Maastricht University

EUROPEAN INSTITUTIONS

SSC 3030
September-October 2016

Introduction and course information

This course builds upon the knowledge and skills acquired in the first year of studies and attempts to add to them a legal dimension. It focuses at the same time on the institutions involved in the decision making process and the enforcement mechanisms on European Union level, i.e. the institutions of the European Union (EU) as well as on the role of the Member States within the EU.

In addition, the course provides an opportunity for students to be exposed to legal thinking and legal reasoning. As the first year of studies has already shown, law is central in understanding how the European Union functions. It is accordingly essential for the students to become familiar with the ways of legal thinking and reasoning, if they want to understand fully the European integration process, and European matters more generally.

Objectives

At the end of the course, students should have acquired adequate knowledge, practical skills and a critical understanding with respect to the following:

- the legal foundations of the European Union;
- the institutions of the EU, their historical evolution and the horizontal relationship between them;
- the vertical relationship between the EU and the Member States (including the principles of conferral, supremacy, subsidiarity, proportionality and loyalty);
- the implementation and enforcement mechanisms of EU law (infringement proceedings against Member States, enforcement through national courts, legal review of EU action).

In addition, students should have become familiar with legal thinking and legal reasoning, and should in particular be able to:

- find EU legal instruments in paper or electronic format;
- keep informed about legal developments within EU;
- read a legal document and extract the most relevant information from it;
- frame a legal argument on a basic issue of EU law;
- use EU law to give or reinforce an opinion on a simple problem.

Structure of the course

The course will comprise both lectures and tutorial group meetings. Attendance at the tutorial group meetings is compulsory and it is expected that students take an active part in the tutorial group meetings and the skills trainings.

Attendance at the lectures is not compulsory, but strongly recommended. The lectures will focus on the mandatory literature, the case law and the relevant legislation. They will also place the often detailed issues discussed during the tutorial meetings in their proper perspective. The lectures are by no means a substitute for reading the prescribed literature.

The course will last for 6 weeks during which the following topics will be covered:

Week 1 **Historical, legal, political and institutional background of the EU**
Week 2 **Institutional framework of the EU**
Week 3 **Basic principles of EU law**
Week 4 **Decision-making in the EU: actors and procedures**
Week 5 **Enforcement of EU law**
Week 6 **Consolidation**

During the tutorial meetings assignments and tasks will be discussed. The assignments will be the starting point for the tutorial meetings, where students will be asked to lead the discussion.

Two of the assignments will have to be submitted via ELEUM prior to the tutorial meetings. At the end of the course, the tutor will choose one of the assignments for correction. The chosen assignment will be graded and will count for 25% of the final exam grade.

The students will be informed in due time about the deadline for the submission of the written assignments.

Course attendance

As mentioned above, the attendance at the tutorial meetings is compulsory. A student cannot miss more than one tutorial meeting.

Examination

The course ends with a written exam. This exam contains three questions. Two of these involve case studies to be solved by students. The third question is in the nature of a brief essay question and addresses (some) theoretical issues discussed during the course. Each question is worth 10 points. The total number of points you can get is thus 40 (3 x 10 points for the exam questions + 10 points for the assignment). You need 22 points to pass the exam.

The re-examination will have the form of an oral exam.

Important! Special exam rules and the additional compensatory assignment

=> A student will receive 0 points for the written assignment in case (s)he fails to submit, within the deadline, the assignment that will be graded. As explained above, the assignment can score in total 10 points and counts for 25% of the final exam grade.

=> In case a student missed 2 tutorial meetings for whatever reason, (s)he is deemed to not have fulfilled the attendance requirements. In such a case, the student will be given a provisional overall grade for the exam, but will not receive credits for the course unless he has successfully completed an additional compensatory assignment. To qualify for the additional compensatory assignment a student may not have missed more than 2 tutorial

meetings and must submit a completed request form 'additional assignment because of insufficient attendance' to the Office of Student Affairs, within 10 working days after the completion of the course. Students who receive a pass for the additional compensatory assignment will be regarded as having met the attendance requirement and their provisional exam grade will be declared valid and final.

=> If a student missed 3 or more tutorial meetings, (s)he fails the course.

Study materials

The preparation for the tutorial meetings will involve *inter alia* the thorough analysis of primary sources (Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)), case-law of the Court of Justice of the EU and other legal documents as well as the study of legal literature.

The basic text book that will be used during this course is:
Fairhurst, J., *Law of the European Union* (Pearson, 11th ed., 2016).

Furthermore, students must possess a copy of the Treaty on EU (TEU) and the Treaty on the Functioning of the EU (TFEU). The text of the Treaties can be found in:
Foster, N. (ed.), *Blackstone's EU Treaties & Legislation* (OUP, last edition) or can be downloaded from the EUR-Lex portal:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF.

Further Materials:

Many further relevant materials are also available in the University Library and online, as will be seen in greater detail during the lectures and tutorials:

- The main portal of the EU contains a large amount of materials, at <http://europa.eu/>. It is useful to explore the many links available there.
- In addition, you may consult the website of the European Commission, European Parliament and of the Council, at <http://ec.europa.eu> <http://www.europarl.europa.eu> and <http://www.european-council.europa.eu>, respectively.
- Judgments of the Court of Justice and of the General Court (formerly Court of First Instance) are available on the website of the Court of Justice of the EU, at <http://curia.europa.eu>.
- The main source for legal research (including case-law) is the EUR-Lex portal at <http://eur-lex.europa.eu>. It contains, or links to, a large amount of legal material, including (i) the Official Journal of the European Union in original format; (ii) a database of Union legislation in force (i.e. Regulations, Directives, Decisions and other significant documents); (iii) preparatory documents put forward by the Commission (the COM series); (iv) case law of the Court of Justice of the EU.

