

EC INTERNAL MARKET LAW

concerning § 4 V The concepts of sphere of protection, enroachment and limits of the fundamental freedoms

Diagram 2

Violation of a Fundamental Freedom

(general structure of examination)

I. Sphere of protection/scope of protection ["Schutzbereich"]¹

• = is the FF concerned?

1) *Geographic and temporal sphere of protection* ["räumlicher und zeitlicher Schutzbereich"]

- a) Measure having affect within the geographic field of application of the FEU Treaty (see art. 52 EU Treaty, art. 355 FEU Treaty²)
- b) No temporary non-applicability of the FF due to special clauses in the treaty of accession (→ concerns new member states)

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

- a) Holder (beneficiary, entitled subject) of the FF
 - aa) Citizen of a member state
 - bb) Legal person ("company or firm") having its registered office, central administration or principle place of business in a member state
 - cf. art. 54 sub-sect. 1 (also read together with art. 62) FEU Treaty³
 - wide concept of "companies or firms" (art. 54 sub-sect. 2 FEU Treaty): including partnerships and legal persons governed by public law
 - cc) In some cases: citizen or legal person from a non-member state
 - α) Protection according to the conception of the FF
 - all persons entitled to free movement of goods (see art. 28(2), 29 FEU Treaty)⁴ and to free movement of capital and payments (see art. 63 FEU Treaty)⁵
 - family members of employees and established persons are protected indirectly only, by secondary law on the free movement of workers and the free movement of establishment
 - β) Protection according to international treaties
 - eg treaties with Switzerland and Turkey
- b) If necessary fulfillment of special personal requirements
 - eg being established in the territory of a member state (art. 49 sub-sect. 1 phrase 2 FEU Treaty)⁶

3) *Material sphere of protection* ["sachlicher Schutzbereich"]⁷

- = sphere of protection *ratione materiae*
- a) Situation of cross-border mobility (→ relevance of Union law)
 - FF do not protect domestic activities with mere domestic impact
- b) Protected activity of the holder of the FF
 - see *diagram 1*
 - here: delimitation from the other FF and the general freedom of movement and residence (art. 21 FEU Treaty)⁸ by analysis of the main emphasis
 - note: every FF includes the right to the necessary traveling and residence in other member states

¹ In English, both terms and also the terms "area of protection" and "protected area" are common.

² Formerly (until the Treaty of Lisbon came into force) art. 299 EC Treaty.

³ Formerly art. 48 (also read together with art. 55) EC Treaty.

⁴ Formerly art. 23(2), 24 EC Treaty.

⁵ Formerly art. 56(1), (2) EC Treaty.

⁶ Formerly art. 43 sub.-sect. 1 phrase 2 EC Treaty.

⁷ In English, some authors also use the terms "substantive sphere", "substantive scope" or "subject matter of protection".

⁸ Formerly art. 18 EC Treaty.

- c) No excluded sector
- some sectors are excluded by art. 45(4), 51 sub.-sect. 1 (also read together with art. 62) FEU Treaty⁹ or by secondary law passed on the basis of art. 51 sub.-sect. 2 (also read together with art. 62) FEU Treaty

II. Encroachment/interference ["Beeinträchtigung"]¹⁰

1) Acting of an addressee (obliged subject) of the FF

- can consist also in a failure to do something (→ duties of protection ["grundfreiheitsrechtliche Schutzpflichten"])
- a) Acting of a member state
 - also of sub-national public authorities (regions, Länder, autonomous communities, counties, authorities of local government etc)
 - also of private-law institutions dominated by public authorities
- b) Acting of a Community/Union institution
- c) Only in some exceptional cases: Acting of a private person with a position of special economic power¹¹
 - aa) General regulations of private associations which hinder the exercise of the FF
 - in particular regulations of sport associations concerning professional sports (→ ECJ, *Walrave and Koch*; ECJ, *Bosman*)
 - bb) Collective agreements and collective actions of trade unions
 - ECJ, *Laval* (without distinction between collective agreements and collective action)
 - bb) General regulations of employers which hinder the exercise of the FF
 - ECJ, *Angonese*; SCEPTICISM IN LITERATURE

