

Introduction to European Business Law

Lund University MOOC, Jan 5 to Mar 15, 2015

Module 1 (Constitutional Foundations and Fundamental Principles)



A glossary of key terms and a summary of case notes from week 1 [plus some terms from the introductory videos on EU law sources]

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These notes were prepared by Penny Parker for private use only. Please feel free to comment or submit corrections to pennyparker@me.com.

Accession – joining a treaty (ratifying it) after it has already gone into effect; in the case of this week’s materials, the EU is planning on accession to the European Convention on Human Rights, but is still negotiating the terms of reference with the Council of Europe. A draft accession treaty is still pending. Member States have already ratified or acceded to the Convention, but the EU itself, as an institution or supra-national entity, is not yet bound by it until the accession takes place.

C series – this refers to the section of the Official Journal of the European Union (OJ) that contains information from the main institutions like notices, guidelines, announcements, resolutions, opinions, joint declarations, preparatory acts and summaries of judgments. Also primary legislation such as treaties, protocols and the Charter of Fundamental Rights.

Charter – The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. It contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. It includes all rights found in the case law of the ECJ, and all rights in the ECHR. It also includes “third generation” rights such as data protection, guarantees in bioethics, and transparent administration.

Common rules – to remove barriers to the internal market, the EU is authorized through its conferral powers, to legislate and override individual Member State measures. It does this by introducing common rules, which can either be deregulation of a particular sector of the market, or regulating it more strictly. For example, in the Snus case the EU banned the Swedish Snus tobacco product in order to facilitate the sale of other tobacco products more smoothly in the market.

Conferral – one of three key principles authorizing the EU to act in the EU law system (the other two are subsidiarity and proportionality). Article 5 of the TEU spells out the EU’s conferred powers. Its only powers are those expressly given to it by the member states as set out in the treaties. However, as we learned in this week’s materials, that can be a fairly ambiguous situation as some of its conferred powers, for example its authority to ensure the smooth functioning of the internal market, can be stretched to apply to almost any situation.

Curia – the name of the official database of the EU Court of Justice.

Decisions – one of three types of secondary legislation (the other two are regulations and directives). Decisions are binding only on those to whom the decision is addressed. They are directly applicable without need for separate implementing legislation in each Member State.

Direct applicability – this is legislation that is binding in each member state without need to first have it implemented (or transposed) by the member state's own implementing legislation. This doctrine applies only to EU regulations, not to directives or decisions.

Direct discrimination -- There are two main types of discrimination, direct and indirect. Direct discrimination is when someone is treated differently because of their status. E.g., a Greek law that said that only Greek nationals could hold the title of captain. The ECJ held the Greek law was directly discriminatory on the basis of nationality. Another example, an Irish campaign to buy Irish, put non-Irish products at a disadvantage on the basis of nationality.

Direct effect – first established as a concept in the case of **Van Gend en Loos** (C-26/62), it is the capacity of EU law to give rise to rights and obligations directly without the need for further implementation, even in the case of EU Directives which by their terms would seem to require separate implementing acts by the Member States. As contrasted with direct applicability (where regulations are self-executing without need for Member State implementation), direct effect is a concept that can extend into Directives that would seem to require implementing legislation from the Member State, but can become de facto directly applicable without waiting for that implementing step. In practical terms it means you should be able to impose EU law in your national courts even without an implementing national law. For example if a national authority had failed to implement an EU Directive but the Directive was reasonably clear as to how it should have been implemented, an individual of that Member State could bring suit against the government for damages (or perhaps also injunctive relief). There are 3 requirements for the principle of direct effect to apply: 1. It must be clear and precise; no ambiguity as to what the EU law requires, 2. It must contain an unconditional right or obligation, and 3. It should not be dependent on implementation. See also the concepts of horizontal and vertical direct effects in this glossary.

Directives -- one of three types of secondary legislation (the other two are regulations and decisions). A Directive is a legal act that sets goals, but which must be implemented by each Member State before it is officially in effect (although the doctrine of direct effects may sometimes make a Directive legally binding even before it has been formally implemented by the Member State).