Staff

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Week 1 **Historical, legal, political and institutional background of the EU**

Literature Fairhurst, Chapter 1

Tutorial 1-1

Introduction Tutorial 1-1 will consist of an introduction familiarising the students with the content of the course and revising the basic theoretical knowledge on the history and background of the European Union.

Assignment Activating previous knowledge about the EU

During the first tutorial, students' prior knowledge on European Union and its institutions will be activated and selected issues concerning the EU will be refreshed, including the most recent institutional developments (such as the election of the President of the European Commission and the elections to the European Parliament in 2014).

In view of the preparation for Tutorial 1-1, students should reflect upon following questions:

1. What knowledge do you already have about the EU, its history and its institutions?

2. Which developments regarding EU institutions did you recently encounter in the press?

3. What is the current composition of the European Commission?

4. Which political party has won the European elections in 2014?

5. Can a Member State exit the EU?

Tutorial 1-2

Assignment ***'Le Concours'*** - Getting familiar with the European Union and the Treaties

Please answer the questions stated below by referring to the relevant Treaty provisions and/or websites from where you found the information. It speaks for itself that with regard to certain questions, the actual answer is of no real importance; what does count is that you manage to find the relevant provision, document or information in question.

1. The ECSC was concluded for 50 years and has in the meantime expired. What is the duration of the EU?

2. How many language versions of the EU Treaty are said to be authentic?

3. Does the TFEU apply to the Faroe Islands?

4. Can you please list the official institutions of the EU?

5. Which country currently presides the Council of Ministers of the EU?

6. How many votes does the Netherlands have in the Council of Ministers? How many does your country of origin have?

7. In the field of Common Transport Policy, how many votes are necessary before a legislative measure can be adopted in the Council of Ministers?

8. Since when are the members of the European Parliament directly elected?

9. How many seats does Malta have in the European Parliament?

10. How many Advocates General are there at the CJEU? What is their task?

11. What does the CJEU stipulate in paragraph 17 of its *Simmenthal* judgment (Case 106/77)?

12. When did the Court of First Instance (now the General Court) precisely deliver its judgment in the *Kadi* case? When did the CJEU deliver its judgment in this case?

13. How many judgments will the CJEU render next week?

14. What is the main task of the European Central Bank?

15. Which Member States of the EU have so far introduced the Euro?

16. Who is the European Ombudsman and what does he do?

17. Who appoints the European Ombudsman? Who may dismiss him?

18. What is OLAF?

19. What is the maximum number of members of the European Economic and Social Committee according to the TFEU?

20. Where are the "European Union Agency for Fundamental Rights" and the "European Monitoring Centre for Drugs and Drug Addiction" situated?

21. On which date did the internal market have to be realized?

22. What is the legal form of the European Arrest warrant? What does it intend to achieve and how?

23. In the field of Common Foreign and Security Policy (CFSP), what legal instruments does the Union have at its disposal?

24. What is meant by 'enhanced co-operation' between the Member States?

25. Does the TFEU prohibit discrimination on grounds of sexual orientation?

26. Who holds Union citizenship?

27. What electoral rights do citizens of the Union enjoy under the TFEU?

28. What are the official candidate and potential candidate countries for EU membership?

29. Can Morocco become a Member State of the EU? What are the criteria for accession?

30. When did the Lisbon Treaty enter into force? Why is it called the Lisbon Treaty?

Week 2 **Institutional framework of the EU**

Literature Fairhurst, Chapters 3 and 5

Tutorial 2-1

Introduction The first part of the tutorial will be dedicated to familiarising the students with the institutional framework of the EU, the composition and competences of the institutions as well as with basic issues of the EU's institutional balance.

Assignment EU's institutional balance

This assignment focuses on the institutional structure of the EU. Short cases and statements below should enable the student to acquire greater insight in the current institutional system and the problems it encounters.

1. Thomas Antihomo

A new Commission is in the process of being installed. A list of candidates is drawn up in agreement with the new president of the Commission. Some members of the European Parliament are not happy about some of the names on the list. One of them concerns Thomas Antihomo, the Irish candidate for the portfolio Justice, Fundamental Rights and Citizenship. Antihomo is a well-known opponent to homosexuals. In an official hearing with the European Parliament, he confirms his views and becomes so upset in the meeting that he accuses a German MEP to behave like a Gestapo officer. The members of the European Parliament decide not to approve his nomination due to doubts about his expertise in the field of the proposed portfolio and his general behaviour.

Can the EP prevent the appointment of Thomas Antihomo?

2. Stairway to Commission

The new Commission is appointed a few months later. It soon appears that the Commissioner responsible for Health and Consumer Policy, a Swedish national Björn Stairway, regularly consults an astrologist. This influences his performance as he plans his trips and meetings around the predictions made by the astrologist. The Commission President, John Monnet, is upset about this and wants to take action against the Commissioner. In addition, after having been a few months in office, the Commission President finds out that the High Representative of the European Union for the Common Foreign and Security Policy, Roberta Schuman, has awarded contracts to a commercial consultancy firm owned by her husband.

a) Is the Commission President empowered to take actions against Stairway and Schuman?

b) Is the European Parliament empowered to take actions against Stairway and Schuman?

