

§ 7. The freedom of establishment (art. 49 et seq. FEU Treaty)

Diagram 9 The freedom of establishment

I. Sphere of protection ["Schutzbereich"]¹

1) Personal sphere of protection

a) Citizens of the member states

- for the setting-up of agencies, branches or subsidiaries they must be established (have their place of business) in any member state (art. 49 sub-sect. 1 phrase 2 FEU Treaty)
- *family members* of established persons (also from non-member states) are not protected by the freedom but enjoy rights "derived" from the legal status of the established person or granted by secondary law (see Directive 2004/38/EC² and Regulation 883/2004³)
- citizens and companies from some non-member states enjoy a freedom of establishment according to special international treaties

b) Legal persons ("companies or firms") in the member states (art. 54 sub-sect. 1 FEU Treaty)

- large, *specific concept of "companies or firms" in Union law*
- the nationality of the shareholders/members/owners is irrelevant
- aa) Organisation constituted under the law of a member state which is capable to act in legal relations in its own name
 - also partnerships, public law persons and subsidiaries of enterprises in non-member states
- bb) No non-profit organisation (art. 54 sub-sect. 2 FEU Treaty)
 - restrictive interpretation: not money-making at all (organisation does not need to want to make profit)
- cc) Registered office, central administration or principle place of business in a member state

2) 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 or setting-up of branches, agencies etc. in another member state

b) Gainful occupation as self-employed person (see art. 49 sub-sect. 2 FEU Treaty)

- aa) Gainful occupation
 - it is irrelevant if it is "immoral" or "anti-social" (ECJ, case C-268/99, Jany: even prostitution)
- bb) Independent work unbound by instructions
 - here: delimitation from the freedom of movement for workers

c) Establishment (see art. 43 sub-sect. 1 FEU Treaty)

- large, *specific concept of "establishment" in Union law*
- aa) Fixed establishment (settlement)
 - not sufficient: purely formal acts (eg the registration of ships)
- bb) Permanence
 - here: delimitation from the freedom to provide services (can be difficult)

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

² 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.

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

- d) **Protected activities** (see particularly art. 49 sub-sect. 2 FEU Treaty)
- aa) Taking up activities
 - α) Setting up of a main establishment
 - also cross-border transfer or re-establishment of the main establishment
 - also cross-border merger of companies (cf. Directive 2005/56/EC⁴)
 - however, companies may also choose to transfer the actual centre of administration without transferring their seat and must still be recognized as foreign companies (ECJ, case C-208/00, *Überseering*)
 - β) Setting up of an agency, branch or subsidiary (only by persons or companies established in the Union)
 - also if a company has been established in another member state only for the purpose to evade the application of national law and does not conduct any business in that other state but now intends to carry out its entire business in the state of the branch (ECJ, case C-212/97, *Centros*; DISPUTED)
 - γ) Taking up of the gainful occupation
 - see concretisation in *secondary law facilitating cross-border access to occupation* (eg Directives 2005/36/EC⁵, 98/5/EC⁶)
 - δ) Movement and residence in the state of the establishment
 - see concretisation in Directive 2004/38/EC
 - bb) Practice of the gainful occupation in the foreign establishment
 - cc) In particular: setting up and managing of undertakings
 - dd) Free movement and residence after having practiced the occupation
 - see concretisation in art. 7(3) Directive 2004/38/EC
 - ee) Annex: protected activities of family members (Directive 2004/38/EC)
- e) **No sector excluded according to art. 51 FEU Treaty**
- aa) No *exercise of public power*
 - narrow, specific concept of the "exercise of official authority" in Union law: only activities in direct and specific connexion with exercise of public power
 - bb) No sector excluded according to secondary law (→ until now: (-))

II. Encroachments ["Beeinträchtigungen"]

1) Discriminations

- a) Open discriminations
 - = violations of the principle of *equal treatment of own and foreign citizens* in art. 49(2) FEU Treaty
- b) Hidden (indirect) discriminations
 - eg measures hindering the acquisition of real estate by foreign companies

2) Non-discriminative restrictions (by indistinctly applicable measures)?

- a) The problem
 - In the field of the freedom of establishment, a general prohibition of restrictions could amount to an obligation of the member states to generally liberalize the law of settlement, and thereby endanger the traditional concepts of the professional rules and regulations in the member states.
- b) The discussion
 - aa) FIRST OPINION: Art. 49 prohibits discriminations only
 - argument: art. 49 does not aim at a total liberalization of economic life
 - bb) MAJORITY OPINION: Art. 49 also includes a general prohibition of restrictions
 - argument: new wording of art. 49 sub-sect. 1; convergence of the FF
 - cc) The JURISPRUDENCE OF THE ECJ is developing towards an interpretation as a general prohibition of restrictions (see ECJ, case C-55/94, *Gebhard*)

⁴ Directive 2005/56/EC on cross-border mergers of limited liability companies.

⁵ Directive 2005/36/EC on the recognition of professional qualifications.

⁶ Directive 98/5/EC to facilitate practice of the profession of *lawyer* on a permanent basis in a Member State other than that in which the qualification was obtained.

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

1) Justification by the limit in art. 52(1) FEU Treaty

- a) Applicability of the limit in art. 52(1): in cases of open discriminations only
 - "special treatment for foreign nationals" only
- b) Fulfilment of the preconditions formulated in art. 52(1)
 - aa) Measure taken on grounds of public policy, public security or public health
 - only on *non-economic grounds*; see more specific rules in art. 27 et seq. of Directive 2004/38/EC
 - on grounds of "public policy" (= public order) only in case of a *personal conduct of the individual* representing a genuine and sufficiently serious threat affecting a fundamental interest of society
 - bb) Missing 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 establishment ["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-19/92, Kraus ("justified by pressing reasons of public interest")
 - only of non-economic public interests; examples: prevention of misuse of foreign academic degrees, protection of professional reliability and faithfulness, of a high standard of professional education, of a functioning system of legal protection, consumer protection
- c) Compliance with the limits of limits (see above)
 - in particular no violation of harmonizing secondary law concerning the regulation of professional activities and the mutual recognition of diplomas

Further reading: *Tietje*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 10; *Craig/de Búrca*, *EU Law*, 5th edition 2011, p. 770 ff.; *Lenaerts/van Nuffel*, *European Union Law*, 3rd edition 2011, p. 228 ff.; See as well the diagrams of *Frenz*, *Europarecht*, 2011, no. 304 and *Streinz*, *Europarecht*, 9th edition 2012, no. 922.

(Date: Diagram 9 (EUIntML-HLU))