ECHR – the European Convention on Human Rights of the Council of Europe. Not technically a part of the EU legal system yet. It came into force on 3 Sep 1953 within the members of the Council of Europe. There are currently 47 countries who have ratified the Convention, including all of the members of the EU and all of the members of the Council of Europe. Formerly known as the Convention for the Protection of Human Rights and Fundamental Freedoms. There are also several Protocols, adding e.g., property rights, education, free elections, etc. Enforced and interpreted by the European Court of Human Rights in Strasbourg. The Committee of Ministers of the Council of Europe monitors the execution of judgments. Individual member states of the European Union are parties to the Convention but not the EU as a system. An accession treaty is under negotiation that is expected to be finalized soon, which will bring the treaty into EU law.

ECJ – the European Court of Justice, the highest court in the Union, responsible for interpreting EU law and ensuring its equal application across all EU member states.

ECLI – the case law identification system that has recently been introduced into ECJ documentation. Example: EU:C:2007:809

Equal treatment – an alternative way to refer to the principle of non-discrimination. The court cases in this week's materials tend to use this term rather than non-discrimination. See also *The Concepts of Equality and Non-Discrimination in Europe: A practical approach from the European Network of Legal Experts in the Field of Gender Equality* (2006) (an EU document available online, link provided in the reading materials list). Equality essentially involves treating like things similarly and not treating different things the same, without proper justification. Discrimination deals more directly with adverse treatment experienced by an individual or group based on their particular characteristics, such as race, gender, disability, etc.

EU Commission – the EU's executive body. Main roles are to propose legislation, enforce European law, set objectives and priorities for action, manage and implement EU policies and the budget, and represent the Union outside Europe (e.g., to negotiate a trade agreement). 1 President, 7 Vice Presidents, and 20 Commissioners. A new team of 28 Commissioners (one from each EU Member State) is appointed every 5 years. The Commissioners meet as a College once a week, usually on Wednesday, in Brussels. When the Parliament holds its plenary sessions in Strasbourg, the Commissioners usually meet there. Emergency meetings may also be called.
EU conform interpretation

EU Council – sets the general political direction and priorities of the Union; does not exercise legislative functions but collaborates on certain legislation with the Parliament. Meets 2 times every 6 months, convened by its President. If the situation so requires the President may also convene special meetings of the Council.

EU Parliament – the directly elected parliamentary institution of the EU. Together with the Council and the Commission, it exercises the legislative function of the EU. 751 members. Elections every 5 years, most recently in 2014. Although it has legislative powers that the Council and Commission do not have, it does not formally possess legislative initiative. It shares equal legislative and budgetary powers with the Council, and equal control over the EU budget (some exceptions). The Commission is accountable to the Parliament which elects the President of the Commission and approves or rejects the appointment of the Commission as a whole. Meetings are held in Brussels, Luxembourg and Strasbourg. The Parliament and Council can be regarded as two chambers in a bicameral legislative branch of the Union, with law making power being officially distributed equally between both chambers. It meets virtually year round, either in plenary or committee meetings, with breaks during the summer, a 4 week "constituency" break, and other shorter breaks in the calendar from time to time.

Exclusive competence – one of three types of authority that the EU has to enact legislation. The other two types are supporting competence and shared competence. In the case of exclusive competence, only the EU may legislate in this area. Member States can not pass their own national laws. An example of exclusive competence is the EU's authority to adopt customs legislation.

Fundamental rights – the rights guaranteed in the Charter of Fundamental Rights, including personal, civic, political, economic and social rights.

General principles – these are concepts that are applied by the ECJ and the national courts of the member states when determining the lawfulness of legislative and administrative measures within the European Union. According to Wikipedia, accepted general principles of EU law include fundamental rights (human rights), proportionality, legal certainty, equality before the law and subsidiarity. From the video lecture on legal certainty: Having the status of a general principle of EU law essentially means it can be used both as a tool for interpretation and as a standard for judicial review. In judicial review, the principle can be used as a benchmark, both in interpreting EU law and national laws. For example, if an EU provision enacts a rule with a retroactive penalty, this would be deemed contrary to the principle of legal certainty and the rule would be held invalid.

