

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

## Diagram 11

### The free movement of capital

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

- Note: The *geographic and personal sphere of protection* is *unlimited*, because art. 63(1) also guarantees the free movement of capital to and from non-member states.
- The delimitation from the other FF is difficult and DISPUTED.

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

##### 2) Movement of capital

- 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")*
- 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, stocks and shares in companies
  - also of loans and securities for loans
  - 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)

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

- All transactions which are necessary for the transfer of the capital
  - in particular all necessary bank-transfers and payments
- 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

#### II. Encroachments ["Beeinträchtigungen"]

##### 1) Discriminations

<sup>1</sup> For questions of terminology see diagram 6 and transparency film 3.

## 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 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

## 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**<sup>2</sup>. 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
- a) **Limits in art. 65 FEU Treaty**
  - do not allow any arbitrary discrimination or disguised restriction on the free movement of capital (art. 65(3))
  - aa) Art. 65(1) lit. a (provisions distinguishing between taxpayers)
  - bb) Art. 65(1) lit. b
    - 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) (Convergence with the freedom of establishment)
    - Art. 65(2) makes clear that encroachments of the freedom of establishment which are justified by the limits of this freedom will also be justified as encroachments on the free movement of capital.
- b) **Special limits on the acquisition of property in some member states**
  - in Denmark (see protocol on the acquisition of property) and, for a transitional period, in the new member states (see transitional agreements in the accession treaties)
- c) **Special limits for the movement of capital to and from non-member states**
  - aa) Art. 64 FEU Treaty (*general exceptions* for the movement of capital to and from non-member states)
  - bb) Art. 66 FEU Treaty (short-term *safeguard measures* to fight serious difficulties for the operation of the economic and monetary union)
  - cc) Art. 75 FEU Treaty (restrictions on capital movements for the purpose to *fight terrorism*)
  - dd) Art. 215 FEU Treaty (*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 these 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*
  - see ECJ case C-483/99, golden shares in France ("justified by ... *overriding requirements of the general interest*")
  - examples: protection of currency stability, of the functioning of the capital markets, consumer protection
- c) Compliance with the limits of limits

**Further reading:** *Wilmowsky*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 12; *Lenaerts/van Nuffel*, *European Union Law*, 3<sup>rd</sup> edition 2011, p. 285 ff. See as well the diagrams of *Frenz*, *Europarecht*, 2011, no. 334 and *Streinz*, *Europarecht*, 9<sup>th</sup> edition 2012, no. 936.

(Datei: Diagram 11 (EUIntML-HLU))

<sup>2</sup> See the extensive overviews of *Glaesner*, in: Schwarze (editor), *EU-Kommentar*, 2<sup>nd</sup> edition 2009, art. 56, no. 47 ff., and *Scadplus*, [http://europa.eu/legislation\\_summaries/internal\\_market/single\\_market\\_capital/index\\_en.htm](http://europa.eu/legislation_summaries/internal_market/single_market_capital/index_en.htm).