

**The Activity of Publicly
Appointed Surveyors and
the Exercise of Official Authority
within the Meaning of Article 45 EC**

Expert opinion

drawn up by

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A. Subject matter of the opinion

The subject matter of this opinion is to give a judgment in terms of European law on the practice of the profession of publicly appointed surveyors in Germany. The surveying sector in Germany is not homogenous, but it is governed by Land Law regulations that may diverge considerably from one federal state to another. There are at least some particular duties, which are in principle assigned to the surveying and cadastral authorities, but entities of private law may also be entrusted with these duties on the basis of an act of public appointment (with the exception of some federal states like Bavaria). These publicly appointed surveyors are then given a functional official status by the institute of appointment. This status of a publicly appointed entrepreneur involves an inevitable tense relationship to the freedoms of the European internal market. The reason to draw up this expert opinion was the view taken by the European Commission that the provisions, which are effective in the federal states of North Rhine-Westphalia and Rhineland-Palatinate concerning the access to the profession for surveyors and their practice of the profession, are incompatible with European law. For this reason the Commission has instituted infringement proceedings (2001/4483) against the Federal Republic of Germany.

The expert opinion tries to answer the question whether the activity of publicly appointed surveyors is excluded from the scope of application of the European fundamental freedoms, especially from the freedom of establishment and the freedom to provide services, due to the derogation of Article 45 EC applied to the exercise of official authority.

B. Fundamentals

I. The fundamental freedoms in the European internal market

The Treaty establishing the European Community concluded on 25th March 1957 in the version of the Amsterdam Treaty introduced with the European internal market a space without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed (Article 14 EC paragraph 2). According to the treaty the so-called fundamental freedoms, the freedoms of the free movement of goods, capital, and persons are guaranteed. They are put in concrete terms in Article

23 EC et seqq. (free movement of goods), Article 39 EC et seqq. (free movement of persons) and Article 56 EC et seqq. (free movement of capital). The provisions concerning the freedom of movement standardized in Article 39 EC et seqq. regarding the free movement of persons, which is subdivided into the free movement of workers and the freedom of establishment and the freedom to provide services for self-employed persons, are as specific characteristics of the general discrimination ban due to the nationality, which is statuted in Article 12 EC paragraph 1, an essential element in Community law. They replace the general ban of Article 12 EC in their field of application and partly go beyond a mere discrimination ban.

Provided that the professions of the surveyor in general and of the publicly appointed surveyor in particular are included in the personal fundamental freedoms, an equal access to the profession has also to be guaranteed in Germany to all professionals of comparable professions from the member states of the European Union. An inevitable consequence would be to open up the activity of publicly appointed surveyors. In this expert opinion only the rights of freelance surveyors are of interest so that the study will focus on the consequences of the freedom of establishment and the freedom to provide services on the profession. A view on the dogmatism of the relevant fundamental freedoms will at first lay the necessary foundations in part B of the opinion. On this basis, the field of application of Article 45 EC will be examined in detail by evaluating the case-law of the European Court of Justice (C). The determinants of European law defined by the evaluation will then be applied to the activity of publicly appointed surveyors (D), and after having examined the legal consequences of Article 45 EC a concluding evaluation and judgment will be given (F).

II. Freedom of establishment and freedom to provide services

1. Definition

Establishment as defined by Community law signifies the actual exercise of a self-employed economic activity by means of a permanent establishment in another member state and for an indefinite time. In delimitation to this definition, the term of services includes temporary activities which one person in one member state

provides for one person in another member state¹. Although the distinction between an establishment on the one hand and services on the other hand may be problematic in individual cases², for example with regard to the question what kind of infrastructure may be used in the host state to provide services without founding an establishment, this difficult delimitation does not have to be explained in this context. The question whether the provisions concerning the freedom of movement may in principle be applied will be answered identically for the freedom of establishment and the freedom to provide services due to a reference in Article 55 EC.

2. Pre-questions

With regard to the activity of publicly appointed surveyors some key features may be given in advance:

- Provided that the Articles 43, 48 EC assume a pecuniary reward according to general understanding, it is not inapplicable due to the fact that the activity in question is paid for according to rates under public law. The pecuniary reward is considered very broadly and includes payments in the form of rates provided that these rates are considered as quid pro quo for services which have been provided.
- The nature of the activity carried out by the surveyor, that means the practice of a liberal profession, does not have any influence on the evaluation in terms of European law because Article 50 EC paragraph 2 letter d) expressly prescribes that the provisions concerning the freedom of movement also apply to freelance activities.
- Finally, the form of organization of the practice of the profession does not play any role. The fundamental freedoms expressly favour only citizens of the

¹ It has in principle to be distinguished between active and passive freedom to provide services as well as correspondence services. Active freedom to provide services means that the service provider in another member state joins the client, and the passive freedom to provide services describes the opposite scenario. Correspondence services include cases in which the provider and the recipient of services stay in their respective member state and only the services cross the border.

² The freedom to provide services only includes services while the freedom of establishment is also important for the production and the sale of goods. The differences in the field of application are insignificant for freelance service activities.

European Union and with them natural persons. Companies having their seat in the internal market are however treated as equals according to Article 48 EC.

3. Dogmatism of the fundamental freedoms

a) Restriction ban

Article 43 EC paragraph 1 sentence 1 demands that the member states abolish the restrictions concerning the free establishment of nationals from one member state in the territory of another member state. According to Article 43 EC paragraph 2 a member state has to guarantee citizens from other member states of the European Union the taking up and the exercise of self-employed economic activities as well as the formation of companies on the same terms which also apply to its own citizens. With regard to the freedom to provide services Article 49 EC paragraph 1 sentence 1 essentially prescribes with the same wording a ban on any restriction of the free movement of services within the European Union.

b) Restriction by discrimination

With regard to the two rights relating to the freedom of movement the member states are thus affected by the regulation to treat their nationals and citizens from other member states of the European Union as equals with the consequence that any discrimination due to the nationality is inadmissible³. Article 43 EC and Article 49 EC represent specific characteristics of the discrimination ban of Article 12 EC⁴. According to the idea the fathers of the European treaties had a Portuguese lawyer, for example, is in principle to have the same possibility to set up a law practice in Finland as a French geometer is to be allowed to provide his services in Germany. National regulations contradicting this concern are prohibited according to Article 43 EC or Article 49 EC and may not be applied⁵.

³ CoJEC case 197/84 (Steinhauser), corpus 1985, 1819; CoJEC case 270/83 (COM./France), corpus 1986, 273, recital 24; case 221/85 (COM./Belgium), corpus 1987, 719, recital 10; CoJEC case 198/86 (Conrady), corpus 1987, 4469, CoJEC C-221/89 (Factortame), corpus 1991, I-3905.

⁴ CoJEC case 2/74 (Reyners), corpus 1974, 631, recital 15 et seqq.; CoJEC case 136/78 (Auer), corpus 1979, 437, recital 14; CoJEC C-203/98 (COM./Belgium), corpus 1999, I-4899.

⁵ CoJEC case 2/74 (Reyners), corpus 1974, 631.

Regulations prescribed by the host state, which are not directly but only indirectly or covertly of a discriminating nature⁶, may however exceptionally be justified provided that they are required due to compelling reasons of public welfare. Typical indirectly discriminating criteria are those which are attributable to the nationality but which do not directly tie up to it; examples are the place of residence⁷, the language, or the education. The necessary consideration between the fundamental freedom and the public interest is carried out in a process which is similar to the examination of the proportionality of restrictions of the basic rights under German law. Reasons of public welfare acknowledged by the European Court of Justice, which may justify a restriction of the freedom of movement, are for example the consumer protection, regulations concerning professional law, which are to protect the recipient of services, the protection of intellectual property, or the employee protection.

c) Restriction by impediment

Article 49 EC guaranteeing the freedom to provide services goes beyond a mere discrimination ban in so far as a member state may not demand under the well established case-law of the European Court of Justice that all the conditions required for an establishment under circumstances which are pure matters of member state competence are complied with. The case-law is based on the idea that the freedom to provide services would lose its practical effectiveness if it were seen from a more severe point of view. The consequence of it is that a person carrying out cross-border activities is not only allowed to take action within the meaning of simple equal treatment under the same circumstances as a national of the host state. The permissibility of its service activity within the meaning of a “country of origin principle” in fact complies with the regulations which are effective in its country of origin. This approach takes the discrimination ban, which only guarantees an equal treatment, on a wider meaning by extending it to a general impediment ban⁸.

In addition to the discrimination ban another result of this ruling practice is the so-called principle of recognition. It means that an activity which is legal in the country of origin may in principle also be offered in the country of destination within the

⁶ CoJEC C-221/89 (Factortame), corpus 1991, I-3905.

⁷ CoJEC C-221/89 (Factortame), corpus 1991, I-3905.

⁸ It was occasionally named “restriction ban”. The term of restriction is according to the wording of Articles 43, 49 EC used as a generic term for discriminations and impediments for reasons of a clear conceptual understanding.

framework of the fundamental freedoms. For professions for which the access is only possible after at least three years of university studies - for example the engineering professions - this principle of recognition was put in concrete terms in accordance with the coordination instruction given in Article 47 EC by the Directive 89/48/EEC passed in 1989, which includes a general regulation concerning the recognition of higher-education diplomas which complete a vocational training after at least three years.

In the process of the progressive discussion about a dogmatism of the fundamental freedoms the European jurisprudence has applied the idea of an impediment ban, which goes beyond a discrimination ban, on a wider scale to the freedom of establishment. The European Court of Justice applied this idea for the first time in 1995 when it dealt with a legal case concerning some lawyers, the *Gebhard* proceedings⁹, and the court has improved it in a series of rulings since 1995¹⁰. The prohibiting effect does not only apply to discriminating national measures but also to indiscriminately applicable national measures if they are suitable for stopping, preventing or making the exercise of the fundamental freedoms, which are guaranteed by the treaty, less attractive¹¹. This kind of impediments is only exceptionally permissible¹² if the corresponding national (non discriminating) measures

- are justified for compelling reasons of public interest,
- are suitable for guaranteeing that the objectives pursued with them are achieved
- and do not go beyond the measures necessary for achieving the objectives pursued.

It is obvious that this dogmatism is based on a very integrative approach which deeply encroaches on the competence of the member states to regulate internal

⁹ CoJEC C-55/94 (*Gebhard*), corpus 1995, I-4165.

¹⁰ CoJEC C-212/97 (*Centros*), corpus 1999, I-1459; CoJEC C-255/97 (*Pfeiffer*), corpus 1999, I-2835; CoJEC C-4242/97 (*Haim*), corpus 2000, I-5123; CoJEC C-108/96 (*MacQuen*) corpus 2001, I-837.

¹¹ CoJEC C-55/94 (*Gebhard*), corpus 1995, I-4165; CoJEC C-255/97 (*Pfeiffer*), corpus 1999, I-2835; CoJEC C-108/96 (*MacQuen*) corpus 2001, I-837; CoJEC C-294/00 (*Paracelsus Schulen./Gräbner*), corpus 2002, I-6515.

affairs autonomously and without supervision by Community law¹³. This approach only becomes understandable in view of the fact that the coordination of the freedom of establishment with the help of directives according to Articles 44, 47 EC turned out to be a much more difficult venture than it was supposed to be at the beginning. More than 20 years of discussions were needed only to pass a sectoral directive concerning the right of establishment for lawyers; there are many other professions which do not have any comparable regulations to this day.

III. Exceptions to the freedom of establishment and the freedom to provide services

Due to the fact that national restrictions are constantly pushed back by the dogmatism of the fundamental freedoms (see above II.3), which is developing further, the exceptions to the freedom of establishment and to the freedom to provide services explicitly conceded in European law become especially important. The exceptions to the freedom of establishment are defined in the Articles 45, 46 EC. They apply in the same way to the freedom to provide services by a reference in Article 55 EC.

Article 46 EC paragraph 1 gives priority to that kind of legal provisions and administrative regulations compared to the freedom of establishment which provide special arrangements for foreigners for reasons of law and order, public safety or health. It is an exemption which is to guarantee that the police law for foreigners effective in the member states, in particular with regard to national regulations concerning entry and residence, is kept being effective. They must not be confused with the restrictions within the meaning of Article 43 EC¹⁴. In the context dealt with here the regulation is not of any significance.

It is different for Article 45 EC, which will be in the focus of the following considerations: Article 45 EC is a special arrangement concerning the activities of

¹² Cf. Article 49 EC CoJEC C-288/89 (*Collectieve Antennevoorziening Gouda*), corpus 1991, I-4007, recital 13 et seqq.; for Article 43 EC CoJEC C-55/94 (*Gebhard*), corpus 1995, I-4165.

¹³ Cf. *Tiedje/Troberg*, in: von der Groeben/Schwarze (editors), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edition, Hamburg 2003, Article 43 EC, recital 87.

self-employed persons, which are directly or indirectly, permanently or temporarily connected with the exercise of official authority in a member state. For these activities Article 45 EC defines in its first paragraph an exception to the freedom of establishment which also includes the freedom to provide services by the corresponding reference in Article 55 EC.