Horizontal direct effect – this is the idea that EU legislation which has not yet been implemented by Member States might still have direct effect, but not horizontal direct effect (in other words, not in disputes between private parties), only vertical direct effect (where a private party might sue his or her national authority on the basis of the legal principle embodied in the EU legislation). This problem of horizontal/vertical direct effect would only apply to Directives and similar types of secondary legislation, but not to regulations since regulations are by their nature self-executing. But see also the case of Defrenne where a long dormant provision in the Treaty of Rome establishing a right of equal pay for women was suddenly applied to private employers, not just to public employers. In this case the Treaty of Rome provision (primary legislation) had horizontal direct effect to disputes between private parties.

Indirect discrimination – there are two main types of discrimination, direct and indirect. More common and more subtle is the concept of indirect discrimination. Indirect discrimination is based on impact. A requirement is imposed which on the face of it seems to be non-discriminatory. But in reality it puts one group at a disadvantage. An example is a requirement based on residency. An Austrian law that required residency to qualify for a certain position was struck down. Even though nationality was not mentioned the requirement was based indirectly on nationality because most non-residents are foreigners.

Internal market – this is the term used to describe the single market comprising the markets of all of the European Union member states. Sometimes known as the single market, formerly the common market. The EU seeks to guarantee the free movement of goods, capital, services and people – the “four freedoms” -- within and between its 28 member states. More about this in next week’s materials. We learned this week, however, that the EU’s authority to legislate in order to protect the internal market is very broad and very ambiguous; it been used to justify almost any type of legislation the EU has enacted.

L series -- this refers to the section of the Official Journal of the European Union (OJ) that contains mainly secondary legislation such as regulations, decisions and recommendations. Example: OJ L 376, 27.12.2006, p.36-68 (services directive)

Legal certainty – this is one of the key principles of EU law. It means that rules should be clear and precise, so that individuals are able to understand unequivocally what their rights and how to assert them. It is a general principle of law, meaning it permeates many aspects of the system. Having the status of a general principle of law means it can be used both as a tool for interpretation and as a standard for judicial review. This means that EU law should be interpreted as a whole as compatible with the principle of legal certainty. One example of the rule’s application was the Defrenne case where the Court held that the equal pay guarantee of the Treaty of Rome applied equally to public and private employers, but because this suddenly opened up claims for equal pay compensation back 20 years for private employers, the court ruled that “legal certainty” dictated that the rule not be made retroactive, but instead it would only apply to claims made at the time of this decision or afterwards.

From Wikipedia: In European Union law the general principle of legal certainty prohibits retroactive laws, i.e. laws should not take effect before they are published. The general principle also requires that sufficient information must be made public to enable parties to know what the law is and comply with it. For example in *Opel Austria v. Council* [1997] ECR II-39 Case T-115/94 The European Court of Justice held that European Council Regulation did not come into effect until it had been published. Opel had brought the action on the basis that the Regulation in question violated the principle of legal certainty, because it legally came into effect before it had been notified and the regulation published. The doctrine of legitimate expectation, which has its roots in the principles of legal certainty and good faith, is also a central element of the general principle of legal certainty in European Union law. The legitimate expectation doctrine holds that and that "those who act in good faith on the basis of law as it

is or seems to be should not be frustrated in their expectations". This means that a European Union institution, once it has induced a party to take a particular course of action, must not renege on its earlier position if doing so would cause the party to suffer loss.

Non discrimination – essentially an alternative way of expressing the principle of equality. There are many references to non discrimination in the EU treaties. For example,

- Art 18 TFEU prohibits discrimination on the basis of nationality
- Art 157 TFEU prohibits discrimination on the basis of sex in matters of employment
- Art 21 of the Charter prohibits discrimination on any grounds such as sex, race, colour, political opinion, age, and so on.