Tutorial 2-2

Assignment Further questions related to EU institutions

1. The Dutch Problem

In November 2016 the Government in the Netherlands looses the constitutionally required support of the Dutch Parliament. New elections are held, which are won by two right-wing

parties named Dutch Pride (DP) and the Dutch Freedom Party (DFP). Together the DP and DFP have 76 out of 150 seats in Parliament, which entitles them to form a new Government. DP leader Ria Ozodom becomes the new Prime Minister; DFP leader Gert Wildhaar takes up the post of Minister of Religion, Immigration and Integration. Ozodom and Wildhaar live up to the promises they made during the election campaigns. They draft various proposals for legislation prohibiting persons of Arab origin to speak Arabic in public, permitting the burning in public of the Quran and including in the Law on the Registration of First Names a clause stating that the names of Mohammed and Ibrahim cannot be lawfully registered. These proposals are subsequently debated in the Dutch Parliament.

The European Parliament and the Commission are shocked and demand the Council to formally determine that there is a clear risk of a serious breach of basic EU values and fundamental rights by the Netherlands. Not being satisfied by the Dutch response to the allegations, the Council unanimously makes the determination. The Dutch Parliament, controlled as it is by the DP and the DFP, ignores all the foreign critique and formally adopts the legislative measures in question. The members of the European Council are outraged and establish by unanimity that there is indeed a serious breach of EU basic values and fundamental rights. 15 Member States, among which Germany, the UK (until negotiation of Brexit), France, Italy, Spain and Poland, wish to take further action and suspend the voting rights of the Netherlands in the Council. The remaining Member States oppose to this, as they prefer to solve the "Dutch problem" through diplomatic channels.

Will the voting rights of the Netherlands be suspended?

Would the answer be different in case the UK is formally no longer an EU Member State?

2. The Dutch Withdrawal

The critique of the other Member States (see above question 3) did not go down very well in the Netherlands. Tensions further increase in 2016 when the EU Commission, the European Parliament and all other Member States conclude that Turkey has met the Copenhagen-criteria and that the accession process can be finalized, in exchange of Turkey admitting 1 million Syrian immigrants. While it is aware that it can prevent Turkey's accession to the EU, the Dutch Ozodom Government concludes that its views on far too many issues differ so much with those of the other Member States that it sees no further basis for future cooperation. The Netherlands decides to withdraw from the EU.

a) Is the Netherlands legally empowered to prevent Turkey's accession to the EU?

b) Can the Netherlands withdraw from the EU and, if so, how?

3. Statements

Please comment upon the following statements:

a. The Single European Act constituted the second major amendment of the original EEC Treaty after the Luxembourg Accords.
b. The Treaty provisions on Enhanced Cooperation permit a minimum of nine Member States to pursue "*integration à la carte*".
c. The decision of the European Council that the Commission would also after 1 November 2014 retain one Commissioner from each Member State is at odds with the EU Treaty.

d. The term “elected” in Article 17(7) EU Treaty could just as well be replaced by the term “appointed”.
e. Article 16(8) EU Treaty runs the risk of the real decision-making process in the Council taking place in Brussels’ pubs and restaurants.
f. Both from a democracy perspective and an efficiency perspective it would be preferable if the Council’s agenda would no longer contain “A” matters.
g. The post of Donald Tusk could be referred to as “*Président procédural*”.
h. Representation in the European Parliament is based on the principle of progressive proportionality.
i. To achieve and maintain peace, economic integration is to be preferred above the creation of a European army.

Week 3 **Basic principles of EU law**

Literature Fairhurst, Chapter 9 (except the principle of state liability)
Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECLI:EU:C:1963:1
Case 14/83 Von Colson and Kamann *v* Land Nordrhein-Westfalen [1984] ECLI:EU:C:1984:15
Case C-91/92 Faccini Dori *v* Recreb [1994] ECLI:EU:C:1994:292
Case C-212/04 Adeneler and others *v* Ellinikos Organismos Galaktos [2006] ECLI:EU:C:2006:443

Tutorial 3-1

Introduction The introduction to the first tutorial in week 3 will aim at guiding the students through the basic principles of EU law, namely those of direct effect, indirect effect and supremacy.

Assignment A busy day at the Court (I)
Please submit the assignment electronically via the Student Portal (ELEUM). A link will be available.

Mrs. Salo has worked since 1991 at a Department of the Academic Hospital in Aalto (AHA) (Finland) that specialises in the treatment of patients who have lapsed into a coma. The Department was known for its unique expertise and was the sole one in the country that developed so-called hydro-electric treatment aimed at 'waking up' patients who have lapsed into a coma.

Until 1995 the Finnish health care system was wholly public in nature. All expenses were funded out of the public purse, i.e. out of tax revenues, and patients were offered medical care free of charge. With a view to reducing costs and stimulating efficiency, however, the Finnish government decided to introduce various market elements in the health care sector.

As a result, AHA was privatized. The Government bought 75% of AHA's shares, the remaining 25% were sold to private investors. In addition, patients were no longer given free medical care; rather, they now had to insure themselves in accordance with the rules of the new Private Health Insurance Act. For various reasons, the Finnish Government decided that AHA's coma department should retain the exclusive right to further develop and use hydro-electric treatment in Finland and it therefore decided to give AHA a special license for this.

After 10 years, however, AHA had to conclude that the coma department was no longer profitable *inter alia* because it seemed that hydro-electric treatment was not as successful as initially thought. AHA decided to sell the department to the Private Aalto Hospital (PAH), a private hospital which continued to believe that hydro-electric treatment had unique potential. PAH, however, was only willing to pay the price requested by AHA on condition that: (1) it would also get the special license and, (2) it would not have to take over all of AHA's employees. The Finnish Government gave permission to the transfer of the license. AHA accepted the conditions relating to the employees. One day before the transfer AHA dismissed 50% of its employees.

