PEN STRATEGY CONSULTING GROUP

PEN ANALYTICAL BRIEF

Reaping the Benefits of Freedom of Establishment for Kosovo

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Introduction

Freedom of establishment is a fundamental aspect of entrepreneurship in the European Union. Implemented and protected by treaties, it allows self-employed individuals and legal persons to establish themselves in other member-states and benefit from the same rights as nationals. It therefore guarantees a free and unrestricted movement of entrepreneurs and companies, along with their subsidiaries and branches within the European Union's territory. This mobility is crucial to the completion of the single market.

This policy insight will evaluate what Kosovo can learn and gain from the freedom of establishment in the single market. Despite not being a member-state of the European Union, Kosovar companies may still benefit directly and indirectly from this freedom. The Stabilization and Association Agreement signed with the European Union has established a contractual economic relationship between the two entities which Kosovo can take advantage of. Kosovar companies and individuals have much to gain from obtaining access to the EU single market and establishing themselves on EU territory. The single market is the biggest market in the world in terms of GDP, with over 500 million customers, and grants access to advanced economies and a qualified workforce.

This policy insight will assess, legally speaking, in what ways Kosovo can benefit from the EU's freedom of establishment. It will be structured in three sections. The first section will present and analyze the relevant legal provisions that concern Kosovo in EU law. The second section will deal with the provisions in the Stabilization and Association Agreement (SAA) signed between Kosovo and the EU, and it will present an analysis of ECJ cases that have created legal precedents with regards to the relation between third countries and freedom of establishment. The third part of this insight will deal with the lessons learned from the legal provisions presented in the first two sections. It will advise and present scenarios that depict the various legal pathways that would allow Kosovar companies, individuals, as well as foreign companies set up in Kosovo, to benefit from the right of establishment.

Freedom of establishment in EU law

To give an overview of the interaction between Kosovo and freedom of establishment in the EU, this first section will present and analyze the right of establishment in EU law. It will briefly describe the relevant articles in the Treaty on the Functioning of the European Union, address landmark ECJ cases that have set significant legal precedents for the application and conduct of freedom of establishment, and attempt to define the boundaries of this right.

a. EU treaties

Article 49 of the Treaty on the Functioning of the European Union

Article 49 defines, implements and protects freedom of establishment in the EU. The article 49 provides that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. "[1]

It defines this freedom as "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms […] under the conditions under the conditions laid down for its own nationals by the law of the country where such establishment is effected".

In other words, an EU national is allowed to undertake entrepreneurial activities and establish companies, as well as subsidiaries and branches in other member states. This however must be done in accordance with the laws and regulations of the member-state. Member-states are forbidden from discriminating against these activities and this freedom. Seeing as it is not explicitly stated, freedom of establishment does not apply to third country nationals or companies.

It is worth noting that freedom of establishment, with regards to individuals, requires that person to be self-employed,

[1] Article 49 of the Treaty on the Functioning of the European Union

meaning that he or she must not be subordinated and under his or her own responsibility. It necessitates, with regards to undertakings, the actual establishment of that undertaking to the host Member State and the pursuit of genuine economic activity there.

Article 63 and 64 of the Treaty on the Functioning of the European Union

These articles define and establish the free movement of capital. Article 63 states that "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."[2] Similarly, clause 2 states that "all restrictions on payments between Member States and between Member States and third countries shall be prohibited." In other words, the movement of capital between member states, and between member states and third countries is completely free of restrictions.

Article 64 notes that this can include "direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets". The article also gives the power to the Council, after having consulted the EU parliament, to "adopt measures which constitute a step backwards in Union law as regards the liberalization of the movement of capital to or from third countries." This means that free movement of capital can be regulated or even forbidden by EU institutions if it involves third countries. However, restricting free movement of capital between member-states is entirely forbidden.

This distinction between freedom of establishment and free movement of capital is not only fundamental in understanding the issue at hand, but will become crucially important when the policy insight deals with ECJ cases that deal with third country involvement.

Exercising freedom of establishment

Companies may exercise this freedom through primary and secondary establishments. They are able to transfer their central office to another member-state, as long as it is in accordance with the member-state's company law. The

[2] Article 63 of the Treaty on the Functioning of the European Union

central office is essentially where the main administration and management of a company is situated.

