

# Part II: The Fundamental Freedoms

## § 4 General theory

### I. The legal nature and the special features of the fundamental freedoms

- 1) The terminology
- 2) The direct applicability and the character as subjective rights of the fundamental freedoms
  - ECJ, case 26/62, van Gend & Loos
- 3) The primacy of the fundamental freedoms
- 4) The convergence of the fundamental freedoms

### II. In particular: fundamental freedoms and fundamental rights

- 1) General aspects
  - parallelism of fundamental freedoms and fundamental rights  
(→ leads to a similar structure of examination of practical cases)
- 2) The fundamental freedoms as a medium to achieve the application of the Union's fundamental rights on persons who are not Union citizens in matters not related to the Union?
  - ECJ, case C-60/00, Carpenter
  - see now Art. 51 Charter of Fundamental Rights

### III. The functions of the fundamental freedoms

- attention: protection of *cross-border mobility* only!
- 1) The fundamental freedoms as prohibitions of discrimination (equality rights)
    - problem of discriminations against one's own citizens [reverse discrimination/ "Inländerdiskriminierung"]
  - 2) The fundamental freedoms as prohibitions of restrictions (liberty rights)
    - ECJ, case 8/74, Dassonville; case Rs. C-415/93, Bosman; case C-55/94, Gebhard
  - 3) The fundamental freedoms as rights to provisions, in particular as basis of (state) duties of protection ["grundfreiheitliche Schutzpflichten"]
    - ECJ, case C-265/95, French blockades
  - 4) The fundamental freedoms as objective elements of the Union's legal order
    - secondary law and national law have to be interpreted in the light of the fundamental freedoms ["grundfreiheitskonforme Auslegung"]

#### **IV. The holders (entitled subjects) and the addressees (obliged subjects) of the fundamental freedoms**

- 1) The holders of the fundamental freedoms (the personal sphere of protection) ["persönlicher Schutzbereich"]**
  - a) Citizens of the member states**
  - b) Legal persons in the member states**  
(→ cf. art. 54, 62 FEU Treaty, formerly 48, 55 EC Treaty)
  - c) In some cases citizens and legal persons from non-member states**
- 2) The addressees of the fundamental freedoms**
  - a) The member states**
  - b) The institutions of the Union**
  - c) In some cases private organisations with regulative power or private enterprises**
    - ECJ, case 36/74, *Walrave and Koch*; case C-415/93, *Bosman*; case C-341/05, *Laval*; case C-281/98, *Angonese*

#### **V. The concepts of sphere of protection ["Schutzbereich"], encroachment/interference ["Eingriff"/"Beeinträchtigung"] and limits ["Schranken"] of the fundamental freedoms**

- 1) General aspects**
  - common *three step examination* as known from the theory of fundamental rights
  - terminology still heterogeneous and unsettled in the English language
  - see *diagram 2*
- 2) The sphere of protection [= "scope of protection"]**
- 3) Encroachments [= "interferences"]**
- 4) The justification of encroachments by the fundamental freedom's limits ["Schranken"] and the limits of limits ["Schranken-Schranken"]**

#### **VI. The concurrence of fundamental freedoms**

#### **VII. The complementation of the fundamental freedoms by the prohibition of discrimination (art. 18 FEU Treaty, formerly 12 EC Treaty)**

- 1) General aspects**
  - no discrimination on grounds of nationality
  - direct applicability, strict control by ECJ
- 2) The addressees**
  - also private organisations with regulative power
- 3) Illicit discriminations**
  - problem of application of national fundamental rights reserved to national citizens in favour of Union citizens from other member states