

concerning § 5 The free movement of goods (art. 28 et seq., 110 et seq. FEU Treaty)

Diagram 7

The free movement of goods

I. Sphere of protection ["Schutzbereich"]¹

- note: the personal sphere of protection is always concerned, because the free movement of goods is a right of everybody (including every legal person) without regard to nationality or citizenship

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

- there must be a context with the import or export of economic goods from or to other member states

2) Goods (see art. 28, 29, 110 FEU Treaty)

- definition: movable physical (corporeal) products which generally can be valued in money and therefore are capable, as such, of forming the subject of commercial transactions (ECJ, case 7/68, objet d'art I)
 - electricity and gas are considered as goods though they are not corporeal products
- also storage media for sound, movies and datas (CDs, DVD, etc.) as memories of intellectual contents
- also waste (ECJ, case C-2/90, international waste trade)

3) Goods in circulation in the internal market (see art. 28(2) FEU Treaty)

- a) Goods originating in member states of the Union
- b) Goods in free circulation in a member state after having been legally imported (see art. 29 FEU Treaty)
 - also goods made in Vietnam after having been imported...

II. Encroachments ["Beeinträchtigungen"]

- only by measures of the member states or the union; private persons are not the addressees of the free movement of goods (no → direct third-party effect; for example, a French supermarket chain can refuse to sell German products...)
- can consist also in a failure to intervene against import blockades set up by private persons (→ duties of protection, ECJ, case C-265/95, *French blockades*)

1) Tariff barriers

- a) **Customs** (see art. 28, 30 FEU Treaty)
 - aa) Import customs
 - bb) Export customs
- b) **Charges having equivalent effect to customs** (see art. 28, 30 FEU Treaty)
 - Definition: any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier, and which is not a customs duty in the strict sense - even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product (ECJ, joined cases 2 and 3/69, *Diamandarbeiders*)

¹ For questions of terminology see diagram 6 and transparency film 3.

- c) **Discriminating internal taxation** (see art. 110 et seq. FEU Treaty)
 - aa) Higher internal taxation than on domestic products (art. 110 sub-sect. 1 FEU Treaty)
 - bb) Internal taxation protecting other products (art. 110 sub-sect. 2 FEU Treaty)
 - cc) Internal taxation with exceeding repayments after export of products (art. 111 FEU Treaty)

2) Non-tariff barriers

- a) **Quantitative restrictions on imports** (see art. 34 FEU Treaty)
 - restrictions on the quantity or the value of imported goods; also quantitative transit restrictions
 - nowadays such restrictions are rare
- b) **Measures having equivalent effect to quantitative restrictions on imports** (see art. 34 FEU Treaty)
 - the by far most frequent encroachments on the free movement of goods; therefore, there is an abundant jurisprudence of the ECJ on this concept
 - can consist also in non-regulative activities (eg the support of an advertising campaign for domestic products, ECJ, case 249/81, *Buy Irish*)
 - aa) Open discriminations
 - eg obligations to indicate the foreign origin or compulsory examinations only for imported goods
 - bb) Hidden (indirect) discriminations
 - cc) (Non-discriminative) Restrictions (by indistinctly applicable measures)
 - α) Very large concept of measures having equivalent effect according to the **Dassonville formula** of the ECJ (case 8/74): "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade"
 - not the aim of the measure is decisive but the effect (possibly only a potential effect!)
 - also regulations on necessary properties of products (ECJ, case 120/78, *Cassis de Dijon*; quasi introduction of the country of origin principle)
 - β) Corrective reduction of the concept of restriction by the **Keck formula** (ECJ, joined cases C-267, C-268/91): *product-related, not sales-related rules*
 - no regulations on the general conditions of sale which equally concern the distribution of domestic and foreign products
 - product-related rules: eg rules relating to the quality, the labelling or the packaging of certain goods, restrictions of the advertisement or of mail-orders for certain goods
 - sales-related rules: eg rules relating to shop closing times, general restrictions of advertisements, restrictions of the sale of certain goods at certain times of the day
 - the detailed delimitation is complicated and often controverse; the decisive factor is the actual *obstruction of the access to the market* (to the consumer market, see ECJ, case C-322/01, *DocMorris*)
- c) **Quantitative restrictions on exports** (see art. 35 FEU Treaty)
 - includes total prohibitions of the export of certain goods
- d) **Measures having equivalent effect to quantitative restrictions on exports** (see art. 35 FEU Treaty)
 - according to the ECJ generally no application of the Dassonville formula: only measures "which have as their specific object or effect the restriction of patterns of exports" and thereby the establishment of a *difference in treatment between the domestic trade of a member state and its export trade* in such a way as to provide a particular advantage for national production or for the domestic market (ECJ, case 15/79, *Groenveld*; A PART OF THE LITERATURE HAS A DIFFERENT OPINION); the ECJ has, however, applied the Dassonville formula in agriculture sectors with a common organisation of the market by EC secondary law (ECJ, case 94/79, *Vriend*)