One of these employees is Mrs Salo. Mrs Salo hires a lawyer who advises her to go to court because her dismissal is contrary to a Directive on transfers of an undertaking, which states that: the transfer of an undertaking automatically implies the transfer of all labour contracts (Article 1) and that dismissals following from or caused by a transfer are null

(Article 2). The lawyer tells her to start (1) a court case against AHA for unlawful dismissal and (2) a case against PCH for payment of her unpaid salary. According to the lawyer Mrs Salo can directly enforce in court her rights conferred by the Directive since Finland has not yet been transposing it into the national legal system and the period of implementation has been expiring. On the 1st October 2016 the Aalto Court hears the two cases.

N.B. In preparing this case you do not have to study the Directive mentioned or case law on transfer of undertakings. You may assume that the dismissal is indeed contrary to the Directive.

a) Please prepare the arguments (1) in favour of Mrs Salo and (2) in favour of both AHA and PAH. How would you argue the case if you were their lawyer?

b) Please make clear how you would decide the case if you were a judge in the Aalto Court?

Tutorial 3-2
Assignment A busy day at the Court (II)

A

Nadia Comaneci is the owner of a pub named 'Hagi' in Bucharest, Romania. To keep things under control, she prohibits her employees from consuming alcohol during working-time. Soft drinks are also prohibited. Practically speaking, the employees can only drink tap water during working time. In March 2016, after having drunk a lot of water, one of the employees, Chris Chivu, suddenly starts feeling horribly sick and decides to go home. Nadia is furious that Chris left on a very busy evening. When Chris returns to work two days later, Nadia tells him that his services are no longer needed and that he can consider himself dismissed. Chris is very angry, especially when he hears from a colleague, who has gone through the same experience once before, that the tap water used in the pub has not been filtered, as is prescribed by the Directive 2004/123, and contains all kinds of substances, which are strictly prohibited by Article 16 of this Directive. The Directive also prescribes criminal sanctions for breaches of its Article 16. Hereupon, Chris decides to inform the police that his former employer uses water that does not meet the criteria laid down in the Directive. The Romanian prosecutor decides to start a criminal action against Nadia and 'Hagi'. The prosecutor is well aware of the fact that Romania has failed to implement the Directive, but since the implementation period has already expired he considers it plain that the pub has committed an economic crime.

Subgroup A acts as the Romanian judges. **Subgroup B** acts as the Prosecutor, whilst **subgroup C** operates as the lawyers of Nadia. The subgroups will be given 10 minutes to prepare the role to be played as a group. The tutorial will have a form of a court hearing with two opposing parties and judges clarifying the issue, deliberating and rendering an (oral) judgment at the end. Students are expected to prepare bullet points containing main points of their legal positions.

B

On 21 January and 21 February 2016 respectively Yolanthe Sneijder and Wesley van Cabau van Kasbergen are approached by a representative of *Multilingua* at one of Milan's underground stations, who makes them an offer to participate in an Italian language

correspondence course. Both Yolanthe and Wesley are very interested and sign the contract immediately. Four days later, however, both Yolanthe and Wesley inform *Multilingua* that they are cancelling the contract because of lack of funds. The company responds, however, that they can not cancel the contract and that they have to pay the price stated in the contract. *Multilingua* refers to a provision in the Italian Act on Contracts, which stipulates that contractual obligations will have to be fulfilled unless this would lead to unreasonable consequences. In *Multilingua*'s view, the latter does not apply in cases of mere inability to pay. Both Yolanthe and Wesley ask you for legal advice. It appears that there is a Directive of 2014 concerning the protection of consumers in respect of contracts negotiated away from business premises, which grants consumers the right of cancellation of such contracts for a period of at least seven days in order to enable them to assess the obligations arising under the contract. The Directive had to be implemented latest by 1 February 2016. Italy has failed to meet this deadline. Both Yolanthe and Wesley refuse to pay. *Multilingua*, however, insists and starts legal proceedings against both Yolanthe and Wesley.

Subgroup A acts as the judges in the two cases. **Subgroup B** represents *Multilingua*, whilst **subgroup C** operates as lawyers of Yolanthe and Wesley. The subgroups will be given 10 minutes to prepare the role to be played. The tutorial will have a form of a court hearing with two opposing parties and judges clarifying the issue, deliberating and rendering an (oral) judgment at the end. Students are expected to prepare bullet points containing main points of their legal positions.

Week 4 **Decision-making in the EU: actors and procedures**

Literature Fairhurst, Chapter 4
Case C-300/89 Commission *v* Council (Titanium Dioxide Waste) [1991] ECLI:EU:C:1991:244
Case C-411/06 Commission v Parliament and Council [2009] ECLI:EU:C:2009:518

Tutorial 4-1 Acting as a legislator

Introduction As a theoretical introduction to Tutorial 4, students will familiarise themselves with the basic concepts on decision-making in the EU in order to consolidate their knowledge gained through studying of the prescribed literature.

Assignment EU legislation on sports contracts?

In the summer of 2008, the Spanish football club Real Madrid tried to convince Cristiano Ronaldo, the Portuguese star player of Manchester United, to leave the UK. Despite a running contract with the club from Manchester, Ronaldo was pleased with the interest and was keen to move to Spain. The English club however was determined not to engage into transfer talks with the Spanish giants and decided to make the player respect the terms of his employment contract. Ronaldo reluctantly agreed and the transfer took place only in July 2009 after Manchester United accepted an unconditional offer of £80 million (around €94 million) from Real Madrid.

