

## **JUS1440 and JUS5440 EU Substantive Law – Guidelines for censor (sensorveiledning)**

(These guidelines were written without us having read answers)

The exam assignments address the topics covered in the course: The free movement of goods rules (Arts 28-36 TFEU); The free movement of workers rules (Arts 45. et seq) and EU Citizenship; The right of establishment rules (Arts 49 et seq); The rules on cross-border services (Art 56 et seq); External aspects of the internal market (Arts 206-207 TFEU)

The topics are covered in 10 lectures. Slides of lectures containing central issues, case law and provisions of primary and secondary law are posted on the website. Students are assigned Catherine Barnard's The Substantive Law of the EU: the Four Freedoms, as mandatory reading, which provides for an in-depth analysis of the relevant rules and case law (reading requirements vary for BA and MA levels: see here <http://www.uio.no/studier/emner/jus/jus/JUS5440/v18/pensumliste/index.html>).

There is also Mock Exam offered at the course, on which students receive a feedback.

### **Requirements and learning outcome**

#### **JUS1440 (BA)**

Students at bachelor's level are required to obtain broad knowledge of these topics (cf. to MA level where advanced knowledge is required).

##### *Skills*

- Practical skills in finding legal sources relevant to substantive EU law
- Ability to understand and analyse the core rules of the EU internal market
- Ability to read and interpret the case law of the Court of Justice of the EU

##### *General competence*

- Basic understanding of the core rules of the EU internal market
- Basic understanding of the legal method of substantive EU Law

### **Requirements and learning outcome**

#### **JUS5440 (MA)**

Students at master's level are required to obtain advanced knowledge of the topics covered in the course (cf. to BA level where broad knowledge is required)

##### *Skills*

- Practical skills in finding legal sources relevant to substantive EU law
- Ability to understand and analyse the core rules of the EU internal market

- Ability to read and interpret the case law of the Court of Justice of the European Union
- Ability to apply basic EU legal method to new cases and problems

#### *General competence*

- Advanced understanding of the core rules of the EU internal market
- Advanced understanding of the legal method of substantive EU law)

### **Exam Questions (for both levels)**

Generally, it can be expected that students are able to identify and formulate the legal issues raised by the cases presented (assignments 1 and 2 for Bachelor and assignments 1, 3 and 4(B) for Masters), and analyse these questions applying relevant Treaty provisions, case law and secondary legislation (eg Citizens' Rights Directive and Services Directive). The expectations to the quality analysis and method are, however, somewhat lower for Bachelor students than in case of MA students (JUS5440). JUS 1440 students are mainly foreign exchange students at BA level (first three years of law studies) and some are Norwegian students from other Faculties.

Students are expected to write in sufficiently clear language but censors should take into consideration that English is not native tongue for most students at this course, so that grammar and style of the answers will not as a rule be perfect.

BA level assignments 1 and 2 are case studies (ca 45 min each\*). BA level assignment 3 (A) or (B) are theoretical questions (ca 30 min each\*). All three questions in the Bachelors' paper should be answered (NB. Choice between A and B in Question 3).

MA level assignment 1, 3 and 4B are case studies, and MA assignment 2 is a theoretical question. Master students have a free choice of answering any 3 questions. All assignments should be weighed equally, as they test different skills (i.e. problem solving skills, essay skills).

Below I present the questions which should be discussed with respect to specific assignments. The evaluation should be based on the total assessment of the quality of the analysis.

Candidates may have different approaches to the structure and method. To the extent the answers include central/important points and law sources, variations in the presentations and length/level of detail should be accepted. However, candidates can be expected to write in generally good style and be able to provide clear formulations and arguments.

### **Problems solving Questions**

#### **Question 1 (bachelors and Masters)**

The question is primarily testing the students' knowledge of the Treaty provisions and case law on the abolition of customs duties and measures having equivalent effect (Treaty articles 28-30)

as well understand when to apply the Treaty provision on taxation (Art 110). It also tests briefly the difference between Art 30 and Arts 34-36.

A general statement re the application of the Treaty rules on FMGds would be good ie: goods; cross-border element; State measure; Norway member of the EEA.

1(a)

There 2 aspects to this question: the inspection itself and the charge imposed for the inspection.

Inspection: a good answer should consider the inspection as a MHEE to a QR citing *Dassonville* and *Cassis*; referring to the doctrine of mutual recognition and mandatory requirements as well as the proportionality test (necessary and suitable). Art 36 can be discussed briefly as also whether the inspection is required by EU Law and why that would matter.

Charge: Is this a custom duty or something else? What is the meaning of a custom duty? Is it a measure having equivalent effect? Discuss the *Italian Statistics Case* as to the definition.

TFEU does not contain a derogation, either (by contrast to Article 36 TFEU with respect to free movement of goods). However, the best students may argue that if the inspection was required by EU Law, then a charge could be imposed but not so disproportional to the cost.

