

Feedback — Period One Graded Quiz

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You submitted this quiz on **Mon 26 Jan 2015 1:01 PM PST**. You got a score of **7.55** out of **10.00**.

Question 1

A national law of Factoria (an imagined EU member state) stipulates that owners of fishing vessels registered in Factoria must be resident in that member state. Non-Nationals of Factoria are much less likely to be resident in Factoria than nationals, so the practice puts non-nationals at a disadvantage, and so it is likely to be indirectly discriminatory on grounds of nationality.

Does this mean that:

| Your Answer | Score | Explanation |
|--|-------------|-------------|
| <input checked="" type="radio"/> The national law breaches EU law? | ✗ 0.00 | |
| <input type="radio"/> The national law will breach EU law unless it is justified, either on grounds allowed by the Treaties or by other objective requirements? | | |
| <input type="radio"/> The national law will breach EU law unless Factoria can show that the difference of treatment is justified on grounds allowed by the Treaties? | | |
| Total | 0.00 / 1.00 | |

Question Explanation

Not all measures which are prima facie (on the face of it) discriminatory will breach EU law – member states may be able to justify differences of treatment that might appear discriminatory. The Treaty provides a number of express grounds that will allow a state to justify differences of treatment, such as public security, public health and public order. These express justifications can justify both indirect discrimination, but also direct discrimination. A member state may be able to justify indirect discrimination not just on the grounds of express justifications, which are set out in the Treaties, such as public order, public health and public security; but also on the grounds of other objective requirements, which are not set out in the Treaties, but have been accepted in the case law of the ECJ, such as protection of consumers, reasons of social policy or organizational effectiveness. The main thing is that the requirement that justifies the difference of treatment must not be related to the discriminatory ground (e.g. it is not related to the nationality of the individual).

Question 2

According to an EU directive, the Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks. Emma Larsson works for a private employer who refuses to grant her the said four weeks of annual leave, since she has been on sick leave during the better part of the past year. According to the national applicable law, a company only has to grant paid annual leave to employees who have actually been working during at least half of the reference period (constituting the past year). However, said national law also stipulates that certain absences, such as those due to maternity leave or work-related accidents, shall count as periods of actual work for the purposes of calculating the length of paid leave that an employee is entitled to. Emma's employer claims that her sick leave cannot count as a period of actual work and that she has, hence, not actually worked for the minimum period of time required for her to be granted paid annual leave. Can Emma force her employer to grant her the four weeks of paid annual leave that is stipulated in the EU directive?

| Your Answer | Score | Explanation |
|---|-------------|-------------|
| <input checked="" type="radio"/> Yes, since the national law should be given an EU conform interpretation, her sick leave should be counted as periods of actual work. | ✓ 1.00 | |
| <input type="radio"/> Yes, she can invoke the direct effect of the EU provision (since it is sufficiently clear and precise) against her employer. | | |
| <input type="radio"/> No, but she could possibly sue the Member State where she is working for damages, since the Member State has not implemented the Directive correctly. | | |
| Total | 1.00 / 1.00 | |

Question Explanation

Even if the provision in this case is sufficiently clear and precise to – in principle – be given direct effect, a provision in a directive cannot be relied upon directly to impose duties on individuals (as Directives lack the capacity to produce horizontal direct effect). Nevertheless, Emma can rely on the said provision to force her employer to grant her the four weeks of paid annual leave by invoking the principle that national law must be interpreted in conformity with EU law. According to the case-law from the ECJ, this principle requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by domestic law, with a view to ensuring that a particular directive is fully effective and achieving an outcome consistent with the objective pursued by it (see Case C-282/10, Dominguez, para. 27). Hence, even if the national law stipulates that Emma's employer only has to grant paid annual leave to employees who have actually been working during at least half of the reference period (and Emma has admittedly not), the national provision stating that certain absences shall count as periods of actual work should be given an EU conform interpretation, in the sense that Emma's sick leave should count as a period of actual work for the purposes of calculating the length of her paid leave.

