *Fintech et Droit. Quelle régulation pour les nouveaux entrants du secteur bancaire et financier?* (Paris: Revue Banque, 2017), 11.

At this point, it is worth emphasizing the impact of the MiFID directive on the freedom of investment services within the EU. Implementing this act into national regulations gave investment companies equal access to markets throughout the European Union while severely limiting the ability of states to impose restrictions in this respect. This issue was already regulated by Art. Article 56 of the Treaty of Rome and Article 63 of the Treaty on the Functioning of the EU on the free movement of capital reiterate the principle of equal access to EU markets for investment companies. However, the European Parliament and the European Commission have sought to ensure that this principle is consistently applied[11].

The fundamental instrument for facilitating broader access to the EU market for investment companies is the extension of the single passport principle. The literature on the subject has long emphasized that the acceptance of requirements or qualifications established in another country did not imply alterations to the national order but merely entailed the acknowledgment of standards adopted in another Member State. It should be recalled that the acceptance of country of origin standards was already expressed in the ECJ judgment of 1979 in the Cassis de Dijon case[12] and was also confirmed in a number of other judgments of the Court, in particular in the Bier-Reinheitsgebot case (178/84 Commission v. Germany), or in the Dassonville case (8/74; Procureur du Roi v. Benoît and Gustave Dassonville). Consequently, it is much more difficult on the financial market for Member States to impose various restrictions or additional requirements on investment companies or credit institutions. Additionally, these companies do not have to apply for a separate permit from the country's authorities in which they intend to operate.

The application of the principle of freedom of capital, based on the assumption that EU member states should act to create one economic area without national borders, has resulted in a limitation of the regulation of the financial market. This fact is particularly visible if we consider the non-discriminatory restrictions related to this principle[13]. This type of restriction is some sort of limitation of the regulatory tendencies, especially

11 Adam A. Ambroziak, „Wpływ wprowadzenia swobodnego przepływu kapitału na bezpośrednie inwestycje zagraniczne w unii europejskiej. Bilans dwudziestolecia istnienia rynku wewnętrznego UE" *Studia Europejskie*, nr 4 (2013): 133-134.

12 Case reference 120/78 *Rewe-Central AG r. Bundesmonopolverwaltung für Brantwein*.

13 Marcin Glicz, „Swoboda przepływu kapitału a zintegrowany rynek kapitałowy" *Gdańskie Studia Prawnicze*, nr 25 (2011): 126.

in the financial market field, that aim to create a detailed legal financial market law framework.

The EU member states cannot apply the principle of freedom of capital. Still, such an action is considered an exception to the public order clause. The clause mentioned above is a legal tool used to protect a given legal order against foreign legal solutions, but only when the effects of this interference are irreconcilable with the elementary legal principles of this given legal system[14]. It may be implemented to protect participants in the financial services market, but its role would be limited. However, it is worth noting that the doctrine of financial market law has already noted the possibility of a subsidiary application of this clause as a tool to strengthen market supervision[15].

In the financial market, the interaction or limitation of regulation by treaty freedoms is even greater because, in many segments of the financial market, these freedoms occur simultaneously and are an addition to the freedom of movement of capital and payments. For example, in the banking sector, as one of the key elements of the financial market, most credit transactions combine elements of both the freedom of services and the freedom of capital and payments. Similarly, in the case of the stock exchange market, it pertains to the trading of financial instruments[16].

The limited regulatory possibilities in the financial market also result from the fact that the technological development and development of a digital economy additionally characterizes the modern financial market. Consequently, the changes in the traditional method of regulation appear first in this legal environment[17] , and the process of financialization, understood as the increasing impact of the financial sphere in man's

14 Bartosz Ziemblicki, „Klauzula porządku publicznego ze szczególnym uwzględnieniem instytucji *punitive damages*", [in:] *Rządy Prawa i europejska kultura prawna*, ed. Andrzej Bator, Joanna Helios, Wioletta Jedlecka (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2014), 97.

15 Michał Mariański, *Problematyka regulacji rynku finansowego w ujęciu transgranicznym. Analiza na przykładzie prawa polskiego i prawa francuskiego* (Olsztyn: Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego, 2020), 55-56.