In addition, private enterprises may also set up branches and subsidiaries, which are secondary establishments, in another member-state while retaining their principal place of business in the member-state in which they were initially established. Subsidiaries, according to company law, are distinct legal entities regarding regulation and taxation, but have over 50% of their shares owned by another entity. On the other hand, branches are the direct extension of a company in another member-state, but are part of the same legal entity.

With regards to individuals, freedom of establishment requires that person to be self-employed, meaning that he or she must not be subordinated and under his or her own responsibility. It necessitates, with regards to undertakings, the actual establishment of that undertaking in the host Member State and the pursuit of genuine economic activity there.

b. EU law and ECJ cases

Incorporation and real seat theory

In one of the earliest cases regarding the right of establishment, Reyners v. Belgium, the ECJ ruled that Article 49 has a "direct effect' and can be invoked directly by individuals and companies to suppress restrictions that discriminate this freedom. But how is freedom of establishment applied and how does it co-exist with national company law?

Two conflicting legal theories have been at the center of the debate on this issue. The incorporation theory advocates that a company is part of the legal system under which it was established. The governing law of the company cannot be changed unless it is set up entirely anew in another member-state or if it is dissolved. Various norther European countries adhere to this theory, such as the Netherlands, the United Kingdom, Ireland and Denmark. This theory favors the mobility of companies, seeing as their movement across member-states does not necessitate a re-incorporation of the entity.

On the other hand, real seat theory suggests that the governing law is where the main place of the management and administration of a company is. The real seat of the company determines which national law applies. Member states such as Luxembourg, Belgium, France, Germany and Spain have adopted this theory in their legal system. This allows member-states to have legal control over foreign companies established within their territory, but makes movement of companies between member-states more difficult. Three landmark ECJ cases dealt with and clarified this debate.

Landmark cases

The Daily Mail case[3], in 1988, was significant in this regard. The Daily Mail, which was governed by British company law, decided to move its main office to the Netherlands in order to benefit from advantageous fiscal rates. British authorities refused this transfer. When the case was brought to the ECJ, the court ruled that freedom of establishment was to be exercised through secondary establishments (subsidiaries and branches). It argued that British legislation and its decision to refuse this transfer did not restrict the Daily Mail from exercising these rights, and that freedom of establishment did not grant the right to move the main office of a company while retaining its status as having been incorporated into the initial member-state. This decision surprised many.

In the Centros Ltd v. Erhvervs- og Selskabsstyrelsen case[4] however, the ECJ ruled differently and it was even argued that the Daily Mail judgment had been overruled. Centros was a company set up in the UK by two Danish citizens residing in their home country. The company was established in the UK in order to avoid a mandatory payment of a minimum share in capital requirement during the establishment phase. After the company was established, Centros decided to set up a branch in Denmark, despite having never traded in the UK. Denmark authorities refused the setting up of this branch and the ECJ was seized. The ECJ ruled that such an impediment was a restriction of freedom of establishment and noted that circumventing minimum capital requirements was not sufficient to

[3] 81/87 R. v. H.M. Treasury et al., ex parte Daily Mail and General Trust PLC [1988] ECR 5483.

[4] C-212/97 Centros Ltd v. Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459, [1999] 2 CMLR 551

forbid the establishment of the branch in Denmark.

The Überseering [5] case clarified these seemingly opposing ECJ judgments. A Dutch company, which owned property in Germany deemed that the contract established with a construction company was unsatisfactory due to various defects. In parallel, the shares of the Dutch company were bought by German nationals and Überseering's main office was transferred to Germany. German authorities rejected the company's legal action against the construction company on the basis that it did not have legal capacity in Germany. "The legal capacity of Überseering was subject to German law, which stated that foreign incorporated companies should be reincorporated in Germany in order to acquire legal capacity."[6] The ECJ ruled that Germany's denial of Überseering's legal capacity was a discriminatory and illegal restriction on the freedom of establishment.