According to a correct understanding Article 45 EC represents a so-called derogation, it is not a justification¹⁵. That means that the question to justify a restriction of the provisions concerning the freedom of movement on the basis of the principle of proportionality does not at all have to be raised if the activity in question may be qualified as the exercise of official authority. Consequentially, the question of the exercise of official authority may – contrary to a point of view which is occasionally found in the literature¹⁶ – not remain unanswered if the restriction does not seem to be justified in either case¹⁷. The person applying law does in fact not have to answer the resulting question of justification if official authority is exercised. This categorization arises from the wording of paragraph 1 “... this chapter ... is not applied ...“ as well as from the reference of paragraph 2 to the application of the provisions concerning the freedom of establishment.

The rulings of the European Court of Justice occasionally contain misleading remarks¹⁸. A more detailed analysis of the case-law of the European Court of Justice however clarifies that the point of view of the European court is based on the ideas represented in this opinion¹⁹: The European Court of Justice expressly speaks of an exemption in its rulings, which may only be imagined if there is a derogation. The

¹⁴ In this respect inapplicable *Zachert*, AVN 2004, 137 et seq., who mixes up the special arrangements within the meaning of Article 46 EC with the restrictions of Article 43 EC specific to the freedom of establishment.

¹⁵ Fundamental *Lackhoff*, Die Niederlassungsfreiheit des EG - nur ein Gleichheits- oder auch ein Freiheitsrecht? 2000, p. 152 et seqq.; further *Randelzhofer/Forsthoff*, in: Grabitz/Hilf (editors), Das Recht der Europäischen Union, loose-leaf publication, Stand EL 20, Article 45 EC, recital 3; *Müller-Graff*, in: Streinz (editor), Treaty on EU/EC, Munich 2003, Article 45 EC recital 2; different view *Jarass*, EuR 1995, 202, 221 et seqq.

¹⁶ *Zachert*, AVN 2004, 135, 138.

¹⁷ Methodically inapplicable, for this reason attempt of a solution by *Zachert*, AVN 2004, 135, 138.

¹⁸ CoJEC case 147/86 (COM./Greece), corpus 1988, 1637, recital 7; CoJEC case 2/74 (Reyners), corpus 1974, 631, recital 42 et seq.; CoJEC C-114/97 (COM./Spain), corpus 1998m I-6717, 6742, recital 34.

¹⁹ Its relevance is discussed in detail see B II 3.

court has not carried out any analysis of justification in any ruling excluding the assumption that there is a derogation.

IV. Opinions about the relevance of the provisions concerning the freedom of movement for the publicly appointed surveyor

In the juristic literature it has up to now not been paid much attention to the question whether the publicly appointed surveyor is affected by the guarantees outlined here regarding the freedom of establishment and the freedom to provide services or to the question whether his activity may be assigned to the derogation of Article 45 EC.

1. Commentary literature

The publicly appointed surveyors are not mentioned as a use case of Article 45 EC in any comment on the Community law. Most comments are limited to the representation and description of occupations²⁰ which the European Court of Justice dealt with before. Other professions are only considered occasionally, especially notaries²¹, official veterinary surgeons²², official brokers²³, gamekeepers²⁴, and safety inspectors²⁵. A firm occupational analysis of the case-law of the European Court of Justice is missing almost completely; in most cases it is only determined apodictically whether a given occupation is to fall within the scope Article 45 EC or whether this is not to be the case.

2. Monographic literature

The monographic literature, which deals with the provisions concerning the freedom of movement and its restrictions in a more detailed way, does not discuss the relevance of Article 45 EC for the activity of publicly appointed surveyors either.

²⁰ *Scheuer*, in: Lenz/Borchardt (editors), EU- und EG-Vertrag, 3rd edition, Cologne et al. 2003, Article 45 EC, recital 4; *Bröhmer*, in: Calliess/Ruffert (editors), Treaty on EU/EC, 2nd edition, Neuwied 2003, Article 45 EC, recital 8 et seq.

²¹ *Randelzhofer/Forsthoff*, in: Grabitz/Hilf, I.c., Article 45 EC, recital 10; *Müller-Graff*, in: Streinz, I.c., Article 45 EC recital 8; *Tiedje/Troberg*, in: von der Groeben/Schwarze (editors), I.c., Article 45 EC, recital 14 et seq.

²² *Müller-Graff*, in: Streinz, I.c., Article 45 EC recital 8; *Tiedje/Troberg*, in: von der Groeben/Schwarze (editors), I.c., Article 45 EC, recital 19.

²³ *Müller-Graff*, in: Streinz, I.c., Article 45 EC recital 8.

²⁴ *Geiger*, Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, 4th edition, Munich 2004, Article 45V, recital 4.

The fundamental study drawn up by *Grüb* with the title "Europäische Niederlassungs- und Dienstleistungsfreiheit für Private mit hoheitlichen Befugnissen" published in 1999²⁶ especially shows this drawback. The author examines in a rather detailed way the question to what extent different professions and activities fall within the scope of Article 45 EC. He analyses in depth the occupation of lawyers, notaries, patent agents, bailiffs, of honorary lawyers, of physicians, veterinary surgeons, food quality inspectors, of approved experts, of test engineers, regional chimney sweep masters, expert witnesses, auditors, official brokers, placement officers, postal and telecommunications service providers as well as of schools. The publicly appointed surveyors are not taken into account without a more detailed explanation being given. It is the more surprising as they are mentioned in the general paragraphs concerning the German system regarding the delegation of sovereign powers to self-employed persons by way of appointment²⁷. The same applies to the earlier study drawn up by *Kranz* with the title "Die Ausübung öffentlicher Gewalt durch Private nach dem Europäischen Gemeinschaftsrecht"²⁸, in which the author applies a theoretical model developed by him to 16 different occupations²⁹. This study does not discuss the publicly appointed surveyor either³⁰.

More general studies about the scope of the provisions concerning the freedom of movement – for example the papers drawn up by *Nachbaur*³¹, *Lackhoff*³², *Klinge*³³ and *Müller*³⁴ - do not deal with the publicly appointed surveyor either. *Wittkopp*³⁵ is

²⁵ *Müller-Graff*, in: Streinz, I.c., Article 45 EC recital 8; *Tiedje/Troberg*, in: von der Groeben/Schwarze (editors), I.c., Article 45 EC, recital 20.

²⁶ *Grüb*, Europäische Niederlassungs- und Dienstleistungsfreiheit für Private mit hoheitlichen Befugnissen, Frankfurt 1999.

²⁷ *Grüb*, I.c., p. 158.

²⁸ *Kranz*, Die Ausübung öffentlicher Gewalt durch Private nach dem Europäischen Gemeinschaftsrecht, Frankfurt 1984.

²⁹ *Kranz*, I.c., p. 371 et seqq.

³⁰ The study drawn up by *Fesenmair*, Öffentliche Dienstleistungsmonopole im europäischen Recht, Berlin 1996, which might also deal with the subject, was not available for the opinion.

³¹ *Nachbaur*, Niederlassungsfreiheit - Geltungsbereich und Reichweite des Article 52 EG im Binnenmarkt, Baden-Baden 1999.

³² *Lackhoff*, Die Niederlassungsfreiheit des EG - nur ein Gleichheits- oder auch ein Freiheitsrecht? Berlin 2000.

³³ *Klinge*, Die Begriffe "Beschäftigung in der öffentlichen Verwaltung" und "Ausübung öffentlicher Gewalt" im Gemeinschaftsrecht, Düsseldorf 1980.

³⁴ *Müller*, Dienstleistungsmonopole im System des EWGV, Baden-Baden 1988, p. 242 et seq.

the only author who mentions the “surveyor”³⁶ in passing in an enumeration of different occupations which are **not** to fall within the scope of Article 45 EC. The opinion is useless for a more detailed academic analysis because *Wittkopp* does not make a distinction between surveyors in general and publicly appointed surveyors and because he especially gears to the technical activity of the professions mentioned by him, but he does not at all mention the specific characteristics in terms of administrative law, which are important to the activity of the publicly appointed surveyor. The author does neither give any analysis dealing with the specific characteristics of the profession nor are there any usable references to the author’s awareness of problems. It may be pointed out only additionally that the ideas discussed by *Wittkopp* date from 1977 except for the ruling concerning the *Reyners* proceedings; for this reason the case-law of the European Court of Justice, which has meanwhile been differentiated, could not be evaluated.

3. Literature of papers

There appear only three articles which decidedly deal with the applicability of Article 45 EC to the profession of publicly appointed surveyors from the literature of papers which has been evaluated for this expert opinion:

Zachert holds the view that the publicly appointed surveyors are affected by the rights relating to the freedom of movement, and they may not refer to Article 45 EC³⁷. His analysis does not conclusively answer the only decisive question whether publicly appointed surveyors exercise official authority because he supports a methodical opinion held by a minority and does not consider Article 45 EC as a derogation but as a justification³⁸ in contrast to the prevailing opinion. Even if it was assumed that publicly appointed surveyors exercise official authority, this kind of delegation of sovereign powers would be disproportionate and with it contrary to the treaty³⁹. The fact that *Zachert* did not give any clear statement regarding the question of the exercise of official authority suggests that he found it difficult to exclude the publicly appointed surveyors per se from the scope of application of Article 45 EC.

³⁵ *Wittkopp*, *Wirtschaftliche Freizügigkeit und Nationalstaatsvorbehalte: eine Untersuchung zu den Artikeln 48 Absatz 4 und 55 Absatz 1 des EWG-Vertrages*, Baden-Baden 1977.

³⁶ *Wittkopp*, l.c., p. 192.

³⁷ *Zachert*, AVN 2004, 137 et seqq.

³⁸ This methodically incorrect approach was discussed in detail above A III.

Tiemann does not definitely commit herself to the problem in her opinion, but she tends to consider the activity of publicly appointed surveyors as not being included in Article 45 EC⁴⁰. She essentially bases her opinion on the argument that publicly appointed surveyors do not exercise any compulsory powers and that their activity is of an especially technical character⁴¹. *Tiemann* only refers to the definition of the term defined by the advocate general of the *Reyners* proceedings. She does not give any detailed analysis of the case-law of the European Court of Justice. She does in particular not deal with the question to what extent there remains a core area for a sovereign activity, which is surely included in Article 45 EC, despite an alleged primarily “technical activity“. Finally, an analysis of the connecting question, which is fundamental to her, whether the restrictions, which are tendentially affirmed by her, may be justified on the principles of the Gebhard ruling of the European Court of Justice, is missing.

Klöppel holds a contradictory view⁴². In his opinion, the activity of publicly appointed surveyors may be based on Article 45 EC. The deciding factor for him is the identical status of the public surveying sector with its land surveying offices and publicly appointed surveyors⁴³. His further considerations are of a rather strategic and tactical nature, and they are based on a line of argumentation which can primarily be used for legal policy in case the exclusion of the activities carried out by publicly appointed surveyors from the provisions concerning the freedom of movement of the Community law should not be realized⁴⁴.

C. The derogation of Article 45 EC

I. Fundamentals for the interpretation

The central problem of Article 45 EC is to define the term of the exercise of official authority. The question, which has to be answered first in order to find a solution to the problem, is whether the term is an autonomous legal term of European law or

³⁹ *Zachert*, AVN 2004, 137, 139.

⁴⁰ *Tiemann*, Forum 2000, 422 et seqq.

⁴¹ *Tiemann*, Forum 2000, 422, 425.

⁴² *Klöppel*, Forum 2004, 292 et seqq.

⁴³ *Klöppel*, Forum 2004, 292, 294.

whether the term has to be defined with reference to the understanding of the term by national law of the member state concerned. The European Court of Justice in principle refers to the national regulations of the member state regarding the structure and the practice of the profession in question when it examines Article 45 EC⁴⁵. When the court examines a profession it only gears to the conventional description of the occupation in the whole, but it normally does not examine any specific conditions which apply in the member state⁴⁶. The member states are to be refused to divest the provisions concerning the freedom of movement of its effectiveness by taking unilateral measures. For this reason the derogation has in principle to be interpreted within a narrow framework according to the prevailing opinion⁴⁷: Exceptions are only permissible in the light of European law in so far as it is required by the purpose by which they are justified⁴⁸.

II. Matter of fact of Article 45 EC

Article 45 EC assumes an “activity“ and the “exercise of official authority“ in terms of the matter of fact. These two conditions are not defined more precisely in the treaty so that it is left to the jurisprudence and to the case-law of the European Court of Justice to put them in concrete terms.

1. Activity

The derogation of Article 45 EC factually ties up to an “activity“. By announcing a verdict in the *Reyners* proceedings the European Court of Justice brought an end to an animated controversy about the question whether the term of “activity“ corresponds with the term of “profession“ or whether it has to be seen in a narrower context. The European Court of Justice ruled within the meaning of the latter term, and the court underlines that the national issues protected by Article 45 EC are

⁴⁴ This expert opinion only deals as per order with legal questions so that it cannot be further dealt with the relevant considerations made by *Klöppel* in this context.

⁴⁵ CoJEC 2/74 (*Reyners*), corpus 1974, 631, recital 48 et seqq.; CoJEC 147/86 (COM./Greece), corpus 1988, 1637, recital 8; CoJEC C-42/92 (*Thijssen*), corpus 1993, I-4047, recital 9 et seq.

⁴⁶ Cf. CoJEC C-355/98 (COM./Belgium), corpus 2000, I-1221, recital 26.

