

EC INTERNAL MARKET LAW

concerning § 8 The freedom to provide services (art. 56 et seq. FEU Treaty, formerly 49 et seq. EC Treaty)

## Diagram 6

### The freedom to provide services

#### I. Sphere of protection ["Schutzbereich"]<sup>1</sup>

- See now the concretisation of some aspects in the *Directive 2006/123/EC (Services Directive)*<sup>2</sup>, an important general harmonisation directive based on art. 55 read together with art. 47(2) EC Treaty (now art. 62 read together with art. 53(1) FEU Treaty). Note, however, that its field of application is limited: important sectors such as healthcare services, financial services, services of temporary work agencies, private security services and many social services have been excluded (see art. 2)

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

- According to the *transitional agreements in the accession treaty*<sup>3</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 limited 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)
    - see now the concretisation of these terms in art. 4 no. 2, 3 of the *Services Directive*
  - The service provider is also protected if the recipient is a citizen of a non-member state but established in the Union
  - Side note: *Family members* do not have own rights which can be based directly on art. 56 FEU Treaty<sup>4</sup>. They enjoy, however, rights which are "derived" from the legal status of the service provider according to *Directive 2004/38/EC*<sup>5</sup>; this is true for family members from non-member states too. - 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. 56 FEU 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. 62 read together with art. 54 sub-sect. 1 FEU Treaty<sup>6</sup>)
  - 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. 56 sub-sect. 2 FEU Treaty<sup>7</sup>) → until now: (-)
  - Side note: *Citizens and companies from some non-member states* enjoy a freedom to provide services according to special international treaties (eg art. 36 EEA Agreement and the Agreement on the free movement of persons with the Swiss Confederation from 1999)

<sup>1</sup> For questions of terminology see diagram 2 and transparency film 2.

<sup>2</sup> **Directive 2006/123/EC** on services in the internal market (to be transposed until december 2009).

<sup>3</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>4</sup> Formerly (until the Treaty of Lisbon came into force) art. 49 EC Treaty.

<sup>5</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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC and other Directives.

<sup>6</sup> Formerly art. 55 read together with art. 48 sub-sect. 1 EC Treaty.

<sup>7</sup> Formerly art. 49 sub-sect. 2 EC Treaty.

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

- a) **Service** within the meaning of art. 57 FEU Treaty<sup>8</sup>
- *specific concept of "service" in Union law*; in particular (but not exclusively) activities of an industrial or commercial character, activities of craftsmen and activities of the [freelance] professions (art. 57 sub-sect. 2)
- aa) Service normally provided for remuneration
- also commercial advertising, but not the provision of information free of charges for political reasons (ECJ, case C-159/90, SPUC v. Grogan [student's union informing the Irish public about the provision of 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
- cc) Temporary activity (see art. 57 sub-sect. 3 FEU Treaty)
- for which a permanent establishment is not necessary (here: delimitation from the freedom of establishment)
- dd) No protection of this activity by the other fundamental freedoms (art. 57 sub-sect. 1 FEU Treaty)
- according to the opinion of the ECJ (case C-452/04, Fidium), this does not establish any order of priority between the freedom to provide services and the other fundamental freedoms but shall ensure that all economic activity falls within the scope of the freedoms (this leads to delimitation by analysis of the main emphasis)
  - Note: If a worker who is employed by the service provider in his home state works temporarily for the service provider in another member state, the freedom to provide services and not the freedom of movement for workers is concerned!
  - Note: If a bank provides services which are not linked directly to capital or payment transactions (eg financial consulting), the freedom to provide services and not the freedom of the movement of capital and payments is concerned!
  - tv and radio broadcasting is protected by the freedom to provide services; however, the trade of sound and movies on storage media (CD, DVD etc.) is protected by the free movement of goods
- b) **Situation of cross-border mobility** (→ relevance of Union 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 techniques of telecommunication (ECJ, case C-384/93, Alpine Investments)
- dd) **The moving provider and recipient**
- the service is provided and received while crossing the border together
  - eg touristic services (see for tourist guides ECJ, case C-198/89, Commission v. Greece)
- c) **Protected activities** (see particularly art. 57 sub-sect. 3 FEU Treaty)
- see now the concretisation in art. 16(1) sub-sect. 2 of the *Services Directive*<sup>2</sup> ("free access and free exercise of a service activity")
- 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>9</sup>
    - the service provider can evade social insurance and considerable parts of the labor law in the state in which the service is provided
    - the directive guarantees, however, the application of standards concerning minimum wages, maximum work periods, minimum paid holidays, health and safety, non-discrimination and some other aspects (see art. 3)
    - art. 46 FEU<sup>10</sup> Treaty and art. 3 of the Posting Directive may widely preclude collective actions of trade unions against foreign service providers to force them to sign collective agreements on minimum wages etc. (see for details ECJ, case C-341/05, *Laval*)

<sup>8</sup> Formerly art. 57 FEU Treaty.

<sup>9</sup> **Directive 1996/71/EC** concerning the posting of workers in the framework of the provision of services.