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

1) In case of tariff barriers: no justification by any limits

- tariff barriers are absolutely forbidden

2) In case of non-tariff barriers

- a) **Justification by the limit in art. 36 FEU Treaty**
 - aa) Applicability of art. 36 FEU Treaty: in case of *all* non-tariff trade barriers

- bb) Fulfilment of the preconditions formulated in art. 36 FEU Treaty
- α) Measure for the protection of one of the legal interests listed in art. 36 phrase 1 FEU Treaty
 - art. 36 phrase 1 must be interpreted restrictively: only measures pursuing *non-economic interests*
 - the list of the recognized legal interests is exhaustive; not included: consumer protection, protection of the environment
 - (1) public morality, public policy (= public order) and public security
 - details of the concepts still unclarified; not the same interpretation as in national police law
 - (a) Generic term: public order ["ordre public"]
 - basic rules concerning substantial interests of the state
 - (b) Sectoral term: public security
 - rules determined by the state for the safeguard of its existence, its institutions and its monopoly to exercise force (against internal and external threats)
 - (c) Sectoral term: public morality
 - moral principles governing the social life of man in the concerned member state at the concerned time
 - (2) Health and life of humans, animals and plants
 - of great significance in practice
 - (3) National treasures possessing artistic, historic or archaeological value
 - (4) Industrial and commercial property
 - copy rights, patent rights, trade marks etc
 - β) Absence of regulations in Union law protecting this legal interest
 - otherwise justification of the encroachment according to these regulations only
 - γ) No arbitrary discrimination or disguised restriction on trade between member states (art. 36 phrase 2 FEU Treaty)
 - in a case study, this aspect can be discussed as well as an aspect of the limits of limits
- cc) Compliance with the *limits of limits* ["Schranken-Schranken"]
- α) Proportionality of the encroachment
 - note: often it is here where you find the main problem of the case
 - (1) Legitimate aim
 - (2) Suitability
 - (3) Necessity
 - (4) Proportionality (in its strict sense)
 - β) No violation of fundamental rights
 - γ) No violation of other primary or secondary law of the Union
- b) **Justification by the inherent limits of the free movement of goods** ["immanente Schranken"]
- aa) Applicability of the inherent limits: in cases of hidden discriminations and (non-discriminative) restrictions
 - not in cases of open discrimination
 - bb) Fulfilment of the preconditions of the inherent limits: pursuit of *imperative reasons of public interest*
 - see ECJ, case 120/78, *Cassis de Dijon* ("mandatory requirements"/"zwingende Erfordernisse"/"exigences impératives")
 - only measures pursuing non-economic public interests
 - examples: measures for the protection of the environment, for the protection of public health, for consumer protection, for the protection of the fundamental rights of other persons (ECJ, case C-112/00, Schmidberger), for the safeguard of cultural diversity, for the safeguard of the plurality of medias, for the protection of the integrity of trade, to secure efficient control in tax affairs
 - cc) Compliance with the limits of limits (see above)
 - in particular necessity of the measure for a reasonable pursuit of the imperative reasons of public interest

Further reading: *Epiney*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 8; *Fairhurst*, *Law of the European Union*, 9th edition 2012, p. 557 ff.; *Lenaerts/van Nuffel*, *European Union Law*, 3rd edition 2011, p. 204 ff.; *Craig/de Burca*, 5th edition 2011, p. 611 ff. See as well the diagrams of *Frenz*, *Europarecht*, 2011, no. 267 and *Streinz*, *Europarecht*, 9th edition 2012, no. 894.