

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

concerning § 9 The free movement of capital and payments (art. 56 et seq. CE Treaty)

**Diagram 7**  
**The free movement of capital**

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

- Note: The *geographic and personal sphere of protection* is *unlimited*, because art. 56(1) also guarantees the free movement of capital to and from non-member states.
- The delimitation from the other FF is difficult and DISPUTED.

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

**2) Movement of capital**

- a) **Transfer of money capital or real capital**
  - for the interpretation of the term "capital" see in particular the extensive but not complete listing in Annex I to *Directive 88/361/EEC ("capital directive")*
  - aa) Transfer of money capital
    - also of cash (also of foreign currencies), if legal tender (otherwise → free movement of goods)
    - also of bonds and securities
    - also of stocks and shares in companies
    - also of loans and securities for loans (eg guaranties, sureties)
    - also of intellectual property rights and tradeable emission rights (pollution allowances)
  - bb) Transfer of real capital
    - acquisition of all kinds of real property rights
- b) **For the purpose of capital investment**
  - here: delimitation from the free movement of payments (transfer of capital for the purpose of payment)

**3) Protected activities** (see Annex I Directive 88/361)

- a) All transactions which are necessary for the transfer of the capital
  - in particular all necessary bank-transfers and payments
- b) Activities for the preparation of the movement of capital
  - also the access to all financial instruments on the concerned market
- c) Liquidation of the transferred capital and repatriation of the proceeds

**II. Encroachments** ["Beeinträchtigungen"]

**1) Discriminations**

## 2) **Non-discriminative restrictions** (by indistinctly applicable measures)

- a) Large concept of restriction, due to **analogous application of the Dassonville formula** of the ECJ (case 8/74): all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-community capital trade
- b) 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*)? (→ DISPUTED)
  - in that case, rules on the business hours of banks and insurance agencies or rules on compulsory standard forms for capital transactions will not be considered as restrictions

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

- Note: There is an *extensive harmonisation* of capital law *by secondary law for the establishment of a European financial area*<sup>1</sup>. In most cases, this secondary law concerns the free movement of capital as well as the free movement of payments, the freedom of establishment and/or the freedom to provide services. In the concerned fields, encroachments by the member states can only be justified according to these provisions of Community law.

### 1) **Justification by the (written) limitations in the EC Treaty**

- only, if in compliance with the *limits of limits* (proportionality, no violation of fundamental rights, no violation of other primary or secondary law of the Union)
- a) **Limits in art. 58 EC Treaty**
  - do not allow any arbitrary discrimination or disguised restriction on the free movement of capital (art. 58(3))
  - aa) Art. 58(1) lit. a EC Treaty (provisions distinguishing between taxpayers)
  - bb) Art. 58(1) lit. b EC Treaty
    - α) Measures to prevent infringements of national law and regulations, in particular in the field of taxation
    - β) *Procedures for the declaration* of capital movements (→ no requiring of official approvals!)
    - γ) *Measures on grounds of public policy or public security*
  - cc) Art. 58(2) EC Treaty (Convergence with the freedom of establishment)
    - Art. 58(2) only makes clear that encroachments of the freedom of establishment which are justified by the limits of this fundamental freedom will be justified as encroachments on the free movement of capital too.
- b) **The limit of the protocol on the acquisition of property in Denmark**
  - allows restrictions on the acquisition of second homes in Denmark
  - see as well the *transitional agreements in the accession treaty* which allow special restrictions of the acquisition of real estate in some of the new member states for a transitional period
- c) **Special limits for the movement of capital to and from non-member states**
  - aa) Art. 57 EC Treaty (general exceptions for the movement of capital to and from non-member states)
  - bb) Art. 59 EC Treaty (short-term safeguard measures to fight serious difficulties for the operation of the economic and monetary union)
  - cc) Art. 60 EC Treaty (embargo measures in the context of activities of the Common Foreign and Security Policy)

### 2) **Justification by the inherent limits of the freedom of the movement of capital** ["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-483/99, golden shares: "justified by ... *overriding requirements of the general interest*"
  - examples: measures for the protection of the stability of the currency, of the functioning of the capital markets, for consumer protection
- c) Compliance with the limits of limits

(Date: Diagram 7 (ECIntML-MBA))

<sup>1</sup> See the extensive overview of *Sedlaczek*, in: Streinz (editor), EUV/EGV, 2003, art. 56 no. 28 ff.