

Part II: The Economic Fundamental Freedoms

§ 4 General theory

I. The legal nature and the special features of the fundamental freedoms

1) The direct applicability and the character as subjective rights of the fundamental freedoms

- ECJ, case 26/62, van Gend & Loos

2) The primacy of the fundamental freedoms

- over national law and secondary Union law

3) The convergence of the fundamental freedoms

- due to the jurisprudence of the ECJ and the influence of legal scholars

II. The functions of the fundamental freedoms

- attention: protection of *cross-border mobility* only!

1) The fundamental freedoms as prohibitions of discrimination (equality rights)

- the problem of discriminations against one's own citizens [reverse discrimination]

2) The fundamental freedoms as prohibitions of restrictions (liberty rights)

- ECJ, case 8/74, Dassonville; case Rs. C-415/93, Bosman; case C-55/94, Gebhard

3) The fundamental freedoms as rights to provisions, in particular as basis of (state) duties of protection ["Schutzpflichten"]

- ECJ, case C-265/95, French blockades

4) The fundamental freedoms as objective elements of the Union's legal order

- secondary law and national law must be interpreted in the light of the fundamental freedoms

III. The holders (entitled subjects) and the addressees (obliged subjects) of the fundamental freedoms

1) The holders

- a) Citizens of the member states
- b) Legal persons in the member states (cf. art. 54, 62 FEU Treaty)
- c) In some cases citizens and legal persons from non-member states

2) The addressees

- a) The member states
- b) The institutions of the Union
- c) In some cases private organisations with regulative power or private enterprises

- ECJ, case 36/74, Walrave and Koch; case C-415/93, Bosman; case C-341/05, Laval

IV. The concepts of sphere of protection ["Schutzbereich"], encroachment/interference ["Eingriff"/"Beeinträchtigung"] and limits ["Schranken"] of the fundamental freedoms

1) General aspects

- common *three step examination* as known from the theory of fundamental rights
- terminology still heterogeneous and unsettled in the English language
- see *diagram 6*

2) The sphere of protection [= "scope of protection"]

3) Encroachments [= "interferences"]

4) The justification of encroachments by the fundamental freedom's limits and the limits of limits ["Schranken-Schranken"]

V. The concurrence of fundamental freedoms

VI. The complementation of the fundamental freedoms by the prohibition of discrimination (art. 18 FEU Treaty)

- no discrimination on grounds of nationality
- addresses also to private organisations with regulative power
- the problem of the application of national fundamental rights reserved to national citizens in favour of Union citizens from other member states