Thus, freedom of establishment obliges member states to recognize the legal capacity of companies which have transferred their seat in their territory. This was a landmark case because it clarified the Daily Mail/Centros apparent contradiction, and settled the theoretical debate in favor of incorporation theory. "In this regard, the establishment of companies, branches, or subsidiaries in another Member State with the aim of benefiting from more favorable provisions does not really constitute circumvention of the domestic legislation of the Member State in question or abuse. That is something permitted and guaranteed within the freedom of establishment, by the Treaty."[7]

Exceptions to the freedom of establishment

But certain sectors are not affected by freedom of establishment. The first set of treaty exceptions are found in Article 51 of the TFEU, which states that: "the provisions of [Chapter 49] shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority."[8] This restriction also applies to activities

[5] Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH [2002] ECRI -9919.
[6] Ulvi Altinişik, "Free Movement of Companies within the EU". Ankara Bar Review, 2012.
[7] Ibid.
[8] Article 51 of the Treaty on the Functioning of the European Union

which are related directly or have a specific connection to the exercise of official authorities. Following this logic, in Commission v. Spain[9] and Commission v. Belgium[10], the ECJ found that activities of private security undertakings, and activities of security firms and internal security services, are not directly connected to the exercise of official authority and can therefore enjoy the right of establishment.

The second set of treaty restrictions are described in article 52 of the TFEU. It states that "The provisions of [Chapter 49] and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."[11] These sectors are also not to be considered under the scope of right of establishment.

In order to validate a discriminatory restriction applied by a member-state, the ECJ evaluates the legality of these restrictive measures through four criteria: "First of all they have to be applied in a non-discriminatory manner, secondly they have to be justified by imperative requirements in the general interest, thirdly they have to be suitable for the attainment of the objective pursued and finally they must not go beyond what is necessary to obtain the objective (proportionality)."[12] These criteria, known as the Gebhard formula, have guided the ECJ's reasoning in cases previously discussed, such as Centros and Überseering.

Equal treatment

Freedom of establishment requires member-states to ensure that EU companies on their territory benefit from equal treatment. Companies from other member-states must enjoy the same terms and conditions, social legislation and benefits as national companies. In Commission v Italy[13] the ECJ deemed illegal an Italian legislation which favored Italian companies with regards to public investments. Although this discrimination was not based on nationality, the legislation was considered to favor Italian

[9] Case C-114/97, Commission v. Spain [1998] ECR I-6717.
[10] Case C-355/98 Commission v. Belgium [2000] ECR I- 1221
[11] Article 52 of the Treaty on the Functioning of the European Union
[12] Ulvi Altinişik, "Free Movement of Companies within the EU". Ankara Bar Review, 2012.
[13] Case C-3/88[1989]ECR4035

companies and therefore discriminate against foreign enterprises.

At an individual level, similar rules apply. The Segers case[14] dealt with the situation of a Dutch national, Mr. Segers, whose company was incorporated in the United Kingdom but conducted its business through its subsidiary in the Netherlands. Mr. Segers saw his application for health insurance in the Netherlands rejected by public authorities on the grounds that social security legislation only applied to companies whose main offices were registered in the Netherlands. Health insurance, according to Dutch legislation, did not apply to foreign companies. The ECJ ruled that this was an impediment to the right of establishment, because discrimination against employees regarding social security would indirectly restrict the choice of companies when establishing themselves in another member-state.

[14] Case 79/85 Segers v. Bedriifsvereniging voor Bank- en Verzekeringsweren, Groothandel en Vrije Beroepen [1986] ECR 2375.

Taxation

Although different treatment of taxpayers may go against the right of establishment in theory, not all differences in taxation are incompatible. Firstly, a distinction between resident and non-resident companies must be noted, seeing as it generally applies to the functioning of tax legislation in EU member-states. Resident companies are obliged to pay taxes based on all their worldwide income. On the other hand, non-resident companies are just liable for the profits made and saved in the host Member State.

Several landmark cases have played an influential role in determining the functioning of taxation with regards to freedom of establishment. In commission v. France[15], the French taxation system granted credits to insurance companies with registered offices in the country. However, insurance companies whose home offices were in another member-state did not benefit from this tax credit. The ECJ ruled that such a discriminatory restriction breached Article 49 of the TFUE because it limited the freedom of choice of companies to establish themselves in member-states.

