

EC INTERNAL MARKET LAW

concerning § 6 The freedom of movement for workers (art. 45 et seq. FEU Treaty, formerly 39 et seq. EC Treaty)

Diagram 4

The freedom of movement for workers

I. Sphere of protection ["Schutzbereich"]¹

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

- According to the *transitional agreements in the accession treaty*² the access of workers from the new member states to the labour market in the old member states can be limited for a period of at most 7 years.

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

a) Citizens of the member states

- Side note: *Family members* of workers do not have own rights which can be based directly on art. 45 FEU Treaty³. They enjoy, however, rights which are "derived" from the legal status of the worker and which are laid down in secondary law (see Regulation 1612/68⁴, Regulation 1408/71⁵ [in future: Regulation 883/2004⁶] and Directive 2004/38/EC⁷); this is true for family members from non-member states too.
- Side note: *Citizens from some non-member states* have the right to free movement according to special international treaties (eg art. 28 EEA Agreement, the Association agreement with Turkey from 1963 and the Agreement on the free movement of persons with the Swiss Confederation from 1999)

b) Legal persons ("companies or firms") as **employers** in the member states

- ECJ, case C-350/96, Clean Car Autoservice

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

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

- occupation in another member state (also occupation of commuters) or returning after occupation or achieving qualification in another member state

b) Status of a worker (= employed person) (see art. 45(1) FEU Treaty⁸)

- large, *specific concept of "worker" in Community law* (ECJ, case 66/85, *Lawrie-Blum*); the work can be part-time work, to the exclusion only of activities on such a small scale as to be regarded as purely marginal and ancillary (ECJ, case 197/86, *Brown*); the work can be briefly interrupted for further education (ECJ, case 39/86, *Lair*)

aa) Performing of services of economic value

- large concept; also professional sports (ECJ, case C-415/93, *Bosman*)

¹ For questions of terminology see diagram 2 and transparency film 2.

² 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). Concerning workers from Bulgaria and Rumania see art. 23 of the Act concerning the conditions of accession of these member states read together with nos. 1 of the Annexes VI and VII.

³ Formerly (until the Treaty of Lisbon came into force) art. 39 EC Treaty.

⁴ Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community.

⁵ Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

⁶ Regulation (EC) No 883/2004 on the coordination of social security systems. According to its art. 91, this regulation shall apply from the entry into force of the implementing regulation (No 987/2009). This will be in May 2010.

⁷ **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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC and other Directives.

⁸ Formerly art. 39(1) EC Treaty.

- bb) Employment (work bound by instructions)
 - here: delimitation from the freedom of establishment and the freedom to provide services with comprehensive regard to all elements of the relationship between contracting parties
- cc) Payment as counterperformance (service in return)
 - does not need to be enough to make one's living
- c) **Protected activities** (see particularly art. 45(3) FEU Treaty⁹)
 - aa) Access to employment
 - application (art. 45(3) lit. a FEU Treaty)
 - free movement for the purpose of seeking employment (art. 45(3) lit. b FEU Treaty, see partial concretisation in *Directive 2004/38/EC*⁷); the question of the allowed time period has not yet been settled (see art. 14(4) lit. b)
 - bb) Exercise of an occupation (art. 45(3) lit. c FEU Treaty)
 - also free movement and residence for the purpose of the employment (see concretisation in *Directive 2004/38/EC*, in particular art. 7(1) lit. a)
 - cc) Free movement and residence after having been employed (art. 45(3) lit. d FEU Treaty)
 - see concretisation in *Art. 7(3) and 17 Directive 2004/38/EC*
 - dd) Annex: protected activities of family members (Regulation 1612/68, Directive 2004/38/EC)
- d) **No employment in the public service** (art. 45(4) FEU Treaty¹⁰)
 - narrow, *specific concept of public service in Union 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 in this sense: institutions providing services of general interest ["*Daseinsvorsorge*"] like the supply of water or energy or road maintenance, and cultural, educational and research institutions
 - workers employed in the public service despite art. 45(4) FEU Treaty must be treated equally as regards remuneration and other conditions of work and employment (ECJ, case 152/73, *Sotgiu*)

