

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

concerning § 8 The freedom to provide services (art. 49 et seq. EC Treaty)

## Diagram 6

### The freedom to provide services

#### I. Sphere of protection ["Schutzbereich"]

- See now the concretisation of some aspects in the *Directive 2006/123/EC (Services Directive)*<sup>1</sup>

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

- According to the *transitional agreements in the accession treaty*<sup>2</sup>, in some branches of business the access of service providers from the new member states to the service market in the old member states can be restricted for a period of at most 7 years.

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

- Citizens of the member states who are established in the Union**
  - as service *providers* or service *recipients* (both must be established in the Union)
  - The service provider is also protected if the recipient is not a Union citizen but established in the Union
  - note: *Family members* are not protected by the freedom but enjoy (even if they come from non-member states) rights "derived" from the legal status of the service provider according to *Directive 2004/38/EC*<sup>3</sup>. - The fundamental freedom of the service provider can be violated if his/her wife/husband is expelled from the state and this hinders the exercise of the freedom, because art. 49 EC Treaty has to be interpreted in the light of the fundamental right to respect for family life (ECJ, case C-60/00, *Carpenter*; DISPUTED IN LITERATURE).
- Legal persons ("companies or firms")** in the member states (art. 55 read together with art. 48 sub-sect. 1 EC Treaty)
  - see *diagram 5*, p. 1
- Citizens of non-member states who are established within the Union (protection according to a Council decision based on art. 49 sub-sect. 2 EC Treaty) → until now: (-)
  - note: *Citizens and companies from some non-member states* (EFTA states, Switzerland) enjoy a freedom to provide services according to special international treaties

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

- Service** within the meaning of art. 50 EC Treaty
  - *specific concept of "service" in Community law*; in particular (but not exclusively) activities of an industrial or commercial character, activities of craftsmen and activities of the [freelance] professions (art. 50 sub-sect. 2)
- aa) Service normally provided for remuneration
  - also commercial advertising, but not the providing of informations free of charges for political reasons (ECJ, case C-159/90, *SPUC v. Grogan* [student's union informing about abortion in other member states])
  - it is irrelevant if the occupation is "immoral" or "anti-social" (even abortion, if legal, and prostitution)
- bb) Providing of the service as a self-employed person
  - here: delimitation from the freedom of movement for workers

<sup>1</sup> **Directive 2006/123/EC** on services in the internal market (to be transposed until december 2009).

<sup>2</sup> 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).

<sup>3</sup> **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) Temporary activity (see art. 50 sub-sect. 3 EC Treaty)
  - here: delimitation from the freedom of establishment
- dd) No protection of this activity by the other fundamental freedoms (art. 50 sub-sect. 1 EC Treaty)
  - Note: If a worker is employed by the service provider in his home state and works temporarily in another member state, the freedom to provide services and not the freedom of movement for workers is concerned!
  - Note: bank services which are not linked directly to capital or payment transactions are protected by the freedom to provide services
- b) **Situation of cross-border mobility** (→ relevance of Community law)
  - aa) **The moving provider** ["aktive Dienstleistungsfreiheit"]
    - the service is provided in another member state
  - bb) **The moving recipient** ["passive Dienstleistungsfreiheit"]
    - the service is received in another member state
    - eg touristic services
  - cc) **The moving service** ["Korrespondenzdienstleistung"]
    - the service crosses the border, but neither the service provider neither the service recipient
    - eg services of consultants and brokers provided by using telecommunication techniques
  - dd) **The moving provider and recipient**
    - the service is provided and received while crossing the border together
    - eg touristic services
- c) **Protected activities** (see particular art. 50 sub-sect. 3 EC Treaty)
  - aa) Initiation and conclusion of the service contract
  - bb) Provision and reception of the service
    - also *temporary stay* for this purpose (also of family members)
  - cc) In particular **employment of staff brought along from the home state** for providing the service
    - also of employees from non-member states who are working for the service provider in his home state
    - see concretisation in *Directive 1996/71/EC (Posting Directive)*<sup>4</sup> (allows to evade huge parts of labour law)
- d) **No excluded sector**
  - aa) No services in the field of transport (art. 51 EC Treaty)
  - bb) No services falling under the Treaty establishing the European Atomic Energy Community
  - cc) No *exercise of public power* ("*official authority*") (art. 55 read together with art 45 sub-sect. 1 EC Treaty)
    - = no direct and specific connexion with the exercise of official authority
  - dd) No sector excluded according to secondary law (art. 55 read together with art. 45 sub-sect. 2 EC Treaty) → until now: (-)
    - note: the sectors excluded from the field of application of the *Services Directive*<sup>1</sup> are *not* excluded from the fundamental freedom