[15] Case 270/83 Commission of the European Communities v French Republic.[1986] ECR273

Marks & Spencer Plc v Halsey[16] also clarified how taxation and freedom of establishment interact. In British law, companies in a group were granted the ability to offset their profits and losses among the members of the group. Marks and Spencer announced that it had stopped trading in EU-member states because it had lost various subsidies. It demanded a group relief from UK authorities, which was rejected because it was argued that such a relief could only be granted to companies whose losses were registered in the UK. The ECJ ruled that domestic legislation forbidding parent companies from deducting losses that occurred in another member-states through its subsidiaries was legal. However, if the parent company managed to prove that such losses did not occur in the member-state in which the subsidiaries were established, than refusing to grant a group relief was contrary to freedom of establishment. The Court considered whether such restrictions could be justified, and concluded that the facts were justified in terms of public interest but failed in a proportionality test.

In conclusion, "the Court has established that Member States may treat companies differently in relation to cross border tax issues as far as they can prove it to be justified and proportionate".[17] Prevention of tax avoidance and forbidding companies from benefitting from the same tax credits multiple times can be as legitimate goals. However, they will be subject to critical observation by the ECJ to evaluate whether they are necessary and proportionate.

We can see that freedom of establishment functions in a very structured manner. Article 49 establish the provisions of this right, and article 51 and 52 define its boundaries and exceptions. Then, various ECJ rulings have shown that the right of establishment adheres to incorporation theory. Finally, freedom of establishment is constituted of various provisions which focus on equal treatment and similar taxation rules.

[16] Case C-446/03 Marks &Spencer Plc v Halsey [2005]ECRI-10837.

[17] Ulvi Altinişik, "Free Movement of Companies within the EU". Ankara Bar Review, 2012.

Freedom of establishment and Kosovo

This second section will deal with the relation between freedom of establishment and Kosovo. After having presented freedom of establishment in EU law, this part will analyze the interaction of this freedom with Kosovo, a third country, by presenting and analyzing the effects of association law, and describing relevant ECJ cases in this regard.

a) Association Law

This section will present the article 51 of the Kosovo SAA which effectively grants the country freedom of establishment within EU territory and will analyze what legal value the article holds.

Article 51 of the Stabilisation and Association Agreement with Kosovo

Clause 2 of Article 51 of the SAA signed between Kosovo and the EU states that:

"The EU shall grant, from the entry into force of this Agreement:

(a) as regards the establishment of Kosovo companies treatment no less favorable than that accorded by the EU to its own companies or to any company of any third country, whichever is the better;

(b) as regards the operation of subsidiaries and branches of Kosovo companies, established in its territory, treatment no less favorable than that accorded by the EU to its own companies and branches, or to any subsidiary and branch of any third country company, established in its territory, whichever is the better."

Inversely, EU companies are also granted freedom of establishment in Kosovar territory in the first clause.

The clause is followed by another significant provision: "The Parties shall not adopt any new regulations or measures which introduce discrimination as regards the establishment of the other Party's companies on their territory or in respect

of their operation, once established, by comparison with their own companies."

Article 51 is explicit. Kosovar individuals and companies, as well as their subsidiaries and branches, are granted the right to establish themselves on EU territory in the same manner as EU companies. The clause not only forbids from treating these individuals and companies in a less favorable manner, but it also ensures that future restrictions are illegal. It is worth noting that the beginning of the clause emphasizes the direct effect and application of the provision, which will be implemented "from the entry into force of this Agreement." This suggests that no delay is permitted and no further legislation is needed for this provision to enter into force.

To be considered an EU company or Kosovo company, the SAA notes that these two terms mean "respectively, a company set up in accordance with the laws of a Member State, or of Kosovo, and having its registered office or central administration or principal place of business in the territory of the EU or of Kosovo. However, should the company have only its registered office in the territory of the EU or of Kosovo respectively, the company shall be considered an EU or a Kosovo company if its operations possess a real and continuous link with the economy of one of the Member States or of Kosovo".[18] The article therefore emphasizes the "real and continuous link" with the economy of the country if it is a company which does not have a "central administration or principal place of business" in the territory. Foreign companies which have set up subsidiaries and branches in Kosovo could therefore be considered to be a "Kosovo company" if they meet this criteria.