But it can be argued that all of these are merely different expressions of the same general principle of equality. Case law shows this principle extends not only to such traditional grounds as sex, race, nationality and political opinion, but also on any other grounds. So treating steel producers less favorably than aluminum producers, might be discriminatory. This aspect of the principle has a very wide potential scope.

This has an important ramification for businesses. It widens the range of possible challenges they can make to a measure that is disadvantageous to them. Having said that, the traditional areas of non discrimination will probably be given more weight than these more speculative grounds.

There is also a distinction between direct and indirect discrimination which is covered separately in this glossary under those headings.

OJ – refers to the Official Journal of the European Union, a compendium of EU legislation and other official documents. Published daily, Monday through Saturday. Available online.

Primacy – this is the 3rd concept to consider when looking at the general applicability of EU law. The other two are direct applicability and direct effect. The principle of primacy was first set out in the case of *Costa vs. ENEL* C-6/64. This principle requires that EU law has a higher normative value and must be given greater effect than the relevant national law, even in the face of a conflicting national law.

Primary legislation – this term refers to the EU treaties, as distinguished from secondary legislation which is the regulations, directives and decisions of the EU institutions themselves.

Proportionality -- Similarly to the principle of subsidiarity, the principle of proportionality regulates the exercise of powers by the European Union. It seeks to set actions within specified bounds. Wikipedia: “a criterion of fairness and justice in statutory interpretation processes ... as a logical method intended to assist in discerning the correct balance between the restriction imposed by a corrective measure and the severity of the nature of the prohibited act.” Under this rule, the involvement of the institutions must be limited to what is necessary to achieve the objectives of the Treaties and no more. In other words, the content and form of the action must be in keeping with the aim pursued. The principle of proportionality is laid down in Article 5 of the Treaty on European Union. The criteria for applying it is set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

Proportionality assessment – a 3-step evaluation process aimed at determining whether a particular measure satisfies the proportionality principle. 1. Is the measure appropriate? 2. Is the measure necessary? 3. Does it satisfy the weighing of the interests?

Wikipedia: In European Union law there are generally acknowledged to be four stages to a proportionality test, namely,

- there must be a legitimate aim for a measure
- the measure must be suitable to achieve the aim (potentially with a requirement of evidence to show it will have that effect)
- the measure must be necessary to achieve the aim, that there cannot be any less onerous way of doing it
- the measure must be reasonable, considering the competing interests of different groups at hand

It is, however, often seen that the third and fourth criterion are often merged into one by the European Court of Justice, depending on the margin of discretion that the Court sees as being afforded to the member state.”

Regulations -- one of three types of secondary legislation (the other two are directives and decisions). Regulations are binding legislative acts which apply across the entirety of the European Union and which do not require separate implementing legislation by the Member States. In other words, regulations have direct applicability.

Secondary legislation – this term refers to legislation that is enacted by the institutions of the EU itself, including regulations, directives and decisions. As distinguished from primary legislation which is the EU treaties themselves.

Shared competence -- one of three types of authority that the EU has to enact legislation. The other two types are exclusive competence and supporting competence. This type of competence is the most common we will encounter in this course. Shared competence means that Member States are free to legislate in the area until the EU adopts its own legislation in the area. As soon as the Union legislates in an area, the member states may no longer do so. Any areas not yet touched by the EU can be freely legislated by the member states. But this is not as clear as it would seem. The EU treaties confer broad powers on the EU so it will often be a question as to what the boundaries are for the EU to act. The example discussed in this week’s materials is the EU’s broad, vague authority to adopt measures for the establishment and functioning of the internal market, which can be stretched to cover almost anything. See, e.g., the Snus case where a law ostensibly involving public health, was justified as an internal market law instead. Other topic areas where shared competence applies – environment, consumer protection and social policy.

Subsidiarity -- The principle of subsidiarity says that the Union can not act where the objectives could be better achieved at the member state level. The Union should ask itself, is regulation on a Union level necessary? The presumption is that it should be done at the national level, unless there are reasons otherwise. However, as we found in the Snus case in this week’s materials, the Court can conclude that the EU should have the primary right to legislate in the field if the objective of the act can be characterized as one where the EU legislature has primacy (such as regulating the internal market) versus where the objective is in an area traditionally left to the member states, e.g., public health.

