BALTISCH-DEUTSCHES HOCHSCHULKONTOR
Prof. Dr. Thomas Schmitz

Spring Semester 2010

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Case 2

(facts of the case)

The states A-land, B-land and C-land are successor states of the Soviet Union. C-land is a member state of the European Union and part of the Schengen area.

One day, the rising tensions between A-land and B-land lead to an armed conflict during which A-land occupies parts of B-land in clear violation of public international law. The European Union discusses possible sanctions against A-land, but at the relevant Council meeting, there is not the necessary majority in favour of the sanctions. C-land is disappointed and decides to impose its own sanctions on A-land. The national parliament passes a law, which imposes additional customs duties (in addition to those imposed by European Union law) on all goods imported from A-land. Furthermore, the right to enter the country is denied to all citizens of A-land.

1. The government of A-land thinks that the law on the additional customs duties is incompatible with European Union law, in particular with the free movement of goods. Is this correct? How can the government achieve, directly or indirectly, a judicial review of that law?
2. Mr. D. is a citizen of A-land with long-term resident status in Italy. Since last year, he has a girl-friend in C-land. When he wants to visit her the next time, on a journey back from a visit in A-land to Italy, he is denied the right to enter C-land. He thinks that this is a violation of European Union law. Is he right? Would an appeal to the European Court of Justice be successful?

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Case 2
(discussion of the case)

SUBJECTS: Free movement of goods; customs union; common border checks, asylum and immigration policy; legal actions at the European Court of Justice.

OUTLINE OF THE CASE SOLUTION:

Question 1: The additional customs duties

I. Compatibility of the law on the additional customs duties with European Union law[1]

The law of the state C-land on the additional customs duties might be incompatible with European Union law, because it imposes customs duties, which have not been determined by the Union, on goods imported to a member state. This might violate the free movement of goods (1) or other norms of European Union law (2).[2]

1) Compatibility with the free movement of goods

Since the law on the additional customs hinders the trade of goods in the European Union, it might be incompatible with the free movement of goods as guaranteed in art. 28 et seq. of the FEU Treaty[3]. It is incompatible with this economic fundamental freedom, if it affects its sphere of protection ["Schutzbereich"][4] and presents an encroachment on the freedom ["Beeinträchtigung"][5], which is not justified by the freedom's limits ["Schranken"].[6] The law imposes duties on goods imported from A-land, which is not a member state of the Union. The free movement of goods, however, only applies to goods that originate in the member states or are in free circulation in the member states after compliance with all import formalities and payment of all payable customs duties and charges (art. 28(2), 29 FEU Treaty). Hence, the most important element of the sphere of protection, the material sphere of protection ["sachlicher Schutzbereich"][7] is not concerned. So the law on the additional customs on goods imported from A-land is not incompatible with the free movement of goods.

2) Compatibility with other norms of European Union law

The law on additional customs duties might however be incompatible with other norms of European Union law. According to art. 30 et seq. FEU Treaty, there is a customs union as an

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1 Note: Since question 1 is not just one question but a block of two questions, it is imperative to divide the answer into two sections. It is logically impossible to answer the questions correctly, consistently and without unnecessary detours and diversions without that division.

2 Note: The second introductory sentence is not absolutely necessary but useful to show the reader the structure of the examination and to facilitate the orientation within the text.

3 Formerly (until the Treaty of Lisbon came into force) art. 23 et seq. EC Treaty.

4 In English, also the terms *"scope of protection"* or "area of protection" are common.

5 In English, some authors also use the term *"interference"*.

6 For the general structure of the examination of an economic fundamental freedom see diagram 2 from the course "EC Internal Market law", autumn semester 2009 (http://home.lanet.lv/~tschmit1/Downloads/Schmitz_EC-IntML_diagram2.pdf). Concerning in particular the free movement of goods, see diagram 3 (http://home.lanet.lv/~tschmit1/Downloads/Schmitz_EC-IntML_diagram3.pdf).