2) Acting to be qualified as discrimination or restriction

- a) Discrimination
 - aa) Open (direct) discrimination
 - formally different treatment of domestic and foreign goods/services/persons etc
 - bb) Hidden (indirect) discrimination
 - formally equal treatment, which however typically has a stronger effect on foreign goods/services/persons etc (broad concept of discrimination of the ECJ)
 - difficult to delimit from the restriction
- b) Restriction
 - aa) Rule which is capable of hindering, directly or indirectly, actually or potentially, intra-union economic exchange
 - original, very broad concept of restriction of the ECJ (since → *Dassonville*)
 - not the aim of the measure is decisive but the effect (possibly only a potentiell effect!)
 - bb) Product-related rules, not rules on general conditions of sale
 - corrective reduction of the concept of restriction by the ECJ (since → *Keck*); developed for the free movement of goods but transferable to the other FF
 - cc) Comprehensible relation between measure and restrictive effect (rule of remoteness)
 - additional corrective reduction of the concept of restriction by the ECJ: no restriction, if the effects are too vague or too indirect
 - further clarification needed, dogmatic significance of this delimitation is still DISPUTED

III. Illegality of the encroachment (no justification by the fundamental freedom's limits ["Schranken"])

1) Justification of the encroachment by explicit limits

- see art. 36 FEU Treaty (free movement of goods), art. 45(3) FEU Treaty (free movement of workers), art. 52(1) FEU Treaty (freedom of establishment), art. 52(1) read together with art. 62 FEU Treaty (freedom to provide services), art. 64 et seq. FEU Treaty (free movement of capital and payments)¹²

⁹ Formerly art. 39(4) and 45 sub.-sect. 1 (also read together with art. 55) EC Treaty.

¹⁰ In English, both the terms "encroachment" and "interference" are common. The term "encroachment" rather corresponds to the German term "Eingriff". The term "interference" rather corresponds to the precisely correct German term "Beeinträchtigung". Since the term "encroachment" is well-known from the theory of fundamental rights and apparently more common, it will be used in the course materials. It is, however, also correct to employ the term "interference". Note that "encroachment" or "interference" does not necessarily mean "violation" (= "infringement"). Only an encroachment/interference that is not justified by the freedom's limits is considered as a violation of the freedom.

¹¹ Addendum 2010: See on this problem *Lengauer*, *Drittwirkung von Grundfreiheiten*. Ein Beitrag zu dem Konzept des Normadressaten im Gemeinschaftsrecht, 2010.

¹² Formerly art. 30 EC Treaty (free movement of goods), art. 39(3) EC Treaty (freedom of movement for workers), art. 46(1) EC Treaty (freedom of establishment), art. 46(1) read together with art. 55 EC Treaty (freedom to provide services), art. 57 et seq. EC Treaty (free movement of capital and payments).

- a) Fulfillment of the preconditions of the limitation clause
 - vague legal concepts ["unbestimmte Rechtsbegriffe"] like "public policy" or "public security" are to be interpreted restrictively; they may have a different meaning than in national law
 - most important grounds of justification: public policy (= public order), public security, public health
 - b) Compliance with the *limits of limits* ["Schranken-Schranken"]
 - aa) Proportionality of the encroachment
 - α) Legitimate aim
 - here: the relevant ground of justification
 - β) Suitability
 - the measure must be conducive to its purpose
 - caution: measures might be harsh but nevertheless suitable!
 - γ) Necessity
 - the measure must be the least intrusive act of intervention that is equally conducive
 - often the crucial point in the examination of a case
 - consider possible alternatives to the measure!
 - δ) Proportionality (in its strict sense)
 - often examined superficially by the ECJ
 - the burdens imposed must not be out of proportion to the aim in view
 - in particular no infringement of the essence ["Wesensgehalt"] of the FF
 - bb) No violation of fundamental rights
 - note the spectacular decision ECJ, *Carpenter*
 - cc) No violation of other primary or secondary law of the Union
 - in particular no arbitrary discrimination (see art. 36 phrase 2 FEU Treaty as expression of a general legal concept)¹³
- 2) *Justification of the encroachment by inherent limits* ["immanente Schranken"]
- recognized since ECJ, *Cassis de Dijon*
- a) Applicability of the inherent limits
 - aa) Encroachment in the form of a restriction
 - bb) Encroachment in the form of a hidden discrimination (MAJORITY OPINION)
 - according to a MINORITY OPINION IN THE LITERATURE applicability as well in case of an open discrimination
 - b) Fulfillment of the preconditions of the inherent limits: pursuit of *imperative (overriding¹⁴) reasons of public interest*
 - terminology of the ECJ: "exigences impératives"/"zwingende Erfordernisse"/"mandatory requirements" (→ *Cassis de Dijon*), "raisons impérieuses d'intérêt général"/"zwingende Gründe des Allgemeininteresses"/"overriding reasons relating to the general interest" (→ *Gouda*)
 - only non-economic interests
 - recognized interests (grounds of justification): eg protection of the environment, public health, consumer protection, safeguard of the national cultural heritage, efficient control in tax affairs, integrity of trade; also free exercise of fundamental rights (→ ECJ, *Schmidberger*)
 - c) Compliance with the limits of limits (see above)

