

BUSINESS LAW - EC INTERNAL MARKET LAW
for students of the MBA program of the Faculty of Economics and Management

concerning § 4 V The concepts of sphere of protection, encroachment and limits of the fundamental freedoms

Diagram 2

Violation of a Fundamental Freedom

(general structure of examination)

I. Sphere of protection ["Schutzbereich"]

• = is the FF concerned?

1) *Geographic and temporal sphere of protection* ["räumlicher und zeitlicher Schutzbereich"]

- a) Measure having affect within the geographic field of application of the EC Treaty (see art. 299)
- b) No temporary non-applicability of the FF due to special clauses in the treaty of accession
(→ concerns new member states)

2) *Personal sphere of protection* ["persönlicher Schutzbereich"]

- a) Holder (entitled subject) of the FF
 - aa) Citizen of a member state
 - bb) Legal person ("company or firm") having its registered office, central administration or principle place of business in a member state
 - cf. art. 48 sub-sect. 1 (also read together with art. 55)
 - wide concept of "companies or firms" (art. 48 sub-sect. 2 EC Treaty): including legal persons of public law
 - cc) In some cases: citizen or legal person from a non-member state
 - α) Protection according to the conception of the FF (→free movement of goods, of capital and payments)
 - β) Protection according to international treaties (→Switzerland, Turkey)
- b) If necessary fulfillment of special personal requirements (→ eg art. 43 sub-sect. 1 phrase 2 EC-Treaty)

3) *Material sphere of protection* ["sachlicher Schutzbereich"]

- a) Situation of cross-border mobility (→ relevance of Community law)
 - FF do not protect domestic activities with mere domestic impact
- b) Protected activity of the holder of the FF
 - see *diagram 1*
 - here: delimitation from other FF and general freedom of movement and residence (→ main emphasis?)
 - note: every FF includes the right to the necessary traveling and residence in other member states
- c) No excluded sector
 - some sectors are excluded by art. 39(4), 45 sub-sect. 1 (also read together with art. 55) EC Treaty or secondary law

II. Encroachment ["Beeinträchtigung"]

1) *Acting of an addressee (obliged subject) of the FF*

- can consist also in a failure to do something (→ duties of protection ["grundfreiheitsrechtliche Schutzpflichten"])
- a) Acting of a member state
 - also of sub-national public authorities (regions, authorities of local government etc)
 - also of private-law institutions dominated by public authorities
- b) Acting of a Community/Union institution
- c) Only in some exceptional cases: Acting of a private person with a position of special economic power
 - aa) General regulations of private associations which hinder the exercise of the FF
 - in particular of sport associations on professional sports (→ ECJ, *Walrave and Koch*; ECJ, *Bosman*)
 - bb) General regulations of employers which hinder the exercise of the FF
 - ECJ, *Angonese*; SCEPTICISM IN LITERATURE

- 2) *Acting to be qualified as discrimination or restriction*
 - a) Discrimination
 - aa) Open discrimination
 - formally different treatment of domestic and foreign goods/services/persons etc
 - bb) Hidden (indirect) discrimination
 - formally equal treatment, which however typically has a stronger effect on foreign goods/services/persons etc
 - b) Restriction
 - aa) Rule which is capable of hindering, directly or indirectly, actually or potentially, intra-community economic exchange
 - original, very broad concept of restriction of the ECJ (since → *Dassonville*)
 - not the aim of the measure is decisive but the effect (possibly only a potential effect!)
 - bb) Rule on necessary properties of products, not on general conditions of sale
 - corrective reduction of the concept of restriction by the ECJ (since → *Keck*)
 - cc) Comprehensible relation between measure and restrictive effect (rule of remoteness)
 - no restriction, if the effects are too vague or too indirect

III. Illegality of the encroachment (no justification by the fundamental freedom's limits ["Schranken"])

- 1) *Justification of the encroachment by explicit limits*
 - see art. 30 EC Treaty (free movement of goods), art. 39(3) EC Treaty (free movement of workers), art. 46(1) EC Treaty (freedom of establishment), art. 46(1) read together with art. 55 EC Treaty (freedom to provide services), art. 57 et seq. EC Treaty (free movement of capital and payments)
 - a) Fulfillment of the preconditions of the limitation clause
 - b) Compliance with the *limits of limits* ["Schranken-Schranken"]
 - aa) Proportionality of the encroachment
 - aa) Legitimate aim
 - bb) Suitability (measure must be conducive to its purpose)
 - cc) Necessity (there must be no less intrusive act of intervention that is equally conducive)
 - dd) Proportionality in its strict sense (burden not out of proportion to the aim in view)
 - bb) No violation of fundamental rights
 - cc) No violation of other primary or secondary law of the Union
- 2) *Justification of the encroachment by inherent limits* ["immanente Schranken"]
 - a) Applicability of the inherent limits
 - aa) Encroachment in the form of a restriction
 - bb) Encroachment in the form of a hidden discrimination
 - b) Fulfillment of the preconditions of the inherent limits: pursuit of *imperative reasons of public interest*
 - terminology of the ECJ: "mandatory requirements" (→ *Cassis de Dijon*), "overriding reasons relating to the general interest" (→ *Gouda*)
 - only non-economic interests; eg protection of the environment, public health, consumer protection, safeguard of the national cultural heritage, efficient control in tax affairs, integrity of trade
 - c) Compliance with the limits of limits (see above)

Further reading: See for the general structure of examination the diagrams of *Ehlers*, in: Ehlers (editor), *Europäische Grundrechte und Grundfreiheiten*, 2nd edition 2005, § 7 no. 98; *Frenz*, *Handbuch Europarecht*, volume 1, 2004, no. 463, 541.

Note: This diagram only presents the *basic structures* which are common to all fundamental freedoms, due to their convergence in the jurisdiction of the ECJ. When applied to the concrete case, it has to be adapted to the special features of the respective fundamental freedom.

(Datei: Diagram 2 (ECIntML-MBA))