

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

§ 7 The freedom of establishment (art. 43 et seq. EC Treaty)

Diagram 5
The freedom of establishment

I. Sphere of protection ["Schutzbereich"]

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

a) **Citizens of the member states**

- for the setting-up of *agencies, branches or subsidiaries* they must be **established** (have their place of business) in a (= any) member state (art. 43 sub-sect. 1 phrase 2 EC Treaty)
- note: *Family members* of established persons are not protected by the freedom but enjoy (even if they come from non-member states) rights "derived" from the legal status of the established person or granted by secondary law (see *Directive 2004/38/EC*¹ and *Regulation 1408/71*²)
- note: *Citizens [and companies] from some non-member states* (EFTA states, Switzerland, Turkey) enjoy a freedom of establishment according to special international treaties

b) **Legal persons ("companies or firms")** in the member states (art. 48 sub-sect. 1 EC Treaty)

- large, *specific concept of "companies or firms" in Community law*
- the nationality of shareholders/members/owners is irrelevant
- aa) Organisation constituted under the law of a member state which is capable to act in legal relations in its own name
 - also partnerships, also legal persons governed by public law (see art. 48 sub-sect. 2 EC Treaty)
 - also subsidiaries of enterprises in non-member states
- bb) No non-profit organisation (art. 48 sub-sect. 2 EC Treaty)
 - restrictive interpretation: not money-making at all (organisation does not need to want to make profit)
- cc) Registered office, central administration or principle place of business in a member state

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

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

- occupation in or returning after occupation or achieving qualification in another member state

b) **Gainful occupation as self-employed person** (see art. 43 sub-sect. 2 EC Treaty)

- aa) Gainful occupation
 - not necessarily in a well-defined profession
 - it is irrelevant if the occupation is "immoral" or "anti-social" (ECJ, case C-268/99, Jany: even prostitution)
- bb) Independent work unbound by instructions
 - here: delimitation from the freedom of movement for workers

c) **Establishment** (see art. 43 sub-sect. 1 EC Treaty)

- large, *specific concept of "establishment" in Community law*: actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period
- aa) Fixed establishment (settlement)
 - not sufficient: purely formal acts (eg the registration of ships)

¹ **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.

² Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (field of applicability enlarged by regulation 1390/81).

- bb) Permanence
 - here: *delimitation from the freedom to provide services* (can be difficult)
- d) **Protected activities** (see particularly art. 43 sub-sect. 2 EC Treaty)
 - aa) Taking up activities (setting up and commissioning of the foreign establishment)
 - α) Setting up (or transfer) of a main establishment
 - β) Setting up of a an agency, branch or subsidiary (only by persons or companies established in the Union)
 - γ) Taking up of the gainful occupation
 - see concretisation in *secondary law facilitating cross-border access to occupation*:
 - directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications based on art. 47(1) EC Treaty (eg Directives 98/5/EC, 2005/36/EC)
 - directives on harmonisation based on art. 47(2) EC Treaty
 - δ) Movement and residence in the state of the establishment
 - see concretisation in *Directive 2004/38/EG*¹
 - bb) Practice of the gainful occupation in the foreign establishment
 - also residence for this purpose
 - cc) In particular: setting up and managing of undertakings
 - dd) Free movement and residence after having practiced the occupation
 - see concretisation in *Directive 2004/38/EC*
 - ee) Annex: protected activities of family members (Directive 2004/38/EC)
- e) **No sector excluded according to art. 45 EC Treaty**
 - aa) No *exercise of public power* ("*official authority*") (art. 45 sub-sect. 1 EC Treaty)
 - narrow, *specific concept of the "exercise of official authority" in Community law*: only activities in direct and specific connexion with exercise of public power
 - bb) No sector excluded according to secondary law (art. 45 sub-sect. 2 EC Treaty) → until now: (-)

II. Encroachments ["Beeinträchtigungen"]

- only by measures of the member states or the Union

1) Discriminations

- a) Open discriminations
 - = violations of the principle of *equal treatment of own and foreign citizens* in art. 43(2) EC Treaty
 - also subtle measures like restrictions of the capacity of foreign companies to sue or to be sued
 - in particular discriminations with regard to social benefits or taxes (see Regulation 1408/71²)
- b) Hidden (indirect) discriminations
 - eg measures hindering the acquisition of real estate by foreign companies

2) Non-discriminative restrictions (by indistinctly applicable measures)?

- a) The problem
 - In the field of the freedom of establishment, a general prohibition of restrictions could amount to an obligation of the member states to generally liberalize the law of settlement, and thereby endanger the traditional concepts of the professional rules and regulations in the member states
- b) The discussion
 - aa) FIRST OPINION: Art. 43 prohibits discriminations only
 - argument: art. 43 does not aim at a total liberalization of economic life
 - bb) MAJORITY OPINION: Art. 43 also includes a general prohibition of restrictions
 - argument: new *wording* of art. 43 sub-sect. 1; convergence of the FF
 - cc) The JURISPRUDENCE OF THE ECJ is developing towards an interpretation as a general prohibition of restrictions (see ECJ, case C-55/94, *Gebhard*)
 - but the limits to this concept are not clear (for this FF, the *Dassonville* and *Keck* formulas are inappropriate!)

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

1) Justification by the limit in art. 46(1) EC Treaty

- a) Applicability of the limit in art. 46(1) EC Treaty: in cases of open discriminations only
 - rules providing for "*special treatment for foreign nationals*" only
- b) Fulfilment of the preconditions formulated in art. 46(1) EC Treaty
 - aa) Measure taken on grounds of public policy, public security or public health
 - only on *non-economic grounds*; see concretisation in *art. 27 et seq. of Directive 2004/38/EC*
 - on grounds of "public policy" (= public order) only in case of a *personal conduct of the individual* representing a genuine and sufficiently serious threat affecting a fundamental interest of society
 - bb) Absence of regulations for the protection of these legal interests in the law of the Union
 - otherwise justification of the encroachment according to these regulations only
- 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 establishment ["immanente Schranken"]

- a) Applicability of the inherent limits: in cases of hidden discriminations and (non-discriminative) restrictions
 - not in cases of measures directed openly against the establishment of foreign citizens of the Union!
- b) Fulfilment of the preconditions of the inherent limits: pursuit of *imperative reasons of public interest*
 - see ECJ, case C-19/92, Kraus ("justified by pressing reasons of public interest")
 - only of non-economic public interests; examples: prevention of misuse of foreign academic degrees, protection of professional reliability and faithfulness, of a high standard of professional education, of a functioning system of legal protection, consumer protection
- c) Compliance with the limits of limits (see above)
 - 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. 765 ff.; see as well the diagram of *Streinz*, Europarecht, 6th edition 2003, no. 766.

(Datei: Diagram 5 (ECIntML-MBA))