

EC INTERNAL MARKET LAW

§ 7. The freedom of establishment (art. 49 et seq. FEU Treaty, formerly 43 et seq. EC Treaty)

Diagram 5

The freedom of establishment

I. Sphere of protection ["Schutzbereich"]¹

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. 49 sub-sect. 1 phrase 2 FEU Treaty)²
- Side note: *Family members* of established persons do not have own rights which can be based directly on art. 49 FEU Treaty. They enjoy, however, a right to move and reside freely which is "derived" from the legal status of the established person (ECJ, case C-370/90, Singh; see now *Directive 2004/38/EC*³) and other "derived rights" according to *Regulation 1408/71*⁴ (in future: *Regulation 883/2004*⁵); this is true for family members from non-member states too.
- Side note: *Citizens [and as well companies] from some non-member states* enjoy a freedom of establishment according to special international treaties (eg art. 31 EEA Agreement and the Agreement on the free movement of persons with the Swiss Confederation from 1999); less developed rights follow from other treaties (eg the European Convention on Establishment from 1955)

b) Legal persons ("companies or firms") in the member states (art. 54 sub-sect. 1 FEU Treaty)⁶

- large, *specific concept of "companies or firms" in Union law*
- the nationality of the shareholders/members/owners of the stock 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. 54 sub-sect. 2 FEU Treaty)
 - also subsidiaries of enterprises in non-member states
- bb) No non-profit organisation (art. 54 sub-sect. 2 FEU Treaty)
 - restrictive teleological interpretation of the concept of "non-profit" in art. 54 sub-sect. 2: The organisation must have the purpose to make money (to take part in the economic life) but not necessarily to make profit (see the German version of the Treaty: "Erwerbszweck", not "Gewinnzweck"). Note that the Treaty of Lisbon has not revised the wording of this provision.
- 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 Union law)

- occupation in another member state or returning after occupation or achieving qualification in another member state or setting-up of branches, agencies etc. in another member state

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

² Formerly (until the Treaty of Lisbon came into force) art. 43 sub-sect. 1 phrase 2 EC Treaty.

³ **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.

⁴ 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).

⁵ 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.

⁶ Formerly art. 48 sub-sect. 1 EC Treaty.

- b) **Gainful occupation as self-employed person** (see art. 49 sub-sect. 2 FEU Treaty⁷)
- aa) Gainful occupation
 - services and activities in return for payment (but not necessarily in pursuit of profit)
 - not necessarily an occupation in a traditional or 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 FEU Treaty⁸)
- large, *specific concept of "establishment" in Union law* (ECJ, case C-221/89, *Factortame*): "actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period"
 - aa) Fixed establishment (settlement)
 - mostly after buying or renting premises (office premises, sales rooms, premises for production plants etc)
 - not sufficient: purely formal acts (eg the registration of ships)
 - bb) Permanence
 - the freedom of establishment is aimed at a *permanent and stable integration into the national economy* of the concerned member state
 - here: *delimitation from the freedom to provide services* (can be difficult)
- d) **Protected activities** (see particularly art. 49 sub-sect. 2 FEU Treaty)
- aa) Taking up activities (setting up and commissioning of the foreign establishment)
 - α) Setting up of a main establishment
 - also cross-border transfer or re-establishment of the main establishment
 - also cross-border merger of companies (ECJ, case C-411/03, *Sevic Systems AG*; see now also Directive 2005/56/EC⁹)
 - however, companies may also choose to transfer the actual centre of administration without transferring their seat and must still be recognized as foreign companies (ECJ, case C-208/00, *Überseering*)
 - β) Setting up of an agency, branch or subsidiary (only by persons or companies established in the Union)
 - also if a company has been established in another member state only for the purpose to evade the application of national law and does not conduct any business in that other state but now intends to carry out its entire business in the state of the branch (ECJ, case C-212/97, *Centros* [→ "no abuse"]; DISPUTED)
 - 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. 53(1) FEU Treaty¹⁰ (eg Directive 2005/36/EC¹¹ and, concerning lawyers, Directive 98/5/EC¹²)
 - directives on harmonisation based on art. 53(1) FEU Treaty¹³
 - δ) Movement and residence in the state of the establishment
 - see concretisation in *Directive 2004/38/EC*³
 - bb) Practice of the gainful occupation in the foreign establishment
 - also residence for this purpose (see also art. 7(1) lit. a Directive 2004/38/EC)
 - cc) In particular: setting up and managing of undertakings
 - dd) Free movement and residence after having practiced the occupation
 - see concretisation in *art. 7(3) Directive 2004/38/EC*
 - ee) Annex: protected activities of family members (Directive 2004/38/EC)
- e) **No sector excluded according to art. 51 FEU Treaty¹⁴**
- aa) No exercise of public power ("*official authority*") (art. 51 sub-sect. 1 FEU Treaty)
 - narrow, *specific concept of the "exercise of official authority" in Union law*: only "activities which in themselves involve a direct and specific connexion with the exercise of official authority" (ECJ, case 2/74, *Reyners*)
 - bb) No sector excluded according to secondary law (art. 51 sub-sect. 2 FEU Treaty) → until now: (-)

⁷ Formerly art. 43 sub-sect. 2 EC Treaty.