1(b) The facts invite an assessment of whether the Italian levy on imported perfume is a charge having equivalent effect to a customs duty, prohibited by Article 30 TFEU (Art 10 EEA).

*Commission v Belgium and Luxembourg (the Gingerbread case)* and *Diamond Workers'* case show that such charges (imposed by virtue of goods crossing the border) are not acceptable and cannot be justified by any legitimate reasons, irrespective of the purpose such charges pursue.

1(c) The facts invite the students to discuss what is a customs duty and how it differs from an internal taxation system ie Article 110. The facts suggest it is part of the internal taxation system of Austria, but it indirectly discriminates in favour of the home product ie the home produced cologne by discouraging the foreign perfume by charging a higher tax.

### **Question 2 (bachelors)/Question 3 (Masters)**

The case study 1 is partly inspired by the ruling in *Saint Prix* case where CJEU discusses whether a woman in the circumstances of Jan's wife may benefit from provisions in Article 7(3)(a) CRD. However, in the present case study Jan is EU national and his wife is TCN.

One can start by discussing whether Jan can be considered as a worker under Article 45 TFEU, applying relevant case law, and what rights he may have under this provision. She is a Polish

national staying (after having worked) in another EU Member State (Acacia), so this is clearly a cross-border situation.

The concept of a worker under Article 45 TFEU has been construed broadly.

It is to be expected that candidates will also consider Articles 20 and 21 TFEU and CRD Article 7 to clarify Jan's and his wife's (and their child's) rights under EU law. Does Jan have a right to stay in Acacia and receive income support even though he is not currently employed? Jan does not meet Article 7(1) CRD requirements (not a 'worker' etc). He has worked in Acacia but quit his job to take up training.

Work seekers may be entitled to benefits at the host State: *Collins, Vatsouras*

May he rely on Article 7(3) in order to retain the status of the 'worker'? Candidates may quickly come to the conclusion that he may retain such a status on the basis of Article 7(3)(b) (but issue with 'involuntary' unemployment here as he left voluntarily) and vocational training (Article 7(3)(d)). Candidates should discuss this question at some extent and not just conclude without giving legal arguments for conclusion.

According to Article 14(2), Jan's wife and child will retain rights to remain in Acacia as long as she meets the conditions of Article 7.

Does Jan and family have a right to Income support? (if we conclude that he is a "worker"): *Saint Prix* ruling states that she had such a right. Also Article 24(1) CRD (right to equal treatment – if Acacian nationals receive such support in same circumstances), Article 7 of Regulation 492/2011.

*Martinez Sala* and *Trojani* rulings also justify Jan's claim under Articles 20-21 TFEU as he is lawfully residing in Acacia.

The students should also discuss whether Acacian practice is contrary to the objectives and spirit of the EU law (free movement of persons and non-discrimination of EU citizens) which could be frustrated by denying Jan the right to stay in Acacia and receive Income Support. This is particularly expected from candidates who forget to apply relevant case law and/or secondary law provisions.

Jan's wife is a Third-Country National but enjoys derived rights under CRD dependent on Jan's rights. She is a family member under Article 2(2)(a) CRD and derives his rights from Article 7(2). So if N has a right to remain in Acacia and receive Income support, they may meet requirements of Article 7(1)(b) on sufficient resources.

If one concludes that Jan is not entitled to retain the status of the worker in the circumstances of her case, one can discuss whether the "warning" from Acacian authorities to leave Acacia if Jan does not find a job within the next few weeks is contrary to EU law. Is this an expulsion order?

**Commented [AP1]:** can one discuss Regulation 492/2011 here?  
(I think I mentioned it in class)

It is unlikely. In any case, Article 7(3) CRD says that expulsion order shall not be an automatic consequence of EU citizens' taking recourse to social assistance system of the host Member State.]

#### **Question 4(B) (Masters)**

*A is a French accountant, established in France, who also offers services as an insurance broker. She wishes to expand geographically and offer her services in Belgium from her French premises. However, she has, faced certain restrictions in Belgium. She brings to you the following problems and asks for advice as to whether she can rely on EU law to enable her to expand her business activities into Belgium. Please advise supporting your advice with relevant authority.*

- (a) The Belgian legislation does not allow an accountant to provide services as a real-estate agent or insurance broker, or to perform other financial activities.*
- (b) Under Belgian legislation, all providers of insurance services must have an office in Belgium so that advice is offered face to face.*

*The Belgian authorities have argued that the restrictions are lawful under both the TFEU and the Services Directive, and even if these national rules are 'restrictions' within the meaning of Article 56(1) TFEU, they can be justified on the grounds of public policy and/or protection of the consumer.*

*The objective of the fact situation is to test whether the students know how to apply the EU rules.*

These topics were covered in lectures and reading from Barnard.