7 In English, some authors also use the terms "substantive sphere", "substantive scope" or "subject matter of protection".

important element of economic integration in the European Union. The concept of a customs union does not only comprise the elimination of customs duties on trade within the union but also the agreement on a common customs tariff for goods imported from third countries; this is the essential difference between a customs union and a free trade area. For the member states of the European Union, the Council fixes the Common Customs Tariff on the basis of art. 31 FEU Treaty, in accordance with the common commercial policy (art. 206 et seq., in particular art. 207 FEU Treaty[8]). These regulations are exhaustive. The member states are not allowed to deviate or to impose additional duties. Within the European Union, a national commercial policy, which differs from that of the Union, is not possible.[9] Even economic sanctions can be determined by the Council only (see art. 215 FEU Treaty).

Therefore, the law of C-land on additional customs duties contravenes art. 31 and 207 FEU Treaty.

Conclusion: The allegation of the government of A-land, that this law is incompatible with European Union law, is correct.[10]

II. Possibilities for the government of A-land to achieve a judicial review of the law on the additional customs duties

1) Possibilities to achieve directly a judicial review of the law

The government of A-land might have the possibility to achieve a judicial review of the contentious law directly, that means by an own legal action, without the involvement of a third institution. Art. 258 and 259 FEU Treaty[11] allow taking actions for failure to fulfil Treaty obligations against member states, which have contravened the Treaty. The right to sue is reserved, however, to the Commission (art. 258) and to the member states of the Union (art. 259). The FEU Treaty does not provide for a right of third countries to appeal to the European Court of Justice in case of Treaty violations by the member states. Legal remedies before the International Court of Justice are also excluded, because the litigation is not about a general question of public international law but about a specific question of European Union law, for which any legal remedies outside the Union are excluded by art. 19 EU Treaty, 251 et seq. FEU Treaty. Therefore, the government of A-land cannot achieve directly a judicial review of the law of C-land.

2) Possibilities to achieve indirectly a judicial review of the law

There is, however, a possibility to achieve indirectly a judicial review: According to art. 258 FEU Treaty, the Commission may, after preliminary proceeding, bring the matter before the Court of Justice, if it considers that a member state has contravened ("failed to fulfil an obligation under") the Treaty. According to art. 17(1) EU Treaty, the Commission has the mission to ensure that the provisions of the Treaties are applied (and respected...) Therefore, even if the Commission is not obliged to take action,[12] there is a great chance that it *will* take action if the Treaty violation is not of minor importance. A national law, which imposes additional customs duties to goods imported from a third country, is an obvious and severe Treaty violation. So the Commission will certainly start the infringement proceedings according to art. 258 FEU Treaty, if the government of A-land appeals for it. During the preliminary procedure, which is part of these proceedings, the member state C-land may revoke its contentious law. If it does not, the Commission will certainly initiate a review by the European Court of Justice.

Conclusion: The government of A-land can certainly achieve a judicial review of the contentious law by contacting the European Commission and appealing for initialising infringement proceedings according to art. 258 FEU Treaty. C-land may avert, however, a judicial review by revoking the law.

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8 Formerly art. 131 et seq., in particular art. 133 EC Treaty.

9 The competence for the common commercial policy is an exclusive competence of the European Union, see *Streinz*, Europarecht, 8th edition 2008, no. 714 with further references.

10 Note: Do not forget the necessary concluding sentences, which finally lead you to the direct answer of the question. They are often forgotten or partly forgotten by unexperienced case solvers. Without them, however, the case solution is not finished and there is a high risk of disorientation and misunderstandings of the reader. A case solution without concluding sentences is like an unfinished computer program: it usually crashes...

11 Formerly art. 226 and 227 EC Treaty.

12 See *Cremer*, in: Calliess/Ruffert (editors), EUV/EGV, 2nd edition 2002, art. 226 EC Treaty nos. 40 ff. with further references.

Question 2: The denial of the right to enter C-land

I. Violation of European Union law

The opinion of Mr. D, that the denial of his right to enter C-land is a violation of European Union law,[13] is right, if this denial is incompatible with any norm of institutional or material primary or secondary law.[14] It is of no relevance that the denial was prescribed in a national law, because with regard to the primacy of European Union law over national law, in case of a conflict the national authorities must follow Union law and not apply national law.[15]

