

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 8

The free movement of payments

I. Sphere of protection ["Schutzbereich"]¹

- Note: The *geographic sphere of protection* is *unlimited*, because art. 63(2) FEU Treaty² guarantees as well the free movement of payments to and from non-member states. Correspondingly, the *personal sphere of protection* is not limited to citizens and companies of the Union.

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

- cross-border movement of payments (also to and from non-member states)

2) Movement of payments

- Transfer of means of payment**
 - by money transfer (remittance) or by handing-over of cash (in any currency), bills of exchange, cheques, letters of credit etc.
 - only of valid legal tender (transfer of ancient coins, bank notes etc.: → free movement of goods)
- For the purpose of the fulfillment of a financial obligation**
 - generally as *counterperformance* in return for a delivery of goods, work, a service or a transfer of capital
 - here: delimitation from the free movement of capital (transfer for the purpose of capital investment), see ECJ, joint cases 282/82 and 26/83, *Luisi and Carbone*

3) Protected activities

- All legal transactions which are necessary for the transfer of the means of payment
 - e.g. to order the bank transfer or to make out the cheque
- All other transactions and measures which are necessary for the transfer of the means of payment
 - in particular to send, transport, carry and hand over coins, bank notes, cheques etc.

II. Encroachments ["Beeinträchtigungen"]

1) Discriminations

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

- 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
- 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)

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

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

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

- Note: There is a *partial harmonisation* of payment law *by secondary law for the establishment of a European financial area*. See in particular the new *Directive 2007/64/EC (Payment Services Directive)*, which is an important step in the creation of the "Single Euro Payments Area" (SEPA).³

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)
- a) **Limits in art. 65 FEU Treaty**⁴
 - do not allow any arbitrary discrimination or disguised restriction on the free movement of payments (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 payments (*analogous* application of the 2nd part of art. 65(1) lit. b)
 - γ) Measures *on grounds of public policy or public security*
 - cc) Art. 65(2) FEU Treaty (convergence with the freedom of establishment)
- b) **Special limits for the movement of payments to and from non-member states**
 - aa) Art. 66 FEU Treaty⁵ (short-term safeguard measures to fight serious difficulties for the operation of the economic and monetary union)
 - only allows the restriction of movements of payments which are linked to movements of capital
 - bb) Art. 75 FEU Treaty⁶ (restrictions on payments for the purpose to fight terrorism)
 - cc) Art. 215 FEU Treaty⁷ (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 payments ["immanente Schranken"]

- only measures in pursuit of *imperative reasons of public interest* in compliance with the limits of limits

Further reading: *Wilmowsky*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 12.

.. (Date: Diagram 8 (ECIntML))

³ **Directive 2007/64/EC** on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (to be transposed until november 2009). Other important acts of secondary law: Regulation (EC) No 2560/2001 on cross-border payments in euro; 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 Formerly art. 59 EC Treaty.

⁶ Corresponds to art. 60 EC Treaty.

⁷ Corresponds to art. 301 EC Treaty.