Below just a few things that would be expected to be discussed by the students but they may focus on other matters which may still be relevant. Markers need to be open-minded.

Students are expected to explain generally why A can rely on EU law on the provision of cross-border services (fundamental freedom; direct effect; etc). Explain what is a service and the difference from establishment. Then deal with each situation.

Re (a): Can they rely on the Directive? If not, back to basic principles of no discrimination on the grounds of nationality; justification on the grounds of imperative requirements; proportionality test (necessary and suitable); and relevant case law.

Re (b): is this a requirement of establishment? Would such a requirement defeat the freedom to provide cross-border insurance services? Can that ever be justified? Discuss the Commission v Germany etc case law on insurance services.

In both cases discuss the Belgian Government's defence citing relevant case law.

## Theoretical questions

### Question 2 (Masters)

[A] *'The Court of Justice of EU (CJEU) faces a dilemma in interpreting the citizenship provisions in the Treaty on the Functioning of the EU (TFEU). While failure to interpret them expansively risks undermining EU citizenship, an expansive interpretation risks undermining, in unacceptable ways, the autonomy of the Member States.'*

*Discuss critically illustrating your answer with case law examples from the CJEU*

Student should discuss the provisions of TFEU article 20 and 21 on the Union's citizens. They should explain the objectives of these provisions and show that they are familiar with CRD implementing these provisions and codifying/developing previous case law and secondary legislation. The assignment invites students to discuss how the need to protect the free movement of persons may come in conflict with the Member States' needs to maintain a workable welfare system.

The assignment question asks expressly about the examples from case law. The best answers would not only list the relevant cases (including but not limited to *Singh*, *Zambrano*, *McCarthy*) but also reflect about the issues raised in these cases and how the CJEU applies Treaty citizenship provisions (e.g. addressing situations where CRD is not applicable).

(B) *'Intellectual property rights, by their very nature, are exclusive and territorial. Thus they are obstacles to the free movement of goods within the EEA.'* Discuss critically how the CJEU has reconciled the free movement of goods rules with the expressed derogation in Article 36 TFEU allowing the protect

*ion of intellectual property rights.*

Students should discuss generally the importance of IPRs for the internal market and then explain how the free movement of goods rules may be restricted where the obstacle is caused by the exercise of IP rights as expressly stated in Art 36 TFEU. BUT this is a derogation to a fundamental freedom so interpreted very restrictively and subject to a proportionality test. The burden of proof is also on the MS to justify the restriction.

Then, describe the case law (*Centrafarm Cases*; *Consten & Grundig*, etc) ie how the Court developed the doctrine of specific-subject matter of an IP right and the doctrine of exhaustion of right after first marketing the protected goods.

**Question 3(A) (Bachelors)/Question 4(A) (Masters)**

*'Ensuring the freedom of cross border trade in services within the internal market is of paramount importance for its prosperity.' Critically discuss some of the challenges that the EU faced and the extent to which they have been resolved by the adoption of the Services Directive.*

This is a general question to enable the candidates to select (or focus) on key obstacles to the freedom to provide cross- border services, so it is difficult to provide a standard answer. The students should give examples of how the Services Directive has resolved or failed to resolve the challenges they identified. The historical development of the freedom and the Services Directive were discussed generally in the lectures and in the reading materials (Barnard).

Matters which the candidate may mention;

1. Explain the historical difficulty of opening up the cross-border services and give the reasons cite case law examples
2. Explain the difficulties encountered by those wishing to exercise the freedom because of failure of the host state to recognise their qualifications
3. Explain the original aim of the Directive and how it falls short ie the list of excluded services; the abandonment of the origin principle;
4. Discuss the principles such as non-discrimination, necessity and proportionality
5. Derogations

However, candidates may also discuss other aspects/questions, which should be accepted to the extent they are relevant for the main question.

**Question 3(B) (Bachelors) and Question 5 (Masters)**

To what extent does the EU's external commercial policy complement the achievement of the internal market? Discuss critically how the exclusive competence to negotiate commercial agreements with third countries protects and enhances the concept of an integrated EU market.

CCP is covered in lectures and reading materials.

Points that candidates may discuss:

- 1) Explain the meaning of the first part of the quote ie the unique nature of the internal market and how it differs from a free trade area ie the CCT and the meaning of 'goods in free circulation' (Arts 28 and 29 TFEU)
- 2) Focus on the External Common Customs Tariff and then go on to explain this is central to the External Common Policy and the exclusive competence of the EU to negotiate on behalf of all the MSs' agreements in respect of goods (originally) and now services, commercial aspects of IP and investment with third countries.
- 3) Discuss the defence measures the EU has adopted to protect the internal market eg Anti-Dumping regulation; Trade Barriers Regulation

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