⁴⁷ Critical for example *Hergeth*, *Europäisches Notariat und Niederlassungsfreiheit nach dem EG-Vertrag*, Baden-Baden 1996, p. 98 et seq.

sufficiently safeguarded if not a profession as a whole but if only those activities which in themselves have to be considered as an involvement in the exercise of official authority are withdrawn from the liberalization⁴⁹. An extension of the derogation to a whole profession may only be considered if the activities which are connected with the exercise of official authority may not be distinguished from other non official duties⁵⁰. The European Court of Justice pursues with that the so-called “principle of division“, which is based on the wording of the Community law⁵¹. Unfortunately, the European Court of Justice has not yet proposed any criteria at what point an isolated consideration of an activity is possible. Every occupation can theoretically be subdivided into a multitude of logical steps so that the right level of abstraction for the interpretation of the derogation cannot be set normatively. For pragmatic reasons the obvious thing is to choose a normal approach⁵².

2. Exercise of official authority

a) Use of terms

(1) Failures of the European Court of Justice

The European Court of Justice avoided in its rulings mentioned here regarding Article 45 EC formulating a precise definition of the term “exercise of official authority“, which is available to the subsumption. The European Court of Justice in fact regularly describes the activity in question in order to determine apodictically whether official authority is exercised or not concerning the activity in question. It has so far not been successful to derive a dogmatism of Article 45 EC from the casuistry as a result of this ruling practice. Even the leading decision concerning the *Reyners* proceedings does not contain any fundamental comments regarding the conception. At first, this failure of the doctrine and practice regarding European law has to be cleared and a structure of the process of examination has to be extracted from the present sources of knowledge in order to cope with this expert problem. It will then be possible to make an occupational interpretation concerning the activity of the surveyor.

⁴⁸ CoJEC case 2/74 (*Reyners*), corpus 1974, 631, recital 42.

⁴⁹ CoJEC case 2/74 (*Reyners*), corpus 1974, 631, 654, recital 45.

⁵⁰ CoJEC case 2/74 (*Reyners*), corpus 1974, 631, 654, recital 46 et seq.

⁵¹ Cf. details *Kranz*, *Die Ausübung öffentlicher Gewalt durch Private nach dem Europäischen Gemeinschaftsrecht*, Frankfurt 1984, p. 255 et seq.

⁵² Cf. *Hergeth*, l.c., p. 100 et seq.

(2) Interpretation aids of the advocate general and the Commission

The apodictic brevity of the rulings of the European Court of Justice, which is complained about in many cases, may as a rule be explained and justified by the petitions filed by the advocate general, which are explained in detail and which are always published in connection with the ruling. Especially in cases in which the court obeys the petitions the combined reading of the petition filed by the advocate general and of the ratio decidendi shows the line of argumentation pursued by the court. The starting point in order to understand the term of official authority therefore constitute the comments made by advocate general *Mayras* in the final motion of the *Reyners* proceedings, which the European Court of Justice adopted without discussing the problem on its own. The following definition is found there⁵³:

“Official authority originates from public ruling power, from the state empire. For the person exercising the authority it contains the possibility to make use of special rights, sovereign privileges and compulsory powers towards the citizen.”

The Commission proposed a similar definition, which is narrower concerning its central statement, in its comment on the *Reyners* proceedings. It formulates it as follows⁵⁴:

“The term of the exercise of official authority may be defined to the effect that it represents the realization of a special right with compulsory powers towards persons and matters which the citizen is not entitled to in the context of a general relationship of powers and which allows the person it is granted to to act irrespective of the approval or even to act against the will of others.”

The definition by the Commission is narrower in comparison with the understanding of the term by the advocate general because it is restricted to the exercise of **compulsory powers** whereas the advocate general has the intention to include other sovereign rights. Furthermore, the Commission demands that the activity may be carried out “irrespective of the approval or even against the will of others“. Such an understanding would exclude activities which are only carried out with the will of the persons involved, for example due to the necessity of a petition instituting

⁵³ CoJEC case 2/74 (*Reyners*), corpus 1974, 631, 665. (retranslated from German)

proceedings or the like. Later the Commission did however not gear to this possibility of an activity which is irrespective of the will of the persons involved anymore in the comment on the proceedings *Commission ./. Greece* ruled in 1991, but it geared to “special rights under public law, to privileges of official authority connected with means of enforcement towards the person concerned”⁵⁵.

(3) in the jurisprudence

There are very different attempts of a definition in the (German) juristic literature:

According to *Bröhmer* a recourse to Article 45 EC is only possible if “the specific activity in question also includes necessarily the exercise of compulsory powers and the public purpose may not be achieved by less decisive measures”⁵⁶.

*Randelzhofer/Forsthoff*⁵⁷ give a more differentiated formulation: “The derogation may only be appropriate if the concrete activity in fact falls within the scope of the exercise of public authority, which is a sensitive area for the member states. This formulation applies *at least* [emphasis by the authors] to activities which are connected with the exercise of compulsory powers, special rights or other sovereign privileges. If the self-employed person is allowed to act by administrative act, it makes use of special rights, and the activity has necessarily to fall within the scope of the proviso.”

Müller-Graff gears to the question whether the specific subject of state sovereignty is revealed by the activity. According to him, it is an *indication* for official authority if a member state makes use of special rights, sovereign privileges, and compulsory powers towards the citizen regarding the activity concerned⁵⁸.

According to *Tiedje/Troberg*, official authority is characterized in that the acting person is authorized by national regulations to order or carry out itself the enforcement of its action, and the addressee has to accept it⁵⁹.

⁵⁴ CoJEC case 2/74 (Reyners), corpus 1974, 631, 641. (retranslated from German)

⁵⁵ CJEC C-306/89 (Commission ./. Greece) = corpus 1991, 5863, 5867. (retranslated from German)

⁵⁶ *Bröhmer*, in: Calliess/Ruffert (editors), I.c., Article 45 EC, recital 6.

⁵⁷ *Randelzhofer/Forsthoff*, in: Grabitz/Hilf, I.c., Article 45 EC, recital 8.

⁵⁸ *Müller-Graff*, in: Streinz, I.c., Article 45 EC recital 5.

⁵⁹ *Tiedje/Troberg*, in: von der Groeben/Schwarze (editors), I.c., Article 45 EC, recital 9.

Geiger confines himself to the statement that the exercise of official authority consists in the exercise of sovereign powers⁶⁰.

Other commentators like *Scheuer* completely renounce a positive definition and make instead do with negative delimitations and the description of the casuistry⁶¹.

The study drawn up by *Klinge* may be mentioned as an example from the monographic literature regarding Article 45 EC⁶². According to this study the “exercise of official authority“ is defined as sovereign influence on the private sphere of individual entities, which is not limited to the acts of state sovereignty but which rather comprises all expressions of sovereign action carried out by self-employed persons to whom the state has delegated this authority for reasons of public welfare⁶³.

(4) Evaluation

It is observed in the monographic literature, which has decidedly analysed Article 45 EC, in the setting of the numerous divergent attempts at interpretation and the missing definition by the European Court of Justice – with a certain resigned undertone – that a subsumable definition may not be offered and that an evaluating judgment may only be given in individual cases⁶⁴. This is undoubtedly correct provided that a prediction of the case-law of the European Court of Justice regarding the activity of a given profession is requested. A reliable dogmatism of Article 45 EC is in fact missing so that every prediction will be charged with a considerable amount of uncertainty.

There may however be derived some fundamental ideas from the definitions and statements which have so far been made: The common central idea of all the opinions outlined above is that the exercise of official authority requires the exercise

⁶⁰ *Geiger*, I.c., Article 45V, recital 3.

⁶¹ *Scheuer*, in: Lenz/Borchardt, I.c., Article 45 EC, recital 2 et seqq.

⁶² Studies which develop an understanding differing completely from the case-law of the European Court of Justice as a result of their interpretation of the terms are not considered, for example the study drawn up by *Kranz*, *Die Ausübung öffentlicher Gewalt durch Private nach dem Europäischen Gemeinschaftsrecht*, Frankfurt 1984.

⁶³ *Klinge*, *Die Begriffe “Beschäftigung in der öffentlichen Verwaltung” und “Ausübung öffentlicher Gewalt” im Gemeinschaftsrecht*, Düsseldorf 1980, p. 233 et seqq.

⁶⁴ Cf. for example *Hergeth*, p. 122 et seq.; *Fischer*, DNotZ 1989, 467, 494.

of rights which may normally only be found in a relationship of superordination/subordination of the state and the citizen. It is indisputable now that an intervention “irrespective of the approval or even against the will of others” is not necessary and that the corresponding earlier opinion of the Commission is antiquated with this new view. Furthermore, it has become clear that according to the literature the recourse to “special rights under public law, privileges of official authority and means of enforcement towards the person concerned” only constitutes the central area of the exercise of official authority because it is archetypical of action in a relationship of subjection. This kind of authority is in either case a sufficient condition, but it is not a necessary condition for the exercise of official authority. The exercise of official authority may in fact also arise from the granting of special rights, which typically fall within the scope of public authority.

b) Analysis of the case-law of the European Court of Justice

The central issue of this expert opinion is whether and to what extent this view of the literature regarding European law is compatible with the casuistry of the European Court of Justice, which always deals with individual cases, so that it can be used as a dogmatic basis for the case-law of the European Court of Justice.

The European Court of Justice has only commented on Article 45 EC in a few rulings⁶⁵ since 1974. The judicial rulings regarding Article 39 EC paragraph 4 may also provide some usable references for the subject matter of this opinion because this provision concerning the term of “employment in the public service” demands to make comparable considerations with regard to dependent employees⁶⁶.

(1) CoJEC case 2/74 (“Jean Reyners”)⁶⁷

The “Reyners” ruling has been acknowledged as a “leading case” of the case-law of the European Court of Justice⁶⁸. It concerned the activity of the ‘avocat’ and dealt

⁶⁵ See for reasons *Randelzhofer/Forsthoff*, in: Grabitz/Hilf, I.c., Article 45 EC, recital 4.

⁶⁶ See for the differences between the two regulations in detail *Randelzhofer/Forsthoff*, in: Grabitz/Hilf I.c., Article 45 EC, recital 1 et seq.

⁶⁷ CoJEC corpus 1974, 631 = NJW 1975, 513.

with the action filed by a Dutch national who was holder of a Belgian diploma which enabled Belgian citizens to practise the profession of the lawyer in Belgium, but it did not enable foreign citizens from other member states of the European Union to do so. The decisive argument the Belgian government gave was that the activity of lawyers represented the exercise of official authority, and foreign citizens could therefore be excluded from the practice of the profession of the lawyer even if their qualifications were sufficient. The European Court of Justice countered this view, and it clarified in the *Reyners* ruling that foreign nationals may only be excluded from those activities of lawyers which represent a direct and specific involvement in the exercise of official authority, but they may not be excluded from the practice of the profession of the lawyer as such. The deciding factor for the European Court of Justice was the fact that the activity of the lawyer is not affected by “the judicial judging and the free exercise of judiciary authority”.

In the opinion of the European Court of Justice, it is insufficient, as the ruling shows, that a person is involved in public decision-making processes with the activity typical of its profession and that it may even have an essential function for these processes. The person’s action has in fact so to speak to be carried out on behalf of the state, that means it may not only have a merely supporting or preparing function which then constitutes the basis for a public decision-maker like for example a lawyer. The *Reyners* ruling also shows that the lack of “special rights under public law, privileges of official authority and means of enforcement“, which are regularly stated as typical examples, does not prevent from assuming that official authority is exercised for other reasons. Lawyers do obviously not have any appropriate powers towards the citizen. The European Court of Justice could very easily have justified the exercise of official authority within the meaning of Article 45 EC by it if the court had really supported an appropriately narrow understanding of the term.

(2) CoJEC case 147/86 (Commission ./. Greece – “Frontistiria“)⁶⁹

The “*Frontistiria*“ ruling dealt with Greek regulations concerning the founding of private schools and with the possibility to be allowed to teach as a private tutor in Greece. The European Court of Justice stated that a member state was not allowed to refer to Article 45 EC, giving the argument that education is a delegatable central

⁶⁸ See for detailed information *Kranz*, p. 110 et seqq.

⁶⁹ CoJEC corpus 1988, 1637.

duty of the state, in order to reserve the founding of certain private schools to nationals. The European Court of Justice only states apodictically that the founding of a private school does not involve the exercise of official authority. The decisive argument offered in these proceedings was that the state may also fulfil its educational duty by using a more lenient means than restricting the freedom of establishment, that is to say by a more intensive supervision of private schools.

The “*Frontistiria*“ ruling appropriately shows that an action towards a citizen has to be carried out if the exercise of official authority is assumed, and measures which only support or substitute the fulfilment of official duties without having any external effects are insufficient to open up the field of application of Article 45 EC.