Note: This diagram only presents the *basic structure* which is common to all fundamental freedoms, due to their *convergence* in the jurisdiction of the ECJ. When applied to the concrete case, it has to be adapted to the special features of the respective freedom.

This diagram and the following diagrams follow a common approach, which takes into account the convergence of the fundamental freedoms and the *strong parallels between fundamental freedoms and fundamental rights*. Given that both are subjective rights and primarily negative rights, most elements of the theory and dogmatics of fundamental rights can be transferred. In particular, it is essential to make a clear distinction between the sphere of protection (= "scope of protection"), the encroachment (= "interference") and its justification by limits. For example, art. 45(4) and art. 51 sub-sect. 1 FEU Treaty¹⁵ exclude whole sectors from the sphere of protection of the concerned freedoms and must not be mistaken for limitation clauses. On the other hand, art. 45(3) - the inserted part - and art. 52(1) FEU Treaty¹⁶ determine the limits of these freedoms, which must not be misunderstood as "exceptions". Note, however, that the English terminology is still heterogeneous and unsettled.

Further reading: See for the *general structure of examination* and its dogmatic backgrounds Ehlers, in: Ehlers (editor), *Europäische Grundrechte und Grundfreiheiten*, 3rd edition 2009 [2nd edition 2005 = Ehlers (editor), *European Fundamental Rights and Freedoms*, 2007], § 7; *Frenz*, *Handbuch Europarecht*, volume 1, 2004, no. 42 ff., 346 ff.; *Bieber/Epiney/Haag*, *Die Europäische Union*, 8th edi-

¹³ Formerly art. 30 phrase 2 EC Treaty.

¹⁴ Many English translations of ECJ decisions and legal acts use the term "overriding". This term, however, does not correspond to the terminology in other languages, such as "exigences impératives" or "zwingende Gründe". In order to achieve multi-lingual congruence, it might be preferable to use the term "imperative".

¹⁵ Formerly art. 39(4) and art. 45 sub-sect. 1 EC Treaty.

¹⁶ Formerly art. 39(3) - the inserted part - and art. 46(1) EC Treaty.

tion 2009, § 10 no. 9 ff.; *Jarass*, Elemente einer Dogmatik der Grundfreiheiten, *Europarecht* 1995, p. 202 ff. and *Europarecht* 2000, 705 ff.; *Jarass*, A Unified Approach to the Fundamental Freedoms, in: Andenas/Roth (editors), *Services and Free Movement in EU Law*, 2002, p. 141 ff.; *Kingreen*, Die Struktur der Grundfreiheiten des Europäischen Gemeinschaftsrechts, 1999; *Kingreen*, Fundamental Freedoms, in: von Bogdandy/Bast (editors), *Principles of European Constitutional Law*, 2006, p. 549 ff. - See in particular the *diagrams* of *Ehlers*, § 7 no. 113 (in the English version no. 98), and *Frenz*, no. 463, 541.

(Datei: Diagram 2 (ECIntML))