

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

concerning § 5 The free movement of goods (art. 23 et seq., 90 et seq. EC Treaty)

Diagram 3
The free movement of goods

I. Sphere of protection ["Schutzbereich"]

- note: the personal sphere of protection is always concerned, because the free movement of goods is a right of everybody (including every legal person) without regard to nationality or citizenship

1) Situation of cross-border mobility (→ relevance of Community law)

- there must be a context with the import or export of economic goods from or to other member states

2) Goods (see art. 23, 24, 90 EC Treaty)

- definition: movable physical (corporeal) products which generally can be valued in money and therefore are capable, as such, of forming the subject of commercial transactions
 - electricity and gas are considered as goods though they are not corporeal products
- also storage media for sound and data (CDs, DVD, etc.) as memories of intellectual contents
- also waste

3) Goods in circulation in the internal market (see art. 23(2) EC Treaty)

- a) Goods originating in member states of the Union
- b) Goods in free circulation in a member state after having been imported (see art. 24 EC Treaty)

II. Encroachments ["Beeinträchtigungen"]

- only by measures of the member states or the union, not of private persons (no → addressees)
- also failures to intervene against import blockades set up by private persons (→ duties of protection, see ECJ, case C-265/95, *French blockades*)

1) Tariff barriers

- a) **Customs** (see art. 23, 25 EC Treaty)
 - aa) Import customs
 - bb) Export customs
- b) **Charges having equivalent effect to customs** (see art. 23, 25 EC Treaty)
 - Definition: *any pecuniary charge*, however small and whatever its designation and mode of application, which is *imposed unilaterally on domestic or foreign goods when they cross a frontier*, and which is not a customs duty in the strict sense - even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product (ECJ, joined cases 2 and 3/69, *Diamantarbeiders*)
- c) **Discriminating internal taxation** (see art. 90 et seq. EC Treaty)
 - aa) Higher internal taxation than on domestic products (art. 90 sub-sect. 1 EC Treaty)
 - bb) Internal taxation protecting other products (art. 90 sub-sect. 2 EC Treaty)
 - cc) Internal taxation with exceeding repayments after export of products (art. 91 EC Treaty)

2) Non-tariff barriers

- a) **Quantitative restrictions on imports** (see art. 28 EC Treaty)
 - restrictions on quantity or value; also quantitative transit restrictions
 - nowadays such restrictions are rare
- b) **Measures having equivalent effect to quantitative restrictions on imports** (see art. 28 EC Treaty)
 - the by far most frequent encroachments on the free movement of goods
 - also non-regulative activities (eg support of a campaign "Buy Latvian")
 - aa) Open discriminations
 - eg duty to indicate the foreign origin of a good or compulsory examinations for imported goods only
 - bb) Hidden (indirect) discriminations
 - cc) (Non-discriminative) Restrictions (by indistinctly applicable measures)
 - α) Very large concept of measures having equivalent effect according to the **Dassonville formula** of the ECJ (case 8/74): "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade"
 - not the aim but the effect of the measure is decisive (possibly only a potential effect!)
 - also *regulations on necessary properties of products* (ECJ, case 120/78, *Cassis de Dijon*)
 - β) Corrective reduction of the concept of restriction by the **Keck formula** (ECJ, joined cases C-267, C-268/91): *product-related, not sales-related rules*
 - no regulations on the general conditions of sale
 - product-related rules: eg rules relating to the quality, the labelling or the packaging of certain goods, restrictions of the advertisement or of mail-orders for certain goods
 - sales-related rules: eg rules relating to shop closing times, general restrictions of advertisements, restrictions of the sale of certain goods at certain times of the day
 - the decisive factor is the actual *obstruction of the access to the market*
- c) **Quantitative restrictions on exports** (see art. 29 EC Treaty)
- d) **Measures having equivalent effect to quantitative restrictions on exports** (see art. 29 EC Treaty)
 - ECJ (CRITICISED IN LITERATURE): no application of the Dassonville formula - only measures "which have as their specific object or effect the restriction of patterns of exports" and thereby a different treatment of domestic and export trade and in order to cause a particular advantage for the national economy

III. Justification of the encroachment by the fundamental freedom's limits ["Schranken"]

1) In case of tariff barriers: no justification by any limits

- tariff barriers are absolutely forbidden

2) In case of non-tariff barriers

- a) **Justification by the limit in art. 30 EC Treaty**
 - aa) Applicability of art. 30 EC Treaty: in case of *all* non-tariff trade barriers
 - bb) Fulfilment of the preconditions formulated in art. 30 EC Treaty
 - α) Measure for the protection of one of the legal interests listed in art. 30 phrase 1 EC Treaty
 - only of *non-economic interests*; the list in art. 30 is exhaustive (not included: consumer protection, protection of the environment)
 - (1) public morality, public policy (= public order) and public security
 - (a) Generic term: public order
 - basic rules concerning substantial interests of the state
 - (b) Sectoral term: public security
 - rules determined by the state for the safeguard of its existence, its institutions and its monopoly to exercise force (against internal and external threats)
 - (c) Sectoral term: public morality
 - moral principles governing social life in the concerned member state at the concerned time
 - (2) Health and life of humans, animals and plants
 - (3) National treasures possessing artistic, historic or archaeological value
 - (4) Industrial and commercial property (eg copy rights, patent rights, trade marks)
 - β) Absence of regulations for the protection of this legal interest in the law of the Union
 - γ) No arbitrary discrimination or disguised restriction on trade between member states (art. 30 phrase 2 EC Treaty)

- cc) Compliance with the *limits of limits* ["Schranken-Schranken"]
 - α) Proportionality of the encroachment
 - (1) Legitimate aim
 - (2) Suitability
 - (3) Necessity
 - (4) Proportionality (in its strict sense)
 - β) No violation of fundamental rights
 - γ) No violation of other primary or secondary law of the Union
- b) **Justification by the inherent limits of the free movement of goods** ["immanente Schranken"]
 - aa) Applicability of the inherent limits: in cases of hidden discriminations and (non-discriminative) restrictions
 - not in cases of open discrimination
 - bb) Fulfilment of the preconditions of the inherent limits: pursuit of *imperative reasons of public interest*
 - see ECJ, case 120/78, *Cassis de Dijon* ("mandatory requirements")
 - only of non-economic interests; examples: consumer protection, protection of environment, public health, fundamental rights of others, safeguard of cultural diversity, integrity of trade, efficient control in tax affairs
 - cc) Compliance with the limits of limits (see above)

Further reading: *Fairhurst/Vincenzi*, Law of the European Community, 4th edition 2003, p. 345 ff.; *Davies*, European Union Internal Market Law, 2nd edition 2003, p. 5 ff. See as well the diagram of *Streinz*, *Europarecht*, 6th edition 2003, no. 741.