The european freedoms and the principle of non-restriction for tax purposes*

Pietro Boria**

*Edited in English by the Author

** Full Professor of Tax Law, Sapienza University of Rome

Abstract

È *ben noto come le ragioni alla base della adesione all›Unione Europea siano da ritrovare nel principio dell›unità del mercato e, di conseguenza, nella affermazione della libertà di movimento.*

In effetti, nella sua tradizionale quadruplice partizione (libera circolazione delle merci, delle persone, dei servizi e dei capitali), la libertà di movimento si adopera per assicurare l›efficace perseguimento degli obiettivi fondamentali dell›integrazione europea in una relazione strumentale con il principio dell›unità del mercato interno europeo.

Queste libertà, infatti, esprimono la necessità di promuovere una riduzione delle barriere fisiche e le restrizioni legali imposte dai diversi Stati-nazione che segnano i confini della sovranità nazionale, al fine di consentire l›attuazione di un processo di unificazione economica e commerciale al livello dell›Unione europea.

Non sorprende, quindi, che le libertà di circolazione siano oggetto di specifiche norme per l›elevato contenuto simbolico, come parte del trattato per anni, sottolineando il loro primato assiologico nella trama dei valori propri del diritto dell›UE.

È *parimenti più che noto come le menzionate libertà di circolazione e stabilimento, in cui si identifica oramai l'essenza stessa dell'Unione Europea, debbano essere garantite nel rispetto delle legislazioni fiscali degli Stati membri e – per quanto costituisce oggetto di esame in questa sede – analizzate con particolare riferimento alle scelte di delocalizzazione d'impresa dettate da ragioni di ottimizzazione dei costi fiscali.*

Dopo aver illustrato e commentato il divieto di restrizioni dettate da ragioni fiscali anche alla luce della giurisprudenza della Corte di Giustizia, vengono esaminate in modo specifico le norme in materia di divieto di restrizioni alla libertà di circolazione che hanno effetti sul piano fiscale, ovvero:

- *l'art. 28 TFUE, che stabilisce la libera circolazione delle merci;*
- *l'art. 45 e l›art. 49 TFUE, che riconosce la libertà di circolazione delle persone;*
- *l'art. 56 TFUE, che afferma la libera circolazione dei servizi;*
- *l'art. 63 TFUE, che sancisce il principio della libera circolazione dei capitali.*

SUMMARY: *1. The fundamental role of the freedoms of movement within the European framework; 1.1. The freedoms of movement as founding value of the European legal system; 1.2. The principle of non-restriction of the freedoms of movement for tax purposes; 1.3. The judgment concerning the non-restriction in the jurisprudence of ECJ; 2. The free movement of goods; 3. The freedom of movement of services; 4. The free movement of capital; 4.1. The free movement of capital for tax purposes; 4.2. The exceptions to the free movement of capital expressly provided by the Treaty; 4.3. A derogation from the principle of the free movement of capital: the judicial clarification of the concept of «lucrative rights» provided by Directive no. 69/35; 5. The free movement of people; 5.1. The free movement of workers; 5.2. The freedom of establishment.*

1. The fundamental role of the freedoms of movement within the European framework

1.1. The freedoms of movement as founding value of the European legal system

It is well known that the underlying reasons of the accession to the supranational organization established by the European Union is to be found typically in the principle of the unity of the market and, consequently, in the assertion of freedom of movement.

Indeed, the freedom of movement in its traditional fourfold partition (free circulation of goods, persons, services and capital) applies to ensuring the effective pursuit of the basic goals of the EU integration according to an obvious instrumental relation with the principle of the unity of the European internal market.

These freedoms in fact express the need to promote a reduction of physical barriers and the legal restrictions imposed by the various nation-States and which mark the boundaries of the national sovereignty, in order to allow the implementation of a process of economic and trade unification at the level of the European Union.

It is not surprising, therefore, that the freedoms of movement are the subject of rules by the high symbolic content as part of the Treaty for years and point out the axiological primacy in the plot of the proper values of the EU law.

In particular, there are some specific rule about the freedoms of movement:

- Art. 28 TFEU, which states the free movement of goods;
- Art. 45 and art. 49 TFEU, which recognize the freedom of movement of people;
- Art. 56 TFEU, which establishes the free movement of services;
- Art. 63 TFEU, which lays down the principle of the free movement of capital.