(3) CoJEC C-3/88 (Commission ./. Italy – “Data processing“)⁷⁰

The subject matter of this legal case were regulations issued by the Italian government according to which governmental agencies in different public fields of activity (taxes, public health system, agricultural sector, urban development) concerning the installation of data processing systems on behalf of the public service were only allowed to make contracts with companies which were mainly in state or public ownership. The Italian government justified these regulations by the argument that a direct exerting influence by the state on those providing services has to be possible in order to be able to influence unforeseeable developments. Furthermore, the restriction contributes to legitimate interests of the state in the concealment of delicate data. It is obvious that it was only stated as an auxiliary argument that the activity in question ranks with the exercise of official authority “because of its confidential character“. The Italian government did not explain in more detail to what extent the merely confidential character of an activity might open up the field of application of the derogation. The European Court of Justice pointed out that the confidentiality could be guaranteed by appropriate liabilities in connection with threats of punishment. With regard to the activity as such – data processing for governmental agencies – the European Court of Justice stated that it did not represent a direct and specific involvement in official authority because activities of a merely technical nature – the design and programming of software for data processing systems and their operation and maintenance - were carried out in the interest of the state.

It can be derived from the ruling that it does at least not represent an exercise of official authority if the activities in question are not provided having external effects on a citizen, but if they are only carried out for the state in its interest.

(4) CoJEC C-306/89 (Commission ./. Greece – “Motor vehicle experts“)⁷¹

The legal case C-306/89 concerned the activity of Greek motor vehicle experts, which Greek courts call on for the examination of traffic accidents. The decisive argument stated by the European Court of Justice in these proceedings why it rejected the fact that the motor vehicle experts exercise official authority was the fact that the expert opinions do not bind the judges regarding their judicial powers and their free evaluation of evidence. It becomes clear again that activities which only have the function to support the authorities in taking their decisions may not be considered as an exercise of public duties. In this case there is a lack of interventions towards a citizen, which are typical of a relationship of subjection and which results the citizen is (at first) bound to.

The European Court of Justice requires for a “direct involvement in the exercise of official authority“ that the person exercising official authority has to take binding decisions, which may only be modified in proceedings with a legal form. It is therefore not sufficient if it is in the discretion of governmental agencies whether the decision made by the self-employed person called on for support may claim validity or not.

(5) CoJEC C-42/92 (Adrianus Thijssen ./. Controledienst voor de Verzekeringen – “Thijssen“)⁷²

This realization was further refined in the case of “*Thijssen*“. The legal case concerned the activity of the Belgian “*commissaire agréé*“, a kind of approved commissioner who is dispatched by the supervision authority of insurance undertakings (*Controledienst voor de Verzekeringen* – CVD) to work in insurance undertakings. He has to revise the accountancy there, to give report to the board of control, and in some cases he has to exercise a power of veto. The question to what extent the activity in question has a direct legally binding effect on the citizen

⁷⁰ CoJEC corpus 1989, 4035.

⁷¹ CoJEC corpus 1991, 5863.

⁷² CoJEC corpus 1993, I-4047.

concerned within the meaning that the citizen considers himself so to speak as being confronted with actions on behalf of the state or whether the activity only affects the citizen by a kind of implementation act, which is issued by a governmental agency or another state institution, was very important in this case. The difference between the Greek case, which was ruled before, and the case of *Thijssen* is that a “*commissaire agréé*” has certain possibilities to exert influence on an insurance undertaking. He has the main duty to provide information for the board of control, which may then constitute the basis for measures in terms of supervisory law. In this respect the activity is similar to the activity of an expert witness.

The specific feature, which also resulted in the fact that the matter was presented to the European Court of Justice, consisted in the fact that the “*commissaire agréé*” is allowed to put a veto on management decisions which might represent punishable offences. From this point of view, it would in principle have been possible to assume an involvement in the exercise of official authority in contrast to the case regarding the Greek motor vehicle experts. The European Court of Justice did however not consider the power of veto as a sufficient reason in order to affirm a delegated state action. The European Court of Justice casually granted the power of veto exercised by the “*commissaire agréé*” a quality of intervention which is typical of state action. However, the court opposed the exercise of official authority because the power of veto exempts a management decision from the beginning only for eight days, and it does not come into legal effect anymore when the time is expired. The board of control is in fact obliged to take a measure, which is appropriate from its point of view, within the postponement period caused by the veto. The action taken by the board of control is not determined by the veto of the approved commissioner, but the board remains completely independent in making its decisions. The European Court of Justice concluded that the board of control is the only authority to exercise sovereignty irrespective of the cooperation of the approved commissioner and the board of control and that it does not delegate any sovereignty.

The central statement of the ruling is that a participation in the exercise of official authority which is relevant to European law presupposes that the activity in question determines binding, definitive legal consequences for the citizen and that it does not only give a governmental agency the possibility to order legal consequences by virtue of the gained knowledge.

(6) CoJEC C-272/91 (Commission ./. Italy – “Lottery licence”)⁷³

Regarding the legal case C-272/91 the case-law resulting from the ruling concerning Italian data processing employees (C-3/88) was on the whole perpetuated. The proceedings concerned the introduction of an automated system for the Italian lottery, which represents a state monopoly. A licence for the technical operation and maintenance of the system was only to be given to companies which were mainly in Italian state ownership. The decisive difference proved by the Italian government between this case and the facts of the ruling concerning data processing consists in the fact that it does not only concern the technical assistance of state activity. It represents in fact a delegation of public authority in the field of games of chance, which are monopolized by the state, because licences for the conduct of the lottery are granted. The service provider would replace the public service, for example, when the taking on of betting stakes by the different agencies - which are also granted a licence by the state - is checked.

The European Court of Justice opposed this view following the comments stated by the advocate general. According to the court the licensee only takes on the technical operation and maintenance of the lottery by programming and installing the appropriate software and hardware to conduct the lottery. Because of the actual form and conduct of the lottery in Italy the European Court of Justice came to the conclusion that the licensee was only to create the technical conditions so that other authorities were able to exercise supervisory powers ordered by the state.

The ruling affirms that it does at least not represent any exercise of official authority if the activities in question are not carried out with external effects on a citizen, but if the activities are only carried out in the state’s interest towards the state so that the state in its turn is able to take action towards the citizen in a relationship of subjection.

(7) CoJEC C-55/93 ("Johannes Gerrit Cornelis van Schaik")⁷⁴

The ruling of the European Court of Justice concerning the *van Schaik* proceedings is of a certain interest with regard to the subject matter dealt with in this expert

⁷³ CoJEC corpus 1994, I-1409.

⁷⁴ CoJEC corpus 1994, I-4837.

opinion. It did not directly concern the interpretation of Article 45 EC or Article 39 EC paragraph 4. The question whether a criminal court in the Netherlands is allowed to convict a person for driving a motor vehicle without having a valid operating licence if the operating licences in question are not given by a governmental agency but “only“ by laboratories, which are run by self-employed persons having the corresponding authorization issued by governmental agencies, was in fact to be settled within the framework of submission proceedings⁷⁵. The person pursued in the Netherlands had objected that the Dutch system of granting operating licences was contrary to contract so that the driving of a motor vehicle without having a valid operating licence was not allowed to be prosecuted under criminal law. The European Court of Justice answered the corresponding submission question of the Dutch *Hoge Rad* by stating rather casually among other things that sovereign authority was exercised by giving an operating licence, and for this reason an extension of the recognition authority to companies in other member states was out of question⁷⁶. The corresponding interpretation was explicitly carried out with regard to Article 45 EC⁷⁷. In this ruling the European Court of Justice did not make any further distinction regarding the question whether the final inspection of the vehicle as such does not represent an exercise of official authority, but if the granting of an operating licence may however be qualified as an exercise of official authority.

It can be concluded from the *van Schaik* ruling - provided that the principal reasons, which are not very expressive regarding this point, actually permit a reliable interpretation – that a person entrusted with sovereign duties is allowed to make a unilateral regulation towards the citizen which binds the citizen. The European Court of Justice obviously acknowledges in this case that an extreme division of this activity into little steps is not possible. The exercise of official authority in fact includes absolutely imperative groundwork which makes the unilateral regulation towards the citizen possible.

⁷⁵ The starting point regarding European law in the Dutch legal proceedings was the fact that the relevant laboratories were only allowed to be run by natural persons having the Dutch nationality or by companies which have their seat in the Netherlands.

⁷⁶ CoJEC corpus 1994, I-4837, recital 16.

⁷⁷ CoJEC corpus 1994, I-4837, recital 3.

(8) CoJEC C-114/97 (Commission ./. Spain – “Security undertaking I”)⁷⁸

The ruling regarding legal case C-114/97 was the first decision out of three rulings, which were issued in rapid succession, concerning the activity of private security undertakings in the member states. In Spain the activity of private security undertakings required a licensing, which was only allowed to be granted to Spanish companies and which required that only Spanish staff was employed, according to the legal provision tackled in this case. The Spanish government justified this regulation among other things by stating that the activity of security undertakings fell within the scope of the derogation of Article 45 EC. The European Court of Justice opposed this justification by considering different considerations: On the one hand, the private security undertakings did not work on a basis under public law with regard to their clients, but they were in relations under private law with them. On the other hand, the private security undertakings were not entitled to make use of special powers typical of state action when they provide their services. The private security undertakings had rather to be seen in the context of the so-called everyman’s rights granted to every citizen. Furthermore, the legal obligation prescribing that security undertakings have to support governmental agencies in certain situations was defined in a way that the supporting activity only represented an auxiliary activity which governmental agencies used within the framework of the exercise of official authority. Provided that the activities of security undertakings served the interests of the state for they contribute to maintain public safety, it was only a reflection of an economic activity in a relationship of equality and therefore it did not represent an exercise of official authority.

The exercise of official authority thus requires that more rights have to be granted to the person in question than to every other citizen even if the rights in question may at first sight seem to be powers exercised by the state. Provided that the activity in question is carried out on the basis of private law, it is at least an indication for the fact that not any official authority is exercised. The necessity to distinguish exactly between merely supporting activities carried out for governmental agencies and a really independent exercise of official authority is underlined once again.

⁷⁸ CoJEC corpus 1998, I-6717 = EuZW 1999, 125.

(9) CoJEC C-355/98 (Commission ./. Belgium – “Security undertaking II”)⁷⁹

This ruling also concerned the activity of private security undertakings. It only confirms the argumentation resulting from the proceedings regarding security undertakings in Spain, which were passed one and a half year before this ruling, and it does not contain any new approaches of justification. The European Court of Justice underlined that this kind of activity was not connected with any “direct or immediate involvement in official authority”.

(10) CoJEC C-283/99 (Commission ./. Italy – “Security undertaking III”)⁸⁰

The ruling C-283/99 also dealt with the activity of private security undertakings, in this case in Italy. This ruling of the European Court of Justice is a little bit more expressive than the previous proceedings regarding the Belgian security undertakings because the Italian government gave a detailed report on the justification of its regulations. The Italian government had objected that the field of application of the derogation was opened up because the private security undertakings and their employees were subject to the disciplinary power of the local police prefect, they were sworn by the state, and certain rights, which are of a criminal investigation nature, were granted to them when preventing crime. Among these rights was for example the authority to arrest persons caught in the act and the authority to take statements. Their activity would then involve the exercise of official authority. The European Court of Justice did not accept this argumentation, and it followed closely the comments made by the Commission when it gave its brief comments on Article 45 EC. According to that, allegiance towards the state by taking an oath and by subjecting to public authority does not justify the fact that a given activity is qualified as the exercise of official authority. The right to arrest persons caught in the act concerning serious crimes is not a right which is specific to a given profession, but it is an everyman’s right.

The European Court of Justice stated that provided that certain other rights were not granted to everyone but that they were only granted to governmental agencies and security undertakings, the following distinction would have to be made: If the authority to take statements having probative value was granted, it would only have to be considered as a preparing auxiliary activity for subsequent state action, but it

⁷⁹ CoJEC corpus 2000, I-1221 = EuZW 2000, 344 = NZA-RR 2000, 431.

⁸⁰ CoJEC corpus 2001, I-4363 = EuZW 2001, 603.

could not comply with the matter of fact of Article 45 EC. Rights to arrest persons, which are not granted to everyone, for example in case of less serious offences, could at most justify excluding this part of the occupation which may be separated from the rights relating to the freedom of movement.

The third ruling of the European Court of Justice regarding the relationship of the activity of private security undertakings with the derogation of Article 45 EC affirms the guidelines of the case-law of the European Court of Justice: Professions as a whole may not be excluded from the rights relating to the freedom of movement provided that individual typical activities which come up when the profession is carried out may be separated and assigned to the derogation. The exercise of official authority requires more than the explicit granting of everyman's rights and the authority to carry out auxiliary activities which only prepare the actual state action without having any direct legal effect on another person. Finally, the mere exercise of public disciplinary power by a professional group does not justify the assumption that this professional group necessarily exercises official authority.

(11) CoJEC C-405/01 (Colegio de Oficiales de la Marina Mercante Española ./ Administración del Estado – “Spanish naval captains“)⁸¹

A current ruling of the European Court of Justice⁸², which was only passed in October 2003, regarding Article 39 EC paragraph 4, which provides a derogation corresponding to Article 45 EC for employees, contains many interesting statements usable for the controversy which an opinion is given on in this expert opinion. The ruling concerned the activity of Spanish naval captains and naval officers: The decisive Spanish rules provide that the captain and the First Officer are only to be allowed to be Spanish citizens in a certain register of resident ships. There are different regulations of Spanish law which grant state duties like safety and police duties, notarial duties as well as duties with regard to births, marriages and deaths to captains – and to the First Officer standing in for him - navigating ships of the Spanish merchant navy. If these activities are not carried out on merchant ships, state officials exercise these functions in Spain. The European Court of Justice stated that these far-reaching powers went beyond the mere contribution to maintain

⁸¹ CoJEC DVBl. 2004, 197 (head note).