The outcome of this situation could have easily been different: sportsmen often change clubs at a whim, contract or no contract. Sport clubs frequently also encourage players' moves, as this enables them to ask for (often lucrative) transfer sums. In case the two clubs involved in the possible transfer of a sportsman do not come to an agreement on the transfer sum, only two possibilities remain open: either the player involved honours the contract with his club of affiliation, or he unilaterally terminates his contract.

The latter possibility is the worst nightmare for many a sport club. But not everywhere in Europe. The rules on the unilateral termination of employment contracts by professional sportspersons differ greatly from Member State to Member State. In **Belgium**, for example, a professional athlete who wants to unilaterally terminate his contract with his club of affiliation must pay a sum of compensation in accordance with the terms of the Act of 24 February 1978 concerning employment contracts for remunerated sportsmen. In practice, this sum may amount up to a maximum of 36 months' wages. In **the Netherlands**, the situation is somewhat different, as a contract between a club and a player can only be unilaterally ended prematurely by rescission of a judge on grounds of a just cause or upon specific request of the player involved. In Dutch legislation, there are no specific provisions with regard to the determination of the sum of compensation due in such a situation. Therefore, one falls back on the general provisions of liability for breach of contract in the Civil Code. Moreover, in some other Member States this issue can be taken care of by the parties themselves in the employment contract. In **Spain** for example, the practice of 'rescission clauses' is legally permissible since the adoption of Royal Decree 1006/85 and really caught on in the aftermath

of the *Bosman* ruling[1] of the European Court of Justice. As a rule, the principle of contractual freedom leaves the parties to the contract at liberty to agree upon the amount of compensation to be paid in the event of unilateral termination of contracts. This has increasingly led to astronomic figures being put into players' contracts. Before his move to AC Milan, it was often murmured that Ronaldinho's contract with Barcelona provided for an astronomic compensation sum due in case another club would have wanted to unilaterally lure the Brazilian star away from the pride of Catalonia against their will.

In practice, most players consider the option of a unilateral termination of their contract only when they already have received an offer they would like to accept from another club and both clubs don't manage to reach an agreement with regard to the transfer of the player by mutual consent. Therefore, in reality the sum of compensation due in case of unilateral breach of the contractual obligations is invariably paid by the acquiring club. Many clubs from several countries, such as Anderlecht (Belgium) and Ajax (Netherlands), now voiced the complaint that because of the applicable legislation in their respective country, they receive only relatively low sums of compensation for the loss of their players in the event of a unilateral breach of contract, whereas they themselves have to pay much higher prices to acquire players from clubs in other countries. They have brought the matter to the attention of the European Parliament, which subsequently submitted a request, based on Art.225 TFEU, to the Commission to draft a legislative proposal to introduce EU-wide rules in this respect.

The Commission reacts cautiously but sympathetic to this invitation and starts informal negotiations with the Member States' representatives in the COREPER. It quickly becomes evident that the Member States' reaction is only lukewarm: **Spain**, in particular, seems categorically opposed to any change to its legislation in this respect. Also **France**, **Italy** and **Greece** strongly object to EU legislation on the topic in question. The other Member States seem to be in favour of it. In particular, the Member States seem to have diverging opinions on:
(1) *the question of whether the Union is empowered to legislate on this topic;*
(2) *if the first question is to be answered in the affirmative, what the legal basis of legislation should be;*
(3) *the significance of the principle of subsidiarity in this respect;*
(4) *the type of legislative instrument to be chosen.*

Conscious of the popularity of the football game the European Parliament is adamant to have a firm say on the matter as well: *concretely, the MP's would like to see a number of general provisions promoting combating discrimination in sport incorporated into the proposal*.

In September 2011, the Commission convenes an informal meeting for which representatives of all Member States and the European Parliament are invited to discuss these matters. *Please advise them on the five points mentioned above.*

[1] Case C-415/93 Bosman [1995] ECR I-4921

Tutorial 4-2 Mid-term discussion

Assignment Brexit: a dead-end road?

Brexit: Is everything going to change in law, so that very little would change in fact?

Published on June 27, 2016 Authors: Jure Vidmar & Craig Eggett

http://www.ejiltalk.org/brexit-is-everything-going-to-change-in-law-so-that-very-little-would-change-in-fact/#more-14404

'A full calorie Brexit or Brexit lite?', Marko Milanovic has asked on this blog. The different modalities of Brexit are rooted in Article 50 TEU, which foresees a period of two years to negotiate the precise terms of UK's exit and a future relationship between the UK and the EU. Moreover, the referendum does not have any self-executing legal effects. It will now be on the UK government to decide when (and whether?) Article 50 should be triggered. We agree with Marko's excellent analysis and believe that, in principle, a number of lite exit diets could be created. What is also possible is that we would get three parallel Brexits, some with more calories than others. England and Wales could leave on different terms than Northern Ireland (which may at least theoretically even stay via the Republic of Ireland); and it is possible that Scotland would continue the UK's membership with some revisions – and as an independent state.

Brexit lite: replacing EU law with international treaty law

Article 50 does not exclude – perhaps it even encourages – the conversion of a full-fledged membership into a 'Switzerland-plus-minus' arrangement. Hence the phrasing in Article 50(2) TEU: '[T]aking account of the framework for its [of the exiting member state] future relationship with the Union.' If it were envisaged from the outset that this relationship would be the same as the relationship between the Union and e.g. Panama, this phrasing would have been completely redundant. Yet, any Conservative PM would probably have difficulties accepting a single market deal with the present free movement of people package. It is difficult to imagine, on the other hand, that the EU could give the UK an asymmetric free movement deal, without people. But then, there is some room to manoeuvre. First of all, the UK can hardly afford complete exclusion from the single market and to stay in it for some purposes, it will need to accept certain concessions in other areas. Further to that, several categories of 'free movers' exist in EU law: people who have been in the host member state for five years and those who have not; workers and job-seekers; students; but also students with and students without UK grants; economically self-sufficient people. There are social benefits involved and there is the question of access to the NHS, for example.