1.2. The principle of non-restriction of the freedoms of movement for tax purposes

The freedom of movement obviously has a specific relevance in tax matters, in order to exclude that nation-States can adopt protectionist or interventionist policy or otherwise obstruct or restrict the free movement of goods, persons, services or capital.

Indeed, on closer inspection it does not appear necessary to verify the existence of protectionist purposes in the national tax rule, since it is sufficient to recognize in the same rule an obstructive or distorting effect about the freedom of movement established by the Treaty.

In essence, it is forbidden to the Member States to adopt a tax law that has the effect of hindering the trade or the other economic mobility within the common market.

The prohibition of restriction for tax purposes is covered in reference to each of the fundamental freedoms of EU law - and therefore to the freedom of movement of goods, services, persons and capital - and possibly also with reference to specific profiles of a same freedom. Thus, for example, the restriction of a tax rule with respect to the freedom of movement of persons enacted by art. 49 TFEU can be established with regard to the principle of mobility of employees and with reference to the freedom of establishment of the enterprises.

It should be noted that a single national rule can collide with more freedoms of the EU law, because of the irreconcilability with a plurality of rules set out in the Treaty. Indeed, it is not uncommon to the experience of the EU case-law to find a national standard which contrasts jointly with the free movement of the persons and the free circulation of the services (case 10/03/2002, C-136/00, *Danner*; case 01/30/2007, C-150/04, *Commission vs. Denmark*) or with the free movement of capital and people (case 12/12/2006, C-374/04, *Test Claimants in Class IV of the Act Group Litigation*, case 05/24/2007, C-157/05, *Holböck*). Often the Court of Justice has ruled that the restrictive effects on the free movement of capital are to be considered as the inevitable consequence of an obstacle to the freedom of establishment of the enterprises and therefore both the freedoms must be included in the same judgment (case 09/12/2006, C - 196/04, *Cadbury Schweppes*; case 10/03/2006, C-452/04 *Fidium Finanz*; case 05/15/2008, C-414/06, *Lidl*).

It is necessary to note that the protection of fundamental freedoms by the banning of restriction appears in many ways contiguous to the protection of the principle of non-discrimination, as the violation of freedom is mostly found in the presence of national measures, which introduce a disadvantage towards residents of other Member States, and therefore produce a discriminatory effect. Moreover, the freedom of movement covers a broader spectrum of cases of the principle of non-discrimination - as mentioned earlier - as it applies to preclude national rules which restrict or obstruct intra-Community trade or economic mobility, even though they do not result in any way discriminatory. In this sense, it has been argued that non-discrimination is a *species* of the broader *genus* of freedom of movement.

It may be noted in this regard that in the case-law sometimes the protection of freedoms is the fundamental logical basis of the principle of non-discrimination and therefore deletes the axiological autonomy of the latter (so that the principle of non-discrimination may not be invoked separately by the restriction of the EU freedoms; case 28.1.1986, C-270/83, *Avoir*

Fiscal); on other occasions, however, it has considered the independence of the two principles and thus the possible contextual and distinct proposal of the judgment about the principle of non-discrimination together with the principle of restriction of the EU freedoms (case 07/16/1998, C-264-96, *Imperial Chemical Industries - ICI*).

It should also be noted that the violation of the fundamental freedoms can be realized in the context of an international convention against double taxation through the simultaneous exercise of taxation by each Member State. In this case it is expressly formulated the theory of the «almost restriction» in order to indicate the uncertainty about the regulatory parameter to be taken by the judgment of restriction on fundamental freedoms, considering the inability to identify which of the two States should give up some tax power (case 05/12/1998, C-336/96, *Gilly*; case 09/14/1998, C-291/97, *Gschwing*; case 11/14/2006, C-513/2004 *Kerckhaert - Morres*).

1.3. The judgment concerning the non-restriction in the jurisprudence of ECJ

The principle of non-restriction has been formulated for the first time by the Court of Justice in the case *Dassonville* (case 01/28/1974, C-8/74) being expressly stated that «all trading regulations enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade should be regarded as a measure having equivalent effect to the quantitative restrictions».

So, it is established that the judgment on the principle of non-restriction affects the legality of a national standard because of the obstructive and/or restrictive effects with respect to intra-Community trade. Therefore, it must carry out a verification of the restrictive effects through a teleological assessment on the national rule.

In particular, the test of restriction is accomplished by the investigation of the disadvantage that the foreign person suffers in relation to the intra-Community trade as a result of the legislation of a Member State.