In the case under consideration, there might be a violation of material secondary law, since Mr. D. has long-term resident status in Italy. Within the European Union, there is a common border checks, asylum and immigration policy (art. 67 et seq., in particular 77 et seq. FEU Treaty[16]). According to art. 77(2) and 79(2) FEU Treaty, the European Parliament and the Council take measures related to the free movement of third country nationals, which have to be respected by the member states. Based in particular on art. 63 nos. 3 and 4 EC Treaty (which preceded art. 79 FEU Treaty), the Council has adopted the Directive 2003/109 concerning the status of third-country nationals who are long-term residents. According to art. 4 and 5 of this Directive, member states shall grant long-term resident status to third country nationals who have resided legally and continuously within their territory for five years, provided that they have sufficient stable and regular financial resources (to be independent from social assistance) and health insurance. Long-term residents have the right to reside not only in the member state which granted them the status but also in all other member states, for a short or even a long period (see for the details art. 14 et seq. Directive 2003/109). This necessarily implies the right to enter. Besides, within the Schengen area, the rules of the Schengen acquis, which have been created by some member states outside the legal order of the European Union but which later have been incorporated into European Union law,[17] in particular the Schengen Convention[18], entitle third country nationals with Schengen visas or with valid residence permits and valid passports to enter and to move freely in all Schengen states. Special reasons lying in the person of Mr. D., which might justify a restriction of these rights on ground of public policy, public security or public health, are not apparent.

Conclusion: The denial of the right to enter C-land violates the rules of the Schengen acquis, in particular the Schengen Convention, which is now part of European Union law, and art. 14 et seq. of Directive 2003/109. Mr. D. is right.

II. Prospects of success of an appeal of Mr. D. to the European Court of Justice

An appeal of Mr. D. to the European Court of Justice would be successful if it was admissible and well-founded. Yet the Founding Treaties do not provide for the necessary form of action. Art. 19 EU Treaty, 251 et seq. FEU Treaty do not grant the citizen the right to appeal to the ECJ against measures taken by the member states. Therefore, an appeal of Mr. D. would be inadmissible and therefore not successful. Mr. D. can only appeal to the competent court in C-land. This court has to respect and enforce European Union law in C-land without regard to any adverse national law. According to art. 267 FEU Treaty[19], the national court of last instance will refer the questions how to interpret the relevant European Union law to the ECJ for a preliminary ruling.

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13 Note: In principle, the introductory sentence of a case solution or an independent part of it should reflect the wording of the question as closely as possible in order to make sure that the solution answers exactly the asked question.

14 Note: The introductory sentences should guide the reader as much as possible, allowing an easy orientation without misunderstandings. In our case, the hint might be helpful that not the institutional but the material (substantial) law is relevant and that secondary law is concerned.

15 See the basic decisions ECJ, case 6/64, Costa/ENEL, and ECJ, case 11/70, Internationale Handelsgesellschaft.

16 Formerly art. 61 et seq. EC Treaty.

17 See the Protocol incorporating the Schengen acquis into the framework of the European Union, annexed to the Treaty of Amsterdam ("the Schengen Protocol").

18 Convention implementing the Schengen agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 19 June 1990; see in particular art. 9 et seq.

19 Formerly art. 234 EC Treaty. See, however, the restrictions under art. 68 EC Treaty that have been eleminated by the Treaty of Lisbon.

NOTE:

The relevant rules in the Schengen Convention and subsequent legal norms concerning the issuing of visas have been modernised, codified and replaced by the Community Code on Visas (Visa Code)[20]. The new rules are concerning all persons who, according to Regulation 539/2001[21], need visas when entering the European Union.

Note that the Treaty provisions concerning border checks, asylum, visa and immigration have been fundamentally reformed by the Treaty of Lisbon.

FURTHER READING:

European Commission, Freedom to travel, http://ec.europa.eu/justice_home/fsj/freetravel/wai/fsj_freetravel_intro_en.htm (special website on the free movement of persons, in particular the Schengen Agreements and the rights of third country nationals).

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.

(Datei: Fall 1 (EuR-Faelle))

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[20] Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code).

[21] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

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1) Compatibility with the free movement of goods

2) Compatibility with other norms of European Union law

II. Possibilities for the government of A-land to achieve a judicial review of the law on the additional customs duties

1) Possibilities to achieve directly a judicial review of the law

2) Possibilities to achieve indirectly a judicial review of the law

Question 2: The denial of the right to enter C-land

I. Violation of European Union law

II. Prospects of success of an appeal of Mr. D. to the European Court of Justice