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
 - private persons can also be bound indirectly, by secondary law; see the prohibition of discriminations in collective and individual agreements in art. 7(4) Regulation 1612/68³
 - 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) Collective agreements
 - see ECJ, case 36/74, *Walrave and Koch*; case C-341/05, *Laval*
 - cc) 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. 45(2) FEU Treaty¹¹)
 - see also art. 1(2), 2, 5 - 9 Regulation 1612/68
 - in particular *discriminations* (of the workers or their families) *with regard to social benefits or taxes*; see art. 7(2) Regulation 1612/68 (with comprehensive jurisprudence of the ECJ) and Regulation 1408/71⁵, in future Regulation 883/2004⁶
 - 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

⁹ Formerly art. 39(3) EC Treaty.

¹⁰ Formerly art. 39(4) EC Treaty.

¹¹ Formerly art. 39(2) EC Treaty.

- 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 freedom of movement for workers

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

1) Justification by the limit in art. 45(3) FEU Treaty¹²

- a) Applicability of the limit in art. 45(3) FEU Treaty
- aa) In case of encroachments on the rights under art. 45(3) FEU Treaty
- bb) In case of encroachments on other protected positions?
- eg in case of discriminations in the sense of art. 45(2) FEU Treaty?
- α) FIRST OPINION: (-), because this limit is formulated in section 3 only (contextual interpretation with regard to the system of the provisions in art. 45 et seq.)
- β) SECOND OPINION: (+), because there is only one integrated freedom of movement for workers and because the general convergence of the FF suggests to apply the limit of grounds of public policy and security to this freedom as a whole
- b) Fulfilment of the preconditions formulated in art. 45(3) FEU Treaty
- aa) Measure taken on grounds of public policy, public security or public health
- only on *non-economic grounds*; see more specific rules in **art. 27 et seq. of Directive 2004/38/EC**
 - on grounds of "public policy" only in case of a genuine and sufficiently serious threat affecting one of the fundamental interests of society; the measure can be based only on the *personal conduct of the individual concerned* (ECJ, case 30/77, Boucherau; see now art. 27(2) sub-section 2 Directive 2004/38/EC)
- 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
 - see in particular Regulations 1612/68 and 1408/71 (in future: 883/2004) 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)
- note the more specific rules in art. 28 and 29 of Directive 2004/38/EC
- 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
- not in cases of open discrimination
- b) Fulfilment of the preconditions of the inherent limits: pursuit of *imperative reasons of public interest*
- terminology of the ECJ: "justified by *pressing reasons of public interest*" (case C-415/93, *Bosman*)
 - only measures pursuing non-economic public interests
 - examples: measures for the safeguard of the functioning of systems of social security benefits; for the protection of sport (in particular of sporting competition), for the prevention of the misuse of foreign academic degrees; for the protection of employed persons, for consumer protection
- c) Compliance with the limits of limits (see above)
- in particular proportionality (necessity of the measure for a reasonable pursuit of the imperative reasons of public interest; 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

¹² Formerly art. 39(3) EC Treaty.

Further reading: *Becker*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 9; *Craig/de Búrca*, *EU Law*, 4th edition 2007, p. 743 ff.; *Fairhurst*, *Law of the European Union*, 6th edition 2007, p. 348 ff.; *Barnard*, *The Substantive Law of the EU*, 2nd edition 2007, p. 249 ff.; *Arnulf/Dashwood/Dougan/ Ross/Spaventa/Wyatt*, *Wyatt & Dashwood's European Union Law*, 5th edition 2006, p. 703 ff.; *Davies*, *European Union Internal Market Law*, 2nd edition 2003, p. 41 ff. See as well the diagrams of *Frenz*, *Handbuch Europarecht*, volume 1, 2004, no.1203 and *Streinz*, *Europarecht*, 8th edition 2008, no. 898.

(Datei: Diagram 4 (ECIntML))