On the other hand, the restrictive measure can be justified in a matter of overriding national general interest according to the canon of rationality. It is a complex evaluation that involves the balancing of the interests of the European Union with the national interests, which will be examined in more detail later.

The judgment on the principle of non-restriction is therefore a typical binary structure as it is divided into two basic steps:

a) determination of a regulatory hurdle about the freedom of movement provided for by the Treaty;
b) assessment of a reasonable cause of justification that legitimizes the existence of a restrictive national measure.

The judgment of non-restriction has been frequently adopted by the Court of Justice also in tax matters, being expressed the conviction that the tax regulations of the Member States may not configure an obstacle to the freedoms of movement and however may not make less convenient the material use of the same freedoms.

The focus of the ECJ case-law is addressed in particular to some specific issues as the double taxation, the use of losses within the group, the anti-avoidance rules on *transfer pricing*, the *thin capitalization*, the *exit tax*. It is typically a series of issues concerning the direct taxes in which the rules of law are judged from the perspective of the principle of non-restriction, having to verify whether the national rule produces the deterrent effect with respect to the exercise of the freedom of circulation (mostly recurring in the freedom of collection and investment of capital and in the freedom of establishment).

2. The free movement of goods

The free movement of goods is one of the primary targets of a supranational organization that takes the essential purpose of establishing a single market and a space free from frontiers and legal restrictions. Indeed, this principle is to characterize not only the European Union but also other forms of supranational organization (such as the WTO, NAFTA, etc.).

The principle of free movement of goods is fixed by the art. 28 TFEU, where it is forbidden the creation of the customs duties or of the charges with equivalent effect which can obstruct or limit the circulation of the goods (import and export) among the Member States; in the same rule it is established a Customs Tariff to be utilized as a common parameter for the trade relations (import and export) with foreigner extra-EU countries.

Therefore, the principle of free movement of goods is defined in the European legal order through tax limitations and constraints: the main limitation is determined by the reduction of the protectionist execution of the

taxation power by the Member States. Therefore this principle is basically integrated by a series of specific tax regulations.

The free movement of goods is ensured mainly by the elimination of the customs barriers and the homogenization of the consumption taxes provided for in the various Member States. The first measure (elimination of the customs barriers) is devoted to avoid fiscal restrictions or taxes that prevent the free play of competition, submitting merchandise trade to protectionist or interventionist measures by the national laws. The second measure (homogenization of the consumption taxes) is functional to avoid the tax burden directly applied on the consumption of goods, which may be a distorting factor for the free competition in the common market.

It should be noted that the policy of European Union about this principle has been executed since the origin through a very hard-hitting action of coordination of the national legislations which has been implemented by the following operations:

i) through the establishment of the Customs Union and the determination of a unified legal framework of the customs duties directly applicable in all the Member States;
ii) due to the harmonization of the regulations about the value added tax by several Directives;
iii) through the harmonization of the regulations about the excise duties, achieved by means of a series of EU Directives.

The principle embodied in art. 28 TFEU has thus found a detailed declination in the derivate EU law, whose target was to establish some European regulations devoted to conform the national fiscal discipline to the value of the free movement of goods.

It is significant, in this regard, that in the ECJ jurisprudence there are not almost cases for the judgment about the restriction of the free movement of goods. That means, basically, that the principle of the free movement of goods is not questioned in the tax jurisdictions of the Member States precisely because of the incisiveness and the accuracy of the guidelines contained in the EU regulations.

3. The freedom of movement of services

The principle of free movement of services– that refers expressly to the industrial, commercial and professional activities - is contained in the art.

56 TFEU and is devoted to establish an essential freedom to the realization of a common market in the current economic context, considering the growing importance of services and industries in the configuration of economic and productive global system. Such freedom must therefore be fully protected by the European order with respect to the national regulations which may assume a restrictive or protectionist nature.

In the tax law, the free movement of services is basically ensured through a policy of harmonization of indirect taxes (especially with regard to the value added tax). At this purpose it may reiterate the comments made in the previous paragraph with reference to the freedom of movement of goods.

The increased importance of the freedom of movement of services in the area of taxation, however, concerns the discipline of direct taxes, where the national regulations can configure restrictive measures with respect to the principle. In particular, the restrictive effect was detected in two cases: the national tax rule may deter service providers from carrying out its activities in the Member State, or service recipients may be reluctant to seek or to receive the services by a national tax rule (case 01/30/2007, C-150/04, *Commission vs. Denmark*).

It should be noted that there is a significant case law regarding the relevance of the principle of free movement of services in the regulation of direct taxes.