It cannot be excluded that a 'Switzerland-plus-minus' deal would be concluded in the end. Both sides agree to certain concessions and the new UK government goes home presenting the new deal to its public in terms of public international treaty law rather than EU law: this is what we agreed to and not what the EU imposed on us. What looked either black or white before suddenly appears to have more shades. The reality may be that many EU rules continue to apply by virtue of a complex and cumbersome collection of bilateral (or perhaps mixed?) agreements. Of course, the UK would no longer be represented in EU institutions,

and the democratic deficit would be even worse, but the new government could play the card of the UK being outside of the EU.

Can we have three parallel Brexits?

Now, turning to the scope for Brexits of different calories, or of different speeds in more conventional EU language. The political leaders in Northern Ireland and Scotland have immediately pointed out that the vote in England is taking their territories out of the EU against the wishes of their own people. It is certainly wrong to assume that all Scottish or Northern Ireland votes for the UK to stay in the EU would in the new circumstances translate into votes for secession from the UK. It is clear, however, that if the referendum rules had stipulated for a double-majority (a majority of all votes cast in the UK as a whole combined with a majority in all constitutive UK countries), the exit referendum would have been unsuccessful. While EU membership is not a devolved competence under UK constitutional law, certain related consequences of the EU exit may well be.

With regard to Northern Ireland, the Good Friday Agreement predicates the current constitutional arrangement on the 'wish' of the people and the right of self-determination, and explicitly allows a referendum on unification with the Republic of Ireland. For an expansion of the territory of an EU member state a precedent already exists – East Germany. If Northern Ireland were to unify with the Republic, the territory would continue in the EU on the Republic's legal arrangement. Even without speculating about this possibility, the Good Friday Agreement was built on the premises that both Ireland and the UK are EU member states. Some modalities of this Agreement would indeed be difficult to implement without the overarching and unifying EU legal framework in the picture. Imagine how things would change when customs (including customs controls!) would need to be re-introduced.

Another important point is that Irish nationality laws extend the right to claim Irish citizenship to a number of residents of the isle of Ireland as a whole. According to the 2011 census, 20% of the population of Northern Ireland holds an Irish passport, with 28% of people identifying as Irish. It seems logical that following the Brexit referendum result the number would only increase (even beyond those who self-identify as Irish; as EU citizenship can indeed be a useful thing), and this is confirmed by recent reports of a dramatic rise in applications. The exit of Northern Ireland as a part of the UK would then create a situation in which the territory would be outside of the EU, but a large number of its population would be EU citizens. Mutatis mutandis, the situation looks a little bit like Greenland (except that in Greenland virtually everyone is a Danish national). Northern Ireland's exit may thus be 'lite' in any case, even without any further referendum complications under the Good Friday Agreement, and regardless of how things look at the conclusion of the Article 50 deal for the UK.

Scotland and another independence referendum

In 2013, one of the authors of this post argued on this blog (and later in this full-fledged article) that – at the time still potential – Brexit would undermine the legitimacy of a prior – at the time also potential – Scottish vote to stay in the UK. The legal mechanics at the Scottish independence referendum were such that Scotland would have exited not only the UK, but also the EU, unless negotiated otherwise. Scotland would need to join the EU as a new state via Article 49 TEU, which would require approval (i.e. ratification) of the

accession agreement by all member states. This is where things could become complicated for reasons that have little to do with Scotland (e.g. the Spain-Catalonia dynamics, the Cyprus problem, etc). Given the special nature of the EU legal order and the importance of the rights stemming from EU citizenship, the argument advanced in 2013 was that Scots had a right to know whether or not they were deciding for the UK within or outside of the EU. The two referenda fell too close to each other. In order to ensure the clarity standards required at territorial referenda, the UK would either need to resolve its EU status first, or allow time for its own territorial status to sink in after the unsuccessful Scotland independence vote. This did not happen.

In the new circumstances, the calls for another Scottish independence referendum are entirely legitimate. Nicola Sturgeon now knows that she has a penalty kick in the injury time, but she also knows that she cannot score with a bad kick. And for a good kick, timing is very important. Should she take this 'penalty' before the UK gets its Article 50 package from the EU or wait until such a deal is on the table, so that she can build her campaign on the opposition to this deal? If the UK no longer has access to the single market, her arguments would be economic in nature. If 'Switzerland-plus-minus' is negotiated, her arguments could potentially be even stronger: the UK would be paying and obeying the EU, but it would not be voting and deciding. In any case, Nicola Sturgeon will have strong cards to play. She seems to be quite cautious at the moment. Another independence referendum is in the air – but when exactly does she want it to happen? And she also talks about Scottish negotiations with the EU.

What now are the EU options for Scotland in law? As a part of the UK, Scotland would simply be a part of the negotiated Article 50 deal, it is difficult to imagine that the EU would agree only to an Anglo-Welsh exit if the UK still existed within its current borders. After all, England and Wales are not for the UK what Greenland is for Denmark. Scotland can thus become an EU member state only via independence and for that Sturgeon will soon need to make her referendum demands more concrete. A referendum would still be risky for her: a penalty kick is always a small victory but it can also lead to a big disappointment! If Scotland votes for independence, however, its EU membership would be much more straightforward than it was in 2014; Scotland could even become an EU member state from the moment of independence and the moment of the rump UK's withdrawal (depending on the Brexit timeline). This would happen by virtue of a parallel application of Articles 48 and 50 TEU.