Question 3

Article 267 TFEU regulates the conditions under which a national court can send a reference for a preliminary ruling to the Court of Justice of the EU. Under which circumstances would the national judge be obliged to send such a reference? (Please note that you can select multiple options. You will receive points for checking correct answer/s as well as for NOT checking incorrect options)

| Your Answer | | Score | Explanation |
|---|---|-------------|-------------|
| <input checked="" type="checkbox"/> Whenever a question of interpretation of EU law arises before a national court. | ✗ | 0.00 | |
| <input type="checkbox"/> Whenever a party to the national litigation demands a reference for a preliminary ruling. | ✓ | 0.25 | |
| <input checked="" type="checkbox"/> Whenever a question of validity of EU law arises before a national court and that court finds it probable that the ground of validity could be well-founded. | ✓ | 0.25 | |
| <input checked="" type="checkbox"/> Whenever a question of interpretation of EU law arises before a national court of last instance and that court considers that a decision on this question is necessary to produce a judgment in the case before it. | ✓ | 0.25 | |
| Total | | 0.75 / 1.00 | |

Question Explanation

Article 267 TFEU empowers all national courts to send references for preliminary rulings to the Court of Justice of the EU,

but does not create an obligation to send such a reference upon the demand of a litigant or upon the mere existence of a question of interpretation of EU law before any national court. However, it follows directly from this article that national courts of last instance are bound to send a reference when a question of EU law interpretation is relevant for the resolution of the case before it. Furthermore, it follows from EU case-law regarding the principle of legal certainty (specifically from Case 314/85, Foto-Frost) that even a national court of first instance would be obliged to send a reference if it is faced with a claim that EU law might be invalid and it considers that this claim could be substantiated.

Question 4

What is the basic condition that must be fulfilled for the EU Charter to become applicable?

| Your Answer | Score | Explanation |
|---|-------------|-------------|
| <input type="radio"/> The circumstances must have taken place in Europe | | |
| <input type="radio"/> The applicability of national law | | |
| <input checked="" type="radio"/> The applicability of EU law | ✓ 1.00 | |
| <input type="radio"/> That there is a violation of a subjective right | | |
| Total | 1.00 / 1.00 | |

Question Explanation

According to Article 51 of the Charter, it applies when EU law is 'implemented'. In the case-law of the ECJ, this has been interpreted as meaning any situation where EU law is applicable.

Question 5

Under what conditions do a certain selling arrangement in the meaning of the judgment in Keck falls outside the scope of Article 34 TFEU?

| Your Answer | Score | Explanation |
|---|-------------|-------------|
| <input checked="" type="checkbox"/> The measure is generally applicable (concerns all affected traders) | ✓ 0.25 | |
| <input type="checkbox"/> The measure is justified by a mandatory requirement | ✓ 0.25 | |
| <input checked="" type="checkbox"/> The measure does not entail any discrimination in law or in fact | ✓ 0.25 | |
| <input type="checkbox"/> The measure is proportionate to the aim in view | ✓ 0.25 | |
| Total | 1.00 / 1.00 | |

Question Explanation

The correct answers are that the measure is generally applicable, and that the measure does not entail any discrimination in law or in fact . The conditions in other options do not have to be fulfilled in relation to the Keck judgment, but only in the Cassis de Dijon line of cases.

Question 6

The public service exception in Article 45 (4) entails that... (Select all that apply)

| Your Answer | Score | Explanation |
|---|-------------|-------------|
| <input checked="" type="checkbox"/> Direct discrimination based on nationality towards employees in the public sector may be allowed | ✓ 0.25 | |
| <input type="checkbox"/> Nationality quota are compulsory in the public service because it should be reflective of society | ✓ 0.25 | |
| <input checked="" type="checkbox"/> Indirect discrimination based on nationality towards employees in the public sector may be allowed | ✓ 0.25 | |
| <input type="checkbox"/> Nationality quota are prohibited in the public sector because it is part of the exercise of the Member State's sovereignty and therefore reserved for its own nationals solely | ✓ 0.25 | |
| Total | 1.00 / 1.00 | |

Question Explanation

The public service exception entails that Member States are allowed to discriminate in favour of their own nationals in selecting the people who work in the public service. It is important to note however, that not all posts in the public service fall within the exception. Furthermore the exception does not allow for discrimination of workers once they have been admitted to the post.