[18] Stabilisation and Association Agreement, Article 50, Definition

The SAA's direct application into EU law

In order to have a better understanding of the legal effects of the SAA signed between Kosovo and the EU, and particularly Article 51, this section will briefly explain the legal value of the agreement.

There are two sources of Community law: primary and secondary. Primary sources are similar to constitutions and international treaties at a national level. They supersede secondary sources and are the highest source in the hierarchy of norms. In Community law, these are often provisions directly adopted by member-states, such as the founding treaties of the European Union. Secondary sources of law, such as directives and regulations established by the EU institutions must be in accordance with primary sources.

The Stabilisation and Association Agreement sits in between primary and secondary law. It is both directly applicable and effective. This is in accordance with the monist approach of the EU in which international agreements concluded by EU institutions form part of the Community legal order without the necessity of transposing the provisions into Community law. The supremacy of international treaties over secondary law in EU jurisdiction is shown for example by the case of *Commission v. Netherlands,* in which the ECJ found a national measure contrary to the non-discrimination clause in article 9 of the Ankara agreement and deemed it illegal. [19]

In the *Demirel* case, the ECJ showed that the direct application and effectiveness of international agreements such as the SAA are valid. The ECJ ruled that "a provision in an international agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."[20] The article 51 of the SAA, which grants Kosovo freedom of establishment, possesses a clear wording and purpose which is not subject to the adoption of subsequent measures. The article is therefore directly applicable.

[19] Commission v. Netherlands, Case C-92/07, para. 75.
[20] Case 12/86, Meryem Demirel v. Stadt Schwäbisch Gmünd, [1987] ECR 3719, paragraph 14.

b) ECJ cases

This section will present key cases in freedom of establishment in relation to third countries.

Test Claimants in the Thin Cap Group Litigation case

In the Test Claimants in the Thin Cap Group Litigation case (C-524/04), which we will refer to as the Thin Cap GL, third country rights regarding freedom of establishment were clarified by the ECJ. The test claimants in the case alleged that a breach of freedom of establishment had been committed by the U.K.'s legislation regarding thin capitalization. Thin capitalization is the situation in which a company finances itself through relatively high debt levels compared to the value of its shares. Seeing as loans and services were involved, test claimants alleged that their free movement of capital and freedom to provide services had been breached. Finally, the fact that several test claimants had third-country parents companies (in the USA and Switzerland) added another legal dimension to the case.

The court determined that, because a company established in another member state or a third country that had "definite influence on the company's decision and allowing them to determine its activities" was involved, the case was to be considered under the prerogatives of the freedom of establishment. Restrictions on the free movement of capital and freedom to provide services would therefore be "unavoidable consequences of any restriction on the freedom of establishment." The claimants which had third country parents were therefore not considered to have been treated unfavorably by UK regulations because freedom of establishment does not apply to such actors.

The ECJ, through this case, marked the difference between freedom of establishment and free movement of capital. It separates an investment that does not grant control over management in an EU company "subsequent exercise of rights granted by share-holding to exert a definite influence over the management and control of that EU company". The former concerns free movement of capital while the latter, which concerns a direct influence over an EU company, falls under the scope of freedom of establishment.

Halliburton services

In Halliburton services (C-1/93) the ECJ analyzed a case in which a U.S. parent company, Halliburton group, had established a Dutch and German subsidiary. The German subsidiary, exercising its freedom of establishment, set up a branch in the Netherlands. It was then decided that this branch would be transferred to the Dutch subsidiary. This transfer, if it had occurred between two Dutch companies, would have been exempted from taxes. Seeing as this was not the case because it involved a German company, the tax exemption was refused by Dutch authorities.

