

EC INTERNAL MARKET LAW

03/04/2008

Test 2
(Final examination)

Question 1: *Adonis* is a personable and charming young EU citizen and a committed, qualified and talented professional gardener. His girl-friend has just left him because he (yet) refused to settle down, get married and found a family. Now he wants to explore gardens (and other aspects of life) in other European countries and therefore live and work for a while abroad. In his national monthly gardener journal he reads a job offer of a big national gardening company which provides gardener's services all over the European Union and sends its national employees to interesting foreign places to do the job. *Adonis* is excited but wants to know if there are other options for him, in particular opened up by the economic fundamental freedoms in the EU.

(4/10 points
+ 1 extrapoint)

What options does he have, due to what fundamental freedoms, and where are they guaranteed? What are the advantages and disadvantages of each particular option? Does it make a difference if *Adonis* wants to live and work for a longer time in one other member state or for shorter periods in a variety of member states? Does it make a difference from which member state he comes from and in which member state he wants to work? Does it make a difference if he does not want to work but to study at a professional gardening college in another member state?

• **Answer: I.** *Adonis* has the following options: (1.) to work as an employee for a gardening company in another member state (→ freedom of movement for workers, art. 39 et seq. EC Treaty); (2.) to establish his own, independent gardening business (→ freedom of establishment, art. 43 et seq. EC Treaty); (3.) to work for a gardening company in his own member state which provides gardening services in other member states, which are executed by staff brought along from its home state (→ freedom to provide services [but only for the employer], art. 49 et seq. EC Treaty); (4.) to establish his own gardening business in his home state and offer gardening services in other member states (→ freedom to provide services). See for details diagrams 4 - 6 of the course.

II. Generally, working for an employer in that other member state will be the most advantageous solution, since in this case, the employee will enjoy the same rights and social benefits as his foreign colleagues. If he makes use of his freedom of establishment and opens his own gardening business, he will not enjoy the protection of labour law and might not have the same access as an employee to all systems of social security but will be free of the corresponding constraints. If he works for an employer in his own member state but is sent (temporarily) to another member state to do the necessary work for services provided by this employer in that state, he will not be protected directly but only indirectly by the freedom to provide services of his employer (this is DISPUTED). In addition, some parts of the labour law, social insurance law and other legal benefits of the foreign member state will not apply. However, the Posting Directive (1996/71) guarantees at least the application of some standards of the foreign labour law.

III. It makes a difference if *Adonis* wants to live and work for a longer time in one state or for shorter periods in a variety of states: In the first case, it will generally be advantageous to make use of the freedom of movement for workers in order to get the full protection of the foreign labour and social insurance law. The same applies if *Adonis* comes from a state with lower standards of protection and benefits for employees. In the second case it might be advantageous to work for a company in his own state which will send him abroad because this solution provides for more flexibility, less bureaucratic obstacles and uncomplicated homogeneous social insurance at home. It will also be advantageous if *Adonis* comes from a state with particularly high standards of protection and benefits. However, if he wants to work and live in another state for a long time, enjoying the same rights and duties and integrating into the foreign society, this is not an option.

IV. It also makes a difference from which member state Adonis is coming and in which member state he wants to work, because due to the transitional agreements in the accession treaty the access of workers from the new member states to the labour market in some old member states can be restricted until 2011.

V. It does make a difference whether he wants to work or to study in another member state because the economic fundamental freedoms of the EU citizens only concern economic activities. Studying at a public college in another state is only protected by the freedom of movement and residences (art. 18 EC Treaty), which is not a fundamental freedom and which is submitted to stronger limitations and conditions in secondary law. Only if Adonis wants to study at a private (commercially run) college, he will be protected - as a service recipient making use of his freedom to receive services.

Question 2: What has been the most controversial act of legislation in the field of EC internal market law in the last years and why? How has political resistance influenced the outcome? What is the significance and the content of the legal act as it has been actually passed?
(2/10 points
+ 1 extrapoint)

• *Answer: the Services Directive (2006/123). The original proposal of the Commission followed a radical neo-liberal approach, which has met strong resistance in many old member states and in the European Parliament and lead to essential modifications. Objectors feared a considerable reduction of social standards and a threat to social cohesion in the more wealthy member states. The directive proposal was one of the reasons for the rejection of the Constitutional Treaty in the referenda in France and the Netherlands. The actual directive is very different from the original proposal of the Commission. The originally dominating country of origin principle has been essentially given up. Many kinds of service activities have been excluded from the scope (see art. 2). The original concept has been diluted to such an extent that the directive is difficult to understand. 118 (!) considerations in the preamble, which all are relevant for its interpretation, make it appear almost ridiculous. However, it still contains important provisions, which aim to promote the free exchange of services, concretising the freedom to provide services as it is guaranteed in art. 49 et seq. EC Treaty (facilitating administrative procedures and the access to relevant informations, limiting and eliminating authorisation schemes, limiting requirements on cross-border services and other restrictions, limiting requirements imposed on recipients and encouraging administrative cooperation). This was broadly discussed in § 8 of the course.*