From the glossary of terms at the Europa site: The principle of subsidiarity is defined in Article 5 of the Treaty on European Union. It ensures that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at Union level is justified in light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby the Union does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principle of proportionality, which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaties.

Supporting competence -- one of three types of authority that the EU has to enact legislation. The other two types are exclusive competence and shared competence. Under supporting competence the

EU can act to support, complement or coordinate the laws in the member states but not “occupy the field” as in the case of exclusive competence. The EU also can not legislate to harmonize the laws of the member states under this supporting competence authority. E.g., culture, tourism.

TEU – Treaty on European Union (TEU), signed in Maastricht in 1992, last major amended version being adopted in the Lisbon Treaty signed 2007, entered into force Dec 1, 2009. The latest consolidated version of the TEU in the EUR-lex database is dated 2012. It created the European Union and led to the creation of the single European currency, the euro. The original Maastricht Treaty has been amended by the treaties of Amsterdam, Nice and Lisbon.

Contents of the TEU:

Title 1 Common provisions

1. Establishment of the Union
2. Common values (human dignity, freedom, democracy, equality, rule of law, etc.)
3. Peace, free movement of persons, internal market, combat exclusion and discrimination, euro currency, UN charter, etc.
4. Competences not conferred by Art 5 remain with the Member States, equality of Member States, principle of sincere cooperation
5. Principle of conferral; competences conferred on the Union, subsidiarity, proportionality
6. Ref to the Charter of Fundamental Rights; future accession to the ECHR
7. Expelling a Member State for a clear breach of the values in Article 2
8. Relations with neighboring countries, entering into agreements with them

Title II Provisions on democratic principles

9. principle of equality
10. representative democracy
11. freedom of expression, dialogue with EU institutions
12. the role of national parliaments

Title III Provisions on the institutions

13. institutional framework – the Parliament, Council, Commission, Court of Justice, etc.
14. Parliament
15. European Council
16. Council
17. Commission
18. High Representative of the Union for Foreign Affairs and Security Policy
19. Court of Justice

Title IV Provisions on enhanced cooperation

20. Enhanced cooperation between particular member states

Title V General provisions on the Union’s external action and specific provisions on the common foreign and security policy

Articles 21- 46

Title VI Final Provisions

47. legal personality
48. amendment procedure
49. becoming a member
50. withdrawing
51. protocols and annexes are also annexed
52. member states to whom these treaties apply
53. unlimited duration
54. ratification procedure
55. original languages

Protocols

1. on the role of national parliaments
2. on the application of the principles of subsidiarity and proportionality
3. on the statute of the Court of Justice
4. on the statute of the European System of central banks and of the European Central Bank
5. on the statute of the European Investment Bank
6. on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union
7. on the privileges and immunities of the EU
8. relating to Article 6(2) of the TEU on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms
9. on the decision of the Council relating to the implementation of Article 16(4) of the TEU and Article 238(2) of the TFEU between 1 Nov 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other
10. on permanent structured cooperation established by Article 42 of the TEU
11. on Article 42 of the TEU (NATO)
12. on the excessive deficit procedure
13. on the convergence criteria
14. on the Euro group
15. on certain provisions relating to the UK
16. on certain provisions relating to Denmark
17. on Denmark
18. on France
19. on the Schengen *acquis* integrated into the framework of the EU
20. on the application of certain aspects of Article 26 of the TFEU to the UK
21. on the position of the UK and Ireland in respect of the area of freedom, security and justice
22. on the position of Denmark
23. on external relations of the Member States with regard to the crossing of external borders
24. on asylum for nationals of Member States of the EU
25. on the exercise of shared competence
26. on services of general interest
27. on the internal market and competition
28. on economic, social and territorial cohesion
29. on the system of public broadcasting in the Member States
30. on the application of the Charter of Fundamental Rights to Poland and the UK
31. concerning imports into the EU of petroleum products refined in the Netherlands Antilles
32. on the acquisition of property in Denmark
33. concerning article 157 on the TFEU
34. on special arrangements for Greenland
35. on article 40.3.3 of the Constitution of Ireland
36. on transitional provisions