⁸² Article 39 EC paragraph 4 provides: “The provisions of this article shall not apply to employment in the public service.”

public safety which everyone is obliged to contribute to, and that the notarial powers and the authority with regard to births, marriages and deaths were not causally connected with the navigation of a merchant ship, but that they represented a protection of public issues on this ship.

The European Court of Justice did not make a problem out of the exercise of official authority, which may in principle be affirmed according to this ruling, but it made a problem out of its temporal aspect: The European Court of Justice demands that these powers are really exercised regularly by the employees and that they do not only constitute a very small part of their activity. The European Court of Justice explains this temporal aspect by the argument that the issues of a member state would not be jeopardized if sovereign authority was only exercised sporadically or exceptionally by citizens from other member states.

The latest ruling of the European Court of Justice adds another mosaic piece in the form of a temporal aspect to the characteristic elements of the exercise of official authority, which have so far been extracted from the casuistry: The European Court of Justice demands that official authority is exercised with a certain frequency because otherwise the member state would have no apparent interest in reserving the activity in question to its citizens.

c) Interim result

Although it has not yet been possible to develop a definition of the term of the “exercise of official authority“ which is subsumable and supported by a large consensus, there may however be inferred a number of characteristic criteria from the analysed rulings of the European Court of Justice which an activity has to fulfil or which it is not allowed to fulfil in order to be accepted as the exercise of official authority.

1) The starting point of the considerations made by the European Court of Justice is that professions as a whole may not be excluded from the rights relating to the freedom of movement provided that individual typical activities which come up when the profession is carried out may be separated and assigned to the derogation of Article 45 EC.

2) The delineation has to be inevitably negative by the way as not any ruling in which the European Court of Justice affirms the exercise of official authority within the

meaning of Article 45 EC has so far been announced. The following criteria have to be examined in this respect with regard to the activity of publicly appointed surveyors:

- The activity has to go beyond merely auxiliary functions which only prepare the actual state action without having any direct legal effect on the citizen.
- The person concerned has to have powers which go beyond everyman's rights within the framework of the activity. The special rights assigned to a person do not necessarily have to be compulsory powers in the narrower sense. This kind of compulsory powers is – in this respect the opinion presented by the European Court of Justice corresponds with the view mentioned in the literature – a sufficient but not a necessary requirement for the exercise of official authority.
- The activity has to be carried out with external effects on a citizen, and it may not only be carried out in the interest of smooth administrative action.
- If an activity is carried out on the basis of private law and if it is up to the professional to establish a privity to the citizen, this is an indication for the fact that not any official authority is exercised.
- The activity, which is to justify the exercise of official authority, has to be carried out with a certain frequency.

3. The criteria of the European Court of Justice in detail

a) “Activity involves special authority“

(1) Special rights, sovereign privileges and compulsory powers

In the context of an overall view the European Court of Justice especially turns its attention to the question whether the activity, which is to be examined, involves powers for the person carrying it out which are not granted to a normal citizen. This requirement also constitutes the core of a definition of the “exercise of official authority“. This requirement is usually described, taking up a comment made by the advocate general in 1974, in the literature with the phrase that the person concerned has to have the possibility to make use of “special rights, sovereign privileges, and compulsory powers“ towards the citizen. It does not become clear from the case-law of the European Court of Justice that this kind of authority may only be supposed if,

as it is occasionally heard, there are compulsory powers in the narrower sense like for example the entry right, which may be enforced independently⁸³. “Special rights, sovereign privileges and compulsory powers“ may in fact be affirmed if a self-employed person is able to make use of a type of action which is not typical of legal relations in terms of private law but of a relationship of subjection by virtue of the corresponding legal authority or appointment towards a citizen. This fact applies at least to activities when the acting person is allowed to issue unilaterally binding acts or to influence others unilaterally⁸⁴.

(2) Types of action in a relationship of subjection

The type of action which is primarily typical of the relationship of subjection in the German legal system is action by administrative act. The administrative act distinguishes itself by the characteristic that a faultless legal effect, a binding effect and – according to its respective content - the possibility of enforcement by the public service are created by unilateral sovereign action. It is characteristic of the administrative act that it is issued by an administrative body, but private persons may also be entrusted with the sovereign fulfilment of certain administrative duties on behalf of themselves, and within this framework they may also be entrusted with the issuing of administrative acts. According to the understanding of the German legal system, this type of action has especially to be differentiated from simple sovereign administrative action, which is not carried out by administrative act but by real act. In the German literature it is predominantly assumed that simple sovereign action does not meet the demands of Article 45 EC⁸⁵. This view is usually protected by referring to the case-law of the European Court of Justice regarding Article 39 EC paragraph 4 and to the “*Frontistiria*“ ruling passed with regard to Article 45 EC, which dealt with the founding of a private school, which has to be qualified as a real act according to German understanding.

It has to be underlined that it is a reapplication of the real circumstances of the case to principles of administrative law which are effective under German law. The

⁸³ Also *Randelzhofer/Forsthoff*, in: Grabitz/Hilf (editors), I.c., Article 45 EC, recital 3; *Grüb*, I.c., p. 116.

⁸⁴ Cf. *Lackhoff*, I.c., p. 157; *Klinge*, *Niederlassungs- und Dienstleistungsfreiheit für Handwerker und andere Gewerbetreibende in der EG*, 1990, p. 233 et seq.

⁸⁵ Cf. for example *Müller-Graff*, in: Streinz, I.c., Article 45 EC, recital 5; *Jarass*, *RIW* 1993, 1, 4.

European Court of Justice holds the view – as far as it can be inferred from its really brief comments – that not the type of action as such is the deciding factor, but that it is the logically subordinated question to what extent the action, of what sovereign nature it might ever be, may justify long-term legal consequences. In the *Thijssen* proceedings this becomes clearer than in the “*Frontistiria*” ruling. The deciding factor in the proceedings was that the commissioner appointed by the state, who was to be judged, was allowed to exercise a power of veto on management decisions which suspended the management decisions in question for eight days. This power of veto did not – irrespective of its legal qualification – have any definitive effect. It was not only possible to get rid of the veto pronounced by the approved commissioner by using legal remedies in a legal or another independent vetting process, but it was automatically not effective anymore after eight days without any influence by the company concerned. The setting of this case-law shows that neither the distinction between action by administrative act on the one hand and action by real act or other types of action used by the administrative sector on the other hand leads to success nor that it is a deciding factor whether an administrative act issued by the state is of a regulating or only of a determining nature⁸⁶.

In contrast to the ruling mentioned above the *Thijssen* ruling does not contain any remarks on the fact that the exercise of official authority requires a definitive commitment of the citizen going beyond concrete proceedings. The examination of the legal form of the result of the exercise of official authority, which is at first binding, for example in legal proceedings, is harmless because the direct exercise of sovereign authority by governmental agencies may also regularly be judicially examined in constitutional systems. It is in contrast harmful if an activity has right from the start a non binding character even if it regularly constitutes the de facto basis – like for example judicial expert opinions – for the binding ruling of the state⁸⁷.

b) “Activities which are not only of a preparing or technical nature“

It is commonly considered as an essential feature of the exercise of official authority that the activity has to go beyond merely auxiliary functions which only prepare the actual state action. This requirement can be explained by the imperative of the “immediacy” of the exercise of official authority, which is found in the judgments

⁸⁶ Similar *Randelzhofer/Forsthoff*, in: Grabitz/Hilf I.c., Article 45 EC, recital 8.

⁸⁷ Similar *Grüb*, I.c., p.120 et seqq.

issued by the European Court of Justice⁸⁸. On closer examination the vague feature of the “activities which are not only of a preparing or technical nature“ comprises several aspects, which may not be defined with a complete selectivity:

(1) Activity of technical nature

It is first important that the merely actual nature of the activity within the framework of Article 45 EC cannot be of any special significance. This has to be especially underlined with regard to the description of an “activity of technical nature“ which is a bit unclear and which tempts to exclude services which are provided with the help of technical skills rather than other activities from the scope of application of Article 45 EC when it is examined superficially. The idea of this is that the corresponding activity may in the end be carried out by everyone who has the technical skills to provide it. It might tempt to consider prima facie technical activities like those carried out by engineers as activities of a “merely technical nature“. A simple control consideration shows that this view cannot be correct: Nobody would think of considering official notifications of charges or tax assessments, which are drawn up with the help of electronic data processing, as actions which are not carried out by the state because they are mainly based on the technical application of mathematical principles, and the respective legal realities are therefore assumed as being existent. This consideration may be very clearly illustrated for publicly appointed surveyors, who are suspected of exercising merely technical auxiliary functions, by the fact that the technical activities in question are also carried out – on the same rates set by the state - by governmental agencies. The two rulings of the European Court of Justice regarding the proceedings against the Italian government (“Data processing” and “Lottery licence“), which underlined the technical character of the activity in question, may therefore not be considered within this meaning.

(2) Activity of preparing nature

On closer examination it was more important that an activity of technical nature was considered as an auxiliary activity because it only prepared the decision made by the state, but it did not replace this decision. A preparing activity may involve the fact – as the ruling “Data processing“ shows – that only one infrastructure is made available

⁸⁸ This feature is also centred by the Commission within the framework of the infringement proceedings no. 201/4483 with regard to publicly appointed surveyors.

which the actual public decision-maker has recourse to. In most cases the private activity moreover provides the basis as regards content to the public decision-maker for a first decision made by the state. This was the case for the rulings “*Reyners*”, “*Lottery licence*”, “*Motor vehicle experts*” and “*Thijssen*”: Lawyers, commissioners and motor vehicle experts allow courts and authorities to make a sovereign decision; the lottery licensees permit public supervisors to supervise the lottery.

(3) Decisive: Creation of a special legally binding effect

The decisive criterion of delimitation in all the rulings mentioned above was the question whether the activities in question represent merely auxiliary activities because they only serve to prepare subsequent decisions, which may also be classed with the exercise of official authority. A relevant participation in the exercise of official authority is opposed for the respective activity, which is to be examined, if the subsequent decision-makers - a lawyer or an official – are not determined in their exercise of sovereignty by the previous activity. This was the case in all the rulings passed by the European Court of Justice. In the reversal conclusion it necessarily follows from the reasoning by the European Court of Justice that this kind of activities which bind the subsequent decision-maker in its decision has always to be considered as an exercise of official authority within the meaning of Article 45 EC. In the proceedings “*Reyners*” and “*Motor vehicle experts*” the commitment to be judged concerned the judicial judgment of the knowledge gained *in the proceedings in question*; in the proceedings “*Thijssen*” and “*Lottery licence*” it concerned the commitment of the boards of control to the establishments established by self-employed persons. Official authority therefore requires the autonomous creation of a special legally binding effect by the self-employed person.

c) Activities with external effects on a citizen

Another requirement, which may be extracted from the ruling practice of the European Court of Justice, concerns the external effects of the activity in question on the citizen. This criterion may be explained by the formulation that there has to be a “specific” exercise of official authority. The constituent fact shows a close affinity towards the criterion explained above, which is a negatively formulated criterion according to which an activity within the meaning of Article 45 EC may not only

prepare the exercise of official authority by another decision-maker, but it has to present itself as the exercise of official authority.

A rather marginal difference to the facts which have already been discussed consists in the fact that the corresponding auxiliary activity is generally carried out with regard to a certain fact of living and with regard to a concrete decision – the examination of a certain traffic accident, the announcement of a certain management decision, the preparation of a judicial ruling by acts of procedure by the lawyer. It is also possible that support is given on a more abstract level that means by providing an infrastructure like for example by installing a system for the electronic taking on of betting stakes (“Lottery licence“) or a data processing system for the administration (“Data processing“). It does not concern individual identifiable facts of living of a certain citizen, but it concerns the functioning of state action as such.

The European Court of Justice clarified in this respect that this kind of activities which are carried out in the state’s interest but which have at most some indirect effects on the citizen – the *Frontistiria* ruling, which dealt with the foundation of private schools promoting the educational duty of the state, has to be categorized among this context – may not be considered as an exercise of official authority within the meaning of Article 45 EC. The state may in these cases in fact guarantee its interests which go beyond the merely internal provision of services, for example regarding the confidentiality or the quality of the persons providing services, by supervision and control. A nationality proviso is therefore not required.

d) Activity is not carried out only very occasionally

The last criterion, which may be derived from the latest case-law of the European Court of Justice, consists in the requirement that official authority may not be exercised only very occasionally or rather coincidentally within the framework of the subordinate occupation. This seems to be the case - the European Court of Justice was not able to settle this question in the submission proceedings for procedural reasons – in the case of the Spanish naval officers who exercise sovereign powers delegated to them - for example the authority to carry out marriages, to register deaths or to exercise police authority – only very occasionally, not as planned but rather coincidentally due to unusual circumstances on board of their ship. According to the view of the European Court of Justice, the activity, which is to justify the

exercise of official authority, has to be a rather important element of the professional activity of the self-employed person.

D. The activity of publicly appointed surveyors in the light of Article 45 EC

I. Method

The starting point of the examination by the European Court of Justice is to determine whether a given profession or a given activity is organized on a sovereign basis in the system of the legal system of a member state. The European court respects such a form of organization as a matter of member state competence, and it consults in particular opinions stated by the national courts and authorities⁸⁹. If there is a sovereign activity according to the specific characteristics of the national legal system, an interpretation is required in a second step regarding the question whether the activity in question may also be assigned to the exercise of official authority according to the criteria of Community law.