Question 3: Competition is an important factor for the functioning of a market. How is it guaranteed and protected in the EC Internal Market Law? Is there important relevant secondary law?
(3/10 points)

• *Answer: see for the necessary details Transparency films 1 and 3; see in particular:*
- *the prohibition of cartels (art. 81 EC Treaty); secondary law: Antitrust Enforcement Regulation (Regulation 1/2003)*
- *the prohibition of abuse of a dominant position (art. 82 EC Treaty); secondary law: Antitrust Enforcement Regulation (regulation 1/2003)*
- *the European merger control; see Merger Control Regulation (regulation 139/2004)*
- *the restrictions on state aids (art. 87 et seq. EC Treaty); see regulation 659/1999 (concerning the supervision of state aids by the Commission)*
- *the prohibition of favouring public undertakings (art. 86 EC Treaty)*

Question 4: The member states of the European Union shall regard their economic policies as a matter of common concern and coordinate them. Which legal instrument is used for this coordination? What is the guiding principle of the economic policy which has to be respected by the member states and the Community institutions? (Just some keywords please!)
(1/10 points)

• *Answer: The legal instrument: the broad guidelines of economic policies of the member states and of the Community adopted by the Council according to art. 99(2) EC Treaty. The guiding principle: the principle of an open market economy with free competition (art. 4(1), 98 EC Treaty).*

Time limit: 90 minutes

The papers will be given back today or tomorrow. Every participant has the option to talk individually about the good and not so good aspects of his paper!

EC INTERNAL MARKET LAW

09/01/2008

Test 2
(Final examination)

Question 1: After her divorce, Mrs. X, a European Union citizen and housewife, is looking for work. Since she has no professional education, she wants to work as a cleaning woman. She also wants to flee for a while the boring provincial town she is living in, and therefore would love to work abroad in exciting cities like Paris, London, Amsterdam or Rīga. She has heard about options opened up by the economic fundamental freedoms of the EU citizens. In her own town, there even is a local cleaning company which cleans office-buildings and apartments in capital cities all over Europe and sends employees from her town to these cities to do the job.

(4/10 points
+ 1 extrapoint)

What options does she have as a union citizen, due to what fundamental freedoms, and where are they guaranteed? What are the advantages and disadvantages of the particular options? Does it make a difference from which member state Mrs. X is coming and in which member state she wants to work?

- *Answer: Mrs. X has the option to work as an employee for a cleaning company in another member state (→ freedom of movement for workers, art. 39 et seq. EC Treaty). She also has the option to establish her own, independent cleaning business (→ freedom of establishment, art. 43 et seq. EC Treaty). Finally, she can work for an employer in her own member state who provides cleaning services in other member states, executed by staff brought along from his home state (→ freedom to provide services [but only for the employer], art. 49 et seq. EC Treaty). See for details diagrams 4 - 6 of the course. Generally, working for an employer in that other member state will be the most advantageous solution, since in this case, the employee will enjoy the same rights and social benefits as his foreign colleagues. If she makes use of her freedom of establishment and opens her own business, she will not enjoy the protection of labour law and might not have the same access as an employee to all systems of social security but will be free of the corresponding constraints. If she works for an employer in her own member state but is sent (temporarily) to another member state to do the necessary work for services provided by this employer in that state, she will not be protected directly but only indirectly by the freedom to provide services of her employer (this is DISPUTED). In addition, due to the Posting Directive (1996/71), huge parts of the labour law and other legal benefits of the foreign member state will not apply. Depending on the levels of protection in the concerned states, this can make an important difference. However, if she lives in a member state with high standards of protection and benefits for employees, it might even be advantageous to work for a local company which provides services abroad. That will also be advantageous, if she wants to work for short periods only but in a variety of other member states. But if she wants to work in one other member state for a long time, working and living like the locals, enjoying the same rights and duties and integrating into the foreign society, this is not an option. It does make a difference from which member state Mrs. X is coming and in which member state she wants to work, because due to the transitional agreements in the accession treaty the access of workers from the new member states to the labour market in some old member states can be restricted until 2011.*

Question 2: Competition is an important factor for the functioning of a market. How is it guaranteed and protected in the EC Internal Market Law?

(4/10 points)

- *Answer: see for the necessary details Transparency films 1 and 3; see in particular:*
 - the prohibition of cartels (art. 81 EC Treaty)
 - the prohibition of abuse of a dominant position (art. 82 EC Treaty)

- the European merger control
- the restrictions on state aids (art. 87 et seq. EC Treaty)
- the prohibition of favouring public undertakings (art. 86 EC Treaty)

Question 3: Please give two or more examples for important secondary law concerning the Internal Market (fundamental freedoms, competition, monitoring of state aids etc.) What are they about? (just some keywords please!)