37. on the financial consequences of the expiry of the ECSC treaty and on the research fund for coal and steel

Annexes

1. List referred to in Article 38 of the TFEU (list of products)
2. Overseas countries and territories to which the provisions of part four of the TFEU apply (Greenland, French Polynesia, etc)

Declarations of member states at the signing (65 declarations)

Tables of equivalences (comparing old and new numbering of the TEU and TFEU)

TFEU – Treaty on the Functioning of the European Union. At Lisbon (2007), the original Treaty of Rome was renamed to be this treaty. It goes into deeper detail on the role, policies and operation of the EU. It is divided into 7 parts. 1. Principles. 2. Non-discrimination and citizenship. 3. Union policies and internal actions. 4. Association of the overseas countries and territories. 5. External action by the Union. 6. Institutional and financial provisions. 7. General and final provisions. In addition there are 37 protocols, 2 annexes and 65 declarations elaborating further details.

Transposition period – the period of time within which Member States are expected to enact implementing legislation in their national laws to transpose a new EU Directive into local law

Vertical effect – this refers to the doctrine of direct effects, permitting private parties to sue Member State governments on the basis of EU law even if the relevant law has not yet been implemented into the Member State laws. The doctrine of direct effects does not apply horizontally (that is, between private parties) but it can apply vertically (between a private party and a government). The ECJ has ruled that the member states, including any public administration, should be precluded from benefiting from the failure to implement a Directive. This comes from the principle of estoppel.

According to Wikipedia: “In *Van Gend en Loos* it was decided that a citizen was able to enforce a right granted by European Community legislation against the state - the question of whether rights could be enforced against another citizen was not addressed. In *Defrenne v. SABENA*, the European Court of Justice decided that there were two varieties of direct effect: **vertical direct effect** and **horizontal direct effect**, the distinction drawn being based on the person or entity against whom the right is to be enforced. Vertical direct effect concerns the relationship between EU law and national law - specifically, the state's obligation to ensure its observance and its compatibility with EU law, thereby enabling citizens to rely on it in actions against the state or against public bodies; an “emanation of the state” as defined in *Foster v. British Gas plc*.

CASE NOTES

1. Conferral and subsidiarity

- C-210/03 – Swedish Snus Case. Establishes that any measure genuinely intended to remove any actual or potential obstacles to the internal market can fall within the competence of the EU.
- C-210/03 – Swedish Match
- C-508/08 – Vodafone Does the EU Regulation establishing a common framework for electronic communications networks and services infringe the principles of proportionality and subsidiarity by reason of the fact that it imposes not only a ceiling for wholesale charges per minute, but also for retail charges, and that it imposes an obligation to provide information about those charges to roaming customers.
- C-376/98 – Germany vs. Parliament and Council

2. The Effects of EU Law

- C-26/62 – Van Gend en Loos
Establishes that provisions of the Treaty Establishing the European Economic Community are capable of creating legal rights which can be enforced by both natural and legal persons before the courts of the Community's member states. This is called the principle of direct effect.
- C-6/64 – Costa vs. ENEL
Establishes the supremacy of European Union law over the laws of its member states. This principle requires EU law to have a higher normative value, and has to be given effect – even in the presence of conflicting national norms.
- C-106/89 – Marleasing
Establishes an obligation for national courts to interpret national law in light of EU law, and should, as far as possible, be given an interpretation which is in conformity with EU law (all EU law, not just the one which has direct effect).