With regard to the starting question how the activity is qualified by national law it can be referred to a stable legal tradition concerning the publicly appointed surveyor: From the point of view of the German courts which are relevant to the European Court of Justice there are not any doubts that the publicly appointed surveyor exercises sovereign authority within the framework of its activity as an appointed person in the surveying sector⁹⁰.

The question which criteria of the European Court of Justice regarding Community law, which have been developed above, the activity of publicly appointed surveyors is to be classed with has still to be settled:

- Does the activity of the publicly appointed surveyor involve any special authority?

⁸⁹ CoJEC C-42/92 (Thijssen), corpus 1993, I-4047, 4069: "To reply this question, it is necessary to consider the nature of the duties (...) as they have been described by the national court."

⁹⁰ Only cf. Federal Constitutional Court NVwZ 1987, 401; Higher Administrative Court Koblenz, NVwZ-RR 1993, 23; Administrative Court Mannheim, NVwZ 1987, 431, 432; Administrative Court Mannheim, NVwZ-RR 1988, 152; Administrative Court Mannheim, VBIBW 2002, 252; Administrative Court Mannheim, NVwZ-RR 2003, 785, 787; Higher Administrative Court North Rhine-Westphalia, Verdicts dated 16.10.2003 – 9 A 221/01 and 9 A 249/01.

- Is the activity of the publicly appointed surveyor not only of a preparing or technical nature?
- Does the activity of the publicly appointed surveyor have any external effects on the citizen?
- Is the activity of the publicly appointed surveyor which is to be qualified as the exercise of sovereign authority only carried out more than very occasionally?

It has to be underlined at the beginning that the question raised in the German literature⁹¹ whether the activity of publicly appointed surveyors has necessarily to be defined as a sovereign activity is methodologically incorrect. This is not the central problem which is discussed within the framework of the derogation. This question results in an examination of the justification which is not at all allowed by Article 45 EC. It has in fact to be determined on the basis of a precise examination of the delegated powers and their categorization among the national legal system whether an activity falls within the scope of the exemption⁹². If the exercise of official authority may be affirmed according to the examination, the decision made by the member state to employ self-employed persons to exercise public duties is not to be objected to. The state may in this case in fact decide independently whether these activities are to be carried out by its own authorities or by appointed entrepreneurs. An obligation to assign these duties to direct governmental agencies would even be absurd from a European point of view because it is a concern of Europe to develop economic activities without any involvement by the states if possible.

The alleged danger that a member state might evade the European fundamental freedoms by qualifying certain activities as being sovereign does not exist in reality. The criteria discussed here in fact ensure that right from the start only a very limited field of originally sovereign duties may be considered in connection with the derogation. Obviously, action by administrative act with external effects on other citizens may only be permitted to private individuals in a very limited range. It is right from the beginning not conceivable that individual member states misuse Article 45 EC in the context of such a narrow understanding of the term of official authority.

⁹¹ Only cf. Zachert, AVN 2004, p. 135 et seqq.

⁹² Randelzhofer/Forsthoff, EC, Article 45, recital 9.

II. The application of the criteria of the European Court of Justice to the activity of the publicly appointed surveyor

Preliminary remark: The activity of publicly appointed surveyors is governed by Land law and not nationally by Federal Law in the Federal Republic of Germany. Although the relevant regulations are identical concerning their basic structures, they differ in detailed aspects. Provided that the corresponding departure is not expressly pointed out, the following comments refer to the legal situation in the federal states of North Rhine-Westphalia and Rhineland-Palatinate because these regulations are the subject matter of infringement proceedings.

1. Does the activity of the publicly appointed surveyor involve any special authority?

a) Fundamentals

The surveying sector is together with the land registry sector an element of the security of land property, and on the one hand it is to put the property guarantee under constitutional law into practice and on the other hand it is to ensure that property is taxed by the state as well as to guarantee governmental planning. The German property security system is based on two pillars: The proof of ownership, of the distribution of property and of property rights is recorded in the land register, which may for its part only refer to property which the location and the area are proved of in a binding way in the real estate cadastre. These two public registers, the land register and the real estate cadastre, are therefore inseparably bound by their functions. The keeping of the land register and of the real estate cadastre are as a public duty of sovereign nature always carried out by the state in order to ensure the legal certainty indispensable to the land property system. The public duties mentioned above are partly – and depending on decisions which are made by the respective appropriate Land law legislator concerned - not fulfilled by the state, but they are delegated to officials by way of appointment. In this case the appointed self-employed entrepreneurs do not only do the groundwork for the governmental agencies, but they take the place of these agencies due to their appointment and work as an authority in the administrative procedure. The legal certainty coming from the land register and the real estate cadastre may only be ensured by the sovereign exercise of authority.

In the surveying sector publicly appointed surveyors are called in to serve as office-bearers, in the land registry sector notaries are called in. The duties which are delegated to them – this is underlined by the sovereign nature of the activity – are in some federal states however continued being exclusively fulfilled by governmental agencies like for example in the surveying sector in Bavaria or in the notarial sector in some parts of Baden-Württemberg. It has to be remarked in this context that the activity of the notary falls within the scope of Article 45 EC according to the prevailing opinion⁹³. The same has to apply to the publicly appointed surveyor because its field of activity is functionally related to the field of activity of the notary.

b) Issuing of administrative acts

An important indication for the recourse to special powers by a self-employed person is – as it was discussed in the fundamental part – the possibility to issue administrative acts because this type of action of German administrative law represents a typical type of action in a relationship of subjection. The deciding factor is not the type of action as such but the question whether the action may justify long-term legal consequences as defined by the *Thijssen* ruling.

One of the fundamental activities of the publicly appointed surveyor is to carry out partition surveys on the basis of which new plots of land may be established. The result of the plot establishment is recorded in a legal act, the so-called boundary establishment. The corresponding establishments made by the publicly appointed surveyor are binding upon everyone after the period for appeal has expired, and their material content is recorded in the land register kept by the land registry office.

The so-called boundary marking, which is carried out within the framework of the surveying activity, also represents an administrative act. When the publicly appointed surveyor carries out a boundary marking, which is for example carried out within the framework of the determination of boundaries regarding partition surveys and “normal“ boundary surveys, he marks site boundaries in a binding way. They are effective for everyone, and in this way they guarantee the boundary peace in legal

⁹³ Hirsch DNotZ 2000, 729, 736; Streinz/Müller-Graff, EC, Article 45, recital 8; Randelzhofer/Forsthoff, EC, Article 45, recital 10; on the compatibility of the nationality proviso in § 5 Federal German Ordinance for Notaries cf. Fleischhauer, DNotZ 2002, 325 et seqq.

life⁹⁴. Appeals against the boundary marking should the occasion arise – regularly after previous opposition proceedings – result in proceedings before the administrative courts where only disputes under public law are settled.

According to the comments stated above it is clear that special powers, which are typical of authoritative action and therefore typical of the exercise of official authority, are delegated to publicly appointed surveyors within the meaning of the case-law of the European Court of Justice. These powers do not only have provisional but definitive legal consequences to the citizen. The citizen is obliged to deal with the action carried out by a publicly appointed surveyor in an identical way as with the action carried out by a governmental agency: By virtue of its appointment the publicly appointed surveyor directly acts as an authority towards the citizen. It is only possible for the citizen to raise objections to administrative acts issued by the publicly appointed surveyor within the framework of formal opposition proceedings. If the publicly appointed surveyor does not redress the appeal, the appealing authority has to rule on the appeal. If the authority rejects the appeal, the citizen is only allowed to take action against it by way of an action to rescind - which affects the initial ruling of the publicly appointed surveyor in the form of the appeal ruling of the appealing authority. If the appealing authority grants the appeal made by the citizen, the publicly appointed surveyor is allowed to resist the appeal by filing an action to rescind – at least provided that notifications of charges issued by him are concerned - before the administrative court⁹⁵. This procedure exactly corresponds to proceedings in which the citizen generally has to defend itself against any form of exercise of sovereign authority exercised by direct governmental agencies or by appointed persons, which he considers not to be lawful.

The exercise of official authority by the publicly appointed surveyor is made manifest in the facts mentioned above and especially in the fact that the professional acts as an authority on its own competence and responsibility in these dispute proceedings before the administrative court. The action at the administrative court therefore affects the publicly appointed surveyor and not the country concerned representing the legal entity supporting him.

⁹⁴ Provided that publicly appointed surveyors charge their fees by notifications of costs this is carried out in the form of administrative acts according to § 35 Administrative Procedure Law, cf. latest verdicts Higher Administrative Court North Rhine-Westphalia dated 16.10.2003 – 9 A 221/01 and 9 A 249/01.

c) Certifications with irreputable presumption of the accuracy

Apart from the issuing of administrative acts the certification activity carried out by the publicly appointed surveyor also gives the profession the character of the exercise of official authority. According to the respective Land law regulations⁹⁶ the publicly appointed surveyor is entitled to certify facts of land which are established by surveying establishments with irreputable presumption of the accuracy⁹⁷.

The necessary required surveying works and the consent of the landowner to establish the boundaries are recorded by the publicly appointed surveyor in official documents, the so-called “survey plan” or “boundary notes”, within the framework of the determination of boundaries. The “survey plan” determines clearly and incontrovertibly the spatial position of boundaries, the boundary notes contain the statements made by the landowners involved as well as data concerning the boundary marking of the previous and the new site boundaries. The corresponding establishments and statements are with their content certified by the publicly appointed surveyor as a registrar with irreputable presumption of the accuracy. In this respect the publicly appointed surveyor does not only draw up official documents within the meaning of the code of civil procedure but also within the meaning of the whole legal system⁹⁸.

The drawing up of the official layout plan is also based on surveying examinations. The publicly appointed surveyor certifies the result of these examinations with irreputable presumption of the accuracy by adding his official seal. The official layout plan requires the certification of the establishments established on the land sealed with irreputable presumption of the accuracy. In this case the publicly appointed surveyor also draws up official documents within the meaning of the code of civil procedure.

⁹⁵ Federal Administrative Court NVwZ-RR 1989, 353.

⁹⁶ North Rhine-Westphalia: § 1, paragraph 2 Professional Rules for Publicly Appointed Surveyors North Rhine-Westphalia dated 15.12.1992, GVBl., 524; Rhineland-Palatinate § 1 paragraph 2 Professional Rules for Publicly Appointed Surveyors dated 20.12.1971, GVBl. 1972, 26.

⁹⁷ Certification law is always Federal Law, but according to § 61 paragraph 1 no. 8 Certification Law Land law regulations concerning the certification of the aforementioned facts are not affected.

⁹⁸ Higher Administrative Court North Rhine-Westphalia, ruling dated 04.02.2003 – 9 B 2231/02; verdict dated 07.04.1994 – 9 A 606/92. Cf. with regard to the scope of the term of certification in terms of civil procedure according to § 415 Code of Civil Procedure Supreme Court of Justice NJW 1957, 1673.

d) Compulsory powers

Provided that the exercise of official authority is rejected in the rulings of the European Court of Justice concerning the activity carried out by private security undertakings referring to missing compulsory powers, the activity of publicly appointed surveyors also shows a specific characteristic. In contrast to the matters of fact ruled on by the European Court of Justice, the publicly appointed surveyor is allowed to carry out a boundary marking against the will of the landowners according to the different Land law regulations. Publicly appointed surveyors are authorized by Land law to step or drive on plots of land and building structures to carry out their instructions and to carry out the works which are necessary according to their best judgment (§ 4 paragraph 1 Surveying and Cadastral Law North Rhine-Westphalia). The citizen is therefore affected by special legal consent. The fact that they are not allowed to make use of any direct coercion in this connection does not set them apart from other authorities.

e) Summary

It can be summarized that a wide range of “compulsory powers, special rights or other sovereign privileges“ is granted to publicly appointed surveyors which cannot be found in any of the other rulings concerning Article 45 EC, which have so far been passed by the European Court of Justice. In our opinion, there cannot even be any serious doubts that the public surveying sector has to be considered as an exercise of sovereign authority both due to its function for the purpose of the security of the distribution of property and the guarantee of boundary peace as well as due to the form of organization with the characteristic methods of authoritative administration. If one refers to the case-law of the European Court of Justice, the responsibilities of publicly appointed surveyors even go beyond those responsibilities granted to the “Spanish naval captains” who were judged by the European Court of Justice with regard to the nature and range of the responsibilities. The European Court of Justice significantly affirmed the exercise of official authority in the proceedings concerning this professional group. Doubts about a restriction of the freedom of movement, which also rose in the field of the naval captains, only resulted from the additional imperative that official authority is exercised “not only very occasionally“.