⁸ Formerly art. 43 sub-sect. 1 EC Treaty.

⁹ Directive 2005/56/EC on cross-border mergers of limited liability companies.

¹⁰ Formerly art. 47(1) EC Treaty.

¹¹ Directive 2005/36/EC on the recognition of professional qualifications.

¹² Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

¹³ Formerly art. 47(2) EC Treaty.

¹⁴ Formerly art. 45 EC Treaty.

II. Encroachments ["Beeinträchtigungen"]

- only by measures of the member states or the Union; no direct third-party effect of the freedom of establishment (still in DISPUTE)

1) Discriminations

- Open discriminations
 - = violations of the principle of *equal treatment of own and foreign citizens* ("Inländergleichbehandlung") in art. 49(2) FEU Treaty ("under the conditions laid down for its own nationals")
 - in particular rules on the choice and practice of professions, but as well more subtle measures like restrictions of the capacity of foreign companies to sue or to be sued
 - in particular *discriminations* (of the working persons or their families) *with regard to social benefits or taxes* (see Regulation 1408/71⁴, in future Regulation 883/2004⁵)
- Hidden (indirect) discriminations
 - eg measures hindering the acquisition of real estate by foreign companies

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

- 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. Thus, the freedom of establishment could become an instrument to force the member states to choose a specific (neo-liberal) orientation for their policy. This could only be avoided by a compensating overly "generous" interpretation of the concept of the "pressing reasons of public interest" that may justify restrictions of the fundamental freedoms.
- The dispute in legal science
 - OLDER OPINION: Art. 43 EC Treaty (today 49 FEU Treaty) includes a prohibition of discriminations only
 - argument: this provision does not aim at a total liberalization of economic life. The member states did not intend to take such a far-reaching fundamental political decision.
 - MAJORITY OPINION: Just as the other FF, art. 43 EC Treaty (today 49 FEU Treaty) includes a general prohibition of restrictions
 - argument: new *wording* of art. 43 sub-sect. 1 EC Treaty (today 49 sub-sect. 1 FEU Treaty); convergence of the FF
- The developments in the jurisprudence of the ECJ are strongly going in the direction of an interpretation as a general prohibition of restrictions
 - "measures liable to hinder or make less attractive the exercise ..." (ECJ, case C-55/94, *Gebhard*; see as well ECJ, case C-19/92, Kraus)
 - see also ECJ, case C-212/97, *Centros* and ECJ, case C-9/02, *De Lasteyrie du Saillant*
 - the limits of the concept are still unclarified (for this FF, the Keck formula is inappropriate!)

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

1) Justification by the limit in art. 52(1) FEU Treaty¹⁵

- Applicability of the limit in art. 52(1) FEU Treaty: in cases of open discriminations only
 - rules providing for "*special treatment for foreign nationals*" only
- Fulfilment of the preconditions formulated in art. 52(1) FEU Treaty
 - Measure taken on grounds of public policy, public security or public health
 - only on *non-economic grounds*; see more specific rules (based on art. 46(2) EC Treaty, today 52(2) FEU Treaty) in *art. 27 et seq. of Directive 2004/38/EC*
 - on grounds of "public policy" (= public order) 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-sect. 2 Directive 2004/38/EC)
 - 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 Regulation 1408/71 (in future: 883/2004) and Directive 2004/38/EC

¹⁵ Formerly art. 46(1) EC Treaty.

- 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 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*
 - terminology of the ECJ: "justified by *pressing reasons of public interest*" (case C-19/92, Kraus)
 - only measures pursuing non-economic public interests
 - examples: measures for the prevention of the misuse of foreign academic degrees, for the protection of professional reliability and faithfulness, for the protection of a high standard of professional education, for the protection of a functioning system of legal protection, 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 or the presentation of special certificates 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

Further reading: *Tietje*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 10; *Craig/de Búrca*, *EU Law*, 4th edition 2007, p. 791 ff.; *Barnard*, *The Substantive Law of the EU*, 2nd edition 2007, p. 249 ff., 308 ff. See as well the diagrams of *Frenz*, *Handbuch Europarecht*, volume 1, 2004, no. 1900 and *Streinz*, *Europarecht*, 8th edition 2008, no. 898.

(Datei: Diagram 5 (ECIntML))