16 Glicz, „Swoboda przepływu kapitału a zintegrowany rynek kapitałowy", 130.

17 Dariusz Szostek, „Is the Traditional Method of Regulation (the Legislative Act) Sufficient to Regulate Artificial Intelligence, or Should It Also Be Regulated by an Algorithmic Code?" *Białostockie Studia Prawnicze*, No. 3 (2021): 43-44.

everyday life[18], is also making all the regulatory activities in this area much more difficult.

3 Freedom of establishment and financial market regulation

A set of regulations that make up the so-called freedom of establishment, next to the freedom of movement of goods, persons, provision of services, and free movement of capital, is one of the basic principles of the functioning of the internal market regulated in the Treaty on the Functioning of the European Union. According to the provisions of Art. 26 section 2 TFEU, freedom of establishment, together with other economic freedoms, creates the concept of the internal market understood as an area without internal borders and one of the most important goals of the EU[19]. As for the interaction with the financial market regulation, it is worth noting that the internal market belongs to the so-called shared competencies between the EU and its Member States, which means that both the EU and the Member States can adopt legally binding acts in this area[20].

It should be underlined that the literature uses various terms for the freedom described in this section by using the expressions freedom to conduct a business, freedom of entrepreneurship, or freedom to establish a business. The European Court of Justice also played an important role in shaping the scope of the described concept. This is the case of the most important judgements in this matter, including the Daily Mail case from

18 Tomasz Nieborak, „Human Rights in the Light of the Process of Financialisation" *Białostockie Studia Prawnicze*, No. 5 (2021): 161.

19 Tadeusz Gadkowski, „Ograniczenia swobody przedsiębiorczości w świetle wybranych orzeczeń Trybunału Sprawiedliwości UE" *Studia Oeconomica Posnaniensia*, No. 3 (2015): 80.

20 Przemysław Saganek, „Nowe reguły dotyczące podziału kompetencji między Unię Europejską a państwa członkowskie w świetle Traktatu z Lizbony" *Przegląd Sejmowy*, No. 4 (2010): 83.

1988[21], the Centros case from 1999[22], the Überseering case from 2002[23], or the Inspire Art. case from 2003[24]. These judgements gradually shaped the relationship between the company's headquarters and the freedom mentioned above of establishment and were an example of the evolution of EU law in this matter.

The effect of the European Court's rulings was to oblige each EU country to accept and tolerate a company established under the law of another Member State on its territory. Moreover, a rather broad approach to the freedom of establishment, which constitutes the basis for the free establishment of business activity within the territory of the entire European Union, also gives and emphasizes the cross-border dimension of modern commercial activity. Freedom of establishment may be a limitation for attempts to regulate entities operating, especially in the financial market, because it expresses economic freedom and qualifies EU entrepreneurs as entities protected by law against interfering actions by different national authorities. Secondly, it is a potential preventive limitation of regulatory activities because it imposes on Member States the obligation to create appropriate conditions to effectively use their freedom. Thirdly, it introduces a specific presumption of prohibition of interference, which, if it occurs, requires the action to be justified by a particularly important public interest[25].

In the author's opinion, when we consider the changes that have occurred in the way the financial market is perceived, especially in the wake of the recent crisis, it is possible to identify an important public interest based on the security and stability of the financial system. In particular, it is emphasized that the application of European freedoms to the financial market may have the consequence of underlining the consequences related to the development of cross-border financial services by entities not covered by any form of regulation, both at the national and supranational level.

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21 Judgement of ECJ from 27.08.1988, case ref. 81/87, *The Queen v. H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*.

22 Judgement of ECJ from 9.03.1999, case ref. C212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*.

23 Judgement of ECJ from 5.11.2002. case ref. C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH*.

24 Judgement of ECJ from 30.09.2003, case ref. C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*.

25 Mariański, *Problematyka regulacji rynku finansowego w ujęciu transgranicznym. Analiza na przykładzie prawa polskiego i prawa francuskiego*, 208 i n.