In relation to the matter of insurance benefits or supplementary pension, it has consolidated the conviction that constitutes an obstacle to the free movement of services the national tax legislation which has the effect of making the provision of services between legal entities of different Member States more costly or difficultly than the provision of services provided within the nation-State (case 04/28/1998, C-118/96 *Safir*; case 01/30/2007, C-150/04, *Commission vs. Denmark*).

Even in the field of treatment of interest paid to a bank (the mortgage loan being a case due typically to the category of services) it was considered unlawful, because of the restriction of the principle enshrined in art. 56, the national provision which allows a tax advantage only if the loan was contracted with a lending institution authorized by the legislation of the Member State and not to the loans received by resident banks or other credit institutions authorized in other Member States (case 11/14/1995, C-484/93, *Svensson - Gustavsson*).

4. The free movement of capital

4.1. The free movement of capital for tax purposes

Another freedom that plays a primary role in the EU legal system regards the movement of capital within the European common market according to the principle established in the art. 63 TFEU.

This freedom is evidently connected to the pursuit of the targets of economic and trade integration of the European Union since it allows the circulation of capital in the free space of the EU territories in order to allow the concrete development of productive initiatives and business.

The freedom of movement of capital is expressed through a variety of forms that can typically be traced to two categories of cases: the freedom to raise capital for the development of economic activities and enterprise (freedom regarded from the point of view of the «recipient»); the liberty to invest capital in order to achieve an economic return (freedom regarded from the point of view of the «investor»).

The EU attention, however, seems to apply mainly to the first of the two mentioned cases, given the instrumental relationship with the freedom of enterprise and, therefore, with the full implementation of the target of free competition in the common market.

In this regard it should be noted that the freedom of movement of capital often tend to overlap, or otherwise to combine with the freedom of establishment of companies; indeed, the raising of capital finds its natural expression in the constitution or in the development of enterprises, particularly with relation to the increase of the share capital or to the financial capacity of a company resident in a Member State other than that one of the investor (mostly the parent company) (case 11.11.1981, C- 203/80, *Casati*; case 13.4.2000, C-251/98, *Baars*; case 3.10.2006, C-452/04 *Fidium Finanz*; case 13.3.2007, C-524/04 *Test claimants in the thin cap group litigation*; case 3.10.2013, causa C-282/12, *Itelcar)*.

National rules may not restrict the freedom of movement of capital by restrictive measures that are intended to put an obstacle to the free movement of capital. This prohibition applies obviously also, and perhaps above all, with the tax national laws that may not be configured to determine a disadvantage or at least a deterrent for non-residents with respect to the movement of capital.

So it was stated that national legislation involving a tax advantage limited to the capital gains arising from domestic investment constitutes a restriction with respect to the freedom of movement of capital under both of the forms mentioned above, since it discourages the citizens of that country to invest in other Member State and at the same time produces a restrictive effect with respect to investors resident in the other Member States to bring their own capital in the State (case 07/15/2004, C-315/2002, *Lenz*; case 01/19/2006, C-265-04, *Bouanich*).

4.2. The exceptions to the free movement of capital expressly provided by the Treaty

The freedom of movement is the only European freedom for which a restriction is permissible on the basis of a cause of justification recognized directly in a provision of the Treaty. For other EU freedoms, instead, the causes of justification are originated in the judgments formulated the Court of Justice.

A first exception to the freedom of movement of capital is provided in art. 65 TFEU, where it is established that the Member States may operate in the domestic legislation a distinction between taxpayers who are not in the same situation because of their residence or place of capital allocation (art. 65 let. a). Moreover the Member States may assume procedural regulation that can introduce some restrictions or limitations with regard to the free movement of capital (art. 65 let. b) in order to:

- take the necessary measures to prevent infringements of tax law and to permit the control of financial institutions;
- establish procedures for the declaration of capital movements in the tax return for the purposes of administrative or statistical information;
- assume regulations devoted to ensure the respect of public policy or public security.

In any case it is established that such regulations and procedures may not constitute a functional means to introduce forms of arbitrary discrimination or a disguised restriction with respect to the principle of free movement of capital and payments.

Therefore the Member State may introduce a legitimate distinction in the treatment of resident taxpayers with respect to non-resident taxpayers as long as it is justified by overriding reasons of general interest and does

not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital (case 06/06/2000, C-35/98, *Verkooijen*; case 01/19/2006, C-265-04, *Bouanich*).

