

BALTISCH-DEUTSCHES HOCHSCHULKONTOR
Prof. Dr. Thomas Schmitz

Spring Semester 2010

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Case 10¹
(facts of the case)

Globalisation has advanced dramatically and English has become the dominating language in the world. Business in the European Union is suffering from that because the English skills of most Europeans, in particular of the highly qualified academic professionals, are insufficient to meet the rising standards of the global clients. Therefore, the European Union wants to strengthen the performance and competitiveness of the enterprises and institutions in the member states by radically improving the language skills of its citizens. There are plans to oblige all universities to provide higher education mainly in English language, but the Union is missing the necessary competences. Finally, the Council, acting on a proposal from the Commission and after consulting the European Parliament, adopts a directive for the mutual recognition of diplomas, certificates and other evidence of formal qualification, based on art. 53(1) FEU Treaty², the so-called "Higher Education Mutual Recognition Directive" (HEMRD). It obliges and allows the member states to recognise higher educational degrees obtained in other member states only if more than two thirds of all courses and exams in the study program have been done in English. For certain studies, which are closely linked to a special language, like philology, linguistic studies, history, certain cultural studies and studies of national law, the directive provides for exceptions.

The rector of a university in member state A-land is convinced that this directive is illegal under many aspects. He considers it as an assault on the national identities of the member states, which are protected by a fundamental clause in the Treaties. He doubts that it falls under art. 53(1) FEU Treaty, questions the way it has been made and assumes a violation of the economic fundamental freedoms of the citizens. The rector is happy that the law students at his university are well-educated in European Union law and asks them:

1. Is the directive legal under European Union law?
2. Who can achieve in which way that the legality of the directive is reviewed by the courts?

What will be the (correct) answer of the law students?

The papers will be given back and discussed on *Tuesday, April 20, 15:00*. Every participant has the option to talk individually about the good and not so good aspects of his paper! Those who fail may repeat the test on Monday, April 26, 15:00 - 17:00.

¹ Case for test 2 (final examination), written on April 19, 2010.

² Formerly (until the Treaty of Lisbon came into force) art. 47(1) EC Treaty.

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(discussion of the case)

SUBJECTS: Legality of legal acts of the European Union; competences of the European Union; procedural requirements of Union legislation; economic fundamental freedoms; principle of respect for the national identities of the member states.

OUTLINE OF THE CASE SOLUTION:

A. Answer to question 1

The (correct) answer to question 1 will be that the directive is legal if there is (I.) no lack of competence, (II.) no infringement of essential formal or procedural requirements, (III.) no infringement of substantive law (of the Treaties or of any rule of law relating to their application) and (IV.) no misuse of powers (see the listing of the requirements of legality that apply to the legal acts of the European Union as grounds of review in art. 263 sub-sect. 2 FEU Treaty³).⁴

I. Competence

The "Higher Education Mutual Recognition Directive" might be illegal for lack of competence. It has been based on art. 53(1) FEU Treaty, which entitles the Council to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications (the competence under art. 53(1) to coordinate national provisions concerning the taking-up and pursuit of activities as self-employed persons is not relevant in the given case). Other legal bases are not relevant for this legal act. The directive does indeed concern the mutual recognition of diplomas, certificates etc. So there are no objections with regard to its subject. However, measures based on art. 53(1) FEU Treaty must also pursue the specific purpose to make it easier for persons with an educational degree to take up and pursue professional activities in other member states. Art. 53(1) does not create a general competence of the Union to regulate mutual recognition for any purpose. The directive under consideration, however, does not make it easier but hinders the citizens from taking up and pursuing professional activities in other member states, if their studies have not been mainly in English. This disadvantage is accepted in order to achieve another goal, the improvement of their language skills. A measure focussing on this goal to the detriment of the objective defined in art. 53(1) cannot be based on this article. Thus, there is a lack of competence.

II. No infringement of essential formal or procedural requirements

The directive is also illegal for infringement of essential procedural requirements because it has not been adopted in accordance with the ordinary legislative procedure under art. 294⁵, as it is required in art. 53(1) FEU Treaty. Certainly, the right institutions were involved, given that the Council decided on a proposal from the Commission and after consulting the European Parliament. But the complexity of the procedure and the influence of the Parliament are not the same and only the Council

³ Formerly art. 230 sub-sect. 2 EC Treaty. The grounds of review listed here for the action for annulment represent the elements of legality and their specific collocation in Union law.

⁴ See for the details diagram 1 from this course.

⁵ See for the past the co-decision procedure under art. 251 EC Treaty.

and not the Parliament has become the author of the directive. The procedure according to art. 294 cannot be replaced by a simple consultation of the Parliament without making the act illegal.

III. No infringement of substantive law

The directive might also be illegal for infringement of substantive law (of the Treaties or of any rule of law relating to their application), since it forces the member states to complicate the access of citizens with foreign qualification to professional activities where special qualification is required and to disregard their national language - if it is not English - in most areas of higher education. Hereby it might violate the economic fundamental freedoms of the citizens (1) and the principle of respect for the national identities of the member states (2).