It is worth noting, however, that in Polish literature, the cross-border nature is increasingly associated with European freedoms, where it is rightly noted that the exercise of freedom of establishment by companies must take the form of economic expansion from one Member State to another. The requirement of the cross-border nature of freedoms is therefore expressed in Art. 49 of TFEU provides the prohibition of restriction related to the exercise of freedom of establishment in the territory of another Member State[26]. The above is consistent with the cross-border nature of the financial market, which is currently more often recognized as its key feature[27].

The possibility of linking the specific nature of the financial market with the freedom to conduct a business is also evidenced by how Art. 54 of the Treaty on European Union and the Treaty on the Functioning of the European Union is written. The concept of a company and its nature, especially in Art. 6 section 3 TEU and Art. 16 of the Charter of Fundamental Rights[28] is also protected under the EU law[29]. Namely, this provision states that companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies and other legal persons governed by public or private law, save for those that are non-profit-making. It should be emphasized that the rank of the provision mentioned above is more important when financial market entities operate in an environment where the norms of private and public law interpenetrate[30]. What is important in the context of the application of freedom of establishment to financial market entities is the fact that it can only be used by companies that were established in accordance with the legislation of one of the EU Member States. This also includes acts of national law

26 Jacek Napierała, „Swoboda przedsiębiorczości", [in:] *Prawo spółek handlowych. Tom 2B,* ed. Andrzej Szumański (Warszawa: C.H. Beck, 2019): 899-900.

27 Michał Mariański, „Transgraniczność jako podstawowa cecha prawa rynków finansowych", [in:] *Księga Zjazdu Katedr i Zakładów Prawa Finansowego i Prawa Podatkowego „Misja prawa finansowego – wyzwania współczesności*, ed. Elżbieta Feret, Paweł Majka (Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego 2023), 283 i n.

28 Official Journal of the European Union – C 326/391.

29 Karol Karski, Bartosz Ziemblicki, „Commercial Companies as Applicants before the European Court of Human Rights" *International Community Law Review*, No. 5 (2021): 503; Elżbieta Karska, „Drafting an International Legally Binding Instrument on Business and Human Rights: The Next Step towards Strengthening the Protection of Human Rights" *International Community Law Review*, No. 5 (2021): 466.

30 Michał Mariański, „Rynek finansowy jako miejsce przenikania się norm prawa prywatnego i prawa publicznego" *Studia Prawno-Ekonomiczne*, No.100 (2016): 123.

enabling the establishment of cross-border companies, such as European economic interest groups, European companies, or European cooperatives.

It is worth mentioning that the requirement to establish a company in the EU is related to the obligation to have a registered office, management body, or head office in any Member State. The above means that many entities operating in the financial market should not have problems with shaping their cross-border structure to benefit from the protection guaranteed by the freedom of establishment. It also includes protection against excessive regulation of their activities by the national financial supervision authority. The above may be a very simple procedure, especially because a company is within the meaning of Art. 54 of the Treaty on European Union may also be an entity that is *de facto* a related company established in one of the Member States by a company outside the Union. It is particularly interesting if we consider the French concept of a group of companies developed based on the judgment of the French Supreme Court (Cour de Cassation) of 4 February 1985 in the Rozenblum case[31]. The judgment mentioned above of the French Supreme Court has given the basis and conditions for recognizing a given structure as a group of companies and specifying that it should be examined each time and individually, referring to the context and specificity of a given structure[32].

To benefit from the freedom of establishment by a given cross-border entity operating on the financial market, its activities should be carried out using the so-called durable organization. For transnational financial institutions, the way of understanding the concept of durability may be crucial, as it refers both to the location of the main decision-making center in the EU territory and, in some cases, only to a subordinated unit of the parent company having its decision-making center in another country. It is important to note that the other country in question, based on the law of which many aspects of the functioning of a given entity will be regulated, should be another EU country.