2. Are the activities of the publicly appointed surveyor not only of a preparing or technical nature?

a) Nature of the activity

It follows from the nature of the activity carried out by the publicly appointed surveyor that his duties are not only of a preparing nature for a subsequent action by governmental agencies within the meaning of the case-law of the European Court of Justice. The fact that publicly appointed surveyors are able to create autonomously a special legally binding effect necessarily results from the fact that they are only appointed to fulfil duties which are exercised in exactly this form and within the same legal framework by the public service: partition, boundary survey, drawing up of the official layout plan, the building survey and the official certification of facts of land established by surveying establishments. These surveying activities are, as it results for example from § 1 paragraph 1 Surveying and Cadastral Law North Rhine-Westphalia, public functions which are primarily exercised by cadastral authorities. Publicly appointed surveyors are besides the official cadastral surveying authorities authorized to fulfil these genuinely public duties of “ordnance survey“ (cf. § 1 paragraph 2 Surveying and Cadastral Law North Rhine-Westphalia). The publicly appointed surveyors, the land registry offices and the land surveying offices are therefore treated as equals, and the publicly appointed surveyors are functionally equivalent to these authorities. For this reason their activity is also carried out in accordance with the Administrative Procedure Law. The regulations concerning the certification of signatures of landowners with regard to applications for the consolidation or partition of sites are an example of the equal treatment of official cadastral surveying authorities and publicly appointed surveyors. § 15 paragraph 1 sentence 2 Surveying and Cadastral Law North Rhine-Westphalia for example provides:

“The official ... who is responsible for carrying out the surveys ... as well as the publicly appointed surveyors are authorized to certify the signature of the owner concerning applications for the consolidation or partition of sites with irreputable presumption of the accuracy.“

The equality of publicly appointed surveyors and official cadastral surveying authorities also becomes clear in the context that the federal state of Bavaria has so far not recognized the necessity of the additional exercise of functions by publicly

appointed surveyors in the surveying sector. In Bavaria the whole field of activity, which is held by publicly appointed surveyors in other federal states, is exclusively covered by governmental agencies.

Accordingly, the publicly appointed surveyor is subject to directives within the official structure and subject to the legal provisions and administrative regulations which apply to surveying authorities (cf. § 11 paragraph 2 Surveying Law Baden-Württemberg). Consequentially, the same authority assumes the supervision of the publicly appointed surveyors and the land registry offices; in North Rhine-Westphalia they are for example supervised by the regional administrations. Due to the fact that the activities which are on the one hand carried out by the land registry offices and land surveying offices and on the other hand by publicly appointed surveyors are absolutely identical in their content both these surveying authorities are generally categorized among the generic term of “surveying authorities”.

Provided that a demand for additional services in the field of surveying has been established, publicly appointed surveyors only increase the capacities for the duties which have to be genuinely fulfilled by the land surveying offices and land registry offices⁹⁹. Publicly appointed surveyors therefore carry out an activity in an official function which is bound to the state and which is actually reserved to the public service and therefore functionally represents an activity of the civil service. The Federal Constitutional Court has logically stated the following comment - which is of course not binding for the European Court of Justice - on the facts mentioned above¹⁰⁰:

“It is particularly important that the publicly appointed surveyor constitutes a part of the public surveying sector and that he exercises typical sovereign functions when carrying out and certifying surveys in a manner which is similar to this of the official surveying authorities.”

The publicly appointed surveyor is not integrated into the administrative sector in those federal states in which he has been appointed to carry out certain surveying activities in addition to the authorities because this would not be compatible with the double function of its profession, the field of freelance activity: The publicly appointed

⁹⁹ In North Rhine-Westphalia there are therefore “only” about 500 publicly appointed surveyors in addition to the approximately 50 land surveying offices and land registry offices.

¹⁰⁰ Federal Constitutional Court NVwZ 1987, 401.

surveyor works under public law within the framework of its duties, and for this work he charges fees according to public fee rules¹⁰¹. He is also allowed to carry out all activities which are carried out by a surveyor who is not publicly appointed and who acts on the basis of private law. If one had the intention to assume that the publicly appointed surveyor only carries out a “preparing“ activity, this would inevitably mean that one denies the action of authorities, which carry out identical activities, to create autonomously a special legally binding effect. This would however be equivalent to denying the state itself the exercise of official authority.

b) Autonomous creation of a special legally binding effect

In order to clarify the comments stated in the context above it has to be pointed out that the publicly appointed surveyor – as well as the authority functionally corresponding to him which fulfils surveying duties – autonomously creates a special legally binding effect like every public authority by virtue of the responsibilities granted to him. He creates this special legally binding effect with the help of the instruments which are at his disposal and which have been described in detail above, the issuing of administrative acts and the drawing up of official documents.

The fact that the publicly appointed surveyor does not carry out only preparing auxiliary activities is in addition clarified by the fact that the surveying results are only recorded in the real estate cadastre by the surveying authority at the land registry office after the periods for appeal have expired and by the fact that the results are then recorded without any detailed check of their correctness as regards content. The citizen may not appeal against the registrations in the land register made by the land registry office, but he has to appeal against the establishments made by the publicly appointed surveyor. If this is not done, the establishments made by the publicly appointed surveyor are unappealable and binding, and it is not possible to appeal against them in the further course of the cadastral procedure. In this respect the land registry office representing a governmental agency is on the one hand bound to the establishments made by the publicly appointed surveyor. On the other hand, the publicly appointed surveyor creates a special legally binding effect on the

¹⁰¹ With regard to North Rhine-Westphalia the latest verdicts are: Higher Administrative Court North Rhine-Westphalia dated 16.10.2003 – 9 A 221/01 and 9 A 249/01; regarding Rhineland-Palatinate: Higher Administrative Court Koblenz, NVwZ-RR 1993, 23.

citizen because his establishments become safe if the citizen does not appeal against them in legal proceedings within a certain period.

The official documents concerning the boundary notes, the survey plan and regarding the official layout plans drawn up by the publicly appointed surveyor also create a special legally binding effect within the meaning of the case-law of the European Court of Justice. These official documents are not subject to the free judicial evaluation of evidence. The judge is in fact bound to the probative value of the establishments made by the publicly appointed surveyor. He has to consider in particular the following facts as being proved: the statements as such, their completeness, the fact that they are stated before the publicly appointed surveyor, time and place of the statements, the identity of the person giving the statement and of the bearer of the name and the authorship of the statement by the bearer of the name.

The activity of the German publicly appointed surveyor considerably differs from the activity carried out by Greek motor vehicle experts or Belgian commissioners due to the specific characteristics mentioned above. In the cases of the Greek motor vehicle experts and the Belgian commissioners the European Court of Justice opposed the field of application of Article 45 EC. Their activities do not develop any commitment for the citizen, governmental agencies or courts.

3. Do the activities of the publicly appointed surveyor have any external effects on a citizen?

The European Court of Justice identifies cases with the help of this criterion in which self-employed persons provide services in the interest of the state without these activities having any apparent connection to an individualizable opponent in a relationship of subjection. To give a catchword, infrastructural services in the state's interest are concerned. This negative feature of delimitation is apparently not relevant in view of the field of activity of publicly appointed surveyors. The surveying authority carries out its activity as an authority due to an order placed with it according to § 22 Administrative Procedure Law with regard to a specific plot of land which a citizen as its owner is assigned to.

It is therefore beyond doubt that the publicly appointed surveyor provides services for the state which have external effects on the citizen.

4. Is the activity of the publicly appointed surveyor not carried out only very occasionally?

In the only ruling in which the European Court of Justice has so far in principle affirmed the exercise of official authority (“Spanish naval captains“) the condition that official authority is not allowed to be exercised only very occasionally has been postulated as another restrictive criterion. Otherwise the state would not have a justified interest in reserving the exercise of sovereign functions to its nationals. The sovereign authority which is delegated to the publicly appointed surveyors is by contrast not a rather incidental concomitant of an activity which is according to its nature not connected with the exercise of sovereign authority (like for example the command of a civilian merchant ship). From the double profession in fact arises the fact that the exercise of official authority represents the exclusive object of the activity carried out by the publicly appointed surveyor. This is the only purpose for which the members of the profession of surveyors, which is open to everyone, are appointed to become publicly appointed surveyors. At the same time the powers which are delegated to them are restricted to the fact that they are only allowed to exercise sovereign functions as office-bearers and to exercise the corresponding official authority going beyond the general surveying services, which have to be provided on the basis of private law.

Official authority is therefore not exercised only very occasionally within the meaning of the case-law of the European Court of Justice. Provided that the activities of the publicly appointed surveyor are considered in a narrow context, the comments stated above rather correspond to the principle of division which has been developed in the case-law of the European Court of Justice. According to this principle the national issues which have to be protected by Article 45 EC are sufficiently safeguarded if not the profession as a whole but if only those subtasks which have to be considered as an involvement in the exercise of official authority are withdrawn from the liberalization¹⁰². The member state may only refer to the exemption from the European fundamental freedoms as far as that is concerned. It can be concluded from it that surveyors from other European countries are only subject to restrictions in so far as they do not only want to exercise general surveying functions but especially the sovereign functions.

¹⁰² CoJEC case 2/74 (Reyners), corpus 1974, 631, 654, recital 45.

5. Other criteria of delimitation

Another negative criterion of delimitation may not be derived from the ruling practice of the European Court of Justice, but it may be found in the literature concerning European law: Sovereign action is generally to be opposed if a self-employed person is allowed to decide independently with which content and with whom he establishes a privity¹⁰³. The publicly appointed surveyor is not allowed to organize his contractual relationship to a client independently because he is only allowed to liquidate costs and fees for the exercise of his sovereign functions according to rates set by the state and because he is in principle not allowed to arrange on his fees independently. The order as such to draw up an official layout plan is always based on public law; the publicly appointed surveyor does in this case not carry out the activity on the basis of private law¹⁰⁴. Furthermore, the publicly appointed surveyor might be obliged to provide his services for the benefit of the public surveying sector even without any special consideration¹⁰⁵. These characteristics of the activity carried out by the publicly appointed surveyor are also an indication for the exercise of sovereign authority.

Finally, the publicly appointed surveyor is even not at all allowed to reject an order placed by a landowner according to the Land law regulations of some federal states. § 8 paragraph 1 of the professional rules effective in Schleswig-Holstein for example provides that the publicly appointed surveyor “has to” execute every order¹⁰⁶; § 9 paragraph 2 of the professional rules effective in Hesse provides that the publicly appointed surveyor is not allowed to “reject” cadastral surveying requests “for any insufficient reason”¹⁰⁷. In these cases he is affected by an obligation to contract, which is atypical of normal self-employed persons¹⁰⁸.

¹⁰³ *Tiedje/Troberg*, Article 45 recital 7.

¹⁰⁴ With regard to the distinctions in detail Higher Administrative Court North Rhine-Westphalia, verdicts dated 16.10.2003 – 9 A 221/01 and 9 A 249/01; Higher Regional Court Düsseldorf NJW-RR 1996, 269, 270; District Court Mühlhausen, LKV 1997, 383, 384.

¹⁰⁵ Federal Administrative Court NVwZ 1995, 484, 487.

¹⁰⁶ GVOBl. Schleswig-Holstein 1982, 148.

¹⁰⁷ GVBl. I 1974, 236.

¹⁰⁸ Cf. Federal Administrative Court NVwZ 1994, 484, 486.

6. Result

When the principles which the European Court of Justice developed with regard to Article 45 are applied to the profession of the publicly appointed surveyor it becomes clear that these professionals exercise sovereign authority within the meaning of Article 45 EC: Special rights and other sovereign privileges as well as compulsory powers are granted to him on a considerable scale which become manifest in the types of action of issuing administrative acts and drawing up official documents, which are at the publicly appointed surveyor's disposal. The fact that the publicly appointed surveyor only exercises preparing auxiliary functions without having any possibility to create autonomously a legally binding effect has to be logically precluded because he and the land surveying offices are treated as equals, and this equality gives him an official status when he acts. The publicly appointed surveyor carries out activities with external effects on the citizen, and therefore he exercises – not only very occasionally – official authority.

The sovereign activity of publicly appointed surveyors has therefore to fall within the scope of the derogation of Article 45 EC.

III. Functional separation of particular aspects of the activity

The question whether the profession of publicly appointed surveyors shows facets which may logically be separated from the exercise of official authority has though to be answered in the light of the *Reyners* ruling which was ruled by the European Court of Justice. With regard to the activities which may be separated this would result in the fact that the member state does not have any justified interest in keeping foreign citizens from the European Union from this separated field. The European Court of Justice stated in the *Reyners* ruling that the national issues protected by Article 45 EC were sufficiently safeguarded if not a profession as a whole but if only those activities which in themselves have to be considered as an involvement in the exercise of official authority were withdrawn from the liberalization¹⁰⁹. The discussion about the applicability of Article 45 EC usually focuses on the question whether a given profession as a whole falls within the scope of the derogation of Article 45 EC or whether it is not the case.

¹⁰⁹ CoJEC case 2/74 (*Reyners*), corpus 1974, 631, 654, recital 45.

With regard to the guidelines of the *Reyners* ruling on the one hand and with regard to the profession of the publicly appointed surveyor on the other hand it has to be taken note of the fact that the publicly appointed surveyor combines two professions: It involves the practice of the engineering profession as a liberal profession on the one hand and the exercise of a function bound to the state on the other hand, which is actually reserved to the public service and therefore functionally represents an activity of the civil service. The question whether Article 45 EC is applicable may only be asked with regard to this section of the duty following the idea of the double function of the profession of publicly appointed surveyors. The question whether a distinction between different activities, which have to be only partly considered as the exercise of official authority, is possible within the occupational sphere of the duties, which is the only deciding factor for Article 45 EC, or whether – exceptionally – such a distinction does not seem to be conceivable so that this field of the double occupation as a whole falls within the scope of Article 45 EC has to be distinguished from the question of the ruling line between the double function of the professional practice.