1) Violation of economic fundamental freedoms

The directive might violate the economic fundamental freedoms of the citizens of the Union because it obliges the member states not to recognize higher educational degrees obtained in other member states if not more than two thirds of all courses and exams have been done in English, thus creating a *serious obstacle to the labour market, the services market and establishment*. The spheres of protection of three fundamental freedoms, the freedom of movement for workers (art. 45 et seq. FEU Treaty⁶), the freedom of establishment (art. 49 et seq. FEU Treaty⁷) and the freedom to provide services (art. 56 et seq. FEU Treaty⁸) are concerned. The obstacle caused by the directive represents at least a restriction of these freedoms and a hidden discrimination of the citizens of those member states where English is not the native tongue. The encroachment cannot be justified by the freedoms' limits because it does not comply with the principle of proportionality: The obligation to refuse categorically the recognition of degrees obtained in non-English study programs is obviously not necessary and not proportional (in the strict sense) to improve the English language skills of the citizens of the Union (which, in itself, is a legitimate aim). There are less intrusive alternatives (for example, the introduction and promotion of special superior degrees that certify advanced language skills); the burden imposed is out of proportion to the aim in view. Hence, the fundamental freedoms are violated.

2) Violation of the principle of respect for the national identities of the member states (art. 4(2) EU Treaty⁹) and of the right to respect of linguistic diversity (art. 6(3) EU Treaty read together with art. 22 ChFR)

The directive might also violate the principle that the Union shall respect the "national identities" of its member states" (art. 4(2) EU Treaty)¹⁰ because it puts the member states under enormous pressure to disregard their national language - if it is not English - in most areas of higher education. The universities in the member states are not legally obliged to organize their study programs in English language, but if they do not, the degrees will not be recognized in the other states. In the integrated Europe of the 21st century this means that in practice, they will be almost useless.

The respect for the national identity of every member state is an aspect of the mutual loyalty within the union [Unionstreue], which is guaranteed by a general (unwritten) principle of Union law and now partly anchored in art. 4(3) EU Treaty (principle of sincere cooperation).¹¹ The national identity appears in particular in the fundamental political and constitutional structures of the member state (see the wording of art. 4(2) EU Treaty), but also in the important elements of

⁶ Formerly art. 39 et seq. EC Treaty.

⁷ Formerly art. 43 et seq. EC Treaty.

⁸ Formerly art. 49 et seq. EC Treaty.

⁹ Formerly art. 6(3) EU Treaty.

¹⁰ With regard to the limits of its jurisdiction under the former art. 46 EU Treaty, the European Court of Justice has not yet developed this principle in its jurisprudence. However, the obligation to respect the national identities was sometimes emphasized in the opinions of the Advocate-Generals; see, for example, *Poiates Maduro*, opinion on the case C-160/03, *Spain v. Eurojust*, and *Kokott*, opinion on the joint cases C-428/06 to C-434/06. Some elements have also been emphasized by the Court in its jurisprudence on art. 10 EC Treaty (now 4(3) EU Treaty), see the references at *Bieber/Epiney/Haag*, *Die Europäische Union*, 5th edition 2005, § 2 no. 60.

¹¹ See on the principle of mutual loyalty within the Union *case 2* from this course (in Autumn Semester 2008), p. 3 ff., 7 f. with further references. The principle of sincere cooperation, as laid down in art. 4(3) EU Treaty, is an important part of it. Before, its elements under art. 4(3) sub-section 2 and 3 EU Treaty were anchored in art. 10 EC Treaty.

the *national culture*. The *national language* is a *basic element* of the national culture and hence an important element of the national identity.¹² This applies in particular to those member states with a unique national language that is not common in other states inside or outside the Union.

Art. 4(2) EU Treaty obliges all institutions of the Union to *be considerate* for the national identities of the member states during all their activities, including the issuing of directives on the mutual recognition of diplomas and certificates etc. That does not mean that encroachments on the national identity are absolutely excluded. But they must be limited to that what is necessary and there must be a *thorough and regardful balancing* of the involved interests. The "Higher Education Mutual Recognition Directive" does not comply with these standards, since it initiates a development, in which the national languages will be largely suppressed in most fields of higher education and, consequently, science. It has a strong impact on national identity in order to achieve an improvement of competitiveness that can be achieved by other means. Thus, the principle of respect for the national identities of the member states is violated.

For the same reasons the right to respect of *linguistic diversity* (art. 6(3) EU Treaty read together with art. 22 ChFR) is violated. Since the reform of Lisbon, linguistic diversity in the Union is recognized as a fundamental right. It is also protected in art. 3(3) sub-sect. 4 EU Treaty.

IV. *No misuse of powers*

The directive might also be illegal for misuse of powers, since the Council has based a measure that impedes the free movement of persons on a legal basis that aims to facilitate it. However, this aspect has already been taken into account when denying the competence of the Union to adopt this act (see above, A.I.). A closer look reveals that the Council has not misused an - existing - power but rather acted without the necessary power, given that the legal power granted by art. 53(1) FEU Treaty is a priori limited to measures pursuing the objective explicitly specified in this article. Furthermore, the concept of misuse of power is interpreted narrowly. There is only a misuse of power if the legal act mainly pursues an objective other than specified (or even illegal) or aims to evade a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.¹³ Hence, in the case under consideration, there was no misuse of powers.