3. The Charter of Fundamental Rights

- C-399/11 – Melloni (26 Feb 2013) (member state not allowed to require its own review of a conviction in absentia as a condition to turning over the convicted person under a European arrest warrant; such a review is not provided for in the Framework Decision of the Council 2002/584 (as amended by Framework Decision 2009/299). To permit such an action would undermine the principles of mutual trust and recognition which the framework decision purports to uphold and would, therefore, compromise the efficacy of that framework decision. Also, a member state is not permitted to refuse to execute a European arrest warrant on the basis of Article 53 of the Charter on the grounds of infringement of fundamental rights guaranteed by the national constitution; the ECJ concludes that the Framework Decision is compatible with the requirements of Articles 47 and 48(2) of the Charter of Fundamental Rights of the EU on this point).
- C-617/10 – Åkerberg Fransson (a national court has the right to determine whether there is a conflict between the ECHR and a rule of national law – this is not a matter of EU law; a national court also has the right to fully assess whether a fundamental right guaranteed by the Charter is violated by national law, meaning the national court is not limited to making such an assessment only when those rights are clear from the text or case law of the Charter)
- C-34/13 – Kušionová (One of the issues the court had been asked to address was, Does the high level of consumer protection guaranteed by Article 38 [and effective legal remedy guaranteed by article 47] of the Charter together with Directives 93/13 and 2005/29 preclude national legislation that permits recovery of a debt that is based on potentially unfair contract terms by the extrajudicial enforcement of a charge on immovable property (the debtor's home)? The loss of a family home is not only such as to seriously undermine consumer rights, but it also places the family of the consumer concerned in a particularly vulnerable position. In that regard the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home, and, secondly that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed. Under EU law, the right to accommodation is a fundamental right guaranteed under article 7 of the Charter. The court concludes that the national legislation in this circumstance is not disallowed in so far as that legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine.).

Suggested Reading (optional):

- Opinion 2/13 (meddelas den 18 december 2014). Note: I found this Opinion by adding a “C” in front of the case number in the search window at the Curia site and then looking for the opinion of the court of 18 Dec 2014 in the list of documents. The first document I looked at was an opinion of the Advocate General delivered on 13 June 2014, evaluating the effect that accession of the EU to the ECHR will have on EU activities. Specifically, is accession compatible with the EU treaties? “The proposed accession of the EU to the ECHR will create a special, possibly even unique, constellation in which an international, supranational organization – the EU – submits to the control of another international organization – the Council of Europe – as regards compliance with basic standards of fundamental rights. As a result, in areas governed by EU law, not only national courts and tribunals and the EU Courts, but also the European Court of Human rights will be called upon to oversee the observance of fundamental rights.” Member States remain liable for human rights violations in their country, even if committed in implementing EU law; however in such case the EU will become a co-respondent to such violations.

The second document, the Opinion of the full court of 18 Dec 2014, concludes that the proposed accession of the EU to the ECHR is not compatible with Article 6(2) of the TEU or with Protocol No. 8 relating to article 6(2). The primary reasons for the conclusion are as follows:

- it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States’ mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
- it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.”

4. The principle of proportionality

- C-523/12 – Dirextra. Proportionality, appropriate measure
- C-58/08 – Vodafone [Does the EU Regulation establishing a common framework for electronic communications networks and services infringe the principles of proportionality and subsidiarity by reason of the fact that it imposes not only a ceiling for wholesale charges per minute, but also for retail charges, and that it imposes an obligation to provide information about those charges to roaming customers. Exercise of EU legislative power must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. The court determines that ceilings on retail charges are

appropriate for the purpose of protecting consumers against high levels of charges. Therefore the legislature did not exceed the limits of the discretion it is recognized as having.]

- C-356/12 – Glatzel [driving licenses for visually disabled persons, in accord with the UN Convention on Disabilities and EU Directive on driving license requirements. It must be determined whether the EU rules at issue, laying down requirements for visual acuity for the drivers of power driven vehicles in categories C1 and C1E is contrary to Article 21(1) of the Charter, according to which “[a]ny discrimination based on any ground such as ...disability ... shall be prohibited.” It must be observed that, as regards complex medical assessments such as those at issue in the main proceedings, the EU legislature has a broad discretion and review by the Court is limited to verifying whether there has been a manifest error of assessment or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion. The principle of proportionality requires, in particular, the principle of equal treatment to be reconciled as far as possible with the requirements of road safety which determine the conditions for driving motor vehicles. [there follows an extensive discussion of medical issues, public safety]. It follows from all of the foregoing considerations that the EU legislature, ... has weighed the requirements of road safety and the right of persons affected by a visual disability to non-discrimination in a manner which cannot be regarded as disproportionate in relation to the objectives pursued.