A second form of derogation to the free movement of capital is expressly provided for by art. 64 TFEU where it is established that restrictions on the free movement of capital existing at the date of 12/31/1993 (and especially those concerning Bulgaria, Estonia or Hungary) are allowed - and thus fully eligible - in relation to third countries with regard to «direct investment», including investments in real estate, the establishment of enterprises or economic activities, the provision of financial services or the admission of securities to capital markets. This exception to the EU principle is also applied in tax matters, enabling national legislation to implement restrictions on relations with third countries provided that such regulations are pre-existing at the end of 12/31/1993 (case 05/24/2007, C-157/2005, *Holböck*).

It should be noted that the Treaty lacks a legal definition of «movement of capital» and the case law therefore has been referred to the elaboration formulated in the derivative legislation (in particular with Directive no. 88/361). Thus, according to the nomenclature annexed to that Directive, it is identified a set of circumstances that may be qualified as «direct investment» of capital; this category includes capital investment of any kind, made from physical persons or legal entities, intended to establish or maintain lasting and direct links between the investor and the business receiving the funds (case 12/12/2006, C-446/2004, *Test Claimants in FII Group Litigation*); however this list is illustrative, and not an exhaustive one (case 23.2.2006, C-513/2003, *van Hilten - van der Heijden*).

4.3. A derogation from the principle of the free movement of capital: the judicial clarification of the concept of «lucrative rights» provided by Directive no. 69/35

The principle of free movement of capital is a partial exemption under the regulations of indirect taxes applicable to business contributions. In particular, according to the rule formulated by art. 10, let. c) of Directive 69/35, the taxation that affects the establishment or the registration of business in public registers is to be considered prohibited, including charges having equivalent effect, with the sole exception of the «lucrative rights» (within the meaning of art. 12, no. 1, let. e).

Indeed, the taxes referred to in art. 10 let. c), although not affecting the capital contributions, are still collected on the basis of the formalities and requirements related to the legal form of enterprises and corporations, and therefore by reason of the structural tool prepared for the raising capital; so the maintenance of such charges and taxes might affect or obstruct the aims pursued by the Directive (case 31/3/1992, C-200/90, *Denkavit*).

The most significant point of the discipline laid down by Directive 69/35 concerns the application of the latitude of the exception established by the aforementioned art. 12, where it is stated that the prohibition of taxes does not affect the «lucrative rights». This concept is not, in fact, outlined in the EU Directive, nor adequately developed into the national legislation.

The legal scope of the category of «lucrative rights» was deepened by the Court of Justice, which has identified a number of concrete indices relevant to determining the profitability of a «right» imposed authoritatively by law to some business because of the mere creation or entry in the public register. The Court held that the amounts charged for entry in the register of the companies must be calculated solely based on the cost of the formalities; these amounts may also cover the costs of minor services performed without charge. It was also pointed out that a Member State in order to calculate these amounts may consider all costs associated with the registration process, including the overheads attributable to them. It is also envisaged that a Member State is entitled to impose lump sum and to establish the amount for an indefinite period, subject to this amount it continues not to exceed the average cost of the public service.

Therefore, the focus of the case law concerning the «lucrative rights» is identified in the definition of the relationship between the amount of capital required by the public service and the actual cost of the same public service (according to the line conceptual indicated in the case 20/4/1993, C-71/91 and C-178/91, *Ponente Carni*).

It is also interesting to note that the issue of the juridical relations between the amount of the public charges and the cost of the public service is not a new issue for the case law of the European Court of Justice.

In fact, already in a dispute concerning the interpretation of Directive no. 64/432, about the harmonization of the control on animal health, the Court of Justice observed (case C-46/1977) that controls and charges expressly permitted by the Directive may not be regarded as unilateral measures that impede trading or commercial activities, but, on the contrary, as operations designed to facilitate the free movement of goods, by neutral-

izing obstacles which may result in the freedom of trade. Therefore, monetary charges levied because of health checks and imposed by a provision of EU, having uniform character and being made before shipment in the exporting Member State, do not constitute charges having an equivalent effect to customs duties on exports, «provided that their amount does not exceed the actual cost of the specific operations of the control».

5. The free movement of persons

5.1. The free movement of workers

A fundamental freedom of the EU legal system regards the free movement of persons within the European area with the power to settle and take up residence in any territory of the European Union (art. 45 TFEU). This freedom constitutes a value typically attributable to one of the norms-symbol of the Treaty, namely the principle of non-discrimination on the basis of the nationality enshrined in the art. 18 TFEU.

