

concerning § 4 IV The concepts of sphere of protection, encroachment and limits of the fundamental freedoms

Diagram 6

Violation of a fundamental freedom

(general structure of examination)

I. Sphere/scope¹ of protection ["Schutzbereich"]

• = is the FF concerned?

1) *Geographic and temporal sphere of protection*

- a) Measure having affect within the geographic field of application of the FEU Treaty
- b) No temporary non-applicability of the FF due to special clauses in the treaty of accession
(→ concerns new member states)

2) *Personal sphere of protection*

- a) Holder (entitled subject) of the FF
 - aa) Citizen of a member state
 - bb) Legal person ("company or firm") having its registered office, central administration or principle place of business in a member state (cf. art. 54 FEU Treaty)
 - wide concept of "companies or firms" (including partnerships and legal persons of public law)
 - cc) In some cases: citizen or legal person from a non-member state
 - protection according to the conception of the FF (→ free movement of goods, of capital and payments) or to international treaties (→ Switzerland, Turkey)
- b) If necessary fulfillment of special personal requirements

3) *Material sphere of protection*²

- a) Situation of cross-border mobility (→ relevance of Union law)
- b) Protected activity of the holder of the FF
 - see *diagram 5*; every FF includes the right to the necessary traveling and residence in other member states
- c) No excluded sector
 - cf. art. 45(4), 51 sub.-sect. 1 FEU Treaty

II. Encroachment/interference ["Beeinträchtigung"]³

1) *Acting of an addressee (obliged subject) of the FF*

- can consist also in a failure to do something (→ duties of protection)
- a) Acting of a member state
 - also of sub-national public authorities and private-law institutions dominated by public authorities
 - b) Acting of a Union institution
 - c) Only in exceptional cases: Acting of a private person with a position of special economic power
 - general regulations of private associations (eg on professional sports) which hinder the exercise of the FF (→ ECJ, Walrave and Koch; ECJ, Bosman)
 - collective agreements and collective actions of trade unions (→ ECJ, Laval)
 - general regulations of employers which hinder the exercise of the FF (→ ECJ, Angonese)

¹ In English, both terms and also the terms "area of protection" and "protected area" are common.

² In English, some authors also use the terms "substantive sphere", "substantive scope" or "subject matter of protection".

³ In English, both terms are common. Note that they do not necessarily mean "violation" (= "infringement"). Only an encroachment/interference that is not justified by the freedom's limits is considered as a violation of the freedom.

- 2) *Acting to be qualified as discrimination or restriction*
 - a) Discrimination
 - aa) Open (direct) discrimination
 - formally different treatment of domestic and foreign goods/services/persons etc
 - bb) Hidden (indirect) discrimination
 - formally equal treatment, which however typically has a stronger effect on foreign goods/services/persons etc
 - b) Restriction
 - aa) Rule capable of hindering, directly or indirectly, actually or potentially, intra-union economic exchange
 - original, very broad concept of restriction of the ECJ (since ECJ, Dassonville)
 - not the aim of the measure is decisive but the (potential) effect
 - bb) Product-related rules, not rules on general conditions of sale
 - corrective reduction of the concept of restriction by the ECJ (since ECJ, Keck)
 - cc) Comprehensible relation between measure and restrictive effect (rule of remoteness)
 - no restriction, if the effects are too vague or too indirect

III. Illegality of the encroachment/interference (no justification by the fundamental freedom's limits ["Schranken"])

- 1) *Justification by explicit limits*
 - see art. 36, 45(3), 52(1) (also read together with art. 62), 64 et seq. FEU Treaty
 - a) Fulfillment of the preconditions of the limitation clause
 - most important grounds of justification: public policy (= public order), public security, public health
 - b) Compliance with the *limits of limits* ["Schranken-Schranken"]
 - aa) Proportionality of the encroachment
 - α) Legitimate aim
 - β) Suitability (measure must be conducive to its purpose)
 - γ) Necessity (there must be no less intrusive act of intervention that is equally conducive)
 - δ) Proportionality in its strict sense (burden not out of proportion to the aim in view)
 - bb) No violation of fundamental rights
 - cc) No violation of other primary or secondary law of the Union
- 2) *Justification by inherent limits* ["immanente Schranken"]
 - a) Applicability of the inherent limits (only to restrictions and hidden discriminations)
 - b) Fulfillment of the preconditions of the inherent limits: pursuit of *imperative (overriding⁴) reasons of public interest*
 - only non-economic interests; eg protection of the environment, public health, consumer protection, safeguard of the national cultural heritage, efficient control in tax affairs, integrity of trade, free exercise of fundamental rights
 - c) Compliance with the limits of limits (see above)

Note: This diagram only presents the *basic structure* which is common to all fundamental freedoms, due to their *convergence* in the jurisdiction of the ECJ. When applied to the concrete case, it has to be adapted to the special features of the respective freedom.

Further reading: See for the *general structure of examination* and its dogmatic backgrounds Ehlers, in: Ehlers (editor), *European Fundamental Rights and Freedoms*, 2007, § 7; Frenz, *Handbuch Europarecht*, volume 1, 2004, no. 42 ff., 346 ff.; Jarass, *A Unified Approach to the Fundamental Freedoms*, in: Andenas/Roth (editors), *Services and Free Movement in EU Law*, 2002, p. 141 ff.; Kingreen, *Fundamental Freedoms*, in: von Bogdandy/Bast (editors), *Principles of European Constitutional Law*, 2006, p. 549 ff. A more detailed diagram can be found at http://home.lu.lv/~tschmit1/Downloads/Schmitz_EC-IntML_diagram2.pdf.

(Date: Diagram 6 (EUIntML-HLU))

⁴ Misleading term often used in English translations (French: "exigences impératives", German: "zwingende Gründe").