5. Non-discrimination

- C-127/07 – Société Arcelor Atlantique et Lorraine and Others -- Principle of equal treatment, objective justification. Greenhouse gas emission allowance trading scheme. Installations in the steel sector are included but the chemical and non-ferrous metal sectors are excluded. Applying the principle of equal treatment, the court determines the differences are justified. In view of the novelty and complexity of the scheme, the original definition of the scope of Directive 2003/87 and the step-by-step approach taken, based in particular on the experience gained during the first stage of its implementation, in order not to disturb the establishment of the system were within the discretion enjoyed by the Community legislature. But the principle of equal treatment requires resort to objective criteria based on the technical and scientific information available at the time of adoption of the directive. As regards, first, the chemical sector, it may be seen from the history of Directive 2003/87 that that sector has an especially large number of installations, not only terms of the emissions they produce but in relation to the number of installations currently in the scope of the directive, which is of the order of 10,000. Including the chemical sector would therefore had made the management of the allowance trading scheme more difficult and increased the administrative burden. The difference in the levels of direct emissions between the two sectors concerned is so substantial that the different treatment of those sectors may, in the first stage of implementation of the allowance trading scheme and in view of the step-by-step approach on which Directive 2003/87 is based, be regarded as justified without there having been any need for the Community legislature to take into consideration the indirect emissions attributable to the various sectors. Accordingly, the Community legislature did not infringe the principle of equal treatment by treating comparable situations differently when it excluded the chemical and non-ferrous metal sectors from the scope of Directive 2003/87.
- C-185/96 – Commission vs. Hellenic Republic. Direct discrimination on grounds of nationality. While the law in question was silent as to nationality, administrative practice had nevertheless established Greek nationality as one of the criteria for qualifying as “large family status” for certain social benefits. Furthermore two other decrees make the award of benefits under those programs subject to the condition of Greek nationality or Greek origins of family members. These practices are direct discrimination on the grounds of nationality.
- C-25/02 – Rinke. Indirect discrimination on grounds of sex. Justification on objective requirements. Equal treatment for men and women. Obligation to undertake periods of full-time

training during part-time training in general medical practice. The petitioner argued that the full time training requirement placed considerably more women at a disadvantage than men and was therefore indirect discrimination on the grounds of sex. The court disagreed stating that these provisions were justified by objective factors independent of sex. Adequate preparation for the effective exercise of general medical practice requires a certain number of periods of full-time training, both for students in hospitals or clinics and for those in approved medical practices or in approved centres where doctors provide primary care. That measure can be considered as being appropriate to achieve the objectives pursued. It was reasonable for the legislature to take the view that that requirement enables doctors to acquire the experience necessary, by following patients' pathological conditions as they may evolve over time, and to obtain sufficient experience in the various situations likely to arise more particularly in general medical practice.

6. The principle of legal certainty

- C-43/75 – Defrenne. Ms. Defrenne was a flight attendant for Sabena Airlines. She claimed she was getting paid less than her male counterparts and that the original treaty forming the European Community, the Treaty of Rome of 1958, should apply to her case giving her equal pay for equal work. The court agreed with Ms. Defrenne, establishing that the principle of equal pay between men and women had horizontal direct effect and that this rule applied to private companies, not just to governmental authorities. However, the principle of legal certainty came into play as to how this decision was to be applied. This was a 1976 decision. Because applying this rule retroactively all the way back to 1958 when the Treaty of Rome went into effect would have been very disruptive (perhaps catastrophic from a damages perspective for many private employers), the court elected to restrict claimants for equal pay only to those who had already filed as of the date of this decision or later.
- [314/85 -- Foto Frost] Lack of jurisdiction of national courts to declare acts of Community institutions invalid.