During the previous Scotland independence campaign, a major problem was that EU institutional arrangements were only designed for 28 states. It was argued by some that the EU legal order already was implemented in Scotland and that an independent Scotland could thus bypass Article 49 TEU via Article 48. The problem of this argument was that Scotland would have become the 29th member state for which no provisions were made in the Treaty. But now the UK is bound to withdraw, while there still is space for 28 member states in the Treaty. This time Scotland really could stay via Article 48 revision rather than join anew via Article 49. While even Article 48 requires unanimity, the important difference is precisely in that it means staying rather than joining anew. And the Treaty will need to be revised anyway to reflect the UKs withdrawal. In comparison with Article 49 procedure, it is less likely that 'Route 48' would lead to blockades. The Treaty revision would, of course, need to reflect that Scotland was a much smaller state that the UK.

Would Scotland be the successor state of the UK? Definitely not in terms public international law in general, but quite possibly for the purposes of the TEU. Would Scotland inherit UKs opt-outs? In principle that would also be quite possible as they are currently applicable to Scotland anyway and Scotland would not be a new 'clean slate' member. How about Scotland's currency? With the EU membership enigma resolved, this may be the most difficult nut to crack in the end. While the Euro opt-out would remain in place legally, the sterling opt-in may not be available politically.

Conclusion

In sum, several scenarios now exist and even the extreme scenario is perfectly legally plausible: Northern Ireland in the EU as a part of the Republic of Ireland, Scotland in the EU as an independent state, and England and Wales having access to the single market via the public international treaty law bypass rather than direct EU law highway. Even if the extreme scenario did not happen, a 'Switzerland-plus-minus' arrangement is highly likely, as is another Scottish independence referendum; while Northern Ireland's exit would be different in any case because of the Good Friday Agreement and the relatively high proportion of population who would remain EU citizens (or be at least eligible for EU citizenship) even if Northern Ireland remained in the UK.

Read the blog above and answer the following questions:

1. *Do you agree with the arguments of the authors on 'three' Brexits?*
2. *Explain the different roles of Articles 50, 49 and 48 TEU.*
3. *What are the legal consequences of Brexit?*
4. *What are the political and economic consequences of Brexit?*
5. *In what way have the Brexit discussions/negotiations progressed since the publication of the blog?*

Week 5 **Enforcement of EU law**

Literature

Tutorial 5-1 Fairhurst, Chapters 6 and 9 (only the principle of state liability)
Joined Cases C-6/90 & 9/90 Francovich and Bonifaci *v* Italy [1991] ECLI:EU:C:1991:428
Joined Cases C-46 & 48/93 Brasserie du Pécheur/Factortame III [1996] ECLI:EU:C:1996:79
Case C-224/01 Köbler *v* Austria [2003] ECLI:EU:C:2003:513

Tutorial 5-2 Fairhurst, chapters 7 (200-218) and 8
Case 25/62 Plaumann & Co *v* Commission [1963] ECLI:EU:C:1963:17

Tutorial 5-1 Enforcement of EU law (I): the preliminary ruling procedure and the principle of state liability

Assignment Lousy judges

In 2012 the city of Tytsjerksteradiel decides to establish a 'Parent Fund' for all its civil servants. The fund is entrusted with the task of paying monthly allowances to civil servants who have more than one child to compensate them for the increasing cost of babysitters and nurseries. After the birth of his second child, Appie Schoonraam, a Belgian national who has been working for the City since 1998 as a window cleaner, applies for an allowance. His application is refused, however, on the ground that allowances can only be paid to persons who are appointed as a civil servant by the City and not to persons who, like Appie, are employed by the City on the basis of a private labour contract.

Appie decides to challenge the refusal in court. He argues that the refusal constitutes an indirect discrimination on grounds of nationality contrary to the EU law because a municipal regulation provides that, unlike Dutch nationals, foreigners can only be employed on the basis of a private labour contract. Unfortunately, both the local Tytsjerksteradiel Court and the Court of Appeals dismiss his claim on the ground that municipal governments, like the City of Tytsjerksteradiel, are wholly excluded from the EU provision on free movement of workers by virtue of Article 45(4) TFEU.

Appie and his lawyer decide to bring the case before the Dutch Supreme Court. Having doubts about the precise scope of Article 45(4) TFEU, in January 2016 the Supreme Court decides to stay the proceedings and to refer the case for preliminary ruling to the CJEU. More specifically, the Supreme Court wishes to know whether Article 45(4) TFEU can apply to window-cleaners and whether the refusal to grant the allowance to Appie Schoonraam indeed constitutes indirect discrimination.

On 1 March 2016, the CJEU delivers its judgment in *Saubermachen*, a comparable case referred to it by a German court. In *Saubermachen* the CJEU concludes that it had already held in 1975 in the *Clean & Proper* case that cleaning activities cannot be regarded as falling within the scope of Article 45(4). In addition, the CJEU holds in *Saubermachen* that child allowances cannot be reserved to civil servants to the exclusion of persons engaged on the basis of private law where it can be established that the majority of employees working on the basis of a private contract consist of non-nationals. This, the CJEU holds, constitutes prohibited indirect discrimination on grounds of nationality

By letter of 2 March 2016 the CJEU asks the Dutch Supreme Court whether it deems it necessary to maintain its preliminary question in light of the judgment in *Saubermachen*.