Also, the requirement of a durable organization in the mentioned other Member State is important when distinguishing the freedom of establishment from the freedom to provide services, especially when a company

31 Aline Atiback, *L'abus des biens sociaux dans le groupe des sociétés* (Paris: Harmattan, 2007), 73-74.

32 Michał Mariański, „The Specificity of the French Concept of a Group of Companies – Analysis Based on the Judgment of the French Supreme Court of 4th February 1985 in the Rozenblum Case" *Przegląd Ustawodawstwa* Gospodarczego, No. 11 (2022): 25.

that is, for example, a financial service provider temporarily moves to the country of the recipient of the service. In this case, without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, to do so, temporarily pursue his activity in the Member State where the service is provided under the same conditions that are imposed by that State on its nationals. The requirement of a durable organization also distinguishes between the freedom of entrepreneurship and the freedom of capital movement, which is especially important in the financial market. However, it is worth noting that, contrary to the conflict with the free movement of services, parallel use of both the freedom of establishment and the free movement of capital is allowed[33] , and that is why they can both cumulate their influence on the regulatory scope of the financial market.

In the author's opinion, to regulate the functioning of transnational entities on the financial market, it is noteworthy that, despite a number of judgments cited in this work, many aspects of cross-border mobility of companies remain unresolved. In particular, the situation of cross-border transformation of a company, especially in connection with a change of legal form, remains problematic because it generates a conflict between the law of the host country and the law of the country of origin[34]. Initially, this issue was raised in the ECJ ruling in the Cartesio case in 2008[35] and then developed in the ruling in the VALE *Építési* Kft case in 2010[36]. Still, due to the development of the market, it requires future and constant adaptation. The evolution in this field is especially related to other cases and new judgements related to the concept of the cross-border conversion of a company[37] and the possibilities for companies to carry it out under the freedom of establishment concerning the recent

33 Napierała, „Swoboda przedsiębiorczości", 898-999.

34 Paweł Błaszczyk, „Transgraniczne przekształcenie spółki jako sposób korzystania ze swobody przedsiębiorczości.Glosa do wyroku TS z 12.07.2012 r. w sprawie C-378/10 VALE Építési kft." *Europejski Przegląd Sądowy*, No. 11 (2012): 40.

35 Judgment of the Court (Grand Chamber) of 16.12.2008, case ref. C-210/06, Cartesio Oktató és Szolgáltató Bt.

36 Judgment of the Court (Third Chamber), of 12.07.2012. *case ref.* C378/10, *VALE Építési kft.*

37 Sylwia Majkowska-Szulc, Arkadiusz Wowerka, „Cross-Border Transfer of a Seat, Cross-Border Conversion or the Coming into Existence of a New Company? Doubts Against the Background of the Court of Justice's Judgment in C-106/16 Polbud – Wykonawstwo Sp. z o.o." *Polish Yearbook of International Law*, No. 38 (2018): 275.

Directive 2019/2121[38]. In the literature, it is underlined that according to this 2019/2121 Directive, Member States will have to pay particular attention to the identification of the competent authorities, and they will have to ensure a high level of competence to confirm the legality of cross-border conversion from the perspective of both national and EU regulations[39].

The fundamental challenge still faced by European jurisprudence is to indicate whether current EU regulations, including the wording of Art. 54 TFEU gives transnational entities the right to unlimited cross-border transformation and thus to fully exercise the freedom of establishment. In this respect, the ruling in the VALE Építési Kft case already raised the issue of restrictions imposed at the national level on cross-border transformations of foreign legal entities. The Tribunal found such actions unjustified, i.e., restrictions on exercising freedom of establishment that were impossible to block through the public policy clause. What is very important in the analyzed judgment is that the Tribunal raised not only substantive legal issues but also the conflict of law issues – which is important because this is one of the important aspects of today's financial market[40]functioning. However, in the case in question, the judgment indicates the threats related to the possibility of refusing to recognize a given legal person under the law of the court's country due to the law applicable to the change of country of residence. At this point, it is worth emphasizing the position of the legal scholars, which, based on the judgment in the Cartesio case, holds that the Member States' legal systems have the competence to decide only on the effectiveness of establishing a company[41].

Due to the supranational nature of the activities related to the financial market, it is very common in this field that a lot of companies acting in the territory of the EU internal market have to deal with the phenomenon of cross-border transfer of their residence or registered office from one to another Member State. That is why, especially in the financial market, the

38 Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ L 321, 12.12.2019.

