

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

concerning § 6 The freedom of movement for workers (art. 39 et seq. EC Treaty)

Diagram 4

The freedom of movement for workers

I. Sphere of protection ["Schutzbereich"]

1) Temporal sphere of protection ["zeitlicher Schutzbereich"]

- According to the *transitional agreements in the accession treaty*¹ the access of workers from the new member states to the labour market in the old member states can be restricted for a period of at most 7 years.

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

- a) **Citizens of the member states**
 - note: *Family members* of workers (also from non-member states) are not protected by the freedom but by secondary EC law (see Regulations 1612/68² and 1408/71³, Directive 2004/38/EC⁴)
 - note: *Citizens from some non-member states* (EFTA states, Switzerland, Turkey) have the right to free movement according to special international treaties
- b) Legal persons ("companies or firms") as **employers** in the member states

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

- a) **Situation of cross-border mobility** (→ relevance of Community law)
 - occupation or returning after occupation or achieving qualification in another member state
- b) **Status of a worker (= employed person)** (see art. 39(1) EC Treaty)
 - large, *specific concept of "worker" in Community law* (ECJ, case 66/85, *Lawrie-Blum*)
 - also part-time work, if not purely marginal and ancillary
 - aa) Performing of services of economic value
 - bb) Employment (work bound by instructions)
 - here: delimitation from the freedom of establishment and the freedom to provide services
 - cc) Payment as counterperformance (service in return)
 - does not need to be enough to make one's living
- c) **Protected activities** (see particularly art. 39(3) EC Treaty)
 - aa) Access to employment
 - application (lit. a)
 - free movement for the purpose of seeking employment (lit. b, see for details *Directive 2004/38/EC*⁴)
 - bb) Exercise of an occupation (lit. c)
 - also free movement and residence for this purpose (see for details *Directive 2004/38/EC*)

¹ See art. 24 of the Act concerning the conditions of accession read together with nos. 1 of the Annexes V - XIV (for Latvia: Annex VIII).

² Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community.

³ Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

⁴ **Directive 2004/38/EC** on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

- cc) Free movement and residence after having been employed (lit. d)
 - see for details *Regulation 1251/70*⁵
- dd) Annex: protected activities of family members (Regulation 1612/68, Directive 2004/38/EC)
- d) **No employment in the public service** (art. 39(4) EC Treaty)
 - narrow, *specific concept of public service in Community law*: only "those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities and which therefore require a *special relationship of allegiance to the state* on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality" (ECJ, case 66/85, *Lawrie-Blum*)
 - no public service: services of general interest like water or energy supply or road maintenance; cultural, educational and research institutions

II. Encroachments ["Beeinträchtigungen"]

1) Acting of an addressee of the freedom of movement for workers

- a) Acting of a **member state**
- b) Acting of a **Community/Union institution**
- c) Acting of a **private person bound** by the freedom of movement for workers
 - aa) General regulations of private associations in fields of professional activities
 - ECJ, case 36/74, *Walrave and Koch*
 - also rules on the transfer of players and limitations of the number of players from other member states in professional sports (ECJ, case C-415/93, *Bosman*)
 - bb) General regulations of employers if they are discriminating
 - see ECJ, case C-281/98, *Angonese*; SCEPTICISM IN LITERATURE

2) Acting to be qualified as discrimination or restriction

- a) **Discriminations**
 - aa) Open discriminations (see art. 39(2) EC Treaty)
 - in particular *with regard to social benefits or taxes*⁶
 - bb) Hidden (indirect) discriminations
 - often by rules which require professional qualifications, knowledge of languages or domestic residence
 - may lead to entitlement to benefits (positive rights) in case of privileges and benefits
- b) **(Non-discriminative) Restrictions** (by indistinctly applicable measures)
 - aa) Large concept of restriction according to the ***Bosman formula*** of the ECJ (case C-415/93):
"Provisions which preclude or deter a national of a member state from leaving his country of origin in order to exercise his right to freedom of movement ... constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned"
 - bb) Corrective reduction of the concept by the ***Graf formula*** of the ECJ (case C-190/98):
the effect must not be *too uncertain or indirect* to be capable of being regarded as liable to hinder the free movement for workers

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

1) Justification by the limit in art. 39(3) EC Treaty

- a) Applicability of the limit in art. 39(3) EC Treaty
 - aa) In case of encroachments on the rights under art. 39(3)
 - bb) In case of encroachments on other protected positions (eg discriminations?)
 - α) FIRST OPINION: (-), because this limit is formulated in section 3 only
 - β) SECOND OPINION: (+), because there is only one integrated freedom of movement for workers and the limits of grounds of public policy and security must apply to it as a whole (→ convergence of the FF)

⁵ Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State.

⁶ See art. 7(2) Regulation 1612/68 and Regulation 1408/71.

- b) Fulfilment of the preconditions formulated in art. 39(3) EC Treaty
 - aa) Measure taken on grounds of public policy, public security or public health
 - only on *non-economic grounds*; see detailed rules in *art. 27 et seq. of Directive 2004/38/EC*
 - on grounds of "public policy" only in case of a real and serious threat for a fundamental interest of society; measure must be based on the *personal conduct of the individual concerned* (ECJ, case 30/77, Boucherau)
 - bb) Absence of regulations for the protection of these legal interests in the law of the Union
 - see in particular Regulations 1612/68, 1251/70 and 1408/71 and Directive 2004/38/EC
- c) Compliance with the limits of limits ["Schranken-Schranken"]
 - aa) Proportionality of the encroachment
 - α) Legitimate aim
 - β) Suitability
 - γ) Necessity
 - δ) Proportionality (in its strict sense)
 - bb) No violation of fundamental rights
 - cc) No violation of other primary or secondary law of the Union

2) Justification by the inherent limits of the freedom of movement for workers ["immanente Schranken"]

- a) Applicability of the inherent limits: in cases of hidden discriminations and (non-discriminative) restrictions
- b) Fulfilment of the preconditions of the inherent limits: pursuit of *imperative reasons of public interest*
 - see ECJ, case C-415/93, *Bosman* ("pressing reasons of public interest")
 - only of non-economic public interests; examples: functioning of systems of social security benefits; protection of sporting competition, prevention of the misuse of foreign academic degrees; protection of employed persons, consumer protection
- c) Compliance with the limits of limits (see above)
 - in particular necessity (mostly not given when a domestic residence is required)
 - in particular no violation of provisions of harmonizing secondary law concerning the regulation of professional activities and the mutual recognition of diplomas and other evidence of formal qualifications

Further reading: *Craig/de Búrca*, EU Law, 3rd edition 2003, p. 701 ff.; *Fairhurst/Vincenzi*, Law of the European Community, 4th edition 2003, p. 238 ff.; *Davies*, European Union Internal Market Law, 2nd edition 2003, p. 41 ff. See as well the diagram of *Streinz*, Europarecht, 6th edition 2003, no. 766.