

EC INTERNAL MARKET LAW

concerning § 9 The free movement of capital and payments (art. 63 et seq. FEU Treaty, formerly 56 et seq. EC Treaty)

Diagram 7

The free movement of capital

I. Sphere of protection ["Schutzbereich"]¹

- Note: The *geographic sphere of protection* is *unlimited*, because art. 63(1) FEU Treaty² guarantees as well the free movement of capital to and from non-member states. Correspondingly, the *personal sphere of protection* is not limited to citizens and companies of the Union. The ECJ has also stated that not only private undertakings but also public undertakings enjoy the freedom (case C-174/04, Commission v. Italy).
- The delimitation from the other FF is difficult and DISPUTED.

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

- cross-border transfer of assets (also to and from non-member states)

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 Movement Directive")*
- the transfer can also lie in or be accompanied with the creation or liquidation of assets

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 for the purpose of payment), see ECJ, joint cases 282/82 and 26/83, Luisi and Carbone

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

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

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

² Formerly (until the Treaty of Lisbon came into force) art. 56(1) EC Treaty.

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-union 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
 - the position of the ECJ is still unclear (see ECJ, case 463/00, golden shares in Spain)

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*³. 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 Union law.

1) Justification by the (written) limitations in the FEU 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); the ECJ practices a *strict control* of suitability and necessity in cases of *golden shares* and other measures that assure a particular influence of the state on a company, see ECJ, case 483/99, golden shares in France; case 503/99, golden shares in Belgium; case C-112/05, Volkswagen Law
- a) **Limits in art. 65 FEU Treaty**⁴
 - do not allow any arbitrary discrimination or disguised restriction on the free movement of capital (art. 65(3))
 - aa) Art. 65(1) lit. a FEU Treaty (provisions distinguishing between taxpayers)
 - bb) Art. 65(1) lit. b FEU 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. 65(2) FEU Treaty (Convergence with the freedom of establishment)
 - Art. 65(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 the individual new member states for a transitional period⁵

³ See the extensive overviews of *Glaesner*, in: Schwarze (editor), EU-Kommentar, 2nd edition 2009, art. 56, no. 47 ff., and *Scadplus*, http://europa.eu/legislation_summaries/internal_market/single_market_capital/index_en.htm. Examples: Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions; Directive 2004/39/EC on markets in financial instruments; Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities; Directive 2002/83/EC concerning life assurance; Directive 97/5/EC on cross-border credit transfers (concerns primarily the free movement of payments but is essential for the realisation of the free movement of capital); Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing; Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Community.

⁴ Formerly art. 58 EC Treaty.

⁵ See the overview of *Scadplus*, http://europa.eu/legislation_summaries/internal_market/single_market_capital/124404_en.htm.

c) **Special limits for the movement of capital to and from non-member states**

- aa) Art. 64 FEU Treaty⁶ (general exceptions for the movement of capital to and from non-member states)
- bb) Art. 66 FEU Treaty⁷ (short-term safeguard measures to fight serious difficulties for the operation of the economic and monetary union)
- cc) Art. 75 FEU Treaty⁸ (restrictions on capital movements for the purpose to fight terrorism)
- dd) Art. 215 FEU Treaty⁹ (embargo measures related to 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*
 - terminology of the ECJ: "justified by ... *overriding requirements of the general interest*" (case C-483/99, golden shares in France)
 - 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
 - in particular: suitability and necessity of encroachments caused by golden shares (see above)

Further reading: *Wilmowsky*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 12; *Barnard*, *The Substantive Law of the EU*, 2nd edition 2007, p. 531 ff. See as well the diagrams of *Frenz*, *Handbuch Europarecht*, volume 1, 2004, no. 2733 and *Streinz*, *Europarecht*, 8th edition 2008, no. 904.

(Date: Diagram 7 (ECIntML))

⁶ Formerly art. 57 EC Treaty.

⁷ Formerly art. 59 EC Treaty.

⁸ Corresponds to art. 60 EC Treaty.

⁹ Corresponds to art. 301 EC Treaty.