

concerning § 8 The freedom to provide services (art. 56 et seq. FEU Treaty)

Diagram 10

The freedom to provide services

I. Sphere of protection ["Schutzbereich"]¹

- See now the concretisation of some aspects in the *Directive 2006/123/EC (Services Directive)*²

1) Temporal sphere of protection

- According to transitional agreements in the accession treaty, in some branches of business the access of Croatian service providers to the service market in the other member states can be limited for a period of at most 7 years.

2) Personal sphere of protection

- Citizens of the member states who are established in the Union**
 - as service *providers* or service *recipients* (both must be established in the Union)
 - *family members* (also from non-member states) are not protected by the freedom but enjoy rights "derived" from the legal status of the service provider according to *Directive 2004/38/EC*³.
 - The freedom of the service provider can be violated if his/her wife/husband is expelled from the state and this hinders the exercise of the freedom, because art. 56 FEU Treaty has to be interpreted in the light of the fundamental right to respect for family life (ECJ, case C-60/00, *Carpenter*; DISPUTED IN LITERATURE).
- Legal persons ("companies or firms")** in the member states (art. 62 read together with art. 54 sub-sect. 1 FEU Treaty)
- Citizens of non-member states who are established within the Union** (protection according to a Council decision based on art. 56 sub-sect. 2 FEU Treaty) → until now: (-)
 - *citizens and companies from some non-member states* enjoy a freedom to provide services according to special international treaties

3) Material sphere of protection

- Service** within the meaning of art. 57 FEU Treaty
 - *specific concept of "service" in Union law*; in particular (but not exclusively) activities of an industrial or commercial character, activities of craftsmen and activities of the freelance professions (art. 57 sub-sect. 2)
 - aa) Service normally provided for remuneration
 - it is irrelevant if the occupation is "immoral" or "anti-social" (even prostitution)
 - bb) Providing of the service as a self-employed person
 - here: delimitation from the freedom of movement for workers
 - cc) Temporary activity (see art. 57 sub-sect. 3 FEU Treaty)
 - here: delimitation from the freedom of establishment
 - dd) No protection of this activity by the other fundamental freedoms (art. 57 sub-sect. 1 FEU Treaty)
- Situation of cross-border mobility** (→ relevance of Union law)
 - The moving provider**
 - the service is provided in another member state

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

² **Directive 2006/123/EC** on services in the internal market.

³ **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.

- bb) **The moving recipient**
 - the service is received in another member state
- cc) **The moving service**
 - only the service crosses the border (e.g. consulting over the phone)
- dd) **The moving provider and recipient**
 - the service is provided and received while crossing the border together (eg touristic services)
- c) **Protected activities** (see particular art. 57 sub-sect. 3 FEU Treaty and art. 16(1) Services Directive)
 - aa) Initiation and conclusion of the service contract
 - bb) Provision and reception of the service
 - also *temporary stay* for this purpose (also of family members)
 - cc) In particular *employment of staff brought along from the home state* for providing the service
 - see concretisation in *Directive 1996/71/EC (Posting Directive)*⁴ (allows to evade parts of labour law)
- d) **No excluded sector**
 - especially no *exercise of public power ("official authority")* (art. 62 read together with art 51 sub-sect. 1 FEU Treaty)

II. Encroachments ["Beeinträchtigungen"]

1) Acting of an addressee of the freedom to provide services

- a) Acting of a **member state**
- b) Acting of a **Community/Union institution**
- c) Acting of a **private person bound** by the freedom to provide services
 - aa) General regulations of private associations in fields of services
 - ECJ, case 36/74, *Walrave und Koch*
 - bb) Collective agreements and collective actions of the trade unions
 - ECJ, case C-341/05, *Laval* (DISPUTED IN LITERATURE for the collective actions)

2) Acting to be qualified as discrimination or restriction

- some examples are listed in art. 16(1,2) of the Services Directive
- a) **Discriminations**
 - aa) Open discriminations
 - bb) Hidden (indirect) discriminations
 - eg rules which require domestic residence
- b) **(Non-discriminative) Restrictions** (by indistinctly applicable measures)
 - aa) Large concept of restriction according to the ***Van Binsbergen formula*** of the ECJ (case 33/74):
"all requirements ... which may prevent or otherwise obstruct the activities of the person providing the service"
 - eg requirements of permissions which demand special professional qualifications
 - bb) 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)

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

1) Justification by the limit in art. 62 read together with art. 52(1) FEU Treaty

- a) Applicability of this limit: in cases of open discriminations only
 - rules providing for "*special treatment for foreign nationals*" only
- b) Fulfilment of the preconditions formulated in art. 62 read together with 52 (1) FEU Treaty
 - see the concretisations in art. 27 et seq. of Directive 2004/38/EC

⁴ Directive 1996/71/EC concerning the posting of workers in the framework of the provision of services.

- 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)
 - bb) No violation of fundamental rights
 - cc) No violation of the Services Directive or other primary or secondary law of the Union

2) Justification by the inherent limits of the freedom to provide services ["immanente Schranken"]

- a) Applicability of these 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-58/98, Corsten ("justified by *overriding requirements relating to the public interest*")
 - see now the concretisation in art. 4 no. 8 of the Services Directive
 - only of non-economic public interests; examples: protection of professional reliability and faithfulness, of a high standard of professional education, of a functioning system of legal protection, of the financial equilibrium of the social security system, of the national cultural heritage, consumer protection, protection of the environment
- c) Compliance with the limits of limits (see above)
 - permissions granted to the service provider in his home state must in principle be recognized as far as the requirements for them are equivalent to those required in the state where the service is provided
 - in particular no violation of harmonizing secondary law concerning the regulation of professional activities and the mutual recognition of diplomas and other evidence of qualifications

Further reading: *Pache*, in: Ehlers (ed.), *European Fundamental Rights and Freedoms*, 2007, § 11; *Craig/de Búrca*, *EU Law*, 5th edition 2011, p. 788 ff.; *Fairhurst*, *Law of the European Union*, 9th edition 2012, p. 412 ff.; *Lenaerts/van Nuffel*, *European Union Law*, 3rd edition 2011, p. 270 ff. See as well the diagrams of *Frenz*, *Europarecht*, 2011, no. 322 and *Streinz*, *Europarecht*, 9th edition 2012, no. 922.

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