On 1 May 2016 the Dutch Supreme Court decides to withdraw the request for preliminary ruling. However, it dismisses Appie Schoonraam's claim on the ground that the German rule at issue in *Saubermachen* only concerned allowances for civil servants who have more than two children and not, as the rule of the City of Tytsjerksteradiel, civil servants who have more than one child.

Appie and his lawyer are furious. In their view the judgments of the Supreme Court constitutes a clear breach of EU law. Not being in a position to appeal the judgment of the Supreme Court, they decide to bring an action for damages against the individual judges and the Kingdom of Netherlands before the Tytsjerksteradiel court.

Please answer the following questions:

1. *As a lawyer, which arguments would you submit in favour of Appie Schoonraam?*

2. *As a legal representative, which arguments would you submit in order to defend the individual judges and the Kingdom of Netherlands?*

3. *If you were a judge at the Tytsjerksteradiel court, how would you decide:*
    a. *about the claim against the individual judges?*
    b. *about the claim against the Kingdom of Netherlands?*

Tutorial 5-2 Enforcement of EU law (II): direct actions before the Court of Justice of the EU

Assignment *Vampirefoods Ltd* & Co.

Please submit the assignment electronically via ELEUM. A link will be available.

On July 6, 2015 the European Parliament and the Council adopted Framework Regulation 123/2015 on the legal protection of biotechnological interventions, using Article 114 TFEU as the legal basis for this legislative initiative. This Regulation provides general rules for determining which inventions involving plants, animals and the human body may or may not receive intellectual property protection. Article 6 of the Regulation confers upon the European Commission the power to adopt further Regulation(s) containing specific criteria for determining which inventions involving plants, animals or the human body may or may not be patented. In exercising this delegated power the Commission is supposed to act in accordance with the regulatory procedure. According to Article 10 of Regulation 123/2015, applications for patents must be addressed to the national patent offices, which are responsible for granting the patents free of charge, in accordance with the Commission Regulation(s) adopted on the basis of Article 6.

Both pharmaceutical companies and a number of NGOs which oppose the commercial exploitation of human organs or fight for the protection of animal rights recognise the strong power granted to the Commission. In August 2015 they start lobbying the Commission's civil servants by inviting them for 'champagne breakfasts' and lunches in Brussels' most expensive restaurants during which "they would like to express their views." The pharmaceutical companies assert that the Commission should allow patents for inventions involving plants, animals and human organs arguing that such patents are needed for the development of medical research. By contrast, a number of "human rights" NGOs strongly

oppose patents for inventions relating to human organs, whilst "animal rights" NGOs present to the Commission evidence of animal abuses by pharmaceutical companies.

The civil servants of the Commission decide to draw up a draft proposal for a Commission Regulation which provides that virtually all inventions involving plants and animals can be patented but, conversely, prohibits the patenting of any invention concerning human materials. On December 6, 2015 the Commission by the unanimous vote of the 13 members present at the meeting adopts Regulation 456/2015 as drafted by the responsible civil servants. The Regulation is published in the Official Journal on December 15, 2015 and enters into force on January 1, 2016. Article 3 of Regulation 456/2015 orders national patent offices to award patents for inventions involving plants and animals that meet the prescribed requirements. Article 4 permits national patent offices to charge a fee covering the costs of the application procedure. Article 5 of the same Regulation orders the national patent offices to withdraw previously granted national patents for inventions involving human material latest by March 1, 2016.

On January 10, 2016 the British Company *Vampirefoods Ltd,* which realises that it might loose the British patent it obtained in 1996 for its invention of human blood wholly immune for malaria viruses, decides to initiate an action for annulment of Regulation 456/2015. In the view of *Vampirefoods Ltd,* Regulation 456/2015 is unlawful because (1) it does not state why the arguments made by their lobbyists during the afore-mentioned breakfasts and lunches were not accepted and (2) is at odds with the principle of legitimate expectations as Article 5 of the Regulation boils down to an almost immediate withdrawal of patents concerning human material.

Also some NGOs are not thrilled by the new Regulation. On January 15 2016, the NGO *Animal Dignity* decides to initiate an annulment procedure against Regulation 456/2015, arguing (1) that procedural requirements have been infringed during its adoption and, repeating the view it had already expressed during the afore-mentioned "champagne breakfasts" with Commission representatives, (2) that Article 114 TFEU could not serve as legal basis for the parental Regulation 123/2015.

Aware of the strict standing rules for interests groups, another NGO, named *In Defense of the Dinosaurs* requests the European Parliament to start a procedure for the annulment of Regulation 456/2015. The Parliament is willing to cooperate and submits its case on February 16 2011+6, arguing that Regulation 456/2015 must be annulled on the ground that Article 4 of Regulation 456/2015 exceeds the powers provided in Regulation 123/2015 and that the Commission thus was not entitled to adopt Regulation 456/2015.

Please establish:

1. *which court (Court of Justice or General Court) is competent to decide each of the cases brought by different parties,*
2. *whether the cases submitted respectively by Vampirefoods Ltd, Animal Dignity and the European Parliement are admissible and*
3. *whether the arguments made by them are likely to lead to the annulment of the contested act(s).*

Even if you conclude that a case is not admissible, you must continue and address the strength of the substantive arguments made by the three parties.

Week 6 Consolidation

Tutorial 6-1 Q&A

The second tutorial of week 6 will be dedicated to the preparation for the exam. Students are asked to send per e-mail any unclarified questions relating to the course content. The questions will be answered, to the extent possible, by their peers during the tutorial. Students are encouraged to bring up the issues concerning the functioning of the EU institutions and enforcement mechanisms in the EU law, as well as any other issues that have remained unclear during the course.

In order to allow for sufficient time for exam preparation, the second tutorial in week 6 will not take place.