<sup>10</sup> Formerly art. 49 EC Treaty.

d) **No excluded sector**

- aa) No services in the field of transport (art. 58 FEU Treaty<sup>11</sup>)
  - see for this sector art. 90 et seq. FEU Treaty
- bb) No services regulated in or according to the Treaty establishing the European Atomic Energy Community
  - see e.g. art. 97 and art. 98, 10, 15 EURATOM Treaty
- cc) No *exercise of public power* ("*official authority*") (art. 62 read together with art 51 sub-sect. 1 FEU Treaty<sup>12</sup>)
  - = no direct and specific connexion with the exercise of official authority (ECJ, case C-355/98, private security industry)
- dd) No sector excluded according to secondary law (art. 62 read together with art. 51 sub-sect. 2 FEU Treaty) → until now: (-)
  - note: the sectors excluded from the field of application of the *Services Directive*<sup>2</sup> or of its art. 16 (see art. 2, 17) are *not* excluded from the sphere of protection of 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*; joined cases C-51/96, C-191/97, *Delière*
  - bb) Collective agreements
    - ECJ, case C-341/05, *Laval*
  - cc) Collective actions of the trade unions?
    - α) ECJ, case C-341/05, *Laval*: (+), because they are liable to make the carrying out of the service less attractive or more difficult
    - β) POSSIBLE OBJECTION: Collective actions constitute an *essential part of the socio-economic civic life in a free society*, which cannot be submitted to "regulation" by the fundamental freedoms. Unlike the collective agreements, they do not represent the exercise of a specific regulative power which is comparable to public power.

### 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>2</sup>
- a) **Discriminations**
  - aa) Open discriminations
  - bb) Hidden (indirect) discriminations
    - eg rules which require domestic residence
- b) **(Non-discriminative) Restrictions** (by indistinctly applicable measures)
  - see wording of art. 56 sub-sect. 1 FEU Treaty<sup>13</sup>
  - 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 permissions which demand special professional qualifications (ECJ, case C-76/90, *Säger*)
    - even restrictions of the reimbursement by social security institutions of expenses for medical treatment in other member states (ECJ, case C-158/96, *Kohll*)
  - 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; the problem is comparable to that which occurred in the field of the free movement of goods after the introduction of the *Dassonville formula*
    - β) SECOND OPINION: (-), because the *Keck formula* would be difficult to apply in the context of the freedom to provide service; anyway there is no practical need

<sup>11</sup> Formerly art. 51 EC Treaty.

<sup>12</sup> Formerly art. 55 read together with art. 45 sub-sect. 1 EC Treaty.

<sup>13</sup> Formerly art. 49 sub-sect. 1 EC Treaty.

- γ) The ECJ has mentioned the question in one judgement (case C-384/92, Alpine Investments) but has not applied the Keck formula due to special aspects of the case. This is understood by SOME AUTHORS as a rejection, by OTHERS (probably the correct interpretation of the judgement) as a recognition in principle of the transfer of the Keck formula. - In any case one can assume a restriction of the freedom to provide services 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. 62 read together with art. 52(1) FEU Treaty<sup>14</sup>

- a) Applicability of the limit in art. 62 read together with art. 52(1) FEU Treaty: in cases of open discriminations only
  - rules providing for "*special treatment for foreign nationals*" only
- b) Fulfilment of the preconditions formulated in art. 62 read together with 52 (1) FEU 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>2</sup> (see in particular art. 16(2)); this directive reduces considerably the options of the member states to subject service providers from other member states to requirements of domestic law

#### 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*
  - terminology of the ECJ: "*justified by overriding requirements relating to the public interest*" (case C-58/98, Corsten)
  - see now the concretisation in *art. 4 no. 8 of the Services Directive*<sup>2</sup>
  - only measures pursuing non-economic public interests
  - examples: measures 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 the protection of the financial equilibrium of the social security system (ECJ, case C-158/96, Kohll), for the safeguard of the national cultural heritage, for the safeguard of plurality and quality in public broadcasting, for consumer protection, for the protection of the environment, for animal protection, for traffic protection, pursuing social or cultural policy objectives
- 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 the requirements for them are equivalent to those required in the state where the service is provided (see also art. 10(3) of the *Services Directive*<sup>2</sup>)
  - 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:** *Pache*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 11; *Craig/de Búrca*, *EU Law*, 4<sup>th</sup> edition 2007, p. 813 ff.; *Barnard*, *The Substantive Law of the EU*, 2<sup>nd</sup> edition 2007, p. 354 ff.; *Fairhurst*, *Law of the European Union*, 6<sup>th</sup> edition 2007, p. 403 ff. See as well the diagrams of *Frenz*, *Handbuch Europarecht*, volume 1, 2004, no. 2441 and *Streinz*, *Europarecht*, 8<sup>th</sup> edition 2008, no. 898. On the *Services Directive*: *Schlachter/Ohler* (ed.), *Europäische Dienstleistungsrichtlinie*. Handkommentar, 2008.

(Datei: Diagram 6 (ECIntML))

<sup>14</sup> Formerly art. 55 read together with art. 46(1) EC Treaty.