

concerning § 6. The freedom of movement for workers (art. 45 et seq. FEU Treaty)

Diagram 8

The freedom of movement for workers

I. Sphere of protection ["Schutzbereich"]¹

1) Temporal sphere of protection

- According to the transitional agreements in the accession treaty the access of workers from the new member state Croatia to the labour market in the other member states can be limited for a period of at most 7 years.

2) Personal sphere of protection

a) Citizens of the member states

- *family members* of workers (also from non-member states) are not protected by the freedom but by secondary law (see Regulation 492/2011², Regulation 883/2004³ and Directive 2004/38/EC⁴)
- citizens from some non-member states enjoy the right to free movement under special international treaties

b) Legal persons ("companies or firms") as **employers** in the member states

3) Material sphere of protection

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

- occupation or returning after occupation or achieving qualification in another member state

b) **Status of a worker (= employed person)** (see art. 45(1) FEU Treaty)

aa) Performing of services of economic value

bb) Employment (work bound by instructions)

- here: delimitation from the freedom of establishment and the freedom to provide services

cc) Payment as counterperformance (service in return)

- does not need to be enough to make one's living

c) **Protected activities** (see particularly art. 45(3) FEU Treaty)

- see for details concretisations in Directive 2004/38/EC, regulation 492/2011

aa) Access to employment

- application, free movement for the purpose of seeking employment

bb) Exercise of an occupation

- also free movement and residence for this purpose

cc) Free movement and residence after having been employed

dd) Annex: protected activities of family members

d) **No employment in the public service** (art. 45(4) FEU Treaty)

- narrow concept of public service in Union law: only posts involving participation in the *exercise of public powers* and requiring a *special relationship of allegiance to the state* (ECJ, case 66/85, Lawrie-Blum)
 - no services of general interest or cultural, educational or research institutions

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

² Regulation (EU) No 492/2011 on freedom of movement for workers within the Union.

³ Regulation (EC) No 883/2004 on the coordination of social security systems.

⁴ **Directive 2004/38/EC** on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

II. Encroachments ["Beeinträchtigungen"]

1) Acting of an addressee of the freedom of movement for workers

- a) Acting of a **member state**
- b) Acting of a **Community/Union institution**
- c) Acting of a **private person bound** by the freedom of movement for workers
 - aa) General regulations of private associations in fields of professional activities
 - ECJ, case 36/74, *Walrave and Koch*
 - also rules on the transfer of players and limitations of the number of players from other member states in professional sports (ECJ, case C-415/93, *Bosman*)
 - bb) Collective agreements
 - see ECJ, case 36/74, *Walrave and Koch*; case C-341/05, *Laval*
 - cc) General regulations of employers if they are discriminating
 - see ECJ, case C-281/98, *Angonese*; SCEPTICISM IN LITERATURE

2) Acting to be qualified as discrimination or restriction

- a) **Discriminations**
 - aa) Open discriminations (see art. 45(2) FEU Treaty)
 - bb) Hidden (indirect) discriminations
 - often by rules requiring professional qualifications, language skills or domestic residence
- b) **(Non-discriminative) Restrictions** (by indistinctly applicable measures)
 - aa) Large concept of restriction according to the ***Bosman formula*** of the ECJ (case C-415/93):

"Provisions which preclude or deter a national of a member state from leaving his country of origin in order to exercise his right to freedom of movement ... constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned"
 - bb) Corrective reduction of the concept by the ***Graf formula*** of the ECJ (case C-190/98):
 - the effect must not be *too uncertain or indirect*

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

1) Justification by the limit in art. 45(3) FEU Treaty

- a) Applicability of the limit in art. 45(3) FEU Treaty
 - aa) In case of encroachments on the rights under art. 45(3) FEU Treaty
 - bb) In case of encroachments on other protected positions (e.g. discriminations)? (→ DISPUTED)
- b) Fulfilment of the preconditions formulated in art. 45(3) FEU Treaty
 - aa) Measure taken on grounds of public policy, public security or public health
 - only on *non-economic grounds*; see detailed rules in art. 27 et seq. of Directive 2004/38/EC
 - on grounds of "public policy" only in case of a real and serious threat for a fundamental interest of society; measure must be based only on the *personal conduct of the individual concerned*
 - bb) Missing of regulations for the protection of these legal interests in Union law
- c) Compliance with the limits of limits ["Schranken-Schranken"]
 - aa) Proportionality of the encroachment
 - α) Legitimate aim
 - β) Suitability
 - γ) Necessity
 - δ) Proportionality (in its strict sense)
 - note the more specific rules in art. 28 and 29 of Directive 2004/38/EC
 - bb) No violation of fundamental rights
 - cc) No violation of other primary or secondary law of the Union

2) Justification by the inherent limits of the freedom of movement for workers ["immanente Schranken"]

- a) Applicability of the inherent 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-415/93, Bosman ("pressing reasons of public interest")
 - only of non-economic public interests; examples: functioning of systems of social security benefits; protection of sporting competition, prevention of the misuse of foreign academic degrees; consumer protection
- c) Compliance with the limits of limits (see above)
 - in particular no violation of harmonizing secondary law on the mutual recognition of diplomas

Further reading: *Becker*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 9; *Craig/de Búrca*, *EU Law*, 5th edition 2011, p. 715 ff.; *Fairhurst*, *Law of the European Union*, 9th edition 2012, p. 357 ff.; *Lenaerts/van Nuffel*, *European Union law*, 3rd edition 2011, p. 228 ff. See as well the diagrams of *Frenz*, *Europarecht*, 2011, no. 282 and *Streinz*, *Europarecht*, 9th edition 2012, no. 922.

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