The ECJ deemed that the decision was illegal. Paying the tax constituted an impediment to the German subsidiary's decision because it made the establishment of its branch in the Netherlands less advantageous than if the branch had been set up by a Dutch company. It also made it less favorable than if it had been set up as a subsidiary, seeing as the subsidiary would have then been considered to be a Dutch company. This was contrary to freedom of establishment, which enables the German subsidiary to decide what form of establishment it wishes to set up in the Netherlands (a subsidiary, branch or agency). The ECJ therefore granted rights to the subsidiary of a third country company. What this ECJ case fundamentally revealed, is that third country companies such as Halliburton group in this case, can have indirect access to freedom of establishment rights within the EU through their subsidiaries.

Lasertec

In Lasertec (C-492/04), the case deals with Lasertec Gesellschaft, a company set up in Germany which was formed with two-thirds of its capital (DEM 200,000) originating from Lasertec, a Swiss company. In 1995, Lasertec loaned DEM 700,000 to Lasertec Gesellschaft, but the interest paid on this loan were classified as a "covert distribution of profits" by German authorities. The decision was challenged and brought before the ECJ.

The ECJ determined that the case fell under the freedom of establishment and that it could not be examined under the scope of free movement of capital. This is because according to German regulations, freedom of establishment applies when "substantial shareholdings capable of

conferring a determinative influence in respect of the company in which the holding is held." Lasertec, holding two-thirds of Lasertec Gesellschaft's capital, was considered to hold a "determinative influence" on the applicant company. Seeing as this fell under the freedom of establishment, and much like the Thin Cap GLO case, the ECJ ruled that any restrictive effects on the free movement of capital of the applicant "must be seen as an unavoidable consequence of the restriction on freedom of establishment." The case could not be examined under the scope of the articles that determine free movement of capital.

Due to the case falling under freedom of establishment, the court ruled that this freedom does not apply to "situations involving national of non-member state countries" because freedom of establishment is not granted to third countries. Lasertec, a company from a third country (Switzerland) could not rely on Article 49 of the TFEU to defend its interests.

The case shows us that freedom of establishment is to be considered under national rules. Member-states determine, indirectly through their regulations, if a case will ultimately fall under the scope of freedom of establishment. Secondly, in cases where freedom of establishment is found to be the relevant jurisdiction, article 63 and 64 of the TFEU on the free movement of capital do not apply and restrictions may occur. In these cases, freedom of establishment supersedes the free movement of capital. The *Lasertec* decision serves as a reminder of the importance of considering member-state regulations when dealing with situations potentially concerning multiple fundamental freedoms. Finally, the case further reminds that the objective of the EU treaties regarding freedom of establishment is to "secure freedom of establishment for nationals of Member States" and not third countries.

Lessons learned

Lesson #1 : Kosovar companies and individuals benefit from freedom of establishment in the EU

Article 51 of the SAA is clear and directly applicable: Kosovo companies and nationals can freely establish themselves within the EU single market. To do so, they must meet these criteria:

- For Kosovo nationals, they must be a citizen of Kosovo.
- For Kosovo companies, they must be set up in accordance with Kosovo rules, have their registered office and central administration or principal place of business in Kosovo.
- For companies that do not have a central administration in Kosovo, they must have a registered office in the country and a real and continuous link with the Kosovar economy.
- To establish in an EU member-state, Kosovo nationals and companies must abide by the rules of the member-state in which they wish to establish themselves.

Examples:

1. A Kosovar Company, which has a registered office and its central administration in Kosovo, wishes to set up a subsidiary in Austria. It is free to do so as long as the establishment of the subsidiary is in accordance with Austrian regulations.

2. An American company has its central administration in the United States and a branch in Kosovo. It has sold products in Kosovo for several years, has a registered office in the country and wishes to establish a branch in Spain. It is free to do so as long as it can prove that it has had a real and continuous link with the Kosovar economy and as long as its branch abides by Spanish regulations.

3. A self-employed Kosovar entrepreneur wishes to move to the Netherlands to start a company. He is free to do so if he abides by Dutch rules regarding for example the setting up of the company and visa obligations.

4. A Kosovar company, with a registered office and its central administration in Kosovo wishes to purchase 90% of the shares of a Portuguese company. This share-holding would grant the Kosovar company direct influence over the management of the Portuguese company. It is free to do so.