## II. Encroachments ["Beeinträchtigungen"]

### 1) Acting of an addressee of the freedom to provide services

- a) Acting of a **member state**
- b) Acting of a **Community/Union institution**
- c) Acting of a **private person bound** by the freedom to provide services
  - aa) General regulations of private associations in fields of services
    - ECJ, case 36/74, *Walrave und Koch*
  - bb) Collective agreements and collective actions of the trade unions
    - ECJ, case C-341/05, *Laval* (→ debatable for the collective actions as part of the socio-economic civic life)

### 2) Acting to be qualified as discrimination or restriction

- see in particular the examples listed in art. 16(1,2) of the *Services Directive*<sup>1</sup>

- a) **Discriminations**
  - aa) Open discriminations

<sup>4</sup> **Directive 1996/71/EC** concerning the posting of workers in the framework of the provision of services. This directive had a strong effect on the situation of domestic firms and on the labour market (in particular in the building industry) in member states with higher wages.

- bb) Hidden (indirect) discriminations
  - eg rules which require domestic residence
- b) **(Non-discriminative) Restrictions** (by indistinctly applicable measures)
  - see wording of art. 49 sub-sect. 1 EC Treaty
  - aa) Large concept of restriction according to the *Van Binsbergen formula* of the ECJ (case 33/74):
    - "all requirements ... which may prevent or otherwise obstruct the activities of the person providing the service"
    - eg requirements of special permissions which demand special professional qualifications
  - bb) Corrective reduction of the concept by **analogous application of the Keck formula** of the ECJ (joined cases C-267, C-268/91 - *product-related, not sales-related rules*)?
    - α) FIRST OPINION: (+), because the concept of restriction has to be limited
    - β) SECOND OPINION: (-), because the Keck formula would be difficult to apply; no practical need
    - γ) The position of the ECJ is still uncertain.
    - It is sure that there is an encroachment, if the *free access to the service market is influenced directly*

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

#### 1) Justification by the limit in art. 55 read together with art. 46(1) EC Treaty

- a) Applicability of the limit in art. 55 read together with 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. 55 read together with 46(1) EC Treaty
  - see *diagram 5*, p. 3; see in particular the concretisation of the grounds of public policy, public security and public health in art. 27 et seq. of 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
    - in particular not of the *Services Directive*<sup>1</sup>

#### 2) Justification by the inherent limits of the freedom to provide services ["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*
  - ECJ: "*justified by overriding requirements relating to the public interest*"; see now concretisation in art. 4 no. 8 of the *Services Directive*<sup>1</sup>
  - only of non-economic public interests; examples: protection of professional reliability and faithfulness, of a high standard of professional education, of a functioning system of legal protection; of the financial equilibrium of the social security system; safeguard of national cultural heritage or of plurality and quality in public broadcasting, consumer protection, protection of the environment, traffic protection
- c) Compliance with the limits of limits (see above)
  - in particular *necessity*
  - permissions granted to the service provider in his home state must in principle be recognized as far as requirements are equivalent to those in the state where the service is provided
  - 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:** *Davies*, European Union Internal Market Law, 2<sup>nd</sup> edition 2003, p. 75 ff.; *Craig/de Búrca*, EU Law, 3<sup>rd</sup> edition 2003, p. 800 ff. See as well the diagram of *Streinz*, *Europarecht*, 6<sup>th</sup> edition 2003, no. 766; On the *Services Directive*: *Schlachter/Ohler* (ed.), *Europäische Dienstleistungsrichtlinie. Handkommentar*, 2008 [coming soon].