39 Katarzyna Pokryszka, „Cross-Border Conversion of a Company in the Light of the Provisions of Directive 2019/2121 as Regards Cross-Border Conversions, Mergers and Divisions — Selected Issues" *Przegląd Ustawodawstwa Gospodarczego*, No. 3 (2021): 25.

40 Mariański, „Transgraniczność jako podstawowa cecha prawa rynków finansowych", 283.

41 Błaszczyk, „Transgraniczne", 44.

questions concerning the scope of application of the freedom of establishment and the permissibility of EU Member States to impose restrictions in this field are of significant importance. Consequently, regulation of the financial market becomes very difficult, and the national and European legislators have to find a balance between the realization of the freedoms of the internal market and market protection. In this case, the principle of proportionality of the financial market regulation means that any limitation in this area must be subjected to additional multi-level analysis. The proportionality test was also the subject of EU judgements, especially in the Centros and Inspire Art cases. This test made it possible to limit fundamental freedoms resulting from the internal regulations of a Member State if four basic conditions were met. The conditions examined under the proportionality test include lack of discrimination, justification for reasons of public interest, suitability for achieving the intended purpose, and adequacy, not going beyond what is necessary to achieve a given purpose. In this aspect, the solutions adopted in Directive 2019/2121 on cross-border company conversions also deal with the specificity of the proportionality principle. It is possible to ensure that companies enjoy economic freedom on the internal market's territory and impose restrictions justified by imperative requirements in the general interest[42].

4 Conclusion

The freedoms of capital, payments, and entrepreneurship were introduced to protect the overall EU market as an area free from restrictions, and this fact has many important benefits. On the other hand, which is rarely noticed in the literature, the freedoms mentioned above constitute a specific limitation to excessive financial market regulation. Exceptions to the treaty freedoms are very rare, so each time a national or European legislator wants to additionally regulate many issues on the financial market, he must

42 Katarzyna Pokryszka, „Economic Freedom and Imperative Requirements in the General Interest-Conflict of Coexistence of Values in European and Polish Economic Law? Remarks Against the Background of Cross-Border Business Activities of Companies in the European Union" *Review of European and Comparative Law*, No. 52 (2023): 122.

consider the above. Moreover, within the context of specific regulations included in financial market law, numerous freedoms frequently occur simultaneously within a given transaction, thereby expanding their scope of impact. One illustrative example is the ruling in the Baars case (ref. C-251/08) regarding the acquisition of shares in enterprises[43].

The aforementioned legislation affords cross-border investors a certain degree of protection. However, it also presents a significant challenge for legislators seeking to impose restrictions or enhanced supervision on the financial market. Moreover, on the one hand, such intensified interference of European freedoms in the financial market somehow forces the elimination of differences in the standards of functioning of national markets. Still, on the other hand, it does not necessarily lead to the primacy of the most effective and most compromise model for all market participants, including its supervisory authorities. Consequently, it can be stated that under EU law, this leads to an additional reason for the existence of the so-called incomplete law of financial markets, which has already been described in international doctrine[44].

The author's opinion, as previously stated, is of particular importance in crises, defined as those instances in which intervention, at least temporarily, by the legislator is advisable. The coronavirus pandemic and the war in Ukraine have demonstrated the necessity of temporarily freezing numerous regulations, including those pertaining to European freedoms, in times of extraordinary events. Due to the limited scope of this study, the author did not analyze the two crises mentioned above in detail. However, they served as an impetus for this publication. Given the likelihood of similar crises occurring more frequently than before, it seems prudent to initiate a discussion on the reactivity of national and European legislators in times of financial crises. Consequently, as part of a proactive approach, it is worth considering the proposition of implementing transitional mechanisms, particularly within the financial sector, that could be employed during periods of pandemic or war. It may be argued that a temporary and state-security-motivated derogation from treaty freedoms, to a very limited extent, could be deemed acceptable.

43 Glicz, „Swoboda przepływu kapitału a zintegrowany rynek kapitałowy", 131.

44 Katharina Pistor, Chenggang Xu, "Incomplete Law", *N.Y.U. Journal of International Law and Politics*, nr 35 (2003): 931.

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