

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

Diagram 12

The free movement of payments

I. Sphere of protection ["Schutzbereich"]¹

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

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

2) Movement of payments

a) Transfer of means of payment

- by money transfer or handing-over of cash (in any currency), bills of exchange, cheques, letters of credit etc.
- only of valid legal tender (transfer of ancient coins or bank notes: → free movement of goods)

b) For the purpose of the fulfilment 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)

3) Protected activities

- All legal transactions which are necessary for the transfer of the means of payment
- All other transactions and measures which are necessary for the transfer of the means of payment

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 6 and transparency film 3.

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 was an important step in the creation of the "Single Euro Payments Area" (SEPA).²

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**
 - do not allow any arbitrary discrimination or disguised restriction on the free movement of payments (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 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) (convergence with the freedom of establishment)
- b) **Special limits for the movement of payments to and from non-member states**
 - aa) Art. 66 FEU Treaty (short-term restrictions for payments linked to movements of capital in order to fight serious difficulties for the operation of the economic and monetary union)
 - bb) Art. 75 FEU Treaty (restrictions on payments for the purpose to *fight terrorism*)
 - cc) 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 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 12 (EUIntML-HLU))

² **Directive 2007/64/EC** on payment services in the internal market. Other important acts of secondary law: Regulation (EC) No 924/2009 on cross-border payments in the Community; Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Community.