

EC INTERNAL MARKET LAW

26/03/2009

Test 1
(Interim examination)

Question 1: *Aphrodite* is a young EU citizen and a committed, qualified and talented professional beauty consultant. When watching the foreign tourists in her home city, she gets the impression that in some European states there is a certain need of consultancy in this field. She wants to contribute to a more beautiful European Union and therefore live and work for a while abroad. In her national professional journal she reads a job offer of a big national beauty consultancy agency, which provides consultancy all over the European Union and sends its national employees to interesting foreign places to do the job. *Aphrodite* is excited but wants to know if there are other options for her, in particular opened up by the economic fundamental freedoms in the EU.

(4/10 points
+ 1 extrapoint)

What options does she 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 *Aphrodite* wants to live and work for a longer time in one other member state or for shorter periods in a variety of member states in order to see more of Europe? Does it make a difference from which member state she comes from and in which member state she wants to work? Does it make a difference if she does not want to work but to study at a professional college for beauty consultancy in another member state?

• **Answer: I.** *Aphrodite* has the following options: (1.) to work as an employee for a beauty consultancy agency or beauty parlour in another member state (→ *freedom of movement for workers, art. 39 et seq. EC Treaty*); (2.) to establish her own, independent beauty consultancy agency or beauty parlour (→ *freedom of establishment, art. 43 et seq. EC Treaty*); (3.) to work for a beauty consultancy agency in her own member state that offers beauty consultancy in other member states, which is provided 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 her own beauty consultancy agency in her home state and offer professional beauty consultancy in other member states (→ *freedom to provide services*). See for details Diagrams 4 - 6 of the course.¹

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 her foreign colleagues. If *Aphrodite* makes use of her freedom of establishment and opens her own beauty consultancy agency or beauty parlour, 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, 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 *Aphrodite* 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

¹ All course materials can be downloaded from the special website for this course, http://home.lanet.lv/~tschmit1/Lehre/EC_Internal_Market_Law.htm.

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 Aphrodite 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 her own state, which will send her abroad because this solution provides for more flexibility, less bureaucratic obstacles and uncomplicated homogeneous social insurance at home. It will also be advantageous if Aphrodite comes from a state with particularly high standards of protection and benefits. However, if she 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 Aphrodite 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.

V. It does make a difference whether she 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 residence (art. 18 EC Treaty), which is not a fundamental freedom and which is submitted to stronger limitations and conditions in secondary law. Only if Aphrodite wants to study at a private (commercially run) college, she will be protected - as a service recipient making use of her freedom to receive services.

Question 2: Discuss thoroughly the general structure of the examination of a potential violation of a fundamental freedom guaranteed in the EC Treaty. Which aspects and important sub-aspects have to be examined? In which order? Please explain in this context the difference between art. 45 and art. 46 EC Treaty. What do you think of the idea of a "convergence" of the fundamental freedoms?
(4/10 points)
+ 1 extrapoint)

- *Outline of the answer: A fundamental freedom is violated if (1.) the sphere of protection (= scope of protection) is concerned, (2.) there is an encroachment on (= interference with) the concerned freedom (that means an acting of an addressee of the fundamental freedom in the form of a discrimination or restriction) and (3.) this encroachment is not justified by the fundamental freedom's limits (explicit or inherent limits) in compliance with the limits of limits (in particular with the principle of proportionality and the fundamental rights). See for the details Diagrams 2 - 6 (in particular Diagram 2) and Transparency film 2.¹ In this context, there is the following difference between art. 45 and art. 46 EC Treaty: Art. 45 excludes some activities from the sphere of protection of the freedom of establishment (with the consequence that measures with regard to these activities a priori do not concern the freedom), while art. 46 has the function of a limit of the freedom (with the consequence that measures, which can be based on this provision, still have to pass the test of the compliance with the limits of limits, in particular the principle of proportionality). - The notion of the "convergence" of the fundamental freedoms describes the phenomenon that due to the development of the jurisprudence of the European Court of Justice, to the contributions of legal scholarship and to some amendments of the wording of the EC Treaty, a consistent and homogeneous dogmatic understanding for all fundamental freedoms has emerged, which is reflected in the structure of the examination of a potential violation. However, there is still some scepticism among legal scholars. The reference to the convergence does not allow to override the continuing differences in detail, set by the different wording in the Treaty.*

Question 3: Discuss the decisions *Dassonville*, *Cassis de Dijon* and *Keck* of the European Court of Justice
(2/10 points)
+ 0.5 extrapoint)

- *Answer: In the decision Dassonville (case 8/74) the ECJ developed a very large concept of encroachments on the free movement of goods in the form of restrictions. Technically, it presented a wide interpretation of the term "measures having equivalent effect to quantitative restrictions on imports" in art. 28 EC Treaty. "All trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade" can be such measures and therefore encroachments on the free movement of goods. This idea later was applied to other fundamental freedoms. However, the concept was too large and therefore reduced in the decision Keck (joined cases C-267, C-268/91), according to which only product-related, not general sales-related rules (as, for example, on shop closing times) are to be considered as encroachments. In the decision Cassis de Dijon (case 120/78) the ECJ decided that regulations on necessary properties of goods (here: the*

necessary concentration of alcohol in liquor) have to be considered as restrictions of the free movement of goods. - See Diagrams 2, 3 and 4 and Transparency film 2.¹

Time limit: 90 minutes

The papers will be given back on Monday, March 30. Every participant has the option to talk individually about the good and not so good aspects of his paper!