(2/10 points
+ extrapoints)

- *Examples from the course:* Directive 2004/38 (right to move and reside freely within the territory of the member states - see Diagrams 4 - 6); Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State (see Diagram 4); Directives for the mutual recognition of professional qualifications (Directive 98/5, Directive 2005/36 - see Diagram 5); Directive 2006/123 ("Services Directive" - facilitating providing certain services in other member states - see Diagram 6); Directive 1996/71 ("Posting Directive" - concerning employing workers from the own state when providing services in another state); Directive 88/361 ("Capital Directive" - listing examples of "capital"); Regulation 1/2003 (Antitrust Enforcement Regulation - about EC Antitrust procedure - see transparency film 3); Regulation 139/2004 (Merger Control Regulation); Regulation 659/1999 (concerning the supervision of state aids by the Commission - see transparency film 3)

The papers will be given back on *Wednesday, January 16, at 10.30* (auditorium 462). Those who fail will have the possibility to repeat the test on *Monday, January 21, at 10.30* (auditorium 4). Every participant has the option to talk individually about the good and not so good aspects of his paper!

BALTISCH-DEUTSCHES HOCHSCHULKONTOR
Prof. Dr. Thomas Schmitz

Autumn Semester 2006

EC INTERNAL MARKET LAW

12.01.2007

Test 2
(Final examination)
(facts of the case)

The Union of European Football Associations (UEFA) and the national football associations are reforming the championships. These are supposed to develop a more sporting than commercial character and to show the local rootedness of the football clubs more strongly. Therefore new regulations are issued, according to which in every team which participates in the national or European championships, a maximum of 2 players from foreign countries is admitted.

The Latvian professional football player A fears for his promising career with high salaries in the best west-European football clubs. According to his opinion the new rules violate the fundamental freedoms from the EC Treaty. The lawyers of the football associations do not share this point of view. They think that the football associations are not bound by the fundamental freedoms and therefore cannot violate them because they are private organisations based on private law.

1. Do the new regulations violate the fundamental freedoms?
2. Additional question (for advanced participants - short answer is sufficient): B wants to establish a European supermarket-association which purpose is to support the sale of local products in all European states and regions. Its members shall have the opportunity to buy local products at a better price but shall be obliged to ban foreign products from their markets if there are suitable local products available. Will this be compatible with the fundamental freedoms?

Question 1: Violation of fundamental freedoms by the new football regulations

- potentially concerned: the freedom of movement for workers (art. 39 et seq. EC Treaty)

I. Sphere of protection

- NOTE: the *temporal* sphere of protection does not need to be mentioned because the new regulations concern *all* European professional football players

1) Personal sphere of protection: (+)

- all professional football players who are citizens of the EU member states

2) Material sphere of protection: (+)

a) Situation of cross-border mobility (→ relevance of Community law): (+)

- *nationality clauses* limiting the number of foreign players in a team

b) Status of a worker (= employed person) in the sense of art. 39(1) EC Treaty: (+)

c) Protected activities: (+)

- here: the participation in the league games as part of the exercise of the occupation (art. 39(3) lit. c EC Treaty)

d) No employment in the public service (art. 39(4) EC Treaty): (+)

II. Encroachment

1) Acting of an addressee of the freedom of movement for workers

- **Problem:** Are private associations like UEFA and the national football associations bound by the freedom of movement for workers (→ direct third-party effect)?

- see ECJ, case 36/74, *Walrave and Koch*; case 415/93, *Bosman*

2) Acting to be qualified as encroachment: (+)

- here: open discrimination in the sense of art. 39(2) EC Treaty

- NOTE: This case is only about nationality clauses, not about transfer rules (the other problem dealt with in the ECJ *Bosman* decision) which are non-discriminative restrictions

III. Illegality of the encroachment (no justification by the fundamental freedom's limits)

1) Justification by the limit in art. 39(3) EC Treaty

a) **Problem:** Applicability of this limit in case of discriminations in the sense of art. 39(2) EC Treaty?

b) Fulfilment of the preconditions formulated in art. 39(3) EC Treaty: (-)

- no grounds of public policy, public security of public health

- 2) **Justification by the inherent limits of the freedom of movement for workers ["immanente Schranken"]:** (-)
- **not applicable on open discriminations**
 - **however: With regard to the enlargement of the binding effect to a private association, ANOTHER OPINION IS WELL ARGUABLE. As well it is arguable to recognize in this constellation not only imperative reasons of public interest but also other imperative substantial reasons (like the protection of the character of the championships of locally rooted sporting events) as justifying grounds.**

Question 2 [additional question]: Compatibility with the fundamental freedoms?: (+)

- **potentially concerned: the free movement of goods (art. 23 et seq. EC Treaty)**
- **however: no direct third-party effect of this fundamental freedom; private persons, companies and associations are not the addressees of it**