Lesson #2: Freedom of establishment does not apply to third country companies and individuals

For a foreign company in Kosovo to benefit from the EU freedom of establishment, it must have a registered office and a real and continuous link with the Kosovar economy. While Kosovo possesses freedom of establishment within the EU, Kosovo territory cannot be considered to be part of the EU single market.

Examples:

1. A Chinese company owns 60% of the shares of a Kosovar company, which is established in Kosovo and has its registered office in the country. It wishes to set up a branch of the Kosovar company in France. It is allowed to do so because, despite being owned in majority by a private entity from a third country, the Kosovar enterprise meets the requirements to be considered a Kosovo company.
2. A Russian company owns 80% of the shares of a Kosovar company, which has its main administration and place of business in Kosovo. The Russian company wishes to establish a subsidiary of its company established in Russia in Greece. It believes its share-holding of the Kosovar company grants it access to the EU market. The Russian company, having no registered office in Kosovo and no continuous link with the country's economy, will not benefit from freedom of establishment. Its branch will be subject to Greek regulations regarding third countries.
3. A South African company sets up a registered office in Kosovo. It does not have a clear economic link with the Kosovar economy. The South African company wishes to establish in Slovakia a subsidiary of the registered office in Kosovo. The subsidiary will not benefit from freedom of establishment and will be subject to Slovakian regulations regarding third countries.

Lesson #3: Distinguishing between free movement of capital and freedom of establishment.

The Thin Cap GLO and Lasertec cases show the importance of distinguishing between free movement of capital and freedom of establishment. The ECJ's decision to consider these cases under the scope of freedom of establishment emphasizes that a clear distinction must be made between the two freedoms. The free movement of capital between member-states and between member-states and third countries is guaranteed by Article 63 of the TFEU. On the other hand, it is article 49 of the TFUE that establishes the prerogatives of the freedom of establishment.

While free movement of capital between EU member states and third countries is guaranteed by the treaties, freedom of establishment is not a right granted to third countries. In cases where both freedoms overlap, the ECJ refers to national regulations to determine which freedom is concerned. This is particularly crucial because in the Thin Cap GLO and Lasertec cases, the case were considered to fall under the scope of freedom of establishment, and restrictions of free movement of capital were seen to be unavoidable consequences of restrictions on freedom of establishment.

Regarding transfer of capital, Kosovar companies as well as foreign-owned companies in Kosovo are allowed to freely borrow and loan money from and to EU companies and foreign-owned companies in the EU if they do not grant influence over the management or decision-making of these companies because this is protected by the treaties under free movement of capital. However, if the money loaned or borrowed grants influence over the management or decision-making of the company, than the case may be considered under freedom of establishment, depending on the national rules of the country concerned, and could potentially be ruled illegal.

Examples:

1. A Lebanese company has established a subsidiary in Kosovo. Immediately after being established, and therefore without being able to prove a clear and continuous link with the Kosovar economy, the Lebanese subsidiary purchases 80% of the shares of a Croatian company. Depending on Croatian regulations, the rights granted by this share-holding to exert a direct influence over the management of the Croatian company may not be permitted to the Lebanese subsidiary or may be restricted. This is because these rights would fall under the scope of freedom of establishment and would be treated through the procedure for third countries.
2. A Japanese company has established a subsidiary in Kosovo. Immediately after being established, and therefore without being able to prove a clear and continuous link with the Kosovar economy, the Japanese subsidiary purchases 35% of the shares of an Italian company. This share-holding does not grant the Japanese subsidiary direct influence over the management of the Italian company and therefore falls under the free movement of capital, which is allowed by the treaties.
3. A Canadian company has established a branch in Kosovo. Immediately after being established, and therefore without being able to prove a clear and continuous link with the Kosovar economy, the Canadian branch loans €1,000,000 to a Bulgarian company. The loan does not grant the Canadian branch any influence over the Bulgarian company's management or decision-making. This falls under the scope of free movement of capital, which is allowed by the treaties.
4. A Kosovar company borrows €1,000,000 from a German company. Whether the loan grants or not the German company influence over the company's management or decision-making, both will be allowed. This is because whether the case is treated under the scope of free movement of capital or freedom of establishment, both rights are protected under EU and association law.