Question 7

On which grounds can derogations be made to the freedom of establishment and the freedom to provide services?

| Your Answer | Score | Explanation |
|--|-------------|-------------|
| <input checked="" type="radio"/> Public policy, public security and public health. | ✓ 1.00 | |
| <input type="radio"/> Environmental protection | | |
| <input type="radio"/> The rule of reason | | |
| <input type="radio"/> Consumer protection | | |
| Total | 1.00 / 1.00 | |

Question Explanation

Article 52 and 62 TFEU state the grounds on which discrimination is allowed in the context of the freedom of establishment and the freedom to provide services. The derogations are regulated in secondary legislation. For natural persons that is Directive 2004/38, for companies that is Directive 2006/123.

Question 8

All signs can not constitute trademarks and there are consequently several grounds for refusal of a trademark registration. In article 3(1) c it is stated that a sign may not constitute a trademark if the sign consists exclusively of indications which may serve, in trade, to designate e.g. the kind, quality, quantity, of the goods. Which of the following is a correct description as to

how article 3(1)c is to be applied and understood?

| Your Answer | Score | Explanation |
|---|-------------|-------------|
| <input type="radio"/> The lack of distinctiveness that is indicated in article 3(1)c may be cured by use and acquired distinctiveness. | | |
| <input checked="" type="radio"/> As soon as there is something indicating a descriptive element a sign can not constitute a trademark | ✖ 0.00 | |
| <input type="radio"/> The wording of article 3(1)c speaks of signs that exclusively consist of descriptive elements. This means that there is no ground for refusal as soon as the sign also consists of some additional element. | | |
| <input type="radio"/> Article 3(1)c only applies in relation to word marks. | | |
| Total | 0.00 / 1.00 | |

Question Explanation

Descriptiveness is part of the assessment of eligibility for registration, but it is not an absolute limitation. Article 3(1)c applies in relation to trademarks in general. The assessment under article 3(1)e takes into account the overall impression of the trademark. Whether or not additional elements may cure lack of distinctiveness is consequently a matter that depends on the circumstances in a specific case.

Question 9

A trademark infringement may be defined as an unauthorised use of a trademark. However, in order for such use to be regarded as infringing a trademark right there are a number of prerequisites that have to be fulfilled. Which of the following is a prerequisite for an infringement according to article 5 trademark directive? (Select all that apply)

| Your Answer | Score | Explanation |
|---|-------------|-------------|
| <input type="checkbox"/> The use in question must be in the course of trade. | ✗ 0.00 | |
| <input checked="" type="checkbox"/> The use gives result to a likelihood of confusion. | ✓ 0.20 | |
| <input type="checkbox"/> The use in question is not descriptive. | ✓ 0.20 | |
| <input type="checkbox"/> The use in question has to be performed within 5 years from the day of registration | ✓ 0.20 | |
| <input checked="" type="checkbox"/> The use regards use of any sign which is identical with a protected trademark in relation to goods or services which are identical with those for which the trade mark is registered. | ✓ 0.20 | |
| Total | 0.80 / 1.00 | |

Question Explanation

A time limitation for use is not relevant in relation to infringements, but rather as an argument for revocation. Descriptiveness is not a prerequisite for infringement, although it may be part of the assessment.

Question 10

Which secondary legislation sets out the rights of residence of self-employed persons?

| Your Answer | Score | Explanation |
|--|-------------|-------------|
| <input type="radio"/> Regulation 2790/99 | | |
| <input checked="" type="radio"/> Directive 2004/38 | ✓ 1.00 | |
| <input type="radio"/> Directive 70/50 | | |
| <input type="radio"/> Regulation 492/2011 | | |
| Total | 1.00 / 1.00 | |

Question Explanation

Directive 73/148/EEC provided that Member States had to abolish restrictions on the movement and residence of nationals wishing to establish themselves in another Member State as self-employed persons or to provide services in another Member State or to enter another Member State to receive services. They also had to abolish restrictions on the movement and residence of the self-employed person's family members. This Directive has been replaced by Directive 2004/38 on free movement rights for citizens and their family members.