Conclusion: The directive suffers from lack of competence, infringement of essential procedural requirements and infringement of substantive law. The (correct) answer of the law students to the rector will be that it is illegal.

B. Answer to question 2

The (correct) answer to question 2 will be that a review of the legality of the directive by the courts can be achieved in several ways. In all cases, it will be a review by the European Court of Justice. Any review by national courts, including constitutional courts, is excluded.

I. Member state A-land or any other member state or the *Union institutions* listed in art. 263 sub-sect. 2 FEU Treaty may bring an action for annulment under art. 263 FEU Treaty¹⁴ before the European Court of Justice. Natural or legal persons however, such as the citizens or companies or public institutions in the member states, may only institute proceedings against decisions (and only if they are addressed to them or concerning them directly and individually, cf. art. 263 sub-sect. 4). For this reason, the *university in A-land cannot* achieve a judicial review of the directive.

II. Citizens of the Union, who have obtained a higher educational degree in a member state that is not recognized in another member state due to the directive, may take legal remedies before the national courts, alleging a violation of their fundamental freedoms. The national courts may refer the question of the validity of the directive to the European Court of Justice under art. 267 sub-sect. 1 lit. b FEU Treaty¹⁵ if the answer is decisive for the outcome of the proceedings before the referring courts. Since any illegal

¹² See Advocate-General *Poiares Maduro*, opinion on the case C-160/03, *Spain v. Eurojust*, no. 24: "Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU [now 4(2) EU] and Article 149 EC [now 165 FEU]".

¹³ Cf. (with further references) *Cremer*, in: Calliess/Ruffert (editors), *EUV/EGV*, 2nd edition 2002, art. 230 EC Treaty, no. 77; *Craig/de Búrca*, *EU Law*, 4th edition 2007, p. 568.

¹⁴ Formerly art. 230 EC Treaty.

¹⁵ Formerly art. 234 sub-sect. 1 lit. b EC Treaty.

act of the Union is invalid, there will be a review of the legality of the directive in the preliminary ruling proceedings.

III. If in a member state the national language is particularly protected in the national constitution and if this protection of the language is part of the constitutional identity (the core of the constitution), which cannot be given up (even not for the participation in the European integration and even not by the way of constitutional amendment), the national constitutional court may, by the way of *constitutional review*, *annul the national provisions*, which implement the directive, notwithstanding the primacy of European Union law that finds, according to the jurisprudence of the constitutional courts of several member states,¹⁶ its limits in the protection of the constitutional identity. The constitutional review is limited to the question of the constitutionality of the implementing national legislation. The directive itself is not reviewed. The national constitutional court may, however, express its *opinion* that the directive violates important rules of European Union law.

NOTE:

This case solution is more extensive and elaborated than required for the test (final examination). For the purpose of the test, the answer to the questions could be limited to appropriate introductory and closing sentences and the essential aspects and ideas. It was, however, crucial to present the answer with a correct structure.

More informations on this course at www.lanet.lv/~tschmit1. For any questions, suggestions and criticism please contact me via e-mail at tschmit1@gwdg.de.

(Date: Case10 (Cases-EULaw))

¹⁶ See the references at *Schmitz*, Constitutional jurisprudence in the member states on the participation in the process of European integration, 2010, <http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/Jurisprudence-on-integration-2.htm>. See in particular the decisions "Solange I" and "Solange II" of the German Federal Constitutional Court (BVerfGE 37, 271, p. 277 ff. and BVerfGE 73, 339, p. 366 ff.) and the decision on the copyright in the information society (decision 2006-540 DC from 2006) of the French Conseil constitutionnel.

A. Answer to question 1

I. Competence

II. No infringement of essential formal or procedural requirements

III. No infringement of substantive law

1) Violation of economic fundamental freedoms

- freedom of movement for workers (art. 45 et seq.), freedom of establishment (art. 49 et seq.), freedom to provide services (art. 56 et seq. FEU Treaty)
- proportionality: (-) (→ not necessary, not proportional in the strict sense)

2) Violation of the principle of respect for the national identities of the member states (art. 4(2) EU Treaty) and of the right to respect of linguistic diversity (art. 6(3) EU Treaty read together with art. 22 ChFR)

- the national language as important element of national identity
- no absolute protection of the national identity but Union must be considerate (here: (-) → OWN REASONING!)
- the respect of linguistic diversity as a fundamental right (art. 22 ChFR)

IV. No misuse of powers

B. Answer to question 2

I. Action for annulment of a member state or Union institution (art. 263 FEU Treaty)

- but no possibility to bring an action for the university in A-land

II. Reference of a national court for a preliminary ruling (art. 267 FEU Treaty)

III. Constitutional review of the national provisions implementing the directive

- only if the constitutional identity (the inviolable core of the constitution) is concerned
- review of the constitutionality of the implementing provisions, not of the legality of the directive itself