It seems to be possible to deny that the surveying activities within the framework of making a legal finding, which precedes the issuing of an administrative act or a certification, are qualified as the exercise of official authority¹¹⁰. However, the double function exercised by the publicly appointed surveyor basically conflicts with such an approach. The German legislator only sifted out one separated field from the general activity of surveyors and declared it to be a competence of publicly appointed surveyors. The field of proviso is right from the start limited to cadastral surveys and certification activities. Beyond it, the publicly appointed surveyor is allowed to act in all fields of the private surveying business provided that the self-employed and autonomous activity in the field of the public appointment is not impeded by it. These surveying activities based on private law are not subject to any special restrictions concerning the access to the profession. Every surveyor from another member state of the European Union is also allowed to carry out this activity. The European fundamental freedoms apply to this field of activity without any restrictions.

¹¹⁰ The question whether it is of any use to make such a consideration is not to be answered as the corresponding splitting due to the flat rates for the whole process of the sovereign activity of publicly appointed surveyors would in either case result in increased costs for the beneficiary.

From the point of view of national law, a certain presumption due to the division into two occupational fields indicates the fact that the whole range of activities carried out by the publicly appointed surveyor represents a sovereign activity and that an arbitrary division into several sections – for example into “simple“ groundwork and “demanding“ core activities – only seems to be possible if the activity of the publicly appointed surveyor, which is granted to him by the legislator as a sovereign duty as a whole, is divided in an unrelated way. As a result of the national constitutional law (Article 12 Basic Law) the regional legislators were obliged to restrict the access to the profession and the practice of the profession only in so far as it is justified by compelling or reasonable considerations of public welfare.

A possible separation can however not be assumed due to the actual form of the activity of the publicly appointed surveyor irrespective of this preliminary consideration: The determination of boundaries which is carried out within the framework of the local surveying, the explanation for the persons involved on site and their statements result in the survey plan which represents the original proof of the site boundary as well as in the boundary notes. The drawing up of an official document is according to § 415 Code of Civil Procedure only possible if the certified statements are made before the registrar, that means the publicly appointed surveyor. This necessarily requires that the registrar, that means the publicly appointed surveyor himself, carries out the certification. Provided that the publicly appointed surveyor draws up an official document within the meaning of § 418 Code of Civil Procedure, it is always required that he himself exercises the surveying activity¹¹¹. It is therefore not possible to exclude individual aspects of the activity carried out by the publicly appointed surveyor, by virtue of which sovereign powers are delegated to him, from the exercise of sovereign authority¹¹². The activities, which may appropriately be separated, are those which the publicly appointed surveyor carries out as a (simple) surveyor within the framework of its double

¹¹¹ The Land law regularly provides, applying § 418 paragraph 3 Code of Civil Procedure, that the publicly appointed surveyor is allowed to make use of the collaboration of qualified assistants which have appropriate specialized qualifications as far as that is concerned. Cf. North Rhine-Westphalia § 10 paragraph 2 Professional Rules for Publicly Appointed Surveyors North Rhine-Westphalia dated 15.12.1992, GVBl. 524; for Rhineland-Palatinate: § 11 paragraph 1 Professional Rules for Publicly Appointed Surveyors dated 20.12.1971, GVBl. 1972, 26.

¹¹² Also as defined by *Holthausen*, Forum 2002, 332.

profession. These activities do right from the start not fall within the scope of the derogation of Article 45 EC. It is of course neither possible to classify these activities with the field of application of Article 45 EC by exercising them on occasion of the duty or under its “colour”. The problem of delimitation is known from German law, for example in the “Hosse case“, which has often been discussed in the circles of publicly appointed surveyors. This case dealt with the question to what extent a mere building survey without measuring and marking the boundary at the same time represents the exercise of a sovereign function¹¹³.

It can be summarized that:

1. the carrying out of cadastral surveys, that means partition surveys and boundary surveys including the boundary marking which is carried out in the course of cadastral surveys as well as the building surveys,
2. the drawing up of official documents in the surveying sector (survey plan, boundary notes, official boundary advice, official layout plans, proof of the observance of the areas and altitudes)

always including the technical surveying activities have as a whole to be classified as the exercise of official authority. There do not exist any subtasks which may be separated and which are not connected with the exercise of official authority. The proviso duties of the publicly appointed surveyor have therefore to be qualified as a whole as the exercise of official authority.

E. Legal consequences of the classification as official authority

“The provisions of this chapter shall not apply, so far as any given Member State is concerned” according to Article 45 EC provided that the requirements of this article are met.

I. Primary law

This rule on legal consequences signifies on the one hand that the freedom of establishment of Article 43 EC is not effective, and on the other hand, it signifies that the European authorities in the member state in which the activity, which is to be

¹¹³ Cf. *Holthausen*, Forum 2002, 332.

regulated, is connected with the exercise of official authority, are not entitled to any responsibilities¹¹⁴. The same applies to the freedom to provide services according to Article 55 EC.

II. Secondary law

Guarantees of secondary law regarding the rights relating to the freedom of movement may not claim any validity either provided that Article 45 EC is relevant.

The facts mentioned above especially apply to Directive 89/48/EEC dated 21st December 1988 “regarding a general regulation concerning the recognition of higher-education diplomas which complete a vocational training of at least three years”¹¹⁵, which follows a horizontal non sectoral approach. This regulation is to guarantee a migration for all holders of higher-education diplomas in the internal market allowing an access to the profession in the country of origin. The diploma of the country of origin qualifying for a profession is to be recognized – if necessary by adding an instrument of adjustment (aptitude test, adaptation course) – as an equal certificate of qualification in the host state as far as that is concerned. However, the directive also clarifies by its considerations that it does not apply if the activity in question represents the exercise of official authority. Consideration 12 of the directive goes as follows:

"The general regulation concerning the recognition of higher-education diplomas does not prejudice the application of ... Article 55 [Treaty establishing the European Community = 45 EC] in no way." (retranslated from German)

The same applies to the proposal – which goes far beyond the guarantees of the directive on the recognition of higher-education diplomas – for a directive on the mutual recognition of professional qualification which the Directorate General Internal Market presented in 2002¹¹⁶ and which the European Parliament finally dealt with on first reading in February 2004¹¹⁷. If the directive was passed in the proposed form, the application of Article 45 EC would not be affected by its consideration 31 either.

¹¹⁴ Randelzhofer/Forsthoff, EC, Article 45, recital 14.

¹¹⁵ ABl. no. L 19 dated 24th January 1989, p. 16 et seqq. – so-called "Directive on the recognition of higher-education diplomas". (retranslated from German)

¹¹⁶ Abl. no. C 181 dated 30.7.2002.

¹¹⁷ With regard to the proposal for a directive *Henssler*, EuZW 2003, 229 et seqq.

III. Nationality provisos and entry regulations

The idea of the derogation of Article 45 EC is to give the members states the possibility to reserve the exercise of sovereignty to their own nationals. The primary legal consequence of it is that the respective member state is authorized to exclude foreigners from the practice of the profession or more precisely from the exercise of official authority. In this respect nationality provisos for those activities which represent the exercise of official authority are not to be objected to with regard to European law.

If the legal system of the member state does not involve any nationality proviso, the derogation has the effect that the other restrictions, which the national law provides for the occupational licensing and the practice of the profession, are at least not to be compared with the European fundamental freedoms. This rule concerns qualification requirements as well as restrictions of the joint practice of the profession. The practice of the profession of geometers with foreign qualifications in Germany may therefore, provided that it is according to national law – in conformity with European law - not subject to the proviso of the German nationality anyway, be made conditional on the condition that the German requirements concerning the education, the licensing and the practice of the profession are met.

IV. National law

The inapplicability of the European fundamental freedoms does however not necessarily result in the fact that the regulations concerning the access to the profession and the practice of the profession in question are lawful. The restrictions have in fact to be comparable with the national constitutional rules of Articles 3 and 12 Basic Law. The current discussion about the licensing for the profession of the notary especially shows that strict control standards are applied as far as that is concerned.

F. Theses in summary

- 1) The question whether the activity of publicly appointed surveyors is included in the rights relating to the freedom of movement of the Articles 43, 49 EC has to be judged according to Article 45 EC, and it has therefore to be judged on the

basis of the criterion whether the activity in question is connected with the exercise of official authority.

- 2) According to a correct understanding Article 45 EC represents a so-called derogation, it is not a justification.
- 3) Article 45 EC has in principle to be interpreted within a narrow framework; the national regulations concerning the structure and the practice of the profession of the publicly appointed surveyor constitute the starting point for the interpretation.
- 4) Within the framework of Article 45 EC only those subtasks of a profession which in themselves represent an involvement in the exercise of official authority may be withdrawn from the liberalization.
- 5) The judiciary and the jurisprudence have so far not succeeded in formulating a subsumable definition of the term of the “exercise of official authority“. Some relevant criteria of delimitation may however be obtained from the case-law of the European Court of Justice.
- 6) The activity, which is to justify the exercise of official authority, has to go beyond merely auxiliary functions, which only prepare the actual state action without having any direct legal effect on the citizen. The deciding factor is the fact whether the professional is allowed to create autonomously sovereign acts with a special legally binding effect.
- 7) The person concerned has to have powers which go beyond everyman’s rights within the framework of the activity, which is to justify the exercise of official authority. These powers do not necessarily have to be compulsory powers in the narrower sense. These compulsory powers indicate the exercise of sovereign authority, but they do not justify it. If a self-employed person is allowed to make use of a type of action which is not typical of private law but of a relationship of subjection by virtue of the corresponding legal authority towards a citizen one can say that these are the corresponding “special rights, sovereign privileges and compulsory powers“.
- 8) Official authority within the meaning of Article 45 EC has to be exercised with external effects on a citizen, and it is not allowed to be exercised only in the interest of smooth administrative action. Activities which are carried out in the

state's interests but which have at most some indirect effects on the citizen do not meet this requirement. The state may in these cases in fact guarantee its interests, which go beyond the merely internal provision of services, for example regarding the confidentiality or the quality of the persons providing services, by supervision and control. A nationality proviso is not required.

- 9) The activity, which is to justify the exercise of official authority, has to be carried out with a certain frequency, and it is not allowed to constitute only a very small part of the profession of the self-employed person. It is not allowed to be carried out only very occasionally.
- 10) The publicly appointed surveyor's authority to issue administrative acts and to draw up official documents grants him a wide range of "compulsory powers, special rights or other sovereign privileges", which may not be found in any of the other rulings concerning Article 45 EC, which have so far been passed by the European Court of Justice.
- 11) Due to the fact that the publicly appointed surveyor and the land surveying offices are put in completely the same category and that they are treated as equals it has to be logically precluded that the publicly appointed surveyor only carries out an activity of a preparing and/or technical nature in contrast to the land surveying offices. This aspect is especially of fundamental significance. Obviously, the decision-makers in Brussels have so far not sufficiently been made aware of this specific characteristic of the German legal system.
- 12) The activity of the publicly appointed surveyor is binding upon citizens, governmental agencies or courts due to the binding effect of the administrative acts issued by him and the irreputable presumption of the accuracy of the official documents drawn up by him; in this respect the publicly appointed surveyor creates a special legally binding effect within the meaning of the case-law of the European Court of Justice.
- 13) The characteristic activity of the publicly appointed surveyor, which justifies the exercise of official authority, is not carried out only very occasionally, but it is the core element of the activity of the publicly appointed surveyor.
- 14) Other characteristic features of the activity of the publicly appointed surveyor also indicate that sovereign authority is exercised (obligation to contract, obligation to rates, duties under public law).

- 15) The duties of the publicly appointed surveyor as a whole fall within the scope of the derogation of Article 45 EC because the activities carried out by him may not be divided into sovereign and non-sovereign functions. The German legislator considered right from the start only those activities as proviso duties for the publicly appointed surveyors which are inseparably bound up with the exercise of official authority. The model of the double profession therefore takes the provisions concerning European law into account.
- 16) The whole field of activity of publicly appointed surveyors is inseparably bound up with the exercise of official authority within the meaning of Article 45 EC according to the theses stated in this expert opinion.
- 17) The question whether the restriction of the rights relating to the freedom of movement of the Articles 43, 49 EC may be justified by compelling reasons of public welfare within the framework of an analysis of the proportionality is not important anymore.
- 18) If the European Court of Justice reaches the conclusion that publicly appointed surveyors do not exercise official authority, which is in contrast to the opinion presented in this expert opinion, there is still the possibility to justify the restrictions of the freedom of movement by compelling reasons of public welfare within the framework of the Articles 43, 49 EC.
- 19) The guarantees of the Directive on the recognition of higher-education diplomas 89/48/EC may not be claimed by foreign geometers because the field of application of this directive has not been opened up for the exercise of official authority.
- 20) The activity of publicly appointed surveyors may in the light of European law also be made conditional on the proof of the German nationality. If the national law does not provide for any nationality requirement, it follows from the exercise of official authority within the meaning of Article 45 EC that a migrant has to fulfil the national entry requirements and to obey the respective appropriate German regulations concerning the practice of the profession.

Cologne, 26th July 2004

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