As mentioned earlier, a first manifestation of this freedom concerns the mobility of workers (or, even, of the people looking for a job), being established the abolition of all restrictions based on nationality or residence of the employee in relation to employment, remuneration and other conditions of employment. In essence, it is granted the access and the execution of an employment in each Member State, without the necessity of a subjective requirement (regarding the nationality or the place of residence) of the employee.

This principle also applies to tax matter, since it is forbidden to assume a national regulation having a restrictive character about the aforementioned freedom of movement of workers. Thus, every tax rule that applies to introduce a taxation of the income coming from employment with a detrimental content with regard to the activities carried out by non-residents is to be considered unlawful and incompatible with EU law (case 12.12.2002, C-385/2000, *De Groot*).

It should be noted in this regard that the Court of Justice judged as a restriction of freedom of movement of workers the domestic discipline that does not permit the deduction of the «losses from negative rental» generated by citizens of a Member State with reference to the dwelling house owned in another Member State (case 02/21/2006, C-152/03, *Ritter*; case 07/18/2007, C-182/06, *Lakebrink*).

5.2. The freedom of establishment

A second manifestation of the principle of free movement of persons regards the right to establish a productive economic activity not related to an employment (and therefore a business or a professional activity) in each of the Member States (so called «primary» freedom of establishment). This freedom extends to the setting up of agencies, branches or subsidiaries by persons or legal entities resident in Member States (so-called «secondary freedom» of establishment). Indeed, in the ECJ case law it is well recognized the right of each European citizen to establish more than one business center in the territories of EU countries (case 15.2.1996, C-53/95, *Inasti*).

This principle – enshrined by the art. 49 TFEU - is resolved in the illegitimacy of the rules of law which not only produce discrimination, direct or indirect, between residents and non-residents, but especially that produce the effect of preventing, obstructing or otherwise restrict the access to the market of a Member State through the establishment of the business. In essence, this principle permits to realize the conceptual passage from the protection of *market equality* to the protection of *market access*.

On the basis of the freedom of establishment the non-residents grant the right to access to the self-employed activities, including the power to proceed with the establishment of enterprises, under the same conditions defined by the national legislation for the residents.

This freedom is typically regarded in the perspective of the non-resident persons who exercise the economic activity; it is not considered instead the opposite hypothesis, namely the right of a resident person not to be hampered by national legislation if he decides to establish his economic activities in another Member State.

This principle is specifically considered by the ECJ jurisprudence in regard to tax matters, being prohibited tax regulations that take on a restrictive connotation compared to the freedom of establishment in the national territory by non-residents (case 09/27/1998, C-81/87, *Daily mail*; case 07/16/1998, C-264-96, *Imperial Chemical Industries – ICI*; case 04/13/2000, C-251/98, *Baars*; case 03/11/2004, C-9/2002, *De Lasteyrie du Saillant*). The Court of Justice has also observed that the freedom of establishment is a norm with a direct effect and it can be invoked by every European citizen in order to obtain the disapplication of the conflicting national regulation (case 13/12/2005, C-446/03, *Marks & Spencer)*.

So, the freedom of establishment is protected in the tax system, even if the choice to work in another Member State is carried out through a permanent establishment (case 07/16/1998, C- 264-96, *Imperial Chemical Industries – ICI*). It follows, in particular, that the treatment of losses incurred by a permanent establishment may not be carried out by national law in a detrimental manner to the non-resident company as it would otherwise arise as a deterrent with regard to the freedom of establishment.

It should also be noted that the freedom of establishment requires the dual requirement of carrying on an economic activity and the existence of a minimum level of physical presence of the non-resident person who is established in the EU territory (case 04/23/2008, C-201/05). In particular, the execution of an economic activity implies an actual settlement in the hosting Member State and, conversely, excludes that the EU protection can be offered to the purely artificial settlement, that is made for the sole purpose of obtaining a tax savings; the minimum level of physical presence in the hosting Member State must be verifiable objectively in terms of premises, staff and equipment (case 09/12/2006, C-196/04, *Cadbury Schweppes*; case 04/23/2008, C-201/05).

For a company resident in a Member State the transfer of the place of the effective management or of the administrative body in the territory of another Member State does not fall within the area of the freedom of establishment, since it has to be considered as a mere organizational choice and not as the location of a stand-alone legal entity (and, thus, the residency is maintained in the same State of origin) (case 09/27/1998, C-81/87, *Daily Mail*).